UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMNESTY INTERNATIONAL USA; GLOBAL FUND FOR WOMEN; GLOBAL RIGHTS; HUMAN RIGHTS WATCH; INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS ASSOCIATION; THE NATION MAGAZINE; PEN AMERICAN CENTER; SERVICE EMPLOYEES INTERNATIONAL UNION; WASHINGTON OFFICE ON LATIN AMERICA; DANIEL N. ARSHACK; DAVID NEVIN; SCOTT MCKAY; and SYLVIA ROYCE Plaintiffs, v. JOHN M. McCONNELL, in his official capacity as Director of National Intelligence; LT. GEN. KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; and MICHAEL B. MUKASEY, in his official capacity as Attorney General of the United States, Defendants.	**DECLARATION OF SCOTT MCKAY** Case No. 08 Civ. 6259 (JGK) **ECF CASE**

DECLARATION OF SCOTT MCKAY

I, Scott McKay, declare:

1. I am a resident of Boise, Idaho over the age of eighteen. I have personal knowledge of the facts stated in this declaration.

2. I am a named partner in the law firm of Nevin, Benjamin, McKay & Bartlett LLP, and my practice encompasses both criminal defense and civil litigation. In 1990, I graduated *magna cum laude* from Gonzaga University School of Law where I served as an associate editor on the *Gonzaga Law Review*. Following law school, I served as a law clerk to the Honorable Byron J. Johnson and later the Honorable Linda Copple Trout of the Idaho Supreme Court. I am also a member of the Idaho and National Associations of Criminal Defense Lawyers.

3. I have a breadth of litigation experience and have successfully represented clients in a number of significant cases. I received the Clarence Darrow Award from the American Civil Liberties Union of Idaho for the defense of a Saudi national, Mr. Sami Omar Al-Hussayen, who was acquitted in June 2004 on terrorism charges following a lengthy trial in federal court. My law partner, David Nevin, and I presently work with detailed military defense counsel on the defense of Mr. Khalid Sheik Mohammed and, in that regard, we both have been appearing before the Military Commissions at Guantánamo Bay, Cuba. We also work on complex civil litigation and for the past several years, we both have been involved in federal multi district litigation arising out of the events of September 11, 2001, which has been consolidated and is now pending in the Southern District of New York. In this litigation, Mr. Nevin and I again represent Mr. Al-Hussayen, who, in addition to facing criminal charges after September 11, was named as a defendant in several civil cases.

4. I have joined this lawsuit because the FISA Amendments Act ("FAA") renders my and other members of my law firm's international communications, including sensitive and privileged communications, susceptible to dragnet monitoring by the U.S. government. Because of the nature of our work and the identities of our clients, I believe that my communications are virtually certain to be monitored under the FAA. The threat of surveillance requires me to take expensive and time-consuming measures to protect the confidentiality of my communications and substantially impairs my ability to gather information that is necessary to my representation of our clients.

5. In connection with my firm's representation of Mr. al-Hussayen, Mr. Nevin and I communicate by telephone and email with people outside the United States, including Mr. Al-Hussayen himself, who now resides in Saudi Arabia. These communications are necessary to

our representation of Mr. Al-Hussayen. All of them are sensitive, and some of them are privileged. The communications concern litigation strategy and other matters relevant to the litigation involving Mr. Al-Hussayen.

6. My concern that our communications with and regarding Mr. Al-Hussayen will be monitored by the U.S. government is augmented by my knowledge that Mr. Al-Hussayen's communications have been monitored in the past. I learned during the course of defending Mr. Al-Hussayen against federal criminal charges in Idaho that the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving Mr. Al-Hussayen.

7. Our representation of Mr. Mohammed also requires Mr. Nevin and me to engage in international communications by telephone and email. In connection with our representation of Mr. Mohammed before the Military Commissions at Guantánamo, we communicate by telephone and email with experts, investigators, attorneys, family members of Mr. Mohammed and others who are located abroad. All of these communications are sensitive, and some of them are privileged. The communications concern litigation strategy and other matters relevant to the litigation involving Mr. Mohammed.

8. Because I believe that the government will monitor my communications under the FAA, I have had to take measures to protect the confidentiality of information that I believe is particularly sensitive. For example, I minimize the amount of sensitive information that I communicate by telephone or email. Whenever possible, I also collect information in person rather than by telephone or email. I understand that Mr. Nevin has taken similar measures for the same reasons. I further understand that the government has said that lawyers who take such measures to protect sensitive information are taking measures that are "voluntary," but these measures are ethically required. The rules of professional responsibility for Idaho – and, as far

as I am aware, for every other jurisdiction in which I practice – require attorneys to maintain the confidentiality of clients' private information. The rules also require attorneys to be reasonably prepared (which in turn requires attorneys to obtain information from their clients) and to keep their clients informed about developments in their cases. I do not see how I can ethically ask clients to share sensitive information with me over the telephone or by email, or how I can ethically share sensitive information with my clients, when there is a substantial risk that the U.S. government – in some cases the very government that is prosecuting or has prosecuted my clients – may be monitoring the communications.

9. The confidentiality of our international communications is integral to our work. The communications we have with clients are, of course, ordinarily protected from disclosure by the attorney-client privilege – a privilege that is recognized under both federal and state law. Additionally, communications we have with potential fact witnesses, experts, investigators, other lawyers, journalists, government officials, political figures, and other third parties outside the United States may also be protected from disclosure by the attorney work-product doctrine. The confidentiality of our international communications is integral to our ability to gather information and make informed decisions concerning legal strategy.

10. The measures that we take in order to protect the confidentiality of sensitive information are far from costless. Collecting information in person sometimes requires travel that is both time-consuming and expensive. In some cases, of course, travel is impractical or prohibitively expensive, which means that we are faced with a choice between asking experts, investigators or witnesses to share sensitive information over the phone or by email or alternatively, forgoing the information altogether. This has a real effect on our ability to properly represent our clients. Beyond our own reluctance to exchange sensitive information by

telephone or email, the U.S. government's surveillance activities affect the willingness of others – including clients – to share information with us. The duty of confidentiality is one of the bases for trust between an attorney and his or her client. By depriving attorneys of their ability to assure confidentiality, the government makes trust much more difficult if not impossible. For example, since Mr. Al-Hussayen returned to Saudi Arabia, he keeps our communications to a minimum and generally avoids substantive communications concerning his case.

11. The FAA affects the way we practice law and significantly compromises our ability to represent our clients. Moreover, the effect of the FAA on our practice is likely to become more severe over time. If the few remaining cases against Mr. Al-Hussayen in the September 11 civil litigation survive pending motions to dismiss and proceed to discovery, I expect our international communications to become even more central to our practice than they are already; we will have to communicate regularly with Mr. Al-Hussayen himself as well as with witnesses, experts, and others based abroad. The ethical dilemmas that we already confront will present themselves even more acutely, because it will be prohibitively expensive for one of us to travel to Saudi Arabia every time we need to gather sensitive information from our client or share sensitive information with him.

12. Similarly, international communications are likely to become even more central to our representation of Mr. Mohammed, who is charged with capital offenses in the Military Commissions at Guantánamo Bay, Cuba. The charging document at issue in Mr. Mohammed's Military Commissions case contains allegations of international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001, al Qaeda, various charged and uncharged co-conspirators, and acts taking place in a number of countries. According to various media reports and public source materials, Mr. Mohammed was captured in Pakistan in March,

2003 and held in the custody of the Central Intelligence Agency at undisclosed locations until his transfer to Guantánamo Bay, Cuba in September 2006. Investigating the foregoing matters and properly assisting in the defense of Mr. Mohammed will require extensive further communication by telephone and email with individuals located abroad. Additionally, given that these are capital proceedings against Mr. Mohammed involving the possibility of a death sentence, extensive investigation will need to be conducted into his history and background. Since Mr. Mohammed is not a U.S. citizen and resided abroad, this aspect of our representation will necessitate frequent contact by telephone and email with individuals located abroad.

13. It is true, of course, that the danger of government surveillance has always presented difficult questions for criminal defense attorneys. In this respect, the FAA does not present concerns that are altogether new. For a criminal defense attorney, however, the concerns raised by dragnet surveillance of international communications are far more serious than the concerns raised by surveillance that is based on individualized suspicion and subject to individualized judicial oversight. In the past, I have understood that certain of my communications with experts, witnesses, clients, and others could be subject to surveillance by the U.S. government, but I have also understood that this surveillance was strictly limited, judicially supervised, and subject to minimization procedures that were also supervised by judges on an individualized basis. I understood that the government had the authority to monitor my communications in certain narrow circumstances, but now my communications may be monitored simply because I am communicating with someone who is outside the country. Moreover, the minimization procedures that exist under the new statute are not supervised by judges on an individualized basis and there is therefore no serious restriction on the government's retention and dissemination of information obtained through surveillance.

14. Because of the FAA, we now have to assume that every one of our international communications may be monitored by the government. With respect to every single international communication, we have to make an assessment of whether our client's interest would be compromised if the government were to acquire the communications. If the answer is yes, we have to forgo the communication altogether or find a way of collecting the information we need (or conveying the information we want to convey) in person rather than by telephone or email. The FAA, in other words, imposes burdens on our practice that are far heavier than the burdens imposed by the kinds of surveillance that the government has engaged in historically.

I declare under penalty of perjury under the laws of the United States and the State of New York that the foregoing is true and correct.

SCOTT McKAY

Executed at New York City, New York on December 1, 2008.