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

16 CAROLYN JEWEL, *et al.* ) No. 08-cv-4873-JSW  
 )  
 17 Plaintiffs, ) **PUBLIC DECLARATION**  
 ) **OF JAMES R. CLAPPER**  
 18 ) **DIRECTOR OF NATIONAL**  
 19 v. ) **INTELLIGENCE**  
 )  
 20 NATIONAL SECURITY AGENCY, *et al.* ) Date: November 2, 2012  
 Defendants. ) Time: 9:00 a.m.  
 ) Courtroom: 11 – 19<sup>th</sup> Floor  
 ) Judge Jeffrey S. White

23 I, James R. Clapper, do hereby state and declare as follows:  
 24

25 **I. INTRODUCTION**

26 1. I am the Director of National Intelligence (DNI) of the United States. I have held  
 27 this position since August 9, 2010. In my capacity as the DNI, I oversee the United States  
 28 Intelligence Community (IC) and serve as the principal intelligence adviser to the President.



1 States and, therefore, the information should be excluded from any use in this case. In addition,  
2 it is my judgment that sensitive state secrets concerning NSA's sources, methods and activities  
3 are so central to the subject matter of the litigation that any attempt to proceed in the case will  
4 substantially risk the disclosure of the classified privileged national security information  
5 described herein (and in more detail in my classified declaration and NSA's classified  
6 declaration) and will therefore risk exceptionally grave damage to the national security of the  
7 United States.  
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### 9 **III. BACKGROUND ON DIRECTOR OF NATIONAL INTELLIGENCE**

10 4. The position of DNI was created by Congress in the Intelligence Reform and  
11 Terrorism Prevention Act of 2004 (amending sections 102 through 104 of Title I of the National  
12 Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI  
13 serves as the head of the IC and as the principal adviser to the President, the National Security  
14 Council, and the Homeland Security Council for intelligence matters related to the national  
15 security. *See* 50 U.S.C. § 403(b)(1), (2).  
16

17 5. The IC includes the Office of the Director of National Intelligence; the Central  
18 Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the  
19 National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices  
20 within the Department of Defense for the collection of specialized national intelligence through  
21 reconnaissance programs; the intelligence elements of the military services, the Federal Bureau  
22 of Investigation, the Department of the Treasury, the Department of Energy, the Drug  
23 Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of  
24 the Department of State; the elements of the Department of Homeland Security concerned with  
25 the analysis of intelligence information; and such other elements of any other department or  
26 agency as may be designated by the President, or jointly designated by the DNI and heads of the  
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1 department or agency concerned, as an element of the Intelligence Community.

2 6. The responsibilities and authorities of the DNI are set forth in the National  
3 Security Act of 1947, as amended. *See* 50 U.S.C. § 403-1. These responsibilities include  
4 ensuring that national intelligence is provided to the President, the heads of the departments and  
5 agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military  
6 commanders, and the Senate and House of Representatives and committees thereof. The DNI is  
7 also charged with establishing the objectives of, determining the requirements and priorities for,  
8 and managing and directing the tasking, collection, analysis, production, and dissemination of  
9 national intelligence by elements of the Intelligence Community. *Id.* § 403-1(f)(1)(A)(i) and (ii).  
10 The DNI is also responsible for developing and determining, based on proposals submitted by  
11 the heads of agencies and departments within the IC, an annual consolidated budget for the  
12 National Intelligence Program for presentation to the President, for ensuring the effective  
13 execution of the annual budget for intelligence and intelligence-related activities, and for  
14 managing and allotting appropriations for the National Intelligence Program. *Id.* § 403-1(c)(1).  
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17 7. In addition, the National Security Act of 1947, as amended, provides that “[t]he  
18 Director of National Intelligence shall protect intelligence sources and methods from  
19 unauthorized disclosure.” 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI  
20 establishes and implements guidelines for the IC for the classification of information under  
21 applicable law, Executive orders, or other Presidential directives and access to and dissemination  
22 of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible for the  
23 establishment of uniform standards and procedures for the grant of access to Sensitive  
24 Compartmented Information (“SCI”) to any officer or employee of any agency or department of  
25 the United States, and for ensuring the consistent implementation of those standards throughout  
26 such departments and agencies. *Id.* § 403-1(j)(1), (2).  
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1 8. By virtue of my position as the DNI, and unless otherwise directed by the  
2 President, I have access to all intelligence related to the national security that is collected by any  
3 department, agency, or other entity of the United States. *See* 50 U.S.C. § 403-1(b); Executive  
4 Order 12333 § 1.3(a), as amended. Pursuant to Executive Order 13526, the President has  
5 authorized me to exercise original TOP SECRET classification authority.

#### 6 **IV. ASSERTION OF STATE SECRETS PRIVILEGE**

7  
8 9. After careful and actual personal consideration of the matter, based upon my own  
9 knowledge and information obtained in the course of my official duties, including the  
10 information contained in the Public and Classified *In Camera, Ex Parte* Declarations of Frances  
11 J. Fleisch, NSA, I have determined that the disclosure of certain information, as set forth herein  
12 and described in more detail in my classified declaration and the Classified NSA Declaration,  
13 would cause exceptionally grave damage to the national security of the United States and,  
14 therefore, must be protected from disclosure and excluded from this case. Thus, as to this  
15 information, I formally assert the state secrets privilege. In addition, it is my judgment that  
16 sensitive state secrets concerning NSA's sources, methods and activities are so central to the  
17 subject matter of the litigation that any attempt to proceed in the case will substantially risk the  
18 disclosure of the privileged information described herein and in more detail in the classified  
19 declarations, and will therefore risk exceptionally grave damage to the national security of the  
20 United States.

#### 21 **V. ASSERTION OF STATUTORY PRIVILEGE UNDER NATIONAL SECURITY ACT**

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24  
25 10. Through this declaration, I also hereby invoke and assert a statutory privilege held  
26 by the DNI under the National Security Act, as amended, to protect the information described  
27 herein, *see* 50 U.S.C. § 403-1(i)(1). My assertion of this statutory privilege for intelligence  
28 sources and methods is coextensive with my state secrets privilege assertion.

**VI. INFORMATION SUBJECT TO ASSERTIONS OF PRIVILEGE**

1  
2 11. In general and unclassified terms, the following categories of information are  
3 subject to my state secrets and statutory privilege assertions:

- 4 A. Information concerning the specific nature of the terrorist  
5 threat posed by al-Qa'ida and its affiliates and other threats  
6 to the United States; and
- 7 B. Information that may tend to confirm or deny whether the  
8 plaintiffs have been subject to any alleged NSA intelligence  
9 activity that may be at issue in this matter; and
- 10 C. Any information concerning NSA intelligence activities,  
11 sources, or methods that may relate to or be necessary to  
12 adjudicate plaintiffs' allegations, including allegations that  
13 the NSA, with the assistance of telecommunications  
14 carriers such as AT&T and Verizon, indiscriminately  
15 intercepts the content of communications and also collects  
16 the communication records of millions of Americans as  
17 part of an alleged "Program" authorized by the President  
18 after 9/11. *See, e.g., Jewel* Complaint ¶¶ 2-13; 39-97;  
19 *Shubert* Second Amended Complaint (SAC) ¶¶ 1-9; 57-58;  
20 62-91.

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

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

(ii) Information concerning whether or not the NSA  
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 or Verizon, (and to the extent relevant or  
necessary, any other telecommunications carrier), 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.

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3 **VII. DESCRIPTION OF INFORMATION SUBJECT TO PRIVILEGE**  
4 **AND HARM OF DISCLOSURE**

5 **A. Information Concerning the al-Qa'ida Terrorist Threat**

6 12. The intelligence activities, sources, and methods that are implicated by this  
7 lawsuit, and put at risk of disclosure in further proceedings, must be viewed and understood in  
8 the context of the threat faced by the United States. In unclassified terms, more than a decade  
9 after the September 11<sup>th</sup> attacks, we remain in a global conflict with al-Qa'ida and we face an  
10 evolving threat from its affiliates and adherents. America's campaign against terrorism did not  
11 end with the mission at Bin Ladin's compound. Indeed, the threats we face have become more  
12 diverse. As al-Qa'ida's core leadership struggles to remain relevant, the group has turned to its  
13 affiliates and adherents to carry out attacks and to advance its ideology. These groups are from  
14 an array of countries, including Yemen, Somalia, Nigeria, and Iraq. To varying degrees, these  
15 groups coordinate their activities and follow the direction of al-Qa'ida leaders in Pakistan. Many  
16 of the extremist groups themselves are multidimensional, blurring the lines between terrorist  
17 groups, insurgency, and criminal gangs.  
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20 13. For example, al-Qa'ida in the Arabian Peninsula (AQAP) remains of particular  
21 concern to the United States. The National Counterterrorism Center (NCTC) assesses that this is  
22 the most likely entity to attempt attacks in the west. Even in the wake of Anwar al-Aulaqi's  
23 death, this group maintains the intent and capability to conduct anti-US attacks with little to no  
24 warning. In its three attempted attacks against the US Homeland -- the airliner plot of December  
25 2009, an attempted attack against US-bound cargo planes in October 2010, and an airliner plot in  
26 May 2012 similar to the 2009 attempt -- AQAP has shown an awareness of the capabilities of  
27 Western security procedures and demonstrated its efforts to adapt. We remain concerned about  
28

1 AQAP's efforts to exploit the security vacuum associated with the Arab unrest, even though the  
2 group has suffered recent setbacks in these efforts. The death of al-Aulaqi probably temporarily  
3 slowed AQAP's external plotting efforts but did not deter the group from attempting another  
4 aviation attack in May 2012.

5 14. AQAP has attempted to continue publishing the English-language *Inspire*  
6 magazine—previously spearheaded by al-Aulaqi and now-deceased Samir Khan—in order to  
7 mobilize Western-based individuals for violent action. While the deaths of al-Aulaqi and Khan  
8 have affected the quality of the magazine, the publication endures and continues to reach a wide  
9 global audience of extremists.  
10

11 15. Similarly, since the withdrawal of US forces from Iraq in 2011, al-Qa'ida in Iraq  
12 (AQI) has conducted nearly monthly simultaneous coordinated country-wide attacks against  
13 government, security, and Shia civilian targets in Iraq. During the past two years its media  
14 statements have reaffirmed the group's commitment to al-Qa'ida's global ideology and have  
15 encouraged attacks in the West. In July 2012, AQI's leader, Abu Du'a, a.k.a. Abu Bakr al-  
16 Baghdadi, issued his first public audio statement since taking over the group in 2010 in which he  
17 threatened to attack the US Homeland, praised what he called the US defeat in Iraq, and  
18 applauded the actions of the Syrian population in rising up against the Asad regime. The  
19 statement included the phrase, "We say to those that have fallen out of communication, oh  
20 sleeping people wake up. Oh sitting people rise," which possibly is a call to Iraqi populations in  
21 and outside the region to become more involved in AQI activities.  
22

23 16. AQI's propaganda statements have cited its support for uprisings against secular  
24 governments in the Middle East and North Africa, and in a June statement, the group expressed  
25 solidarity with the Syrian Sunni population. In January 2011, it published an explosives training  
26 video that called for lone wolf attacks in the West and against so-called apostate regimes in the  
27  
28



1 Middle East.

2 17. During the past two years, American and Canadian authorities have arrested  
3 several North America-based AQI associates, highlighting the potential threat posed to the  
4 United States. In May 2011, the FBI arrested Kentucky-based Iraqi nationals Waad Alwan and  
5 Shareef Hamadi for attempting to send weapons and explosives from Kentucky to Iraq and  
6 conspiring to commit terrorism while in Iraq. Alwan pled guilty to supporting terrorism in  
7 December. In January 2010, Canadian authorities arrested dual Iraqi-Canadian citizen Faruq 'Isa  
8 who is accused of vetting individuals on the internet for suicide operations in Iraq.  
9

10 18. We continue to monitor al-Shabaab and its foreign fighter cadre as a potential  
11 threat to the US Homeland, although the group is mainly focused on combating the ongoing  
12 Kenyan and Ethiopian incursions into Somalia which have eroded its territorial safehaven since  
13 late last year. The group, which formally merged with al-Qa'ida in February 2012, also remains  
14 intent on conducting attacks against regional and Western targets in East Africa, especially in  
15 countries supporting the Transitional Federal Government (TFG) and allied forces in Somalia.  
16 Probable al-Shabaab sympathizers recently conducted several low-level attacks in Kenya. Al-  
17 Shabaab leaders in the past have publicly called for transnational attacks, including threatening  
18 to avenge the January 2012 death of British national and al-Shabaab senior foreign fighter Bilal  
19 Berjawi.  
20  
21

22 19. Al-Qa'ida in the Lands of the Islamic Maghreb (AQIM) and Boko Haram have  
23 shown minimal interest in targeting the US Homeland and remain focused on local and regional  
24 attack plotting, including targeting Western interests including through kidnap-for-ransom  
25 operations. AQIM is actively working with local extremists in northern Mali to establish a  
26 safehaven from which to advance future operational activities. Boko Haram probably has an  
27 emerging awareness of US persons or entities in the US with connections to Nigeria. The group's  
28

1 spokesman in April publicly threatened to find a way to attack a US-based news organization if  
2 its coverage of Islam did not change.

3         20. In addition, while most Pakistani and Afghan militant groups pose a more direct  
4 threat to U.S. interests and our allies in that region, the Intelligence Community continues to  
5 watch for indicators that any of these groups, networks, or individuals are actively pursuing or  
6 have decided to incorporate operations outside of South Asia as a strategy to achieve their  
7 objectives. Tehrik-e Taliban Pakistan (TTP) leaders have repeatedly threatened attacks against  
8 the U.S., including after the death of Bin Ladin in May 2011. NCTC assesses that TTP's claim  
9 of responsibility for the failed Times Square bombing in May 2010 demonstrates its willingness  
10 to act on this intent.  
11

12         21. In sum, a variety of entities continue to pose a significant threat to the nation's  
13 security. The Government is utilizing all lawful intelligence gathering capabilities, including  
14 those set forth in the Classified NSA Declaration, to meet these threats and to protect the  
15 American people. I set forth this information and the information in my classified declaration  
16 not only to provide the Court with background information necessary to understand why the  
17 intelligence activities implicated by or directly at issue in this case are being undertaken, but also  
18 to assert a claim of privilege over classified threat information. The Government cannot disclose  
19 classified threat information in addressing plaintiffs' allegations or other issues in this case, or  
20 even in publicly supporting its assertion of privilege, because to do so would disclose to our  
21 adversaries what we know of their plans and how we may be obtaining information about them.  
22 Such disclosures would lead our adversaries not only to alter their plans, but also to implement  
23 greater security for their communications, thereby increasing the risk of non-detection. In  
24 addition, disclosure of threat information might reveal human sources for the United States,  
25 compromise those sources, and put lives in danger. Accordingly, although I believe that  
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1 classified threat information is crucial to understanding the importance to our national security of  
2 the NSA intelligence activities, sources, and methods implicated by the plaintiffs' allegations, I  
3 must assert the state secrets privilege and the DNI's statutory privilege over this classified threat  
4 information because of the exceptionally grave danger to national security that could reasonably  
5 be expected to result from its disclosure.

6  
7 **B. Information That May Tend to Confirm or Deny Whether**  
8 **the Plaintiffs Have Been Subject to the Alleged NSA**  
9 **Intelligence Activities**

10 22. I am also asserting privilege over information that would reveal whether  
11 particular individuals, including the named plaintiffs in the *Jewel* and *Shubert* actions, have been  
12 subject to alleged NSA intelligence activities. Disclosure of such information would cause  
13 exceptionally grave damage to the national security. The NSA cannot publicly confirm or deny  
14 whether any particular individual is subject to surveillance activities. If the NSA were to reveal  
15 that an individual is the target of surveillance, the collection capability relating to that individual  
16 would certainly be compromised. On the other hand, if the NSA were to reveal that an  
17 individual is not the target of surveillance, adversaries would know that a particular individual  
18 has avoided surveillance and is a secure source for communicating. Moreover, providing  
19 assurances to those individuals who are not being targeted quickly becomes unworkable when  
20 faced with a case in which an individual has in fact been targeted. If the NSA were to confirm  
21 that any specific individual is not the target of surveillance, but later refuse to confirm or deny  
22 that information in a case involving an actual target, it would be apparent that surveillance was  
23 occurring in the latter case. The only recourse for the NSA is to neither confirm nor deny  
24 whether someone has been targeted or subject to NSA activities, regardless of whether the  
25 individual has been targeted or not. To say otherwise when challenged in litigation would result  
26 in the frequent, routine exposure of NSA information, sources, and methods, and would severely  
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28

1 undermine surveillance activities in general.

2 **C. Information Concerning NSA Activities, Sources, or Methods**

3 23. I am also asserting privilege over any other facts concerning NSA intelligence  
4 activities, sources, or methods that may relate to or be necessary to litigate the plaintiffs' claims,  
5 including allegations that the NSA, with the assistance of telecommunication companies  
6 including AT&T and Verizon, has indiscriminately intercepted the content and obtained the  
7 communications records of millions of ordinary Americans as part of an alleged presidentially  
8 authorized "Program" after 9/11. *See, e.g., Jewel* Complaint at ¶¶ 2-13; 39-97; *Shubert* SAC ¶¶  
9 1-7, 62-91. As noted above, my privilege assertion encompasses (1) facts concerning the  
10 operation of the now-inoperative Terrorist Surveillance Program, including any facts needed to  
11 demonstrate that the TSP was limited to the interception of the content<sup>1</sup> of one-end foreign  
12 communications reasonably believed to involve a member or agent of al-Qa'ida or an affiliated  
13 terrorist organization, and that the NSA does not otherwise conduct a dragnet of content  
14 surveillance as the plaintiffs allege; and (2) information concerning whether or not the NSA  
15 obtains transactional communication records from telecommunications companies such as  
16 AT&T and Verizon as plaintiffs allege.  
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20 24. As the NSA indicates, *see* Public NSA Declaration ¶ 11, the NSA's collection of  
21 the content of communications under the TSP was directed at international communications in  
22 which a participant was reasonably believed to be associated with al-Qa'ida or an affiliated  
23 organization. Thus, as the Government has previously stated, plaintiffs' allegation that the NSA  
24 has indiscriminately collected the content of millions of communications sent or received by  
25 people inside the United States after 9/11 under the TSP is false. I concur with the NSA that to  
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<sup>1</sup> The term "content" is used herein to refer to the substance, meaning, or purport of a communication, as defined in 18 U.S.C. § 2510(8).

1 the extent it must demonstrate in this case that the TSP was not the content dragnet plaintiffs  
2 allege, or demonstrate that the NSA has not otherwise engaged in the alleged content dragnet,  
3 highly classified NSA intelligence sources and methods about the operation of the TSP and other  
4 NSA intelligence activities would be disclosed, which would cause exceptional harm to national  
5 security.<sup>2</sup>

6  
7 25. I am also asserting privilege over information concerning whether or not the NSA  
8 obtained from telecommunications companies such as AT&T and Verizon the complete and  
9 allegedly ongoing disclosure of private telephone and Internet transactional records of those  
10 companies millions of customers. I concur with the NSA that confirmation or denial of any  
11 information concerning this allegation would cause exceptionally grave harm to national  
12 security, including by risking disclosure of whether or not the NSA utilizes particular  
13 intelligence sources and methods and, thus, the NSA's capabilities or lack thereof.

14  
15 **D. Plaintiffs' Allegations that Certain Telecommunications Carriers**  
16 **Provided Assistance to the NSA with the Alleged Activities.**

17 26. In addition, I am asserting privilege over information that may tend to confirm or  
18 deny whether or not AT&T, Verizon, or to the extent necessary, any other particular  
19 telecommunications provider, has assisted the NSA with alleged intelligence activities. The  
20

21  
22 <sup>2</sup> The Government has publicly confirmed that, in addition to the "Terrorist Surveillance  
23 Program," other intelligence activities were authorized by the President after the 9/11 attacks in a  
24 single authorization that was periodically reauthorized. See Unclassified Inspector General  
25 Report on the President's Surveillance Program (10 July 2009) ("IG Rept.") at 5, available at  
26 [www.dni.gov/files/documents/Newsroom/Reports and Pubs/report\\_071309.htm](http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/report_071309.htm). However, those  
27 other intelligence activities remain highly classified, see Public IG Rept. at 5, and subject to the  
28 DNI privilege assertions. As the IG report also indicates, activities that were originally  
authorized by the President along with the TSP were subsequently authorized under orders  
issued by the FISC. See Public IG Rept. at 30. As a result of this transition, the final presidential  
authorization for the Presidential Surveillance Program activities authorized after the 9/11  
attacks expired on February 1, 2007. *Id.* at 30. To the extent plaintiffs' allegations seek to put at  
issue the nature of these other classified activities, they are encompassed by my privilege  
assertion in this litigation as well.


1 disclosure of any information that would tend to confirm or deny allegations of such assistance  
2 would cause exceptionally grave harm to the national security. Confirming or denying such  
3 allegations, again, would reveal to foreign adversaries whether or not the NSA utilizes particular  
4 intelligence sources and methods and, thus, either compromise actual sources and methods or  
5 disclose that the NSA does not utilize a particular source or method. Such confirmation or denial  
6 would also replace speculation with certainty for hostile foreign adversaries who are balancing  
7 the risk that a particular channel of communication may not be secure against the need to  
8 communicate efficiently.  
9

### 10 **VIII. CONCLUSION**

11 27. In sum, I am asserting the state secrets privilege and the DNI's statutory privilege  
12 set forth in 50 U.S.C. § 403-1(i)(1) to protect the classified national security information  
13 described herein and in my classified declaration that is available for the Court's *in camera* and  
14 *ex parte* review, as well as in the Classified NSA Declaration. Moreover, because proceedings in  
15 this case risk disclosure of privileged and classified intelligence-related information, I  
16 respectfully request that the Court not only protect that information from disclosure but also take  
17 all steps necessary, including dismissal of this action, to protect the intelligence information,  
18 sources, and methods described herein in order to prevent exceptional harm to the national  
19 security of the United States.  
20  
21

22 I declare under penalty of perjury that the foregoing is true and correct.  
23

24 DATE: September 11, 2012  
25

26   
27 JAMES R. CLAPPER  
28 Director of National Intelligence