No. 11-1200

In The Supreme Court of the United States

TASH HEPTING, *et al.*,

Petitioners,

v.

AT&T CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

As the petition explains, there has never been another statute like section 802 of the Foreign Intelligence Surveillance Act (50 U.S.C. § 1885a). What makes section 802 unprecedented, and unconstitutional, is the unbounded power Congress gave the Attorney General to negate existing federal and state law and thereby abolish plaintiffs' causes of action.

Article I, section 7 of the Constitution prohibits Congress from abdicating this power. And, because Congress supplied no intelligible principle limiting the Attorney General's discretion in choosing whether to file a certification, section 802 also violates the nondelegation doctrine.

Respondents do not defend the actual powers that Congress has given to the Attorney General. Instead, they mischaracterize the statute as one in which Congress mandated that petitioners' lawsuits be dismissed, in which the Attorney General must file a certification whenever he determines that one of the conditions in section 802(a)(1) through (a)(5) exists, and in which the Attorney General plays only a ministerial role in tendering evidence to the court. They then embark on a fruitless search for analogous statutes. What they fail to do is overcome the conflict between the powers section 802 grants the Attorney General and the limits imposed by Article I, section 7 and the nondelegation doctrine.

In enacting section 802, Congress simply went too far in granting its own powers to the Attorney

General – both in allowing him to nullify existing law and in providing no intelligible principle to allow Congress, the courts, and the public to determine whether Congress' will was being obeyed. Not just petitioners but all Americans deserve, as the Constitution requires, to have their laws written by Congress.

I. Respondents Mischaracterize Section 802

As *Clinton* teaches, the functional reality of section 802 is what matters in an Article I, section 7 analysis. *Clinton v. New York*, 524 U.S. 417, 441, 444 (1998). The functional reality of section 802 is that the Attorney General gets to choose whether petitioners' claims are decided by applying preexisting state and federal law or the quite different legal standards and procedures of section 802. If the Attorney General so chooses, he nullifies federal causes of action, preempts state-law causes of action, and ousts federal and state courts of jurisdiction over constitutional claims – all quintessentially legislative actions.

Respondents mischaracterize section 802 as a decision by Congress to abolish petitioners' causes of action: "Congress...determined that it was not in the national interest for these or similar cases to proceed." Carriers' Br. 1. "[A]llow this case to end as Congress directed." *Id*. at 28. Congress determined the "circumstances in which civil actions...may not be maintained and should be dismissed." Govt. Br. 14. Congress made the "fundamental policy judgment

that burdensome litigation should not proceed against persons for allegedly assisting the intelligence community." *Id*. at 24.

Congress, of course, did not make the decision to terminate petitioners' lawsuits. The simplest proof is that, had the Attorney General decided not to file certifications here and instead let these lawsuits go forward, he would have been in complete compliance with section 802.

Respondents further mischaracterize section 802 as an Executive-factfinding-with-a-mandatory-consequence statute like the ones at issue in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); and *Owens v. Republic of the Sudan*, 531 F.3d 884, 891-92 (D.C. Cir. 2008). *See* Pet. 32. Under those statutes, "when the President determined that the contingency had arisen, he had a *duty*" to perform the act specified by Congress. *Clinton*, 524 U.S. at 443 (emphasis added); *accord*, *Hampton*, 276 U.S. at 411 (in *Field*, "[the President] was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect"). Once the Executive has found the specified fact, the consequences are mandatory. *Clinton*, 524 U.S. at 445 & n.39. Here, even if the Attorney General finds that one or more of the facts set forth in section 802(a)(1) through (a)(5) exist, there is no mandatory consequence. It is he, and not Congress,

that determines whether the existence of those facts has any consequence at all.[1]

The government attempts to evade the issue by artful misdirection, stating that "Congress itself has specified what certifications will trigger the dismissal of certain civil actions." Govt. Br. 18. True – but irrelevant. What matters is that, unlike *Field* and *Hampton*, Congress has not specified any circumstances under which the Attorney General must file a certification or any principle for him to use in choosing whether to file a certification, only the consequences if he does choose to file a certification. In choosing whether or not to file a certification he does his own will – not Congress'. In these lawsuits, once he "determined that the contingency had arisen" (*Clinton*, 524 U.S. at 443), he had no duty to do anything.

It is not correct that "[t]he Attorney General is limited to gathering specified facts and certifying them to a court." Govt. Br. 24. Under section 802, the very act of filing a certification changes the legal standard applied to those facts. Facts which would otherwise be legally irrelevant, such as those set forth

[1] The government misdescribes the petition in asserting "petitioners err in maintaining (Pet. 32) that Congress cannot incorporate a factual determination by the Executive if Congress has not affirmatively 'require(d) the Executive to perform fact-finding.'" Govt. Br. 17. The partially-quoted sentence from the petition says that Congress "can require the Executive to perform fact-finding" – not that Congress must do so.

in section 802(a)(4), when couched within a certification instead result in dismissal. He determines not only the facts, but whether they should have any consequence.[2]

II. Respondents' Failed Statutory Analogies

Respondents' attempted analogies to other statutes also fail. The statutes in *Loving*, *Touby*, *Yakus*, and *Curtiss-Wright* raise no *Clinton* issue because the Executive's action did not negate existing legislative decisions. *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Unlike section 802, those statutes delegated to the Executive the power to act on a matter that Congress had not acted upon, and, thus, the Executive's action did not negate any contrary statutory provision. None is a statute in which, as in section 802, Congress has created one rule governing the matter and has given the Executive the power to undo its rule and substitute a different one. Moreover, none of those statutes authorized the Executive to preempt state law, block adjudication of constitutional claims, or abolish existing causes of action.

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[2] The carriers erroneously assert that "petitioners have challenged § 802 only on its face." Carriers' Br. 11. Petitioners challenge the constitutionality of section 802 as it has been applied to them, not as it might be applied to some other person.

In *Loving*, Congress authorized the President to define in the first instance capital sentencing aggravating factors for military crimes committed by service members; nothing the President did nullified any legal standard previously established by Congress. *Loving*, 517 U.S. at 770-71. The statute in *Touby* permitted the Attorney General temporarily to add a drug to the schedule of controlled substances; it did not permit him to remove a drug that Congress had previously put there. 21 U.S.C. §§ 811, 812; *Touby*, 500 U.S. at 166-67. Likewise in *Yakus*, Congress authorized the Executive to set maximum prices for various commodities; Congress had not itself set any prices, so none of the Executive's prices nullified different prices Congress had previously set. 321 U.S. at 423-25. By contrast, the Attorney General's section 802 certification nullifies statutory causes of action Congress previously created.

In addition, section 802 is outside the Executive's foreign affairs or military command powers because it allows the Attorney General to negate claims arising from unlawful domestic electronic surveillance. Decisions addressing foreign affairs or military command powers are thus irrelevant. These include *Loving, Field, Owens,* and *Curtiss-Wright*, as well as *Republic of Iraq v. Beaty*, 556 U.S. 848, 856-57 (2009), and *Jones v. United States*, 137 U.S. 202, 212 (1890) (exercise of foreign affairs power to acquire overseas territory presented nonjusticiable political question). *Beaty*, moreover, is additionally within the *sui generis* field of foreign sovereign immunity. Pet. 26-27.

No doubt "[t]he President...possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948); *accord*, *Clinton*, 524 U.S. at 445 (distinguishing *Field*); *Curtiss-Wright*, 299 U.S. at 320. But the foreign affairs power extends only to statutes dealing with "the powers of *external* sovereignty."[3] *Curtiss-Wright*, 299 U.S. at 318 (emphasis added). Illegal domestic surveillance is not a matter of external sovereignty.

The military command power is likewise circumscribed. The President's Commander-in-Chief powers give him "'independent authority'" (*Loving*, 517 U.S. at 772) over the command of military forces, not authority to conduct domestic surveillance.

Section 802 falls outside the narrow exception allowing greater latitude in delegation for statutes exercising foreign affairs or military command powers. The President and the Attorney General have no independent authority "already assigned...by express terms of the Constitution" (*Loving*, 517 U.S. at 772) to abolish accrued causes of action between private domestic citizens, to conduct warrantless domestic

[3] *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981), has no bearing here. The President's action requiring claimants against Iran to arbitrate rather than litigate was taken under his inherent foreign affairs power, not pursuant to any statutory delegation.

surveillance of ordinary Americans outside the bounds of Fourth Amendment and statutory limits, to negate federal law regulating domestic surveillance, to preempt state law, or to preclude any court from hearing constitutional claims.

Respondents proceed on the false assumption that the Executive has inherent constitutional authority under Article II to conduct the untargeted, suspicionless seizure of the domestic electronic communications of millions of Americans at issue here, even in defiance of FISA and other statutory and constitutional limitations. The Executive has no such inherent, free-ranging constitutional power, and section 802 cannot be defended on that basis. Pet. 38. The decisions in *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988), and *C.I.A. v. Sims*, 471 U.S. 159, 167 (1985), address only the President's Commander-in-Chief and statutory powers to refuse to disclose classified information possessed by the Executive Branch – a nondisclosure power not implicated in section 802 and not at issue here.

Section 802 is also not an instance of enforcement discretion, another inherent Executive power under Article II. Pet. 26; *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The Attorney General's suspension of deportation in *I.N.S. v. Chadha*, 462 U.S. 919, 923-25 (1983), was not only an instance of enforcement discretion but also an exercise of the inherent foreign affairs power. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005).

Finally, respondents continue to raise the Westfall Act, although it is nothing like section 802. An Attorney General certification under subsection (d) of the Westfall Act (28 U.S.C. § 2679) accomplishes only a substitution of the government for the employee and is not a grant of immunity – the cause of action against the employee is already dead because Congress unconditionally killed it in subsection (b), just as it unconditionally killed the claims in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). Pet. 24-26, 31-32.

III. Respondents' Other Points Lack Merit

The government erroneously contends that the Attorney General's certification destroying both federal and state court jurisdiction over petitioners' lawsuits is permissible because Congress authorized removal of such lawsuits in section 802(g) (50 U.S.C. § 1885a(g)). Govt. Br. 13. But removal only transfers a lawsuit; it was the *post*-removal certification that destroyed state court jurisdiction. Ordinarily, if a federal court loses jurisdiction over a removed case it must remand it. 28 U.S.C. § 1447(c). In any event, none of petitioners' lawsuits was removed pursuant to section 802(g).

The carriers erroneously equate a section 802 certification with the state secrets privilege. Carriers' Br. 21. But the state secrets privilege is an "evidentiary rule[]: The privileged information is excluded and the trial goes on without it." *General Dynamics*

Corp. v. United States, ___ U.S. ___, 131 S.Ct. 1900, 1906 (2011).

The carriers argue about whether only a statute may preempt state law or whether a properly promulgated federal regulation can also have preemptive effect. Carriers' Br. 22 & n.15. The point is irrelevant. The Attorney General's certification was not the promulgation of a federal regulation, and certainly was not the product of a rulemaking proceeding.

The "intelligible principle" the court of appeals invented – "protecting intelligence gathering and national security information" (Pet. App. 39) – is not stated in the statute or in the legislative history. The government argues it is supported by the procedural protections sections 802(c) and 802(d) (50 U.S.C. §§ 1885a(c), 1885a(d)) provide to preserve the secrecy of certifications filed under section 802. Govt. Br. 21-22. This argument lacks logic; the fact that Congress wished to protect the secrecy of certifications *after* the Attorney General chooses to file them provides no intelligible principle for deciding *whether or not* to file a certification.

The government also argues (Govt. Br. 21) that the meaning of an ambiguous phrase in the statutory text can be fleshed out using tools of statutory construction – a point made by petitioners, Pet. 36 – but it points to *no* text in section 802, ambiguous or otherwise, on which to hang the court of appeals' extra-statutory intelligible principle. It is not petitioners (Govt. Br. 20) but this Court that requires

that "*Congress*," and not the Executive or the courts, "must 'lay down *by legislative act* an intelligible principle.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasis original).

The carriers suggest erroneously that in *Clinton* the President's cancellation changed the words of the statutes at issue rather than depriving those words of any legal effect. Carriers' Br. 13. The carriers are mistaken. Pet. 21-23.

The carriers argue that the existence of traditional common-law affirmative defenses validates the Attorney General's discretionary power under section 802 to destroy federal and state court jurisdiction over constitutional claims. Carriers' Br. 23-24. But these are "background...common-law adjudicatory principles" that Congress impliedly incorporated into 28 U.S.C. § 1331's grant of jurisdiction. *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). More fundamentally, these defenses are under the control of legislatures and courts and are non-jurisdictional. The Executive has no power to turn them on and off at will, as it can with section 802.

IV. Certiorari Is Appropriate Here

As explained in the Petition, the court of appeals' decision is in stark conflict with the Court's decision in *Clinton* and its nondelegation doctrine precedents.

Respondents do not contest the Court's unique and indispensible role in policing the boundaries between the Branches and confining each to the proper limits of its constitutional authority. They do not contest that to fulfill this duty the Court frequently grants certiorari even in the absence of a split of authority in the lower courts, given the importance of the task and the reality that separation-of-powers violations often occur under circumstances, like those here, that make it unlikely that multiple courts of appeals will have the opportunity to consider the issue. *See* Pet. 9-13. They do not contest that, because all cases arising out of the so-called President's Surveillance Program were consolidated in a single district court and because the statute of limitations has run, there is no possibility of cases challenging that program giving rise to a circuit split and this is the Court's only opportunity to address the application of section 802 to lawsuits contesting that program.

Instead, the government seeks to trivialize the invasion of petitioners' rights and the Executive-sanctioned law-breaking that caused it, dismissively describing it as being limited to "less than five and one-half years." Govt. Br. 11. It argues that only if history repeats itself and the Executive in the future again enlists the carriers in a scheme of massive unlawful surveillance will it be the time to resolve the constitutionality of section 802. The Executive's desire to evade this Court's oversight is discreditable.

The government also contends petitioners' lawsuits are "poor vehicle[s]" precisely because they are ones in which the Attorney General exercised his unconstitutional authority and filed certifications. Govt. Br. 16-17. This makes no sense, for a case in which the Attorney General did *not* file a certification would be no vehicle at all – there would be no injury to the plaintiff from the non-invocation of section 802 and thus no standing.

Respondents' argument that petitioners may seek relief against the government and its officials rings hollow. The same Ninth Circuit panel that decided petitioners' appeal recently held that sovereign immunity bars FISA claims against the government. *Al-Haramain v. Obama*, 2012 U.S. App. LEXIS 16379 (9th Cir. Aug. 7, 2012). Claims against government officials likewise are subject to immunity defenses. Many of the petitioners have never brought such claims and would confront statutes of limitation defenses as well. In any event, whether petitioners possess claims against other nonparties is irrelevant to whether section 802 is a constitutional means for extinguishing their claims against the carriers.

CONCLUSION

Separation of powers cases like this one address the fundamental structural question of how our Republic is to be governed, a question only this Court can answer: "[T]he Framers considered structural protections of freedom the most important ones, for

which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *National Federation of Independent Business v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2676-77 (2012) (dissenting opinion of Scalia, Kennedy, Thomas & Alito, JJ.).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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