No. 11-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress added section 802 to the Foreign Intelligence Surveillance Act in 2008. 50 U.S.C. § 1885a. In so doing, Congress created a set of new legal standards potentially applicable to lawsuits alleging unlawful electronic surveillance by telecommunications carriers, encompassing lawsuits in either state or federal court and lawsuits raising claims under state law, federal statutory law, or federal constitutional law.

Congress, however, did not put the new legal standards of section 802 into effect; after enactment, preexisting law continued to govern lawsuits challenging unlawful surveillance by telecommunications carriers. Instead, Congress gave the Attorney General the power to choose which of two irreconcilable legal standards should be applied to those lawsuits: If the Attorney General does nothing, the lawsuit remains governed by preexisting law. If the Attorney General chooses to file a section 802 certification in the lawsuit, his action nullifies legal standards established by preexisting law and replaces them with the legal standards of section 802. The Attorney General did so in these lawsuits, which were then dismissed pursuant to section 802.

The questions presented are these:

1. In the case of a federal statutory claim, may Congress grant the Attorney General the power to choose which of two inconsistent statutory standards should govern the claim?

QUESTIONS PRESENTED – Continued

2. In the case of a state-law claim, may Congress grant the Attorney General the power to choose whether the state law governing the claim should be preempted by federal law?

3. In the case of a federal constitutional claim, may Congress grant the Attorney General the power to choose whether to exclude the claim from the jurisdiction of the federal and state courts?

4. Even if Congress may grant the Attorney General the powers described in Questions One, Two, and Three, did Congress provide an intelligible principle limiting the Executive's discretion in exercising those powers?

PARTIES TO THE PROCEEDING

Petitioners are Tash Hepting; Gregory Hicks; Erik Knutzen; Carolyn Jewel; Sean Basinski; Richard D. Suchanek, III; Charles F. Bissitt; Sandra Bissitt; George Hayek, III; June Matrumalo; Gerard Thibeault; Arthur Bouchard; Maryann Bouchard; Aldo Caparco; Janice Caparco; Jenna Caparco; Rose Deluca; Nicole Mirabella; Patricia Pothier; Paul Pothier; Marshall Votta; Vincent Matrumalo; Paula Matrumalo; Jennifer Thomas; Christine Douquette; Maryann Klaczynski; Christopher Bready; Anne Bready; Kyu Chun Kim; Jenet Artis; Claudis Artis; David Beverly, Jr.; Tom Campbell; George Main; Dennis P. Riordan; Margaret Russell; Robert Scheer; Peter Sussman; Richard Belzer; Marc Cooper; Stephen J. Mather; Sandra Richards; Curren Warf; American Civil Liberties Union Of Northern California, Inc.; ACLU Of Southern California; American Civil Liberties Union Of San Diego/ Imperial Counties; Edward Gerard De Bonis; Robert S. Gerstein; Rod Gorney; Robert Jacobson; Vincent J. Maniscalco; Carol Sobel; Glen Chulsky; Alejandro Trombley; Samuel Fisher; Omar Moreno; Paul Robilotti; Stephen Ternlund; Anatoly Sapoznick; Charmaine Crockett; A. Joris Watland; Anakalia Kaluna; Kim Coco Iwamoto; William R. Massey; Travis Cross; John Elder; Gabriel Fileppelli; Sam Goldstein; Healing Arts Center; David Kadlec; The Libertarian Party of Indiana; Tim Peterson; Carolyn W. Rader; Sam Goldstein Insurance Agency, Inc.; Sean Sheppard; Joan Dubois; Christopher Yowtz; Rebecca Yowtz; Pat

PARTIES TO THE PROCEEDING – Continued

Mahoney; Pamela A. Mahoney; Mark P. Solomon; Rhea Fuller; Shelly D. Souder; Steve Dolberg; Theresa Fortnash; D. Clive Hardy; James C. Harrington; Richard A. Grigg; Louis Black; The Austin Chronicle; Michael Kentor; Tina Herron; Brandy Sergi; Darryl Hines; Alex Klabacka; Jana Klabacka; Howard Jacobs; Laurence Kornblum; Kathleen Miller; Claudia Mink; Richard Roche; Benson B. Roe; Paul Goltz; Elaine Spielfogel-Landis; Studs Terkel (now deceased, as authorized by his estate); Barbara Flynn Currie; Diane C. Geraghty; Gary S. Gerson; James D. Montgomery; Quentin Young; American Civil Liberties Union of Illinois, Inc.; and Herbert Waxman.

Respondents are AT&T Inc.; AT&T Corp.; American Telephone and Telegraph Co.; AT&T Communications of California, Inc.; AT&T Communications of the Southwest, Inc.; AT&T Communications – East, Inc.; AT&T Operations Inc.; AT&T Teleholdings, Inc.; BellSouth Corp.; BellSouth Communications Systems, LLC; BellSouth Telecommunications, Inc.; Cingular Wireless LLC; Illinois Bell Telephone Co. d/b/a AT&T Illinois; New Cingular Wireless Services, Inc.; Pacific Bell Telephone Co. d/b/a AT&T California; SBC Long Distance, LLC d/b/a AT&T Long Distance; Sprint Nextel Corporation; Sprint Communications Company L.P.; Nextel West Corp.; Sprint Spectrum L.P.; Verizon Communications Inc.; Verizon Florida LLC; Verizon Global Networks Inc.; Verizon Maryland Inc.; Verizon Northwest Inc.; Verizon Business Global LLC;

PARTIES TO THE PROCEEDING – Continued

MCI Communications Services, Inc.; the United States; Steven Lebow, Rabbi; Steven Bruning; Cathy Bruning; Jonnie Starkey; Brian Bradley; Barry Kaltman; Meredith Kaltman, Ray Anderson; Collin Baber; Mark Barker; John Barrett; Anthony Bartelemy; William Betz; Fran Blamer; Trudy Bond; Kristen Brink; Shane Brink; Michael Brooks; Paul Bruney; Peter Catizone; Steve Christianson; John Clark; Kingsley Clark; Thomas M. Cleaver; Gerard P. Clerkin; Peter B. Collins; Kris Costa; Mark Costa; Julie Davis; Sharon L. Davis; Toni Didona; Theresa R. Duffy; Thomas S. Dwyer; Thomas Michael Fain; Shawn Fitzgibbons; John Fitzpatrick; Jennifer Florio; Margaret Franklin; Dawn Furler; C. Garifo; Diane Gavlinski; Joseph Gehring; Jane Gentile-Youd; Mark Gentile-Youd; G. Lawrence Gettier; Linda Gettier; Linda J. Gettier; Jit Gill; Mike Gilmore; Jayson Gleason; Marc Goldstone; Todd Graff; Janet Granja; Susan Grossman; Stephanie Gustave; Pam Haddon; Vern Haddon; Don Hawkins; Donna Hawkings; Jose V. Heinert; Lamar Henderson; Carolyn R. Hensley; Douglas S. Hensley; Donald Herron; Jennifer Hontz; Joyce Jackson; Andrew Jaffe; Randel James; Michael Johnson; Diane Juliano; Fay Kaiser; Rajendram Krishnan; Barbara Langer; Michael Lavo; Fred Leak; Ken Leha; Ben Lindsey; Lisa Lockwood; Ms. Lodge; Nancy K. Lorey; Michael T. Lyda; Eleanor M. Lynn; Esq.; Terry Mancour; Charlene Mann; Rev.; Jon Paul McClellan; Alicia McCollum; James McGrattan; Rev. Joe McMurray; Stephanie Meket; Clyde Michael

PARTIES TO THE PROCEEDING – Continued

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CORPORATE DISCLOSURE STATEMENT

Petitioners American Civil Liberties Union of Northern California, Inc., American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego/Imperial Counties, American Civil Liberties Union of Illinois, Inc., Sam Goldstein Insurance Agency, Inc., and Austin Chronicle Corp. state that none of them has a parent corporation, and that no publicly held corporation owns 10% or more of the stock of any of them.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tash Hepting, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-56) is not yet reported but is available at 2011 WL 6823154. The district court's opinion (Pet. App. 57-109) is reported at 633 F. Supp. 2d 949.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2011. On March 26, 2012, parties to the proceedings in the court of appeals who are not petitioners here timely filed a petition for rehearing and rehearing en banc, after being granted an extension of time to do so by the court of appeals. The petition remains pending. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 802 of the Foreign Intelligence Surveillance Act ("FISA"), codified at 50 U.S.C. § 1885a, provides as follows in subsections (a), (b), and (c):[1]

> (a) Requirement for certification. Notwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that –
>
> (1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) [50 U.S.C. § 1803(a)] directing such assistance;
>
> (2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;
>
> (3) any assistance by that person was provided pursuant to a directive under section 102(a)(4) [50 U.S.C. § 1802(a)(4)], 105B(e) [50 U.S.C. § 1805b(e)], as added by section 2 of the Protect America Act of 2007 (Public

[1] Section 802 of FISA (herein "section 802" or "§ 802") was enacted as a portion of section 201 of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, and is codified at 50 U.S.C. § 1885a.

Law 110-55), or 702(h) [50 U.S.C. § 1881a(h)] directing such assistance;

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was –

(A) in connection with an intelligence activity involving communications that was –

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was –

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

(b) Judicial review.

(1) Review of certifications. A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section.

(2) Supplemental materials. In its review of a certification under subsection (a), the court may examine the court order, certification, written request, or directive described in subsection (a) and any relevant court order, certification, written request, or directive submitted pursuant to subsection (d).

(c) Limitations on disclosure. If the Attorney General files a declaration under section 1746 of title 28, United States Code, that disclosure of a certification made pursuant to subsection (a) or the supplemental materials provided pursuant to subsection (b) or (d) would harm the national security of the United States, the court shall –

(1) review such certification and the supplemental materials in camera and ex parte; and

(2) limit any public disclosure concerning such certification and the supplemental materials, including any public order following such in camera and ex parte review, to a statement as to whether the case is dismissed and a description of the legal standards that govern the order, without disclosing the paragraph of subsection (a) that is the basis for the certification.

———♦———

STATEMENT OF THE CASE

Petitioners are customers within the United States of the respondent telecommunications carriers, and are not agents of any foreign power. About 10 years ago, initially as part of the so-called "President's Surveillance Program," the respondent telecommunications carriers began a massive, unlawful program of electronic surveillance, intercepting and disclosing to the government both the communications and the communications records of millions of their customers.[2]

Petitioners' claims center on these two categories of unlawful activities by the respondent telecommunications carriers. The first category – the telecommunications dragnet – involves the mass, indiscriminate interception and diversion to the government of the content of the telecommunications of millions of ordinary Americans as those communications transit respondents' domestic telecommunications facilities. ER 483-84; *Hepting v. AT&T Corp.*, 439 F. Supp. 2d

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[2] *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 301, 122 Stat. 2436, 2471 (defining "President's Surveillance Program"). As the Inspectors General of the Justice Department, Defense Department, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence have confirmed, the surveillance was broader than the so-called "Terrorist Surveillance Program" ("TSP") that was initially disclosed by the President in December 2005. *See* Inspectors General, *Unclassified Report On The President's Surveillance Program* (July 2009) at 1-2, 5-6, 36-37 (available at www.dni.gov/reports/report_071309.pdf); *see also* Court of Appeals Excerpts of Record ("ER") 508-11.

974, 986-90 (N.D. Cal. 2006). In San Francisco and other cities across the country, for example, AT&T has installed special fiber-optic "splitters" that copy and divert all of its Internet traffic into the control of the National Security Agency. ER 323-26, 358-77, 469-71, 491-96.

The second category of unlawful activities giving rise to petitioners' claims is the carriers' mass, indiscriminate disclosure to the government of the communications records of millions of Americans. ER 484-91. AT&T, for example, has provided the government with its telephone communications record database called "Hawkeye" and its Internet communications record database called "Aurora." ER 56-58.

Petitioners' complaints state claims against the telecommunications carrier respondents arising under federal constitutional and statutory law and state constitutional, statutory, and common law.[3] Many of the complaints allege causes of action under the First

[3] This petition encompasses 30 actions filed in 2006. The first-filed action, Hepting v. AT&T Corp., was filed in the Northern District of California. ER 47-77. Twenty-five of these actions were filed elsewhere; six of those were actions removed from the state courts of Florida, Indiana, Maryland, Minnesota, Missouri, and New Jersey. These 25 actions were transferred to the Northern District and consolidated for pretrial proceedings with the Hepting action by the Judicial Panel on Multidistrict Litigation. ER 309-19. Four additional actions pending in the Northern District (two of which were removed from California state court) were consolidated with the Multidistrict Litigation proceeding by the district court. ER 78-105.

and Fourth Amendments, FISA (50 U.S.C. §§ 1809, 1810), the Wiretap Act (18 U.S.C. §§ 2511, 2520), the Stored Communications Act (18 U.S.C. §§ 2702, 2707), and the Communications Act of 1934 (47 U.S.C. § 605). *See*, *e.g.*, ER 63-72, 112-14, 136-48, 184-93, 222-31, 265-75. Many of the complaints also allege causes of action under state law, presenting claims, for example, under the privacy guarantee of Article I, section 1 of the California Constitution, under section 2891 of the California Public Utilities Code, and under California common law for breach of contract. ER 87-90, 101-03, 148-50, 193-200, 232-43, 275-306. For purposes of the Multidistrict Litigation proceedings, petitioners filed master consolidated complaints against the Sprint, MCI/Verizon, BellSouth, and Cingular groups of respondents. ER 117, 153, 203, 245. The claims against the AT&T group of respondents are found in the complaints in each action against those respondents. *See*, *e.g.*, ER 47, 78, 106. The district court had jurisdiction over these actions under 28 U.S.C. §§ 1331, 1332, 1367, and 1441.

Respondent United States intervened in these actions soon after they were filed in 2006. Later, after the enactment of section 802 of FISA in 2008, the Attorney General filed a section 802 certification in the district court (filing both a public version and a secret, *ex parte* version which petitioners have never seen). Pet. App. 110-120. In his public certification, the Attorney General asserted that petitioners' actions "fall within at least one provision contained in Section 802(a)(1)-(5)" and denied that the government conducted dragnet collection of communications content "for

the purpose of analyzing those communications through key word searches to obtain information about possible terrorist attacks" (petitioners' dragnet surveillance claims were not limited to the collection of communications content for this purpose, and the Attorney General did not deny that the government had conducted dragnet surveillance for any other purpose). Pet. App. 113, 115, 117. The government then moved to dismiss these actions, or in the alternative for summary judgment, pursuant to section 802(a).

Petitioners opposed the government's motion. Among other grounds, petitioners contended that section 802 was unconstitutional because it gave the Attorney General the power to choose whether petitioners' claims should be decided by applying preexisting state and federal law or by applying the quite different legal standards and procedures of section 802, thereby changing the legal force and effect of preexisting law without observing the requirements of bicameralism and presentment required by Article I, section 7 of the Constitution. Petitioners also contended that because Congress provided no standard whatsoever to govern the Attorney General's decision whether to file a section 802 certification, the statute violated the nondelegation doctrine. The respondent telecommunications carriers supported the government's motion. The district court granted the government's motion and entered judgment against petitioners. Pet. App. 57; ER 535-67.

On appeal, the Ninth Circuit affirmed. Pet. App. 1, 22, 56. It rejected petitioners' argument that section 802 was unconstitutional because it permitted

the Attorney General to choose between inconsistent legal standards. The Ninth Circuit rejected this argument on the ground that section 802 did not literally enact, amend, or repeal a statute. Pet. App. 32-34. It also rejected petitioners' argument that section 802 was unconstitutional because it sets forth no intelligible principle to govern the Attorney General's discretion whether to file a certification. Pet. App. 34-40.

REASONS WHY THE PETITION SHOULD BE GRANTED

Section 802 is an unprecedented and unconstitutional violation of the separation of powers. The underlying subject of these lawsuits – the President's Surveillance Program – is a secret Executive Branch usurpation of power that violates well-established constitutional and statutory prohibitions on warrantless, suspicionless domestic surveillance. Section 802 compounds the problem of undue Executive power by tendering to the Executive what is essentially legislative power: Congress gave the Attorney General the power to choose in his sole discretion which of two inconsistent legal standards should apply to a civil lawsuit, allowing him to negate federal statutes, preempt state law, and oust the jurisdiction of federal and state courts. This power extends not only to the present lawsuits but also to future lawsuits challenging unlawful surveillance.

This Court has a unique and essential constitutional role as arbiter of the divisions of power the Constitution creates among the three branches of government. It is charged with ensuring that no branch intrudes upon the powers reserved to another. *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.'"). By upholding the separation of powers, the Court safeguards individual liberty and preserves the structures that guarantee the rule of law. *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594, 2609 (2011) ("'The structural principles secured by the separation of powers protect the individual as well.'"); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

The Court regularly reviews decisions raising substantial questions about the distribution of powers among the three branches, even where the lower courts are not divided on the issue. *E.g.*, *Stern v. Marshall*, 131 S. Ct. 2594; *Free Enterprise Fund v. Public Company Accounting Oversight Board*, ___ U.S. ___, 130 S. Ct. 3138, 3151 (2010); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991).

Particularly deserving of review by this Court are cases in which Congress has devised a novel allocation of power among the branches. *See*, *e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594; *Free Enterprise Fund*, 130 S. Ct. 3138; *Clinton v. New York*, 524 U.S. 417; *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252; *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

Section 802 is such an instance and deserves this Court's review; it is an unprecedented statute in which Congress made a novel allocation of power raising separation-of-powers issues of exceptional importance. In it, Congress has allocated to the Executive the legislative choice of which laws should govern petitioners' lawsuits: the statutes that Congress has passed since 1934 that protect petitioners against unlawful government surveillance, the federal constitutional protections of the Bill of Rights, and state laws, on the one hand, or the entirely new legal standards of section 802 on the other. In doing so, Congress both avoided democratic accountability and set up a dangerous precedent in which the Attorney General and not Congress determines what law applies to claims arising from illegal surveillance, both now and in the future.

Section 802 is anathema to representative democracy. If it remains viable, it will serve as a model on any occasion in which both Congress and the

Executive seek to diminish their own political accountability for any decision that undermines the rule of law. Our system of representative democracy is premised on the notion that elected officials are accountable to the electorate for their decisions. Section 802 represents a new species of statute in which Congress assured that no branch would be fully accountable:

- Congress is not accountable to the electorate because the ultimate policy decision whether to relieve the respondent telecommunications carriers of liability is left to the Attorney General;
- The Attorney General is not accountable because his policy decision only needs to be supportable by "substantial evidence" – he need not make any effort to find facts or respond to any facts marshaled in response – and he may unilaterally cloak any evidence that he proffers under a veil of secrecy; and
- The Judiciary is not accountable because its review is both secret and circumscribed by the highly deferential substantial-evidence standard.

The result is Congress' abdication of responsibility to the Attorney General for a policy decision involving an illegal program in a way that avoids oversight by either the Judiciary or the electorate.

Moreover, review should be granted because this petition presents the Court with the only opportunity

it will ever have to decide the constitutionality of section 802 as applied to the President's Surveillance Program between 2001 and 2007, the sole subject of subsection (a)(4) of section 802.[4] That is a question of great national importance. The unlawful and unconstitutional surveillance covered under subsection (a)(4) was nationwide in scope, involved the telecommunications services essential to modern life, and intercepted the domestic communications of millions of Americans for a period of six years.

Finally, there will be no circuit split as to the application of section 802 to lawsuits against telecommunications carriers arising out of the President's Surveillance Program because the Judicial Panel on Multidistrict Litigation consolidated all such pending lawsuits before the district court below, which dismissed them all pursuant to section 802. The dismissals of all of those lawsuits were affirmed in the Ninth Circuit opinion that is the subject of this petition.

I. The Powers Granted By Congress To The Attorney General In Section 802

Section 802 creates a new statutory regime addressing unlawful surveillance claims arising under federal statutory law, state law, or federal

[4] Plaintiffs' claims are not limited to surveillance occurring during the 2001 to 2007 period, but encompass ongoing unlawful surveillance as well.

constitutional law. This new statutory regime, however, although enacted by Congress, has no legal force or effect of its own. Preexisting federal and state law continues to govern unless and until the Attorney General chooses to nullify preexisting law and replace it with the legal regime of section 802.

A. Section 802's New Legal Standards

The changes set forth in the legal standards of section 802 are both substantive and procedural. Subsection (a)(4) of section 802, when triggered by the Attorney General, creates a new bar to adjudication of unlawful surveillance claims arising under state or federal law. By filing a certification invoking subsection (a)(4), the Attorney General makes warrantless, suspicionless surveillance of American citizens within the United States that violates the Constitution, federal law, or state law no longer actionable, so long as the carrier was told that the surveillance was authorized by the President sometime between 2001 and 2007 and had been determined (by anyone at all in the government) to be "lawful."

Subsection (a)(5) of section 802 also creates new procedures the Attorney General can trigger for determining the merits issues of whether the alleged surveillance occurred and, if so, whether the defendant participated in it. No longer are courts, or any other adjudicator, permitted to adjudicate these elements of the plaintiff's claim. There is no trier of

fact at all and no adjudication. Instead, the Attorney General unilaterally certifies his conclusions on these issues to the district court without any notice or process, and the court must dismiss the case so long as the Attorney General submits "substantial evidence" in support of the certification.[5] § 802(b) ("A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence. . . ."). Likewise, the facts on which the preclusive bars of subsections (a)(1) through (a)(4) are based are no longer subject to trial or other adjudication. They, too, are subject to the Attorney General's unilateral certification.

Section 802 also empowers the Attorney General to require the district court to keep secret from the plaintiff the evidence the Attorney General has submitted in support of his certification, whether or not the court agrees that secrecy is required. The Attorney General invoked this provision against petitioners here, and the dismissal of their actions was based on secret evidence they never saw.

Finally, section 802 limits the evidence on which the district court's substantial evidence determination is based to "court order[s], certification[s],

[5] This is not the familiar use of the substantial-evidence standard of review to review an agency determination made after an adjudication that comports with due process. *See*, *e.g.*, 5 U.S.C. § 706(2)(E). Under section 802, the Attorney General conducts no adjudication and provides no process at all before filing a certification.

written request[s], or directive[s]" authorizing surveillance. § 802(b)(2), (d).

B. The Attorney General's Power To Decide Whether Section 802 Applies

Section 802's new bar to liability and new procedures do not apply to any lawsuit of their own force. Only if the Attorney General files a certification do those provisions come into force and supersede preexisting law. Subsection (a) gives the Attorney General unlimited discretion to cause, or not to cause, the dismissal of any action falling within one of the five categories set forth in subsections (a)(1) through (a)(5). That subsection provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, *if* the Attorney General certifies to the district court" that one of the five statutory categories is satisfied. § 802(a) (emphasis added).

In the proceedings in the district court, the United States and the respondent telecommunications carriers agreed that the Attorney General's discretion under section 802 was unlimited: "Congress left the issue of whether and when to file a certification to the discretion of the Attorney General." District Ct. Dkt. No. 466 at 21:3-5. "Nothing in the Act requires the Attorney General to exercise his discretion to make the authorized certifications, and until he actually

decides to invoke the procedures authorized by Congress, the Act would have no impact on this litigation." *Id*. at 22 n.16.

Section 802 confers two types of standardless discretion on the Attorney General. First, the Attorney General has unlimited discretion to undertake, or not, a determination of whether a civil action falls within one of the five statutory categories set forth in section 802(a). If the Attorney General declines to undertake a determination of whether a particular lawsuit falls within section 802(a), neither the defendant nor the court can compel the Attorney General to do so. Nothing in the statute triggers any obligation for the Attorney General to take any action.

Second, if the Attorney General does determine that the action falls within one of the five statutory categories, it is also entirely up to his discretion whether to file a certification and thereby switch the law governing the action. If the Attorney General chooses not to file a certification in an action falling within one of the five statutory categories, the existing federal and state law creating liability for unlawful surveillance and establishing the procedures for resolving such claims by trial continues to govern the plaintiff's causes of action. Here, for example, if the Attorney General had chosen not to file a certification, these lawsuits would have continued to be governed by existing law, section 802 would not apply to the lawsuits, and no dismissal under section 802 would have been possible. Indeed, even if in that case the respondent telecommunications carriers could

and did prove the relevant facts under section 802(a), it would not matter: only the Attorney General can trigger the new rules.

If the Attorney General chooses to file a certification, his unilateral determination that a lawsuit falls within one of the statutory categories is reviewable by the district court under the deferential "substantial evidence" standard of review. § 802(b)(1). However, the Attorney General's separate decision to exercise, or not to exercise, his power to file a certification in any particular lawsuit falling within one of the five statutory categories is completely unreviewable.

II. Review Should Be Granted Because Section 802 Violates The Lawmaking Procedures Of Article I, Section 7 Of The Constitution

Although the procedure and standards of section 802 are the same regardless of whether the source of the plaintiff's claim is federal statutory law, state law, or federal constitutional law, the effect of the Attorney General's choice to substitute section 802 for preexisting law differs in each case. For a federal statutory claim, the Attorney General's decision to invoke section 802 replaces the legal standards of the statutes creating the claim with the legal standards of section 802; for a state-law claim, invoking section 802 preempts the state-law claim and imposes the legal standards of section 802 instead; for a federal constitutional claim, invoking section 802 excludes

that claim from the jurisdiction of the federal or state courts.

A. Only Congress Can Nullify Previously-Enacted Statutes Creating Federal Causes Of Action

Section 802 is unconstitutional because it gives to the Attorney General the power to choose whether petitioners' federal statutory causes of action should be governed by the statutes that created them or by the conflicting provisions of section 802, which effectively eliminate them. The Constitution requires that any change to the legal force and effect of previously-enacted statutes must be chosen by Congress in accordance with Article I, section 7's mandatory procedures for the enactment, amendment, and repeal of statutes, which include bicameral passage and presentment. *Clinton v. City of New York*, 524 U.S. 417, 437-41, 444-45 (1998).

As *Clinton* demonstrates, Article I, section 7 bars Congress from giving the Executive the power to choose which of two competing and inconsistent enactments applying to the same subject should have the force of law and which should be nullified. In *Clinton*, Congress had previously enacted a general capital-gains tax. It then amended this law by enacting a special deferral of the capital-gains tax applicable only to a single category of transactions. In yet a third statute (the so-called "Line Item Veto Act"), however, Congress gave the President the power to

nullify ("cancel") the special tax deferral and thereby subject the transactions to the preexisting capital-gains law. The Line Item Veto Act thus gave the President the power to choose, post-enactment, which of the two inconsistent tax statutes would apply to the designated category of transactions. The President chose to cancel the special capital-gains tax deferral, depriving it of any "'legal force or effect'" (524 U.S. at 438) and subjecting the transactions to the preexisting capital-gains law. This cancellation violated Article I, section 7 of the Constitution because it amounted to the functional equivalent of a partial repeal of the statute containing the tax deferral. *Id.* at 441, 444 ("cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7"). The Court reached the same conclusion with respect to a second cancellation at issue in *Clinton*: the cancellation of a provision forgiving an indebtedness owed by New York to the United States. *Id*. at 422-23, 438, 441, 444.

Section 802 parallels the arrangement found unconstitutional in *Clinton*. In each case, Congress enacted two conflicting statutes addressing the same subject. By their terms, one statute prevails over the other, so long as the Executive does not act. But Congress also gives the Executive the power to nullify the statute that would otherwise prevail. In *Clinton*, the special capital-gains deferral would have applied to the plaintiff's transaction, but the Executive acted and caused the general capital-gains tax to apply

instead. Here, as in *Clinton*, Congress granted rights to private parties and then granted the Executive the power to change those rights by giving legal force and effect to a statute that otherwise would not apply. Petitioners' federal statutory claims would have gone forward under the preexisting statutory regime created by 18 U.S.C. §§ 2702, 2707, 2511, 2520; 47 U.S.C. § 605; and 50 U.S.C. §§ 1809, 1810, but the Executive acted and caused them instead to be subject to the substantive and procedural legal standards of section 802. That choice is inherently legislative in nature.

The court of appeals, in rejecting this conclusion, misapprehended the nature of section 802 as well as the nature of the statutes at issue in *Clinton*. It took the position that: "Under § 802 the Executive does not *change or repeal* legislatively enacted law, as was the case with the Line Item Veto [in *Clinton*]. The law remains as it was when Congress approved it and the President signed it." Pet. App. 33 (emphasis original).

The court of appeals was mistaken in thinking that the Line Item Veto Act in *Clinton* permitted the President to literally change or repeal the text of the special tax-deferral provision as opposed to changing the legal force or effect of the law. The Line Item Veto Act is not a true line-item veto, in which the President could strike a provision from a bill *before* signing the bill and turning it into law. Instead, the President first signed the bill, turning it into enacted law, and only then made a unilateral post-enactment statement cancelling the provision, i.e., depriving it of "any

legal force and effect" and causing a different statute to apply instead. The cancellation could not and did not alter a single word of the enacted statutes containing the cancelled provisions.[6] *Clinton*, 524 U.S. at 423-25, 436 ("each of those provisions had been signed into law . . . before it was canceled"), 439 ("the statutory cancellation occurs *after* the bill becomes law" (emphasis original)). Because the statutes were already enacted law, the President's post-enactment cancellation did not alter the literal text of the statutes. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4722(c), 111 Stat. 251, 515; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 968, 111 Stat. 788, 895-96; *see Clinton*, 524 U.S. at 421. The President's cancellation altered only the legal force and effect of the cancelled provisions; the words of the cancelled provision remained in the statute book.

Indeed, the court of appeals here took the same position as Justice Breyer did in his dissent in *Clinton*, in which he concluded that "[b]ecause one cannot say that the President's exercise of the power the Act grants is, literally speaking, a 'repeal' or

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[6] There were two enrolled appropriations bills at issue in *Clinton*, the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997. These became Public Laws 105-33 and 105-34, respectively, when the President signed them on August 5, 1997. 33 Weekly Comp. Pres. Docs. 1221 (Aug. 8, 1997).

After both bills became laws, the President signed statements on August 11, 1997, cancelling the legal force and effect of two specific provisions in the enacted statutes. 62 Fed. Reg. 43262; 62 Fed. Reg. 43265.

'amendment,'" there could be no Article I, section 7 violation. 524 U.S. at 479-80. The Court's majority agreed that the cancellation was not a literal repeal of the statutory language, but held nonetheless that the cancellation amounted to "the functional equivalent" of a partial repeal because it deprived the cancelled provision of the legal force or effect it would otherwise have had, making it "entirely inoperative as to appellees." *Id*. at 441.

Both in *Clinton* and here, the Executive's action deprived the words in the statute book of legal force and effect that they would otherwise have. The court of appeals' cryptic and unexplained conclusion that "nothing effected by the Attorney General 'prevent[s] the item from having legal force or effect'" is entirely mistaken. Pet. App. 33 (quoting *Clinton*, 524 U.S. at 437). It was only because of the Attorney General's certification that these actions were dismissed. His certification prevents 18 U.S.C. §§ 2702, 2707, 2511, 2520; 47 U.S.C. § 605; and 50 U.S.C. §§ 1809, 1810 from having the legal force and effect they would have otherwise had with respect to petitioners' claims. Had the Attorney General not chosen to file a certification invoking section 802, petitioners' federal statutory claims would have continued under preexisting law. Under preexisting law, petitioners' federal statutory claims could *not* be dismissed on the ground that the President had authorized the surveillance and some unnamed person in the government thought it was legal (section 802(a)(4)), could not be dismissed on the ground that the Attorney General believed that the

defendant had not participated in the alleged surveillance (section 802(a)(5)), and could not be dismissed, whatever the ground, by use of section 802's certification procedure, which forecloses any adjudication of fact and requires the court to defer to the factual determinations of the Attorney General. Absent the Attorney General's certification, the legal force and effect of the statutes governing petitioners' federal statutory claims would have controlled the possible defenses to petitioners' claims and would have required that adjudication of the facts material to petitioners' complaints occur by the ordinary procedures of summary judgment or trial.

The court of appeals also drew mistaken analogies between section 802 and four other statutes. Pet. App. 34. First, it erroneously asserted that the Westfall Act, 28 U.S.C. § 2679, permits the Attorney General to decide whether or not to bar lawsuits against federal employees for actions within the scope of their employment. *Id*. The Attorney General does not have that power. Congress has unconditionally barred the lawsuits by operation of law. 28 U.S.C. § 2679(b)(1) ("The remedy against the United States . . . is exclusive of any other civil action. . . . Any other civil action . . . against the employee . . . is precluded. . . . "); *see also* 28 U.S.C. §§ 1346(b)(1), 2672, 2674. The Attorney General may use a certification to confirm that the employee was acting within the scope of his or her employment and to effect a substitution of parties, but the bar to liability exists regardless of the Attorney General's actions or inactions. *See*

Hui v. Castaneda, 559 U.S. ___, 130 S. Ct. 1845, 1851 (2010) ("The Westfall Act amended the FTCA [Federal Tort Claims Act] to make its remedy against the United States the exclusive remedy for most claims against Government employees arising out of their official conduct. In providing this official immunity, Congress . . . stat[ed] that the remedy against the United States is 'exclusive of any other civil action or proceeding,' § 2679(b)(1)."); *Osborn v. Haley*, 549 U.S. 225, 229 (2007) ("[T]he Westfall Act[ ] accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. *See* 28 U.S.C. § 2679(b)(1).")

The court of appeals ignored the Westfall Act's unconditional preclusion in subsection (b) of 28 U.S.C. § 2679 and focused only on the statutory mechanisms in subsection (d)(1) and (d)(2) permitting the Attorney General to certify that the employee was acting within the scope of his or her employment and thereby substitute the United States for the employee as defendant. Pet. App. 34. Yet, in addition to being completely separate from the liability preclusion effected by subsection (b), the mechanisms of subsections (d)(1) and (d)(2) provide only two of the three methods by which substitution can occur. Even if the Attorney General fails to certify, under subsection (d)(3) the employee can petition the court and obtain a court-issued certification and substitution. Thus, unlike section 802, which provides no mechanism for the telecommunications carrier respondents to obtain

immunity absent an Attorney General certification, federal employees are *categorically* immune from suit for actions within the scope of their employment and the Westfall Act sets forth a procedure for employees to assert that immunity without the Attorney General's involvement.

The court of appeals also analogized section 802 to statutes authorizing the Executive to grant immunity from prosecution and authorizing it to grant a discretionary suspension of deportation. Pet. App. 34. In each of these instances, however, the Executive forbears from pursuing its own claim against someone; it does not extinguish a claim one private party possesses against another private party. Such Executive forbearance is no different from the right of any party to decline to pursue a claim it possesses. Executive forbearance deprives no private party of any right and works no injury to anyone.

Finally, the court of appeals made an equally misplaced analogy to Congress' grant to the President of the power to restore sovereign immunity to post-invasion Iraq, addressed in *Republic of Iraq v. Beaty*, 556 U.S. 848, 129 S. Ct. 2183, 2189 (2009). Pet. App. 34. Foreign sovereign immunity is a "*sui generis* context" of historical deference to the Executive. *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). "Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction.'" *Id*. The power granted in *Beaty* is within that tradition: "The granting of

Presidential waiver authority is particularly apt . . . since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch." *Beaty*, 129 S. Ct. at 2189. Section 802, which addresses claims of illegal surveillance in the United States against ordinary United States persons, lies far outside the unique Executive authority over foreign sovereign immunity at issue in *Beaty*.[7]

B. Only Congress May Preempt State Law

The Attorney General's preemption by fiat of petitioners' state constitutional, state statutory, and state common-law causes of action is unconstitutional because it, too, occurs without bicameral passage and presentment. The Supremacy Clause provides that state law is preempted only by "[t]his Constitution, and the Laws of the United States which shall be

[7] Nor is section 802 remotely like statutes, alluded to by the court of appeals (Pet. App. & n.2), in which Congress permits the Executive to waive a condition or duty that Congress has imposed on a task Congress has instructed the Executive to perform, e.g., the waivable condition that if the Executive determines a person to be a foreign narcotics trafficker, it must impose sanctions on that person, 21 U.S.C. § 1903(g)(1). In a waivable-condition statute, the Executive is waiving its own statutory duties, and whether exercised or not, the waiver has no impact on any legal obligations owed by one private party to another. Congress, of course, has the right to control how the Executive performs a task Congress has assigned it. Waiver provisions exist when Congress has decided not to make the condition it has imposed on the assigned task mandatory in all circumstances.

made in Pursuance thereof." U.S. Const., art. VI, cl. 2; *Printz v. United States*, 521 U.S. 898, 924 (1997) ("The Supremacy Clause, however, makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution]' " (alterations original)). "Laws of the United States" are only "made in Pursuance" of the Constitution if they are made in conformance with Article I, section 7. Thus, state law is preempted only if the decision to preempt is enacted by a majority vote of each house of Congress in accordance with Article I, section 7. *Wyeth v. Levine*, 555 U.S. 555, 586 (2009) (Thomas, J., concurring) ("The Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.").

Here, Congress did not enact a decision to preempt petitioners' state-law causes of action, including those alleged in the eight cases brought in the state courts of California, Florida, Indiana, Maryland, Minnesota, Missouri, and New Jersey. Instead, Congress enacted a statute giving the Attorney General the power to preempt. Because it is the Attorney General, and not Congress, who chose to preempt petitioners' state-law causes of action, there has been no compliance with Article I, section 7, and no valid preemption.

C. Only Congress May Alter The Jurisdiction Of The Federal And State Courts

Petitioners' federal constitutional claims for equitable relief arise directly under the Constitution. *Free Enterprise Fund*, 130 S. Ct. at 3151 n.2. They are not created by Congress and cannot be abolished by Congress. *City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997). All Congress can do to prevent them from being heard and decided in the inferior federal courts is to exclude them from the jurisdiction of those courts. Whatever the extent to which Congress' Article I, section 8 power "[t]o constitute Tribunals inferior to the supreme Court" and its Article III, section 1 power to "ordain and establish" "inferior courts" allows it to deny any forum whatsoever for petitioners' constitutional claims, Congress cannot give that choice to the Attorney General.

The general federal-question statute, 28 U.S.C. § 1331, gives the district courts jurisdiction to hear and decide petitioners' federal constitutional claims. The effect of the Attorney General invoking section 802 is to exclude those claims from the jurisdiction of the district courts, for that is the only mechanism by which section 802 can cause constitutional claims to "not lie or be maintained in any Federal or State court." § 802(a). Section 802 thus gives the Attorney General the choice whether or not petitioners' claims should fall within section 1331's grant of jurisdiction.

Nothing in the Constitution permits Congress to give this power to the Attorney General. Control of the jurisdiction of the inferior federal courts over claims arising under the federal Constitution is a power that belongs exclusively to Congress.

Section 802 does more than just exclude petitioners' federal constitutional claims from federal court jurisdiction. It also excludes petitioners' constitutional claims from state court jurisdiction; thus, petitioners may not refile their constitutional claims in state court. Whatever power Congress possesses to limit the jurisdiction of state courts to decide federal constitutional claims or to bar the adjudication of a plaintiff's constitutional claim in every court, whether federal or state, must be exercised by Congress directly. Congress cannot give those powers to the Attorney General to exercise on a case-by-case basis, picking and choosing which plaintiffs get to adjudicate their constitutional claims.

D. Section 802 Is Unlike Other Statutes Abolishing Causes Of Action Or Changing The Governing Legal Standard

The Court should grant the petition to review section 802's unparalleled grant of power to the Executive. There is no established tradition of giving the Executive the power to choose in a pending civil action which of two inconsistent laws should be applied and which should be ignored. Section 802 is unlike other statutes in which Congress has

unconditionally abolished causes of action or unconditionally changed the governing legal standard, either in particular lawsuits or in all lawsuits, without giving the Executive any choice in the matter. For example, 15 U.S.C. § 7902 unconditionally preempts an entire category of lawsuits against gun manufacturers, without giving the Executive any power to control whether the suits should be preempted. 15 U.S.C. § 7902 ("A qualified civil liability action may not be brought in any Federal or State court."); *Ileto v. Glock*, 565 F.3d 1126, 1139 (9th Cir. 2009) (in 15 U.S.C. § 7902, Congress "set[ ] forth a new legal standard . . . to be applied to all cases"); *City of New York v. Beretta*, 524 F.3d 384, 395 (2d Cir. 2008) (statute "sets forth a new legal standard to be applied to all actions"). And in *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438-41 (1992), the Court addressed a statute in which Congress had unconditionally "replaced the legal standards" (*id.* at 437) governing certain pending lawsuits it identified by name and case number; no action by the Executive was necessary to trigger the change in the governing legal standards, and the Executive had no power to choose whether the new legal standards or the preexisting legal standards would apply. *Id.* at 439 (noting "the imperative tone of the provision, by which Congress 'determined and directed' that compliance with two new provisions would constitute compliance with five old ones").

The court of appeals repeatedly characterized section 802 as an immunity statute. As the examples

of 15 U.S.C. § 7902, the Westfall Act, and the *Robertson* statute show, it is not. Because, unlike them, section 802 does not unconditionally remove the threat of litigation from the telecommunications carrier respondents but instead empowers the Attorney General to remove that threat of litigation or not at his sole discretion, section 802 does not confer immunity.

Section 802 also is not an Executive fact-finding statute like the ones in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892) and *Owens v. Republic of the Sudan*, 531 F.3d 884 (D.C. Cir. 2008). *See* Pet. App. 37-38. In those statutes, Congress imposes a mandatory consequence upon the occurrence of certain triggering facts that do not yet exist at the time of enactment, and asks the Executive to determine whether the facts have come into existence: "[W]hen enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President." *Clinton*, 524 U.S. at 445; *accord*, *Owens*, 531 F.3d at 891-92.

Congress can repeal laws, change legal standards, preempt state law and create an immunity where no immunity existed before. It can require the Executive to perform fact-finding. What Congress may not do is to provide two incompatible sets of statutes to govern a single subject and delegate to the Executive the option to "choose one."

Ultimately, in enacting section 802 Congress unconstitutionally gave to the Attorney General the fundamental legislative choice of whether or not to change the federal statutes and preempt the state laws creating petitioners' claims, a choice that under the Constitution it alone is empowered to make. Certiorari should be granted to review this unprecedented transfer of legislative power to the Executive Branch.

III. Section 802 Violates The Nondelegation Doctrine Because It Delegates Power To The Executive Without Any "Intelligible Principle"

The nondelegation doctrine enforces a fundamental constitutional requirement: "'The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.'" *Touby v. United States*, 500 U.S. 160, 165 (1991). "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). While most statutes have no trouble passing constitutional muster under the nondelegation doctrine, the doctrine continues to serve as an outer boundary limiting Congress' transfer of power. Section 802, which

completely lacks meaningful guidance for the Attorney General's discretion, falls outside that expansive boundary.

"[T]he delegation doctrine[ ] has developed to prevent Congress from forsaking its duties." *Loving v. United States*, 517 U.S. 748, 758 (1996). One of its requirements is that "when Congress confers decisionmaking authority upon agencies *Congress* must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasis original, internal quotation marks and brackets omitted).

A statute states an intelligible principle only if the asserted principle is sufficiently definite that it can be used to determine whether the Executive's action conforms to Congress's will: Congress fails to provide an intelligible principle if "there is an absence of standards for the guidance of the [Executive's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). The test is not particularly demanding, but it does require that Congress actually state a principle, however general its terms, in the statutory text.

Section 802 lies outside these generous boundaries. In section 802, Congress defined the five categories of lawsuits in which the Attorney General could file a certification. But Congress did not lay down any

principle at all "'by legislative act,'" i.e., in the text of a statute, for the Attorney General to apply in choosing whether to file a certification. *Whitman*, 531 U.S. at 472. In doing so, Congress abdicated even the broadest interpretation of its constitutional duty.

Section 802 does not require any action by the Attorney General. He is not required to examine any lawsuit to determine whether it falls within one of the five statutory categories in which certification is permitted. Even if the Attorney General does decide to examine a lawsuit and determines that certification is permitted, he is not required to take any further action. He is not required to consider any factors, apply any criteria, undertake any investigation, or engage in any analysis. He can exercise, or refuse to exercise, his discretion to file a certification for any reason or for no reason at all.

The court of appeals attempted to circumvent this defect by asserting that the five categories of lawsuits delineated in section 802 amounted to an intelligible principle governing the Attorney General's discretion. Pet. App. 36. This was error. The statutory categories merely define the class of lawsuits in which the Attorney General *may* nullify the preexisting law governing petitioner's causes of action; they provide no standard or principle for when he should exercise that power. They set the boundaries within which he may act, but give no principle for him to apply in deciding whether to act.

Whitman also makes clear that the principle of decision must be found in the "legislative act" and not in the legislative history. Legislative history is used in delegation cases only to elucidate the meaning of an intelligible principle that exists in the statutory text; it cannot supply a principle that is entirely absent from the statute. For example, in *Mistretta* (a decision relied upon by the court of appeals), Congress set forth detailed standards in the text of the statute. 488 U.S. at 374-75. The Court used legislative history only to "provide[ ] additional guidance for the Commission's consideration of the *statutory factors*," not to create standards where Congress had created none. *Id*. at 376 n.10 (emphasis added). The use of legislative history in nondelegation analysis is only to put flesh on the bones of standards already stated in the statutory text. This is in accord with the general rule that "'courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point.'" *Shannon v. United States*, 512 U.S. 573, 584 (1994).

Despite this clear limitation, the court of appeals improperly looked to the report of the Senate Select Committee on Intelligence (S. Rep. No. 110-209, ER 383) in its attempt to derive an intelligible principle. Pet. App. 39. Yet even were that examination proper, the legislative history provides no intelligible principle. The court of appeal's analysis was as follows:

> The Senate Select Committee Report goes far in explaining the congressional concerns that motivated the passage of the immunity

> provision. When considering how to respond to lawsuits like this one, the Committee 'recogniz[ed] the importance of the private sector in assisting law enforcement and intelligence officials in critical criminal justice and national security activities.' S. Rep. 110-209 at 5. The Report further states that 'electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system.' *Id*. at 9. The intelligible principle that comes through in the legislative history is one of protecting intelligence gathering and national security information.

Pet. App. 39.

But the Committee Report's observation that the private sector is important in assisting law enforcement simply is not a principle for decisionmaking by the Attorney General. Certification decisions concerning electronic surveillance under section 802 will always involve private persons and entities by definition. 50 U.S.C. § 1885(8) (section 801(8) of FISA) (defining "person" for purposes of section 802). Observing their importance gives no principle for the Attorney General to follow in deciding whether to file a certification in a particular case and no way to tell if Congress' will has been obeyed. To the contrary, the committee report's section-by-section analysis of the bill acknowledges the Attorney General's unbounded discretion, noting that dismissal occurs only "*if* the Attorney General makes a certification," and suggests

no standard or principle limiting the Attorney General's discretion. ER 404-05 (S. Rep. No. 110-209 at 22-23) (emphasis added).

The court of appeals also erred in suggesting that the Executive has inherent power under Article II over the domestic surveillance at issue here and therefore the intelligible-principle requirement is relaxed in this case. Section 802 addresses claims arising out of the search and seizure within the United States of the communications of United States citizens who are not agents of foreign powers. The Executive has no inherent power to conduct domestic searches and seizures of ordinary Americans, a subject far removed from its inherent powers in the fields of foreign affairs and military command. *United States v. United States District Court (Keith)*, 407 U.S. 297, 320 (1972); *Halperin v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986) (per Scalia, Circuit Justice; the Fourth Amendment warrant "requirement attaches to national security wiretaps that are not directed against foreign powers or suspected agents of foreign powers").

Nor is there any historical tradition of the Executive exercising standardless discretion to choose which of two competing legal standards enacted by Congress should govern litigation between private parties that would lessen or excuse the requirement for an intelligible principle here. In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), the Court stated: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its

function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." Most statutes challenged under the nondelegation doctrine have passed muster because they involve either the making of subordinate rules by the Executive (as in *Whitman*) or Executive fact-finding that carries a mandatory consequence (as in *Field* and *Owens*). Section 802 neither involves the making of subordinate rules nor a policy that must be applied if a particular fact is found to exist. Instead, it delegates to the Attorney General the discretion to grant a civil amnesty for pending litigation, unguided by any intelligible principle.

That unlimited discretion is an invitation for mischief. Separation of powers is a bedrock principle of our system of government because the aggregation of power in any single branch is so vulnerable to abuse.[8] The absence of any intelligible principle in section 802 does more than just deprive telecommunications customers like petitioners of any means to test the Attorney General's discretion against the will

[8] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected may justly be pronounced the very definition of tyranny." James Madison, "Federalist No. 47," in The Federalist Papers, ed. I. Kramnick (Penguin Books, 1987) p. 303.

of Congress; it equally deprives telecommunications carriers of any means to constrain the Attorney General's discretion. Both may eventually suffer: the Attorney General may use this power, which in this instance included relief from significant liability, to pressure telecommunications carriers to refrain from advocating the privacy rights of their customers.

Because section 802 is only a naked delegation lacking any intelligible principle, it is unconstitutional. Congress "failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7. Section 802 "provide[s] literally no guidance for the exercise of discretion" by the Attorney General. *Whitman*, 531 U.S. at 474. Instead, "Congress left the matter to the [Attorney General] without standard or rule, to be dealt with as he pleased." *Panama Refining*, 293 U.S. at 418. The "absence of standards" governing the Attorney General's discretion to file or not to file a certification makes it "impossible . . . to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426.

The Court should grant certiorari because of the national importance of the subject matter of this litigation and to resolve whether the nondelegation doctrine permits Congress to grant power to the Executive without stating any intelligible principle. If the Court does not strike down the standardless delegation of section 802, then the nondelegation doctrine will be a dead letter.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

In re NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION, _____ TASH HEPTING; GREGORY HICKS; ERIK KNUTZEN; CAROLYN JEWEL, on behalf of themselves and all other similarly situated, *Plaintiffs-Appellants*, v. AT&T CORPORATION; AT&T, INC., *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16676 D.C. Nos. 3:06-cv-00672-VRW M:06-cv-01791-VRW
SEAN BASINSKI, on behalf of himself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON COMMUNICATIONS, INC.; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16677 D.C. Nos. 3:06-cv-06434-VRW M-06-cv-0179-VRW

RICHARD D. SUCHANEK, III, on behalf of himself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. SPRINT NEXTEL CORPORATION, *Defendant-Appellee*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16679 D.C. Nos. 3:06-cv-06295-VRW M:06-cv-01791-VRW

CHARLES F. BISSITT; SANDRA BISSITT; GEORGE HAYEK, III; JUNE MATRUMALO; GERARD THIBEAULT; ARTHUR BOUCHARD; MARYANN BOUCHARD; ALDO CAPARCO; JANICE CAPARCO; JENNA CAPARCO; ROSE DELUCA; NICOLE MIRABELLA; PATRICIA POTHIER; PAUL POTHIER; MARSHALL VOTTA; VINCENT MATRUMALO; PAULA MATRUMALO; JENNIFER THOMAS; CHRISTINE DOUQUETTE; MARYANN KLACZYNSKI; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON COMMUNICATIONS, INC.; VERIZON, *Defendants-Appellees*.	No. 09-16682 D.C. Nos. 3:06-cv-05066-VRW M:06-cv-01791-VRW

CHRISTOPHER BREADY; ANNE BREADY; KYU CHUN KIM; JENET ARTIS; CLAUDIS ARTIS; DAVID BEVERLY, JR.; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON MARYLAND, INC.; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16683 D.C. Nos. 3:06-cv-06313-VRW M:06-cv-01791-VRW
TOM CAMPBELL; GEORGE MAIN; DENNIS P. RIORDAN; MARGARET RUSSELL; ROBERT SCHEER; PETER SUSSMAN; RICHARD BELZER; MARC COOPER; STEPHEN J. MATHER; SANDRA RICHARDS; CURREN WARF; AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, a nonprofit corporation; ACLU OF SOUTHERN CALIFORNIA, a nonprofit corporation; AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO/IMPERIAL COUNTIES, a nonprofit corporation; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T COMMUNICATIONS OF CALIFORNIA, a corporation; AT&T CORP., a corporation, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16684 D.C. Nos. 3:06-cv-03596-VRW M:06-cv-01791-VRW

DENNIS P. RIORDAN; EDWARD GERARD DE BONIS; ROBERT S. GERSTEIN; ROD GORNEY; ROBERT JACOBSON; VINCENT J. MANISCALCO; CAROL SOBEL; AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, a nonprofit corporation; ACLU OF SOUTHERN CALIFORNIA, a nonprofit corporation; AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO/IMPERIAL COUNTIES, a nonprofit corporation; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON COMMUNICATIONS, INC., a corporation; Verizon, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16685 D.C. Nos. 3:06-cv-03574-VRW M:06-cv-01791-VRW
GLEN CHULSKY; ALEJANDRO TROMBLEY; SAMUEL FISHER; OMAR MORENO; PAUL ROBILOTTI; STEPHEN TERNLUND; ANATOLY SAPOZNICK; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. CELLCO PARTNERSHIP, DBA Verizon Wireless; VERIZON, Verizon Communications, Inc.; AT&T, INC.; CINGULAR WIRELESS, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16686 D.C. Nos. 3:06-cv-06570-VRW M:06-cv-01791-VRW

CHARMAINE CROCKETT; A. JORIS WATLAND; ANAKALIA KALUNA; KIM COCO IWAMOTO; WILLIAM R. MASSEY, individually and on behalf of all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON WIRELESS, (VAW) LLC; HAWAIIAN TELECOM, INC., DBA Verizon Hawaii; NEXTEL WEST CORP., DBA Sprint; CINGULAR WIRELESS LLC; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16687 D.C. Nos. 3:06-cv-06254-VRW M:06-cv-01791-VRW
TRAVIS CROSS; JOHN ELDER; GABRIEL FILEPPELLI; SAM GOLDSTEIN; HEALING ARTS CENTER; DAVID KADLEC; THE LIBERTARIAN PARTY OF INDIANA; TIM PETERSON; CAROLYN W. RADER; SAM GOLDSTEIN INSURANCE AGENCY, INC.; SEAN SHEPPARD; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T COMMUNICATIONS, INC.; AT&T CORP.; AT&T TELEHOLDINGS, INC., FKA SBC; BRIGHT HOUSE NETWORKS, LLC; CINGULAR WIRELESS, LLC; COMCAST TELECOMMUNICATIONS, INC.;	No. 09-16688 D.C. Nos. 3:06-cv-06222-VRW M:06-cv-01791-VRW

INDIANA BELL TELEPHONE COMPANY, INC., DBA SBC Ameritech Indiana; MCI COMMUNICATIONS SERVICES, INC.; NEXTEL WEST CORP., DBA Sprint Nextel; SPRINT COMMUNICATIONS COMPANY, L.P.; SPRING SPECTRUM L.P.; TDS COMMUNICATIONS SOLUTIONS, INC.; VERIZON WIRELESS SERVICES, INC.; VERIZON,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

JOAN DUBOIS; CHRISTOPHER YOWTZ; REBECCA YOWTZ; ALL PLAINTIFFS,
Plaintiffs-Appellants,

v.

AT&T CORP.; CHARTER COMMUNICATIONS LLC; MCI COMMUNICATIONS SERVICES, INC.; TRANSWORLD NETWORK CORP.; VERIZON WIRELESS, LLC; VERIZON,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

No. 09-16690

D.C. Nos.
3:06-cv-06387-VRW
M:06-cv-01791-VRW

TRAVIS CROSS; JOHN ELDER; GABRIEL FILEPPELLI; SAM GOLDSTEIN; HEALING ARTS CENTER; DAVID KADLEC; THE LIBERTARIAN PARTY OF INDIANA; TIM PETERSON; CAROLYN W. RADER; SAM GOLDSTEIN INSURANCE AGENCY, INC.; SEAN SHEPPARD, individually an on behalf of others similarly situated; ALL PLAINTIFFS,
Plaintiffs-Appellants,

v.

AT&T COMMUNICATIONS OF CALIFORNIA, INC.; AT&T CORP.; AT&T TELEHOLDINGS, INC.; BRIGHT HOUSE NETWORKS, LLC; CINGULAR WIRELESS, LLC; COMCAST TELECOMMUNICATIONS, INC.; INDIANA BELL TELEPHONE COMPANY INCORPORATED, other SBC Ameritech Indiana; MCI WORLDCOM ADVANCED NETWORKS, LLC; MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.; NEXTEL WEST CORP., DBA Sprint Nextel Corporation; SPRINT COMMUNICATIONS COMPANY L.P.; SPRING SPECTRUM L.P.; TDS COMMUNICATIONS SOLUTIONS, INC.; VERIZON WIRELESS SERVICES, LLC; VERIZON,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

No. 09-16691

D.C. Nos.
3:06-cv-06224-VRW
M:06-cv-01791-VRW

PAT MAHONEY, individually, and on behalf of all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T COMMUNICATIONS, INC.; AT&T CORP., *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16692 D.C. Nos. 3:06-cv-05065-VRW M:06-cv-01791-VRW

PAMELA A. MAHONEY, on behalf of herself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON COMMUNICATIONS, INC.; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16693 D.C. Nos. 3:06-cv-05065-VRW M:06-cv-01791-VRW

MARK P. SOLOMON, MD, on behalf of himself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON COMMUNICATIONS, INC.; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16694 D.C. Nos. 3:06-cv-06388-VRW M:06-cv-01791-VRW
RHEA FULLER, on behalf of herself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON COMMUNICATIONS, INC.; VERIZON WIRELESS, LLC; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16696 D.C. Nos. 3:06-cv-05267-VRW M:06-cv-01791-VRW
SHELLY D. SOUDER; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T INC.; AT&T CORP., *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16697 D.C. Nos. 3:06-cv-05067-VRW M:06-cv-01791-VRW

STEVE DOLBERG, on behalf of himself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T, INC.; AT&T CORP., *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16698 D.C. Nos. 3:06-cv-05269-VRW M:06-cv-01791-VRW
THERESA FORTNASH; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T CORP., *Defendant-Appellee*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16700 D.C. Nos. 3:06-cv-06385-VRW M:06-cv-01791-VRW
D. CLIVE HARDY; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T CORPORATION, *Defendant-Appellee*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16701 D.C. Nos. 3:06-cv-06924-VRW M:06-cv-01791-VRW

JAMES C. HARRINGTON; RICHARD A. GRIGG; LOUIS BLACK; THE AUSTIN CHRONICLE; MICHAEL KENTOR, on behalf of themselves and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T, INC.; AT&T CORP.; AT&T OPERATIONS INC.; NEW CINGULAR WIRELESS SERVICES, INC., *Defendants-Appellees*.	No. 09-16702 D.C. Nos. 3:06-cv-05452-VRW M:06-cv-01791-VRW
TINA HERRON; BRANDY SERGI, individually and as representative of all similarly situated individuals; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON GLOBAL NETWORKS, INC.; AT&T CORP.; AMERICAN TELEPHONE AND TELEGRAPH COMPANY; BELLSOUTH COMMUNICATION SYSTEMS, LLC; BELLSOUTH TELECOMMUNICATIONS, INC.; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16704 D.C. No. 3:06-cv-05343-VRW

DARRYL HINES; ALEX KLABACKA; JANA KLABACJA; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. VERIZON NORTHWEST, INC., an active Washington corporation; VERIZON COMMUNICATIONS, INC., an active Delaware corporation; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16706 D.C. Nos. 3:06-cv-05341-VRW M:06-cv-01791-VRW
HOWARD JACOBS, a natural person; LAURENCE KORNBLUM, a natural person; KATHLEEN MILLER, a natural person, on behalf of themselves and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T CORP., a foreign corporation; AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a foreign corporation; BELLSOUTH TELECOMMUNICATIONS, INC., a foreign corporation; CINGULAR WIRELESS LLC, a foreign limited liability company; VERIZON COMMUNICATIONS, INC., a foreign limited liability	No. 09-16707 D.C. Nos. 3:06-cv-02538-VRW M:06-cv-01791-VRW

company; VERIZON FLORIDA, INC., a Florida corporation; VERIZON,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

CLAUDIA MINK; ALL PLAINTIFFS,
Plaintiffs-Appellants,

v.

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., a Delaware corporation; SOUTHWESTERN BELL TELEPHONE, L.P., a Texas limited partnership; SBC LONG DISTANCE, LLC, a Delaware corporation,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

No. 09-16708

D.C. Nos.
3:06-cv-07934-VRW
M:06-cv-01791-VRW

RICHARD ROCHE; ALL PLAINTIFFS,
Plaintiffs-Appellants,

v.

AT&T CORP.,
Defendant-Appellee,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

No. 09-16709

D.C. Nos.
3:06-cv-01243-VRW
M:06-cv-01791-VRW

BENSON B. ROE; PAUL GOLTZ, individually and on behalf of all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T CORP., a New York corporation; AT&T INC., a Delaware corporation; SBC LONG DISTANCE, LLC, a Delaware limited liability company, DBA AT&T Long Distance; PACIFIC BELL TELEPHONE COMPANY, a California corporation, DBA AT&T California; AT&T COMMUNICATIONS OF CALIFORNIA, INC., a California corporation, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16710 D.C. Nos. 3:06-cv-03467-VRW M:06-cv-01791-VRW
ELAINE SPIELFOGEL-LANDIS, on behalf of herself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. MCI, LLC, a Delaware limited liability company; VERIZON, *Defendants-Appellees*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16712 D.C. Nos. 3:06-cv-04221-VRW M:06-cv-01791-VRW

STUDS TERKEL, (now deceased); BARBARA FLYNN CURRIE; DIANE C. GERAGHTY; GARY S. GERSON; JAMES D. MONTGOMERY; QUENTIN YOUNG, on behalf of themselves and all others similarly situated; AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, INC.; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T CORP.; ILLINOIS BELL TELEPHONE Co., DBA AT&T Illinois; UNITED STATES OF AMERICA, *Defendants-Appellees*.	No. 09-16713 D.C. Nos. 3:06-cv-05340-VRW M:06-cv-01791-VRW
HERBERT WAXMAN, on behalf of himself and all others similarly situated; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. AT&T CORP., *Defendant-Appellee*, UNITED STATES OF AMERICA, *Defendant-intervenor-Appellee*.	No. 09-16717 D.C. Nos. 3:06-cv-06294-VRW M:06-cv-01791-VRW

STEVEN LEBOW, Rabbi; STEVEN BRUNING; CATHY BRUNING; JONNIE STARKEY; BRIAN BRADLEY; BARRY KALTMAN; MEREDITH KALTMAN; ALL PLAINTIFFS, *Plaintiffs-Appellants*, v. BELL SOUTH CORPORATION; CINGULAR WIRELESS LLC; SPRINT NEXTEL CORPORATION; NATIONAL SECURITY AGENCY, *Defendants-Appellees*.	No. 09-16719 D.C. Nos. 3:07-cv-00464-VRW M:06-cv-01791-VRW

RAY ANDERSON; COLLIN BABER; MARK BARKER; JOHN BARRETT; ANTHONY BARTELEMY; WILLIAM BETZ; FRAN BLAMER; TRUDY BOND; KRISTEN BRINK; SHANE BRINK; MICHAEL BROOKS; PAUL BRUNEY; PETER CATIZONE; STEVE CHRISTIANSON; JOHN CLARK; KINGSLEY CLARK; THOMAS M. CLEAVER; GERARD P. CLERKIN; PETER B. COLLINS; KRIS COSTA; MARK COSTA; JULIE DAVIS; SHARON L. DAVIS; TONI DIDONA; THERESA R. DUFFY; THOMAS S. DWYER; THOMAS MICHAEL FAIN; SHAWN FITZGIBBONS; JOHN FITZPATRICK; JENNIFER FLORIO; MARGARET FRANKLIN; DAWN FURLER; C. GARIFO; DIANE GAVLINSKI; JOSEPH GEHRING; JANE GENTILE-YOUD; MARK GENTILE-YOUD; G. LAWRENCE	No. 09-16720 D.C. Nos. 3:07-cv-02029-VRW M:06-cv-01791-VRW

GETTIER; LINDA GETTIER; LINDA J. GETTIER; JIT GILL; MIKE GILMORE; JAYSON GLEASON; MARC GOLDSTONE; TODD GRAFF; JANET GRANJA; SUSAN GROSSMAN; STEPHANIE GUSTAVE; PAM HADDON; VERN HADDON; DON HAWKINS; DONNA HAWKINGS; JOSE V. HEINERT; LAMAR HENDERSON; CAROLYN R. HENSLEY; DOUGLAS S. HENSLEY; DONALD HERRON; JENNIFER HONTZ; JOYCE JACKSON; ANDREW JAFFE; RANDEL JAMES; MICHAEL JOHNSON; DIANE JULIANO; FAY KAISER; RAJENDRAM KRISHNAN; BARBARA LANGER; MICHAEL LAVO; FRED LEAK; KEN LEHA; BEN LINDSEY; LISA LOCKWOOD; MS. LODGE; NANCY K. LOREY; MICHAEL T. LYDA; ELEANOR M. LYNN; ESQ.; TERRY MANCOUR; CHARLENE MANN; REV.; JON PAUL MCCLELLAN; ALICIA MCCOLLUM; JAMES MCGRATTAN; REV. JOE MCMURRAY; STEPHANIE MEKET; CLYDE MICHAEL MORGAN; THEODORE R. MORRIS; SHERI A. MUELLER; PROF. ROBERT NEWBY; FRAN NOBILE; SERGE POPPER; ILENE PRUETT; DR. MICHAEL REUSCH; MERRILYN ROME; MICHELE ROSEN; MICHELE S. ROTHMEL; KEVIN SHAWLER; GREG L. SMITH; HARRIS SONDAK; JAMES VANALSTINE; CHRIS VON OBENAUER; DEADRIA FARMER-PAELLMANN; DAN PATTON; RAY PENA; CONSTANCE PHILLIPS; MARK PLANTE;

JEREMY PUHLMAN; MARTIN RAZO; DANIEL REIMANN; MARK RICHARDS; LINDA RITHKIS; WILLIAM ROBINETTE; FRED ROGERS; DARLENE ROGERS; KATHLEEN ROGERS; WILLIAM J. ROMANSKY; BRONSON ROSIER; JOSH SEEFRIED; ANNA F. SHALLENBERGER; ROYCE SHEPARD; ROBERT SIDEN; GREGORY L. SMITH; CHRISTIAN STALBERG; MICHAEL L. STEPHAN; ROBERT STEWART; DONNA A. STONE; REGINA SUNBERG; WILLIAM R. SWEENEY; JR.; DAVID TAYLOR; APRIL TIPE; ALLEN T. TRADER III; BARRY W. TRIBBLE; FRED TRINKOFF; THOMAS VILAR; VICKIE VOTAW; LEON DWIGHT WALLACE; ACHIENG WARAMBO; ULRICH GEISTER; DAVID WHITE; JANE WINSTON; KEVIN WRIGHT; JOEL AINGER; CAROL COSE; DEBORAH DOUGHERTY; JAMES FLYNN; IRENE KING; PAUL KRAFT; GINA DE MIRANDA; CATALINA R. THOMPSON; MARY LEAH WEISS; ELIZABETH ARNONE; ELEANOR LYNN; JAY H. ROWELL; DANIEL REIMANN; VIVIAN PHILLIPS; JEFFREY G. MARSOCCI; BRIDGET IRVING; JAMES HALL; JOHN MCINTYRE; BETH WHITE; BRAD MARSTON; AND PAUL SUNBERG,

Plaintiffs-Appellants,

v.

VERIZON COMMUNICATIONS, INC.; NATIONAL SECURITY AGENCY; GEORGE W. BUSH; BELLSOUTH CORPORATION; AT&T CORPORATION; AT&T INC.; VERIZON,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

JAMES JOLL; RAMON GOGGINS; IAN WALKER; JAMES NURKIEWICZ, on behalf of themselves and all others similarly situated; ALL PLAINTIFFS,
Plaintiffs-Appellants,

v.

AT&T CORP.; AT&T INC.; VERIZON COMMUNICATIONS, INC.; BELLSOUTH CORP.; VERIZON,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-intervenor-Appellee.

No. 09-16723

D.C. Nos. 3:06-cv-05485-VRW M:06-cv-01791-VRW

OPINION

Appeal from the United States District Court for the Northern District of California, Vaughn R. Walker, District Judge, Presiding.

Argued and Submitted Aug. 31, 2011 – Seattle, Washington

Filed December 29, 2011

Before: Harry Pregerson, Michael Daly Hawkins, and M. Margaret Mckeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Kevin Stuart Bankston, ELECTRONIC FRONTIER FOUNDATION, San Francisco, California; Aram Antaramian, LAW OFFICE OF ARAM ANTARAMIAN, Berkeley, California; Richard R. Wiebe, LAW OFFICE OF RICHARD R. WIEBE, San Francisco, California; Thomas E. Moore, III, The Moore Law Group, Palo Alto, California; Cindy Cohn, ELECTRONIC FRONTIER FOUNDATION, San Francisco, California; Gary Edward Mason and Nicholas A. Migliaccio, Mason LLP, Washington, District Of Columbia; Michael A. St. Pierre, Revens Revens & St. Pierre, Warwick, Rhode Island; Julia Harumi Mass, ACLU FOUNDATION OF NORTHERN CALIFORNIA, San Francisco, California; Peter Jay Eliasberg, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, Los Angeles, California; Vincent Ian Parrett, MOTLEY RICE LLC, Mt. Pleasant, South Carolina; Roger L. Mandel, LACKEY HERSHMAN LLP, Dallas, Texas; Marc R. Stanley, STANLEY MANDEL & IOLA LLP, Dallas, Texas; Michael D. Donovan, DONOVAN, SEARLES, LLC, Philadelphia, Pennsylvania; M. Stephen Turner, Broad & Cassel, Tallahassee, Florida; Gerald Edward Meunier, Gainsburgh Benjamin David Meunier & Warshauer, L.L.C., New Orleans, Louisiana; R. James George, Jr., George & Brothers LLP, Austin,

Texas; Val P. Exnicios, Liska Exnicios & Nungesser, New Orleans, Louisiana; Christopher A. Slater, Slater Ross, Portland, Oregon; Brian Hugh Adler, Bader Stillman & Adler PL, Margate, Florida; Sam J. Alton, Stone Leyton Gersham PC, St. Louis, Missouri; Barry Himmelstein, LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, San Francisco, California; Harvey Grossman, Roger Baldwin Foundation of ACLU, Inc., Chicago, Illinois; Clinton A. Krislov, KRISLOV & ASSOCIATES, LTD., Chicago, Illinois; James M. Evangelista, Evangelista & Associates, LLC, Atlanta, Georgia; Carl Mayer, Mayer Law Group LLC, Princeton, New Jersey; Steven Edward Schwarz, The Law Offices of Steven E. Schwarz, Chicago, Illinois, for the plaintiffs-appellants.

Michael Kellogg, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, District Of Columbia for the defendant-appellee.

Thomas Mark Bondy, DOJ – U.S. Department of Justice, Washington, District Of Columbia, for the defendant-intervenor-appellee.

Howard Merrill Wasserman, FIU COLLEGE OF LAW, MIAMI, Florida, for the Amicus Curiae Law Professors in support of appellees.

OPINION

McKEOWN, Circuit Judge:

These consolidated appeals arise from claims that major telecommunications carriers assisted the government with intelligence gathering following the terrorist attacks on September 11, 2001. News reports that the National Security Agency ("NSA") undertook a warrantless eavesdropping program with alleged cooperation by telecommunications companies spawned dozens of lawsuits by customers against the companies, along with multiple suits against the NSA and other government actors. Tash Hepting and other residential telephone customers (collectively "Hepting") challenge the legality of the companies' participation in the surveillance program. Partially in response to these suits, Congress held hearings and ultimately passed legislation that provided retroactive immunity to the companies, subject to various conditions, but expressly left intact potential claims against the government. The sole issue before us is the constitutionality of § 802 of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1885a, known as the FISA Amendments Act of 2008, which allows for immunity for the telecommunication companies. Like the district court, we conclude that § 802 passes constitutional muster.

BACKGROUND

I. The Lawsuits

This appeal includes thirty-three actions against the nation's telecommunications companies, originally filed in 2006. The complaints were filed in the wake of news reports in December 2005 that President Bush had issued an order permitting the NSA to conduct warrantless eavesdropping. Under a program known as the Terrorist Surveillance Program ("TSP"), the NSA "had obtained the cooperation of telecommunications companies to tap into a significant portion of the companies' telephone and e-mail traffic, both domestic and international." James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts,* N.Y. TIMES, Dec. 16, 2005, at A1. The President later acknowledged that in the weeks following September 11, he authorized a "terrorist surveillance program to detect and intercept al Qaeda Communications" and stated that the program applied "only to international communications, in other words, [where] one end of the communication [was] outside the United States." President George W. Bush, Speech at the National Security Agency (Jan. 25, 2006) *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/01/20060125-1.html. The complaints "challenge[d] the legality of Defendants' participation in a secret and illegal government program to intercept and analyze vast quantities of Americans' telephone and Internet communications." Hepting alleged that the telecommunications companies provided the government

with direct access to nearly all of the communications passing through their domestic telecommunications facilities. These suits were consolidated in August 2006 in the Northern District of California under the multidistrict litigation ("MDL") provisions of 28 U.S.C. § 1407. Although not a defendant in these suits, the United States intervened to seek dismissal under § 802 of the FISA.

II. The 2008 Amendments to the FISA

While the underlying actions were pending in district court, and partially in response to these suits, Congress enacted the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2435, codified at 50 U.S.C. § 1885a. Among the amendments is § 802, an immunity provision and related procedures that are triggered if the United States Attorney General certifies to one or more of five conditions. In such case, no civil action may be maintained "against any person for providing assistance to an element of the intelligence community." § 802(a).

This amendment dovetails with an existing comprehensive statutory framework that grants the Executive Branch authority to enlist telecommunications companies for intelligence gathering, to protect those companies from suit, and to keep their efforts secret. Acknowledging the existing legislation, Congress deemed an amendment necessary to empower the Attorney General to immunize from suit telecommunications companies that had cooperated with

the government's intelligence gathering, including post-September 11 activities under the TSP.

Subsection 802(a) reads as follows:

> (a) Requirement for certification. Notwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that –
>
> (1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) [50 U.S.C. § 1803(a)] directing such assistance;
>
> (2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;
>
> (3) any assistance by that person was provided pursuant to a directive under section 102(a)(4) [50 U.S.C. § 1802(a)(4)], 105B(e) [50 U.S.C. § 1805b(e)], as added by section 2 of the Protect America Act of 2007 (Public Law 110-55), or 702(h) [50 U.S.C. § 1881a(h)] directing such assistance;
>
> (4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was –

(A) in connection with an intelligence activity involving communications that was –

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was –

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

Section 802(a) permits the Attorney General to certify to a court that assistance was provided under at least one of a series of situations – ranging from a Foreign Intelligence Surveillance Court order, a national security letter, an Attorney General directive regarding FISA-authorized warrantless surveillance to participation in the TSP – or that no assistance was provided. This certification is subject to judicial

review under a substantial evidence standard: "[a] certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section." § 802(b)(1).

Section 802(c) details the court's handling of classified information. If the Attorney General declares that public disclosure of the certification and related materials "would harm the national security of the United States," then the court must review the material *ex parte* and *in camera*. The court may not reveal the specific subsection under which the certification was made nor may the court reveal any such material. Instead, the court must simply state whether the case is dismissed and a description of the legal standards governing the order.

Finally, § 802(d) provides that

> [a]ny plaintiff or defendant in a civil action may submit any relevant court order, certification, written request, or directive to the district court referred to in subsection (a) for review and shall be permitted to participate in the briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of classified information to such party.

All classified materials must be reviewed *in camera* and *ex parte* and any part of the court's order reviewing such information must be under seal.

The Senate Select Committee on Intelligence issued a report on the amendments, discussing, among other provisions, § 203, which was later codified as the FISA § 802. *See* S. Rep. 110-209 (2007). The report contains a lengthy background section describing "Pending Litigation" and "Civil Suits Against Electronic Communication Service Providers," leaving little doubt that these cases were among the intended targets of the amendments.

The new immunity provision "reflect[ed] the Committee's belief that there is a strong national interest in addressing the extent to which the burden of litigation over the legality of surveillance should fall on private parties." *Id.* at 8. The Committee noted the "importance of the private sector in security activities." *Id.* at 5. It emphasized that electronic intelligence gathering depends in great part on cooperation from private companies, *id.* at 9, and that if litigation were allowed to proceed against persons allegedly assisting in such activities, "the private sector might be unwilling to cooperate with lawful Government requests in the future." *Id.* at 10. The "possible reduction in intelligence that might result . . . is simply unacceptable for the safety of our Nation." *Id.* The Committee pointed to the pending suits, including this one, noting that "even if these suits are ultimately dismissed on state secrets or some other grounds, litigation is likely to be protracted." *Id.* at 7. Thus Congress explicitly crafted § 802 to allow for the dismissal of cases against telecommunications companies.

III. The Attorney General's Certification under § 802

Shortly after § 802(a) became law, Attorney General Michael Mukasey submitted to the district court both a public and a classified certification under the statute. In his public declaration, Attorney General Mukasey "confirm[ed] the existence of the TSP" but "denied the existence of the alleged dragnet." He "certif[ied] that the claims asserted in the civil actions pending in these consolidated proceedings brought against electronic communication service providers fall within at least one provision contained in Section 802(a) of the FISA." He further explained that disclosure of the classified certification "would cause exceptional harm to the national security of the United States" and "must therefore be reviewed *in camera, ex parte* by the Court" pursuant to § 802(c)(2). Mukasey concluded that "the provider-defendants are entitled to statutory protection based on at least one of the provisions contained in Section 802(a)(1) to (5) of the FISA, which includes the possibility that a provider defendant did not provide any assistance."

IV. The District Court Decision

With the filing of the Attorney General's certification, the United States intervened and moved to dismiss all of the claims against the telecommunications companies. The district court granted the motion and dismissed the complaints. *Al-Haramain*

Islamic Found., Inc. v. Bush (In re NSA Telcomms. Records Litig.), 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009).

In a thoughtful and lengthy opinion, the district court characterized § 802 as "sui generis among immunity laws." *Id.* at 959. The district court considered Hepting's multiple claims "that constitutional defects make the statute unenforceable." *Id.* at 959-60. In the end, the district court rejected each of these claims.

Hepting also made "a series of arguments to the effect that, on the merits and putting alleged infirmities in section 802 aside, the Attorney General's certifications are inadequate under section 802's own terms to support dismissal of these actions." *Id.* at 975. In support of these claims, Hepting pointed to specific evidence offered with respect to the surveillance. Unpersuaded, the district court wrote as follows:

> While plaintiffs have made a valiant effort to challenge the sufficiency of certifications they are barred by statute from reviewing, their contentions under section 802 are not sufficiently substantial to persuade the court that the intent of Congress in enacting the statute should be frustrated in this proceeding in which the court is required to apply the statute. The court has examined the Attorney General's submissions and has determined that he has met his burden under section 802(a).

Id. at 976.

ANALYSIS

On appeal, Hepting challenges only the facial constitutionality of § 802, not its application. He does not appeal the district court's determination that the substance of the Attorney General's certifications (both classified and unclassified) was supported by substantial evidence and that the Attorney General met his statutory burden. As a consequence, our legal analysis is not dependent on the details contained within the certifications.[1]

Three of Hepting's arguments focus on separation of powers: (1) bicameralism and presentment; (2) nondelegation; and (3) congressional interference with litigation. The fourth claim, which draws upon separation of powers and due process, is that the statute effectively forecloses litigation of the claims. Finally, Hepting characterizes his claims as a property interest and seeks relief under the Due Process Clause of the Fifth Amendment for deprivation of an opportunity to be heard before an unbiased adjudicator and of his right to meaningful notice in light of the statutory secrecy provisions.

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[1] The district court considered both the public and classified certifications. Because this appeal raises only the constitutionality of § 802 and not its specific application in this case, we need not consider the classified materials.

I. Separation-of-Powers Challenges

A. Bicameralism and Presentment

We first consider whether, in view of the requirements of bicameralism and presentment found in Article I, § 7 of the Constitution, § 802 effectively amends or negates existing law without going through the constitutionally-mandated legislative process. Relying primarily on *Clinton v. City of New York,* 524 U.S. 417 (1998), in which the Supreme Court struck down the Line Item Veto Act as unconstitutional, Hepting correctly asserts that "[a]mendment and repeal of statutes, no less than enactment, must conform with Art[icle] I." *INS v. Chadha,* 462 U.S. 919, 954 (1983). Similarly, there is no "provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton,* 524 U.S. at 438. Hepting's argument fails, however, because in enacting § 802, Congress did not give the Executive the power to enact, amend or repeal a statute.

In *Clinton,* the Supreme Court characterized the Line Item Veto Act as giving "the President the power to 'cancel in whole'" tax and spending provisions that had been passed by both houses of Congress and signed into law. *Id.* at 436 (citation omitted). The line item veto prevented the cancelled items "from having legal force or effect," though the remaining provisions "continue[d] to have the same force and effect as they had when signed into law." *Id.* at 437-38. The Court concluded "that cancellations pursuant to the Line

Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7." *Id.* at 444.

Hepting argues that § 802 is similar to the Line Item Veto Act because the Executive may partially repeal or preempt the law governing electronic surveillance on a case-by-case basis by certifying to one of the five circumstances set forth in § 802(a). This argument glosses over a crucial distinction between § 802 and the Line Item Veto Act: Under § 802 the Executive does not *change or repeal* legislatively enacted law, as was the case with the Line Item Veto. The law remains as it was when Congress approved it and the President signed it. In other words, nothing effected by the Attorney General "prevent[s] the item from having legal force or effect." *Clinton,* 524 U.S. at 437 (internal quotation marks omitted). Unlike the line item veto, the Attorney General's certification implements the law as written and does not frustrate or change the law as enacted by Congress.

Through the amendment to the FISA, Hepting's causes of action are now subject to an additional statutory defense. As a practical matter, a discretionary decision by the Attorney General that invokes a defense or immunity hardly represents an impermissible statutory repeal. It is not uncommon for executive officials to have authority to trigger a defense or immunity for a third party. The United States Code is dotted with statutes authorizing comparable executive

authority.[2] For example, executive officials regularly grant immunity from the fruits of compelled testimony in criminal prosecutions. *See* 18 U.S.C. § 6003; *see also* 28 U.S.C. § 2679(d) (allowing the government to trigger immunity by certifying that a defendant is acting within the scope of federal employment); *cf. Republic of Iraq v. Beaty,* ___ U.S. ___, 129 S. Ct. 2183, 2192 (2009) (A provision of the emergency Wartime Supplemental Appropriations Act "did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation." (citing *Clinton,* 524 U.S. at 443-45)); *Chadha,* 462 U.S. at 953 n.16 (noting that the Attorney General's discretionary authority under the INA to suspend removal does not implicate Article I, § 7). An executive grant of immunity or waiver of claim has never been recognized as a form of legislative repeal. Section 802 thus does not violate the bicameralism and presentment requirements of Article I, § 7.

B. The Nondelegation Doctrine

The nondelegation doctrine is central to the notion of separation of powers. *See Mistretta v. United*

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[2] The Brief of the Amici Law Professors includes an appendix that contains a laundry list of "Selected Statutes Authorizing Executive Branch Officials to Waive Existing Laws in Certain Circumstances" ranging from the Intelligence Authorization Act, 21 U.S.C. § 1903(g)(1), to the Protect our Children Act of 2008, 42 U.S.C. § 17616(a)(3)(C).

States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."). The Supreme Court has only twice invalidated legislation under this doctrine, the last time being seventy-five years ago.

Article I, § 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." In practice, of course, Congress delegates authority frequently. The relevant question is how, when, and under what circumstances Congress may delegate its authority. The Supreme Court's answer: "[W]hen Congress confers decision-making authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001) (emphasis and internal quotation marks omitted). "Only if [a court] could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would [it] be justified in overriding its choice of means for effecting its declared purpose. . . ." *Yakus v. United States,* 321 U.S. 414, 426 (1944).

In applying the intelligible principle test to congressional delegations, the Supreme Court "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply

cannot do its job absent an ability to delegate power under broad general directives." *Mistretta,* 488 U.S. at 372. The Court summed up its nondelegation jurisprudence as follows: "[I]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman,* 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan,* 392 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935)). The text, structure, history, and context of § 802 together demonstrate the existence of an intelligible principle.

Hepting argues that § 802 contravenes the nondelegation doctrine because Congress imposed no standard or intelligible principle governing the Attorney General's certification authority. The text of § 802 sets out five statutory categories – ranging from the specific TSP program to the fact that no assistance was provided – that delineate and circumscribe the Attorney General's certification discretion. Hepting faults the legislation because it lacks guidance on *whether* the Attorney General should exercise his discretion. In our view, the Attorney General's discretion *whether* to invoke a specific subsection does not eviscerate the "intelligible principle" standard.

A review of standards upheld by the Court underscores the concrete and intelligible nature of the

text of § 802. For example, the Court has countenanced as intelligible seemingly vague principles in statutory text such as whether something would "unduly or unnecessarily complicate," or be "generally fair and equitable," in the "public interest," or "requisite to protect the public health." *Whitman,* 531 U.S. at 474-76; *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104 (1946); *Yakus,* 321 U.S. at 420; *Nat'l Broadcasting Co. v. United States,* 319 U.S. 190, 225-26 (1943). Statutes authorizing the recovery of "excessive profits," and allowing action when "necessary to avoid an imminent hazard to public safety" also passed the test. *Touby v. United States,* 500 U.S. 160, 166 (1991); *Lichter v. United States,* 334 U.S. 742, 778-79 (1948). The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman,* 531 U.S. at 474-75 (quoting *Mistretta,* 488 U.S. at 416 (Scalia, J., dissenting)). Indeed, the "hazard to public safety" provision in *Lichter* is comparable to, if not less specific than, the "designed to detect or prevent a terrorist attack" language in § 802(4)(4). Never has the Court invalidated a law simply because the Executive has the discretion to act.

Section 802's structure resembles that of similar statutes that have been found valid. When considering the state-sponsored terrorism exception to the FISA, the D.C. Circuit explained that "Congress delineated the area of immunity and the exception to the immunity, delegating to the Executive only the

authority to make a factual finding upon which the legislatively enacted statute and the judicially exercised jurisdiction would partially turn." *Owens,* 531 F.3d at 889. The same is true regarding § 802. Congress created liability under the FISA, as well as the immunity exception for private companies, under certain circumstances. And Congress delegated to the Executive the authority to trigger this immunity. *See infra* Part III.A.

The legislative history also confirms our textual analysis of the statute. In the context of nondelegation, the Supreme Court has emphasized the role of legislative history, even absent ambiguity in the statute. *See Mistretta,* 488 U.S. at 376 n.10 ("[L]egislative history, together with Congress' directive that the Commission begin . . . by ascertaining the average sentence imposed in each category in the past, and Congress' explicit requirement that the Commission consult with authorities in the field of criminal sentencing provide a factual background and statutory context that give content to the mandate of the Commission." (citing *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104-05 (1946))).

Following *Mistretta,* the D.C. Circuit also noted that when the court reviews statutes under the nondelegation doctrine, the court "do[es] not confine [itself] to the isolated phrase in question, but utilize[s] all the tools of statutory construction, including the statutory context and, when appropriate, the factual background of the statute to determine whether the statute provides the bounded discretion

that the Constitution requires." *Owens v. Republic of the Sudan,* 531 F.3d 884, 890 (D.C. Cir. 2008). In short, context matters.

The Senate Select Committee Report goes far in explaining the congressional concerns that motivated the passage of the immunity provision. When considering how to respond to lawsuits like this one, the Committee "recogniz[ed] the importance of the private sector in assisting law enforcement and intelligence officials in critical criminal justice and national security activities." S. Rep. 110-209 at 5. The Report further states that "electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system." *Id.* at 9. The intelligible principle that comes through in the legislative history is one of protecting intelligence gathering and national security information.

The fact that § 802 arises within the realm of national security – a concern traditionally designated to the Executive as part of his Commander-in-Chief power – further suggests that the intelligible principle standard need not be overly rigid. *See* U.S. Const. art. II, § 2, cl. 1; *see also Dep't of Navy v. Egan,* 484 U.S. 518, 527 (1988) (noting "constitutional investment of power [over national security] in the President" that "exists quite apart from any explicit congressional grant"). The Supreme Court has repeatedly underscored that the intelligible principle standard is relaxed for delegations in fields in which

the Executive has traditionally wielded its own power. *See, e.g., Loving,* 517 U.S. at 772 (military affairs); *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 324 (1936) (foreign relations); *Freedom to Travel Campaign v. Newcomb,* 82 F.3d 1421, 1438 (9th Cir. 1996) (same).

Section 802 authorizes the Attorney General to act only in narrow, definable situations, subject to review by the courts. In sum, the text, structure, history, and context of § 802 contain an intelligible principle consistent with the Constitution's non-delegation doctrine.

C. No Congressional Interference with Adjudication

Hepting asserts that § 802 offends the doctrine of separation of powers because it is a legislative incursion upon the judicial branch. He claims that judicial review under § 802 "is deferential to the point of meaninglessness," taking issue with the "substantial evidence" standard of review. To support his argument, Hepting cites only two cases, neither of which illuminates his point, but instead contain broad pronouncements on the proper role of the judiciary.

Hepting invokes *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995). But he does well not to dwell on this case because the Supreme Court in *Plaut* struck down a very different statute – one that "require[d] federal courts to reopen final judgments in private civil actions." *Id.* at 213. When compared to *Plaut,*

where Congress "attempted to set aside the final judgment of an Article III court by retroactive legislation," 514 U.S. at 230, Hepting's separation of powers claim as to § 802 is weak indeed. Nor does *Crim v. Handley,* 94 U.S. 652, 657 (1876), bolster Hepting's argument. He cites it only for the general proposition that courts review criminal trials for errors of law, but *Crim* discusses the Seventh Amendment and does not implicate Article III powers.

On the other hand, there is a long line of cases upholding deferential standards of review for administrative factual determinations in other statutory schemes. *See, e.g., Dickinson v. Zurko,* 527 U.S. 150, 152-61 (1999) (rejecting clearly erroneous standard and reaffirming substantial evidence standard of review for agency findings); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490 (1951) (stating that substantial evidence review is sufficient to fulfill the conventional judicial function); *Bonnichsen v. United States,* 367 F.3d 864, 879-80 (9th Cir. 2004) ("We review the full agency record to determine whether substantial evidence supports the agency's decision."); *Retlaw Broad. Co. v. NLRB,* 53 F.3d 1002, 1006 (9th Cir. 1995) ("Credibility determinations by the ALJ are given great deference, and are upheld unless they are 'inherently incredible or patently unreasonable.'") (citing *Local 512, Warehouse & Office Workers' Union v. NLRB,* 795 F.2d 705, 712 (9th Cir. 1986)).

Deferential review does not mean that courts abdicate their judicial role. Section 802 does not represent a legislative incursion into the independent

decisionmaking and reviewing authority of the courts. Given the judiciary's long history and experience with reviewing cases for substantial evidence, review under § 802 is neither "partial" nor "meaningless" as Hepting urges.

II. Separation of Powers and Due Process Challenges to Claims Limitation

Hepting claims § 802 forecloses a challenge to the government's wiretapping program, thus violating due process and separation of powers under Article III. Although Congress granted immunity to private parties that assisted the government, § 802 does not foreclose relief against government actors and entities who are the primary players in the alleged wiretapping. Hepting retains an independent judicial avenue to address these claims.[3]

The Senate Report confirms this reading. "Only civil lawsuits against electronic communication service providers alleged to have assisted the Government are covered under this provision. The Committee does not intend for this section to apply to, or in any way affect, pending or future suits against the

[3] As the district court pointed out, "the same plaintiffs who brought the *Hepting v. AT&T* lawsuit . . . are now actively prosecuting those claims in a separate suit . . . against government defendants". *Al-Haramain,* 633 F. Supp at 960. Notably, Hepting has a separate proceeding pending against the government. *See Jewel v. NSA,* No. 08-4373 (N.D. Cal. filed Sept. 18, 2008).

Government as to the legality of the President's program." S. Rep. 110-209 at 8. The Committee determined that "narrowly circumscribed civil immunity should be afforded to [cooperating] companies." *Id.* at 3. The report continues, describing § 802 as "establish[ing] procedures by which civil actions against those who assist the Government shall be dismissed." *Id.* at 10-11. Congress did not prohibit adjudication of Hepting's claims, it simply limited the universe of responsibility to government defendants.

To be sure, a "serious constitutional question . . . would arise if a federal statute were construed to deny *any judicial forum* for a colorable claim." *Webster v. Doe,* 486 U.S. 592, 603 (1988) (emphasis added). Separation of powers concerns would be raised because "the appellant would have *no forum at all* for the pursuit of her claims" and the court "would thus be faced with a situation in which Congress has enacted legislation and simultaneously declared that legislation to be immune from any constitutional challenge by the plaintiff." *Bartlett v. Bowen,* 816 F.2d 695, 703 (D.C. Cir. 1987). Such is not the situation here. The federal courts remain a forum to consider the constitutionality of the wiretapping scheme and other claims, including claims for injunctive relief. The judiciary's essential role in protecting constitutional rights is not undermined simply because Hepting is unable to bring twin claims against the telecommunications companies and the government.

III. Section 802 Does Not Violate Due Process

Hepting's final argument – that § 802's certification and review procedures deprive him of liberty and property interests without sufficient process – rests on the Due Process Clause of the Fifth Amendment. Hepting identifies his causes of action against the telecommunications companies as the property right at issue. We assume, without deciding, that he has such a right, even if minimal, as it does not affect the ultimate outcome of the appeal.[4]

Hepting's due process argument is twofold. He argues first that the Attorney General's certification is an adjudication that denies claimants a *de novo* review before an unbiased adjudicator. He then claims that the procedures under § 802 deny him meaningful notice of the government's basis for certification.

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[4] The parties disagree as to when a cause of action becomes a property right protected by the due process clause. *Compare Lujan v. G & G Fire Sprinklers,* 532 U.S. 189, 195 (2001) ("assum[ing], without deciding," that a "claim for payment under [specified] contracts" was a property interest), *and Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"), *with Lyon v. Agusta,* 252 F.3d 1078, 1086 (9th Cir. 2001) (holding that "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained.") (*citing Grimesy v. Huff,* 876 F.2d 738, 74344 (9th Cir. 1989)), *and Fields v. Legacy Health System,* 413 F.3d 943, 956 (9th Cir. 2005) (same). We need not resolve this issue because § 802 provides sufficient process.

A. The Attorney General Was Not an Adjudicator

Hepting's initial complaint is that the Attorney General acts as a biased adjudicator when certifying immunity. But Hepting's focus on the role of the Attorney General misapprehends the certification process. The Attorney General certifies either that assistance was provided in narrowly defined circumstances or that no assistance was offered. In this capacity, the Attorney General does not function as an adjudicator. *See Owens,* 531 F.3d at 891-92 (citing cases and describing executive decision making in the context of foreign affairs as "factfinding"). Mere certification, which is the foundation of immunity under § 802, is not tantamount to an adjudication.

The fact that the Attorney General may have supported the legislation to amend the FISA has no legal import in this context. Hepting views Attorney General Mukasey as operating under "a structural, institutional bias" because he served during the Bush Administration, which advocated for the legislation, and was counsel to the United States in these lawsuits. He follows with the claim that Mukasey "had an actual bias in this matter," because he stated publicly that the immunity provision was "important" and that immunity represented "a fair and just result," and also conveyed this opinion to members of Congress.

Hepting ignores that the Attorney General has a legitimate policy role. It is well established that

"[a]dministrators . . . may hold policy views on questions of law prior to participating in a proceeding." *Ass'n of Nat'l Advertisers, Inc. v. FTC,* 627 F.2d 1151, 1174 (D.C. Cir. 1979) (quoted in *United States v. Payne,* 944 F.2d 1458, 1476-77 (9th Cir. 1991)); *see also FTC v. Cement Inst.,* 333 U.S. 683, 702 (1948) (rejecting a due process claim where agency head previously expressed a view on the issue); *Fidelity Television, Inc. v. FCC,* 515 F.2d 684, 694 (D.C. Cir. 1975) (rejecting bias argument based on prior Commission decisions and Chairman's testimony before Congress). Public officials are presumed not to be biased; expressing an opinion, even a strong one, on legislation, does not disqualify an official from later responding to a congressional mandate incorporating that opinion. *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). The ultimate legislative judgment regarding immunity for the telecommunications companies was made by Congress, not the Attorney General, and falls to the courts, not the Attorney General, to review.

B. Section 802 Provides Sufficient Notice and Process

The question we next address is whether the judicial review procedures under § 802 satisfy the Due Process Clause. Under § 802(a), no claim may be brought against any person providing certain categories of assistance, as certified by the Attorney General. If the Attorney General files a declaration that disclosure of his certification or any supplemental

materials "would harm the national security of the United States, the court shall . . . review such certification and supplemental materials *in camera* and *ex parte*." § 802(c). "[A]ny public disclosure concerning such certification and the supplemental materials [is limited] . . . to a statement as to whether the case is dismissed and a description of the legal standards that govern the order," without disclosing the specific subsection of the certification. *Id.*

In targeting § 802, Hepting challenges only a narrow subset of the statutory provisions that render the proceedings secret. Two important points bear noting: the requirements of § 802 piggyback on a preexisting framework of secrecy statutes not challenged by Hepting; and the scope of the § 802 certification is itself narrow.

The FISA amendments essentially left untouched the basic framework of statutes that already provide broad protection of the secrecy of court orders and certifications that rest on national security materials. These statutes range from certification provisions under the Wiretap Act, 18 U.S.C. § 2511(2)(a)(ii)(B), to authorization for telecommunication companies' provision of information under the Electronic Communications and Security Act, 18 U.S.C. § 2709(b). Where Hepting references these underlying provisions, he characterizes them as constitutional in contrast to the alleged unconstitutionality of § 802. The amendment that Hepting objects to was enacted

> [b]ecause the Government has claimed the state secrets privilege over the question of whether any particular provider furnished assistance to the Government, [and thus] an electronic communication service provider who cooperated with the Government pursuant to a valid court order or certification cannot prove it is entitled to immunity under section 2511(2)(a)(ii) without disclosing the information deemed privileged by the Executive branch.

S. Rep. 110-209 at 11. In other words, the amendment was adopted to effectuate a pre-existing immunity for telecommunications companies.

Hepting's challenge is simply to the extra layer of secrecy provided by § 802 which precludes him from knowing the precise statutory subsection relied on by the Attorney General in the certification. Hepting does not take aim at the underlying provisions which, standing alone, allow for the wiretapping, immunity, and *in camera* proceedings. Thus, § 802 only marginally refines and limits the notice available to a potential claimant.[5]

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[5] For example, certification under § 802(a)(1) means that "any assistance by that person was provided pursuant to an order of the court established under section 103(a) [50 U.S.C. § 1803(a)] directing such assistance." The cited statute creates the authority for the FISA courts. 50 U.S.C. § 1803(a). The FISA court orders and proceedings are already secret, *id.* 1803(c), and entirely independent of the challenged *in camera* provisions in § 802. Thus, certification under § 802(a)(1) would mean that the

(Continued on following page)

Next, the practical effects of § 802's additional constraints on notice are limited. The statute lays out the five grounds for certification. Hepting has notice that the foundation of the certification rests on one of those grounds, and may challenge any or all of them even when the Attorney General does not publicly disclose the exact ground.

The grounds of certification do not require complex analysis. The first three subsections of § 802(a) invoke a binary determination (yes or no) of whether the person provided assistance under the specific laws listed. § 802(a)(1)-(3).

The fourth subsection, § 802(a)(4), the most lengthy of the provisions, covers the widely reported TSP program, whose existence was acknowledged by the President, and, at this stage, has been much discussed and reported. S. Rep. 110-209 at 1; David Sanger & John O'Neil, *White House Begins New Effort to Defend Surveillance Program, Bush Lets U.S. Spy on Callers Without Courts,* N.Y. TIMES, Jan. 23,

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party being granted immunity acted pursuant to an already secret FISA court order. Likewise, certification under § 802(a)(2) invokes either the Wiretap Act, which authorizes telecommunications companies to provide the government with aid in eavesdropping under certain, narrow circumstances, and provides for secrecy and immunity, 18 U.S.C. § 2511(2)(a)(ii)(B), or the Electronic Communications and Privacy Act, which requires telecommunications companies to provide information to law enforcement and to keep secret their assistance. 18 U.S.C. § 2709. Certification under § 802(a)(3) invokes provisions of the FISA that already have secrecy and immunity clauses.

2006; *see also Al-Haramain Islamic Found., Inc. v. Bush,* 507 F.3d 1190 (9th Cir. 2007). Under subparagraph four, immunity is dependent on assistance under the TSP along with additional requirements, including that the assistance was "designed to detect or prevent" a terrorist attack. The activity must have been documented in writing and "authorized by the President" or "determined to be lawful."

Finally, certification under § 802(a)(5) can only mean that the party being immunized "did not provide the alleged assistance." This too is binary. If assistance was provided, immunity is available. Absent such assistance, a plaintiff would have no claim in any event. As the Senate Report describes it, § 802(a)(5) "provides a procedure . . . to seek dismissal of a suit when a defendant either provided assistance pursuant to a lawful statutory requirement, or did not provide assistance." S. Rep. 110-209 at 11.

Section 802's limited effect on Hepting's ability to challenge the grounds for certification stands in marked contrast to the statute considered in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004). Hepting cites *Hamdi* to urge that the secrecy provisions in § 802 deprive him of due process because he has no "notice of the factual basis" of the government's claim. 542 U.S. at 533 (plurality opinion); That case involved the power of the Executive to indefinitely detain a citizen on unspecified criminal charges; Hamdi had no notice at all of the evidence arrayed against him. *Id.* at 509-15. In this civil case, however, Hepting is on notice of the limited universe of situations that could justify

certification. He has the opportunity to provide evidence and arguments as to why certification or immunity is not justified under each scenario. Indeed, the procedures under § 802(c) are not fully *ex parte* – any party may participate in the briefing or argument challenging the certification and grant of immunity, "but only to the extent that such participation does not require the disclosure of classified information to such party." § 802(d). The government noted at oral argument that Hepting is "free if [he] want[s] to submit to the district court public information that [he] believe[s] supports [his] claim, and [he has] done so – hundreds and hundreds of pages." Oral Argument at 52:36-45. These hundreds of pages of evidence, including books, television interviews, government reports and documents from the Director of National Intelligence, are nicely catalogued in Hepting's Rule 1006 Summary of Voluminous Evidence.

Finally, the national security considerations present here successfully outweigh the limited effects of § 802 on the scope of the notice Hepting receives and his ability to challenge the Attorney General's certification. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

Courts have consistently upheld *in camera* and *ex parte* reviews when national security information is concerned. In *National Council of Resistance of Iran v. Dep't of State*, the D.C. Circuit explained that the notice "need not disclose the classified information to

be presented *in camera* and *ex parte* to the court under the statute. This is within the privilege and the prerogative of the Executive, and we do not intend to compel a breach in the security which that branch is charged to protect." 251 F.3d 192 (D.C. Cir. 2001). The court conducted a detailed analysis of the interests at stake under the traditional balancing test for procedural due process claims, *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), and definitively upheld the congressionally-approved *in camera* and *ex parte* proceedings. 251 F.3d at 206-08 (considering Secretary of State's designation of two foreign entities as foreign terrorist organizations under *in camera* and *ex parte* provisions of the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189).

Hepting's claim mirrors the one made – and rejected – in *People's Mojahedin Organization of Iran v. Department of State*: that a statute violates the Due Process Clause because it "permits the Secretary to rely upon secret evidence – the classified information that respondent refused to disclose and against which [the petitioner] could therefore not effectively defend." 327 F.3d 1238, 1241-42 (D.C. Cir. 2003) (rejecting a due process challenge to a designation as a terrorist organization). Similarly, in *Holy Land Foundation for Relief & Development v. Ashcroft*, the court held that the petitioner's designation as a "Specially Designated Global Terrorist" using classified information reviewed by the court *in camera* and *ex parte* did not violate due process for lack of meaningful notice. 333 F.3d 156, 164 (D.C. Cir. 2003); *see also Global Relief*

Found., Inc. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) ("Administration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered *ex parte* by the district court.") (citing 50 U.S.C. § 1702(c)).

To counter this line of cases Hepting relies on *American-Arab Anti-Discrimination Committee v. Reno* ("*AADC*"), in which we held that the use of undisclosed classified information in adjustment-of-immigration-status proceedings violated due process. 70 F.3d 1045, 1070 (9th Cir. 1995). The circumstances in *AADC* could hardly diverge more. Most significantly there was "no statutory or regulatory basis supporting" *in camera* process, *id.* at 1068; under § 802, Congress sanctioned *in camera* and *ex parte* procedures. Another significant distinction: the government in *AADC* offered no evidence to demonstrate the threat to national security posed by the individuals against whom it sought to use the *in camera* and *ex parte* information. *Id.* at 1169. Here Congress itself expressed the seriousness of the national security interests at stake, *see* S. Rep. 110-209 at 9, and the Attorney General explicitly declared "that disclosure of [the] classified certification, including the basis of [the] certification, for particular provider defendants, would cause exceptional harm to the national security of the United States." Finally, in *AADC*, the government "[did] not seek to shield state information from disclosure in the adjudication of a tort claim against it; instead, it [sought] to use secret information as a

sword against the aliens." 70 F.3d at 1070. *AADC* is thus instructive because it represents the striking contrast between a court process unhinged to specific standards and statutes in the immigration context and § 802's certification process crafted for specific national security reasons and subject to judicial review.

The government's invocation of national security concerns does not guarantee it a free pass. When enacting § 802, Congress was mindful to preserve and even expand the essential role of the courts. The Senate Report explained that:

> The procedure in [§ 802] allows a court to review a certification . . . even when public disclosure of such facts would harm the national security. Because an assertion of state secrets over the same facts would likely prevent all judicial review . . . this provision serves to expand judicial review to an area that may have been previously non-justiciable. In addition, the statute explicitly allows the court to review . . . the Attorney General's certification.

S. Rep. 110-209 at 12. The certification is reviewed for "substantial evidence." § 802(b)(1); *cf. Hamdi,* 542 U.S. at 527 (using a more deferential "some evidence" standard). The statute envisions a meaningful role for the courts, as exemplified by the careful and detailed work of the district court in this case.

Accordingly, we conclude that the procedures afforded under § 802 are sufficient under the Due

Process Clause. Given the circumstances dictated by national security concerns, the statute provides sufficient notice of a range of grounds for immunity from suit and provides meaningful judicial review based on substantial evidence. The public evidence is, of course, provided to all parties; the courts may review any sealed evidence *in camera* to assure that there is a legitimate national security interest and to review the certification and its accompanying evidence under the substantial evidence standard.

IV. Issues Specific to Joll, Anderson, Herron, and Lebow

Four appellants, Joll, Anderson, Herron, and Lebow, filed complaints alleging conduct that began as far back as February 2, 2001, predating the TSP program. In its dismissal of their actions, the district court stated that because "section 802's immunity provision may only be invoked with regard to suits arising from actions authorized by the president between September 11, 2001 and January 7, 2007, the dismissal is without prejudice." *Al-Haramain,* 633 F. Supp. 2d at 976. Unlike the district court, we conclude that § 802's immunity provisions are not temporally limited; only § 802(a)(4), which references the TSP, contains a temporal limitation. The district court did not err by dismissing these four appellants' pre-September 11, 2001 claims.

In addition to claims against the private telecommunications companies, the complaints filed by

Anderson and Lebow also included alleged illegal conduct on the part of the government. Because § 802 does not apply to claims against the government, the district court erred in dismissing these claims. We reverse and remand with respect to Anderson and Lebow's claims against the government for further consideration by the district court.

CONCLUSION

Although Hepting offers a broadside against the constitutionality of § 802, we conclude that the statute is constitutional and does not violate Articles I or III of the Constitution or the Due Process Clause of the Fifth Amendment. After rejecting similar constitutional arguments, the district court dismissed the complaints based on the Attorney General's certification under § 802. Hepting did not appeal this underlying basis for dismissal, so we do not pass on it here. The district court's grant of the government's motion to dismiss is AFFIRMED as to the challenge of all appellants with respect to the § 802 claims and REVERSED and REMANDED as to Anderson and Lebow's claims against the government.

Each party shall bear its own costs on appeal.

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

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

MDL Docket No. 06-1791 VRW

ORDER

(Filed Jun. 3, 2009)

This Document Relates To All Cases *Except*:

Al-Haramain Islamic Foundation, Inc v Bush, No. C 07-0109; *Center for Constitutional Rights v Bush*, No. C 07-1115; *Guzzi v Bush*, No. C 06-6225; *Shubert v Bush*, No. C 07-0693; *Clayton et al v AT&T Communications of the Southwest, Inc, et al*, C 07-1187; *United States v Clayton*, C 07-1242; *United States v Reishus*, C 07-1323; *United States v Farber*, C 07-1324; *United States v Palermino, et al*, C 07-1326; *United States v Volz, et al*, C 07-1396 /

The United States has moved to dismiss "all claims against the electronic communication service providers" in the cases in this multidistrict litigation (MDL) matter brought by individuals against telecommunications companies. Doc #469 at 23. The single ground for dismissal in the government's motion is

section 802 of FISA, part of the FISA Amendments Act of 2008, Pub L No 110-261, 122 Stat 2436 (FISAAA), enacted July 10, 2008 and codified at 50 USC § 1885a. In response to the government's motion to dismiss, plaintiffs, alleged to be customers of the various telecommunications companies named as defendants in these actions, have advanced a variety of constitutional challenges to the provisions of FISAAA upon which the government relies in seeking dismissal. Doc #483. For the reasons presented herein, these challenges must be rejected and the government's motion to dismiss GRANTED.

I

A

In December 2005, news agencies began reporting that President George W Bush had ordered the National Security Agency (NSA) to conduct eavesdropping of some portion of telecommunications in the United States without warrants and that the NSA had obtained the cooperation of telecommunications companies to tap into a significant portion of the companies' telephone and e-mail traffic, both domestic and international. See, e g, James Risen and Eric Lichtblau, *Bush Lets US Spy on Callers Without Courts*, NY Times (Dec 16, 2005). In January 2006, the first of dozens of lawsuits by customers of telecommunications companies were filed alleging various causes of action related to such cooperation with the NSA in warrantless wiretapping of customers'

communications. See, e g, *Hepting v AT&T Corp*, C 06-0672 VRW (ND Cal filed January 31, 2006). Several such cases were originally venued in the Northern District of California; others were filed in federal district courts throughout the United States. The cases typically alleged federal constitutional and statutory violations as well as causes of action based on state law such as breach of contract, breach of warranty, violation of privacy and unfair business practices.

The course of the *Hepting* case before the establishment of the MDL for these cases is illustrative for purposes of summarizing the procedural history of these cases. The United States moved to intervene in the case and simultaneously to dismiss it, asserting the state secrets privilege (SSP) and arguing, in essence, that the SSP required immediate dismissal because no further progress in the litigation was possible without compromising national security. C 06-0672 VRW Doc ##122-125. The telecommunications company defendants in the case also moved to dismiss on other grounds. C 06-0672 VRW Doc #86. On July 20, 2006 the court denied the motions to dismiss and certified its order for an interlocutory appeal pursuant to 28 USC § 1292(b). *Hepting v AT&T Corp*, 439 F Supp 2d 974 (ND Cal 2006). The court denied the United States' request for a stay of proceedings pending appeal.

On August 9, 2006, the Judicial Panel on Multidistrict Litigation ordered all cases arising from the alleged warrantless wiretapping program by the NSA

transferred to the Northern District of California and consolidated before the undersigned judge.

On January 5, 2007, the court ordered the plaintiffs in the cases brought against telecommunications company defendants to prepare, serve and file master consolidated complaints for each telecommunications company defendant. See master consolidated complaints at Doc #123 (T-Mobile and related companies), Doc #124 (Sprint and related companies), Doc #125 (MCI & Verizon companies), Doc #126 (Bellsouth) and Doc #455 (Cingular & ATT Mobility companies). Unlike the remaining cases in this MDL matter, no government entities were named as defendants in these actions; rather, the United States made itself a party by intervening in these actions in order to obtain a posture from which to seek their dismissal.

On July 7, 2008, after months of election-year legislative exertion that received considerable press coverage, Congress enacted FISAAA. The new law included an immunity provision for the benefit of telecommunications companies that would be triggered if and when the Attorney General of the United States certified certain facts to the relevant United States district court.

On September 19, 2008, the United States filed its motion to dismiss all claims against telecommunications company defendants in these cases, including the pending master consolidated complaints. The two categories of cases not targeted for dismissal in the United States' instant motion to dismiss are those

brought against governmental entities (*Al-Haramain Islamic Foundation, Inc v Bush*, No C 07-0109; *Center for Constitutional Rights v Bush*, No C 07-1115; *Guzzi v Bush*, No C 06-6225; *Shubert v Bush*, No C 07-0693) and those brought by the United States against state attorneys general (*United States v Clayton*, C 07-01242; *United States v Palermino*, C 07-01326; *United States v Farber*, C 07-01324; *United States v Reishus*, C 07-01323; *United States v Volz*, C 07-01396; *Clayton v ATT*, C 07-01187). The latter six actions by the United States against states are the subject of a separate motion for summary judgment brought under section 803 of FISAAA, 50 USC § 1885b (Doc #536) and a separate order by the court.

B

FISAAA contains four titles. The government's motion rests on a provision of Title II, which bears the heading "Protections for Electronic Communication Service Providers" and contains section 802, concerning "procedures for implementing statutory defenses under [FISA]."[1]

Section 802(a) contains the new immunity provision upon which the United States relies in seeking dismissal:

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[1] This provision is codified at 50 USC § 1885 (definitions), 50 USC § 1885a (procedures for implementing statutory defenses), 50 USC § 1885b (preemption) and 50 USC § 1885c (reporting).

(a) REQUIREMENT FOR CERTIFICATION. – Notwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that –

(1) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;

(2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of title 18, United States Code;

(3) any assistance by that person was provided pursuant to a directive under section 102(a)(4), 105B(e), as added by section 2 of the Protect America Act of 2007 (Public Law 110-55), or 702(h) directing such assistance;

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was –

(A) in connection with an intelligence activity involving communications that was –

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was –

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

The government has submitted a public certification by former Attorney General Michael Mukasey which includes the following statement: "I hereby certify that the claims asserted in the civil actions pending in these consolidated proceedings brought against electronic communication service providers fall within at least one provision contained in Section 802(a)." Doc #469-3 at 2. In addition, the government has submitted classified certifications (Doc #470) in support of its motion.

Section 802(b)(1) sets out the standard for judicial review of a certification: "A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section." The statute does not define "substantial evidence," so courts presumably are to employ definitions of that standard articulated in other contexts. The United States, for example, cites a social security case, *McCarthy v Apfel*, 221 F3d 1119, 1125 (9th Cir 2000) (Doc #469 at 22), which defines the substantial evidence standard as "such relevant evidence as a reasonable mind might, upon consideration of the entire record, accept as adequate to support a conclusion." The substantial evidence standard appears to have been in use for nearly a century in federal courts in a form closely resembling that in use today. In 1912, the Supreme Court applied the standard in *Int Com Comm v Union Pacific RR*, 222 US 541, 548 ("not that its decision * * * can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order"); see also *Edison Co v Labor Board*, 305 US 197, 229 (1938) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.")

Section 802(c) specifies the manner in which the court is to deal with classified information. If the Attorney General files an unsworn statement under penalty of perjury that disclosure of the certification

and related materials would harm the national security, the court is obligated under section 802(c) to do two things: (1) review the certification and any supplemental materials in camera and ex parte; and (2) limit public disclosure concerning such certification and the supplemental materials, including any public order following such in camera and ex parte review, to a statement whether the case is dismissed and a description of the legal standards that govern the order, without disclosing the specific subparagraph within subsection (a) that is the basis for the certification.

Section 802(d) provides, regarding the role of the parties, that any plaintiff or defendant in a civil action may submit to the court "any relevant court order, certification, written request, or directive" for review and "shall be permitted to participate in the briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of classified information to such party." It also requires the court to review any relevant classified information in camera and ex parte and to issue orders or parts of orders that "would reveal classified information" in camera and ex parte and maintain them under seal.

C

The United States and the telecommunications company defendants quote extensively from the October 26, 2007 report of the Senate Select Committee on

Intelligence to accompany Senate Bill 2248 (SSCI Report), S Rep No 110-209, 110th Cong, 1st Sess (2007). Doc #469 & 508, passim; SSCI report docketed at #469-2. Senate Bill 2248 was the original Senate bill that, together with the House bill (H 3773), resulted in the compromise legislation that ultimately passed both houses on July 8, 2008 (H 6304). *See* FISA Amendments of 2008, HR 6304, Section-by-section Analysis and Explanation by Senator John D Rockefeller IV. Chairman of the Select Committee on Intelligence. Doc #469-2 at 51.

The SSCI Report included among the committee's recommendations for legislation amending FISA that "narrowly circumscribed civil immunity should be afforded to companies that may have participated in the President's program based on written requests or directives that asserted the program was determined to be lawful." Doc #469-2 at 4. The SSCI Report included a lengthy summary of the instant MDL cases, leaving no room for doubt that these cases were the intended target of the new immunity provision:

BACKGROUND ON
PENDING LITIGATION

CIVIL SUITS AGAINST
ELECTRONIC COMMUNICATION
SERVICE PROVIDERS

> After the media reported the existence of a surveillance program in December of 2005, lawsuits were filed against a variety of electronic communication service providers for their alleged participation in the program

reported in the media. As of the date of this Committee report, more than forty lawsuits relating to that reported surveillance program had been transferred to a district court in the Northern District of California by the Judicial Panel on Multidistrict Litigation.

The lawsuits allege that electronic communication service providers assisted the federal government in intercepting phone and internet communications of people within the United States, for the purpose of both analyzing the content of particular communications and searching millions of communications for patterns of interest. Some of the lawsuits against the providers seek to enjoin the providers from furnishing records to the intelligence community. Other suits seek damages for alleged statutory and constitutional violations from the alleged provision of records to the intelligence community. Collectively, these suits seek hundreds of billions of dollars in damages from electronic communication service providers.

The Government intervened in a number of these suits to assert the state secrets privilege over particular facts, including whether the companies being sued assisted the Government. The Government also sought to dismiss the suits on state secrets grounds, arguing that the very subject matter of the lawsuits is a state secret. Ultimately, this Government assertion of the state secrets privilege seeks to preclude judicial review of whether, and pursuant to what authorities,

any particular provider assisted the Government.

Although the Government has sought to dismiss these suits, the future outcome of this litigation is uncertain. Even if these suits are ultimately dismissed on state secrets or other grounds, litigation is likely to be protracted, with any additional disclosures resulting in renewed applications to the court to allow litigation to proceed.

* * *

SUITS AGAINST THE GOVERNMENT

In addition to the lawsuits involving telecommunications providers, a small number of lawsuits were filed directly against the Government challenging the President's surveillance program. These suits allege that the President's program violated the Constitution and numerous statutory provisions, including the exclusivity provisions of the Foreign Intelligence Surveillance Act. These cases are at a variety of different stages of district court and appellate review. Nothing in this bill is intended to affect these suits against the Government or individual Government officials.

Id at 8-9.[2]

[2] The SSCI report also contained (at 8-9) several paragraphs describing the suits by the United States seeking to enjoin investigations by state attorneys general into alleged warrantless

(Continued on following page)

II

FISAAA's section 802 appears to be *sui generis* among immunity laws: it creates a retroactive immunity for past, completed acts committed by private parties acting in concert with governmental entities that allegedly violated constitutional rights. The immunity can only be activated by the executive branch of government and may not be invoked by its beneficiaries. Section 802 also contains an unusual temporal limitation confining its immunity protections to suits arising from actions authorized by the president between September 11, 2001 and January 7, 2007. The government contends that section 802 is valid and enforceable and fully applicable to all the cases in the MDL brought by individuals against telecommunications companies. The government now invokes section 802's procedures in seeking dismissal of these actions.

In opposing the motion to dismiss, plaintiffs advance a number of challenges to the constitutionality of section 802, asserting that constitutional defects make the statute unenforceable. These challenges are properly presented and considered in the context of the instant motion to dismiss and are addressed on their merits in this order. In the alternative, plaintiffs contend that section 802 is not applicable to, or does

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wiretapping activities conducted with the cooperation of telecommunications companies. These suits, referred to in Part I A above, are part of this MDL and are addressed separately.

not require dismissal of, the cases against the telecommunications company defendants.

A

The court turns first to plaintiffs' argument, for which they cite *Marbury v Madison*, 5 US 137 (1803), and *Boumediene v Bush*, 553 US ___, 128 S Ct 2229 (2008), that Congress and the executive branch have improperly taken actions that leave no path open for adequate judicial review of plaintiffs' constitutional claims. Plaintiffs assert that in enacting FISAAA, Congress has "refused to provide any alternative forum or remedy" for their constitutional claims. Doc #483 at 11-15. The United States and the telecommunications company defendants counter that while suits against telecommunications companies are foreclosed, neither the statute nor the government's actions prevent plaintiffs from seeking redress for their constitutional claims against the government actors and entities. Doc #520 at 12. Lest any further reassurance be necessary, the SSCI report states: "The committee does not intend for [section 802] to apply to, or in any way affect, pending or future suits against the Government as to the legality of the President's program." Doc #469-2 at 9.

The court agrees with the United States and the telecommunications company defendants on this point: plaintiffs retain a means of redressing the harms alleged in their complaints by proceeding against governmental actors and entities who are, after all, the

primary actors in the alleged wiretapping activities. Indeed, the same plaintiffs who brought the *Hepting v AT&T* lawsuit (C 06-0672 VRW) are now actively prosecuting those claims in a separate suit filed in September 2008 against government defendants before the undersigned judge. *Jewell v United States*, C 08-4373 VRW, filed September 18, 2008. *Jewell* thus joins several other cases in this MDL which seek relief only against government defendants. *Al-Haramain Islamic Foundation, Inc v Bush*, No C 07-0109; *Center for Constitutional Rights v Bush*, No C 07-1115; *Guzzi v Bush*, No C 06-6225; *Shubert v Bush*, No C 07-0693. Plaintiffs' argument that section 802 violates constitutional principles by leaving plaintiffs no recourse for alleged violations of their constitutional rights is therefore without merit.

B

Among their constitutional arguments, plaintiffs advance three based on the separation-of-powers principle. They argue that Congress has usurped the judicial function, has violated a principle of law prohibiting Congress from dictating to the judiciary specific outcomes in particular cases and has impermissibly delegated law-making power to the executive branch. The court addresses these three arguments in turn.

1

Plaintiffs assert that section 802(a) impermissibly attempts to "make [Congress] and the executive branch the final arbiters of what the First and Fourth Amendments require," citing *United States v United States District Court (Keith)*, 407 US 297 (1972), as requiring "prior judicial scrutiny by a neutral and detached magistrate." Doc #483 at 15-22. Specifically, plaintiffs argue that "the other branches [of government] may not take actions that have the effect of nullifying the Judiciary's constitutional interpretation and superseding it with their own, different judgment," id at 17, and assert that "[u]nder section 802, those who collaborate with the executive branch no longer need comply with the Supreme Court's decisions in *Keith* and other cases interpreting the First and Fourth Amendments." Id at 18.

The court finds no merit in this argument. Congress has created in section 802 a "focused immunity" for private entities who assisted the government with activities that allegedly violated plaintiffs' constitutional rights. In so doing, Congress has not interpreted the Constitution or affected plaintiffs' underlying constitutional rights. Moreover, plaintiffs' alarm about prospective disregard for the Constitution by private entities is largely misplaced given that the immunity for warrantless electronic surveillance under section 802(a)(4) is not available for actions authorized by the president after January 17, 2007, before FISAAA became law.

Plaintiffs argue that Congress, in enacting section 802, impermissibly directed the judiciary to adjudicate these pending cases in a particular way, thus running afoul of the doctrine first set forth in *United States v Klein*, 80 US (13 Wall) 128 (1872), a case in which the United States Supreme Court refused to give effect to a statute that was said to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." Id at 146.

In *Klein*, the executor of the estate of a person who had been sympathetic to the Confederate cause sought return of government-seized property under the Abandoned and Captured Property Act, a 1863 statute that provided for return of property or its proceeds to its original owner "on proof that he had never given aid or comfort to the rebellion." Id at 139. In December 1863, the President issued a proclamation granting a full pardon, including the restoration of property rights, to those who took an oath to support the Union. Id at 131-32. In 1869, the Supreme Court affirmed a return of property under the Act because the proclamation had "cured [the claimant's] participation in the rebellion." *United States v Padelford*, 76 US 531, 542 (1869). But the following year, Congress enacted legislation declaring that pardons did not restore property rights and requiring courts to treat pardons as conclusive proof of disloyalty to the Union. See *Klein*, 80 US at 136-44.

The Supreme Court refused in *Klein* to give effect to Congress' requirement that the Court view pardons of evidence of disloyalty, as the requirement prevented the Court from giving "the effect to evidence which, in its own judgment, such evidence should have." Id at 147. The Court delicately noted: "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." Id. The Supreme Court contrasted the circumstances presented in *Klein* with those in *Pennsylvania v Wheeling Bridge Co*, 54 US 518 (1851), in which Congress had deemed the eponymous bridge a "post road" to avoid the consequences of a condemnation action against it as a "bridge." The Supreme Court upheld the new law because "[n]o arbitrary rule of decision was prescribed * * * but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 US at 146-47.

The rather oblique discussion in *Klein* has benefitted from elaboration by twentieth-century court decisions, discussed below, to become of some practical use to courts. Subsequent decisions note that *Klein* contains two central ideas: legislation that creates new circumstances does not prescribe a rule of decision but legislation that prevents courts from determining the effects of evidence may do so. These concepts are easier to articulate than to apply. Two amici curiae have submitted briefs to the court on opposite sides of the question whether section 802 runs afoul of *Klein*. Doc ##501, 507.

More than a century later, a unanimous Supreme Court illuminated the scope of *Klein* to some degree in *Robertson v Seattle Audubon Society*, 503 US 429 (1992). In response to litigation challenging proposed timber harvesting in national forests, Congress had enacted the Northwest Timber Compromise in which subsection 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act of 1990, 103 Stat 745, "popularly known as the Northwest Timber Compromise," 503 US at 433, provided that

> management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al, v F Dale Robertson*, Civil No 89-160 and *Washington Contract Loggers Assoc et al v F Dale Robertson*, Civil No 89-99 * * * and the case *Portland Audubon Society et al v Manuel Lujan, Jr*, Civil No 87-1160-FR.

In response to motions to dismiss based on the new statute, plaintiffs argued that the above-quoted provision violated Article III of the Constitution. Id at 436. The district courts upheld the statute and dismissed the respective lawsuits, but the Ninth Circuit (on consolidated appeals) reversed, holding that the

compromise violated the separation-of-powers principle under *Klein* because "the first sentence of § 318(b)(6)(A) 'does not, by its plain language, repeal or amend the environmental laws underlying this litigation,' but rather 'directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases.'" Id.

The Supreme Court reversed, holding that "subsection (b)(6)(A) compelled changes in law, not findings or results under old law" because "under subsection (b)(6)(A), the agencies could satisfy their MBTA obligations in either of two ways: by managing their lands so as neither to 'kill' nor 'take' any northern spotted owl within the meaning of § 2, or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5)." Id at 438. The Supreme Court did not directly address the Ninth Circuit's reading of *Klein* in *Robertson*. Instead, it reversed on the grounds that the statute amended applicable law, thus passing constitutional muster. Id.

The Supreme Court further developed the connection between *Robertson* and *Klein* in *Plaut v Spendthrift Farm, Inc*, 514 US 211 (1995): "Whatever the precise scope of *Klein* * * * later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" Id at 218, citing *Robertson*, 503 US at 441. *Plaut* thus sets forth the principle that a statute that amends applicable law, even if it is meant to determine the outcome of

pending litigation, does not violate the separation-of-powers principle. And under *Robertson*, Congress amends applicable law when it creates a new method to satisfy existing statutory requirements, i e, when "compliance with certain new law constituted compliance with certain old law." *Robertson*, 503 US at 440.

In *Ecology Center v Castaneda*, 426 F3d 1144 (2005), the Ninth Circuit applied *Robertson* and *Klein* to facts like those in *Robertson*: with litigation pending, Congress had enacted a forest-specific management act which changed the criteria for approving timber sales. Id at 1149. The Ninth Circuit held that the Act changed the underlying law because it did not "direct particular findings of fact or the application of old or new law to fact" but still left to the district court the role of determining whether the new criteria were met. Id. *Ecology Center* noted that a separation-of-powers problem appears where "Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law." Id at 1148, quoting *Robertson*, 503 US at 429. See also *Gray v First Winthrop Corp*, 989 F2d 1564, 1569-70 (9th Cir 1993) ("*Robertson* indicates a high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way.").

The court reads *Klein*, *Plaut*, *Robertson* and *Ecology Center* to mean that the court's inquiry must be whether Congress has, in enacting section 802, directed certain findings of fact in pending litigation or, instead, changed the underlying law.

One amicus argues that Congress has not changed the underlying substantive law; the other argues that it has. The former contends that if the Attorney General were to decline to submit a certification under section 802, telecommunication companies would remain liable under old law and that this somehow means Congress has not changed the underlying law. Doc #501 at 6. The latter amicus argues that section 802 does not amend the substantive federal law that provides plaintiffs' claim of right but rather creates an affirmative defense that changes applicable law in a detectable way by altering the overall substantive legal landscape pertinent to the subject matter at issue. Doc #507 at 10.

The court agrees with the view that section 802 amends substantive federal law. The Attorney General's role is examined in detail in the next section; for the reasons stated therein, the Attorney General does not have the authority to "change the law" or legislate under section 802. The court does not agree, however, with the characterization of the substantive change in law as the creation of an affirmative defense; rather, as already noted, section 802 creates an immunity, albeit one that is activated in an unusual way.

Plaintiffs, meanwhile, contend that section 802 is unconstitutional under the principles articulated in *Klein* because "section 802 * * * forbids the Court from engaging in independent fact-finding," Doc #483 at 30, and "section 802 violates the separation of powers because it permits the Executive to dictate

that the Judiciary dismiss these actions without allowing the Judiciary to make an independent determination of the facts on which the dismissal is based." Doc #483 at 29. The United States counters that "it is the Court that 'finds' whether the Attorney General's certification is supported by substantial evidence provided under Section 802 and, thus, whether dismissal will be granted." Doc #520 at 17. Plaintiffs nonetheless contend that a "substantial evidence" standard of review of the Attorney General's certification, i e, his fact-finding, is "an unconstitutional attempt to direct * * * particular findings of fact," citing *Robertson*, 503 US at 438. Doc #483 at 30.

One amicus also argues that Congress, in enacting section 802, acted in a self-interested manner by "hiding unconstitutional and unlawful conduct" and "hop[ing] for dismissal behind a facade of judicial process" because of "intensive lobbying," "targeted fundraising efforts" and "contributions" and that this somehow makes section 802 unconstitutional. Doc #501 at 12-15. But the court's role is limited to examining the product of the legislative process to determine whether it accords with Constitutional rules for the exercise of legislative power, not to second-guess that process.

In enacting section 802, Congress created a new, narrowly-drawn and "focused" immunity within FISA, thus changing the underlying law in a "detectable way." *Gray*, 989 F2d at 1570. The statute, moreover, provides a judicial role, albeit a limited one, in determining whether the Attorney General's certifications

meet the criteria for the new immunity created by section 802; it does not direct the court to make specified findings. The court may reject the Attorney General's certification and refuse to dismiss a given case if, in the court's judgment, the certification is not supported by substantial evidence. Accordingly, the court finds that section 802 does not violate the separation-of-powers principle examined in *Klein*.

3

Plaintiffs assert that section 802(a) violates the "nondelegation doctrine" under which Congress may not delegate law-making power to the executive branch, citing *Youngstown Sheet and Tube Co v Sawyer*, 343 US 579, 587 (1952). Doc #483 at 22-23. Plaintiffs also quote *Marshall Field & Co v Clark*, 143 US 649, 692 (1892), the seminal case in which the Supreme Court wrote: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." This is the most serious of plaintiffs' challenges.

Plaintiffs specifically assert, somewhat confusingly, that Congress "has not changed the law governing plaintiffs' causes of action," but, rather, "[b]y the act of filing certifications in this Court, the Attorney General has purported to amend the statutes governing plaintiffs' actions long after Congress enacted FISAAA and the President signed it." Doc #483 at 24-25.

As the court understands plaintiffs' contention, section 802(a) specifies a good many things that the Attorney General must do should he choose to seek dismissal of a "covered civil action," but it does not actually direct the Attorney General to take any steps up to and including filing certifications, nor does it appear to establish any basis for his exercise of discretion in determining whether to do so in a particular case.

Notwithstanding the non-delegation doctrine's sweeping prohibition on delegations of law-making power, congressional delegations of law-making authority to administrative agencies are commonplace and those agencies create enormous bodies of law including, but not limited to, the entire Code of Federal Regulations. One treatise comments thusly about the current status of the non-delegation doctrine: "The real law is pretty close to acceptance of any delegation of authority," but "the doctrine's theoretical foundation is very sound and scholars continue to argue about a more robust nondelegation doctrine." 33 Charles A Wright, *Federal Practice and Procedure* § 8365 at 264-65 (Thomson/West 2006). Id at 265. There are, in short, limits to what Congress may permissibly delegate to the executive branch, although the courts are rarely called on to enforce those limits. In 1928, Chief Justice Taft wrote, in an opinion upholding the power of Congress to delegate to the executive the authority to adjust import tariffs:

> If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed

> to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority.

Hampton & Co v United States, 276 US 394, 409 (1928). Chief Justice Taft's "intelligible principle" test became the guiding principle for non-delegation challenges and, indeed, remains so. See *Whitman v American Trucking Assns, Inc*, 531 US 457, 487 (2001) (Thomas, dissenting) ("this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies * * * ").

Congressional enactments during the 1930s and 1940s prompted a number of non-delegation challenges; in just two of them, the Supreme Court determined that Congress had delegated too much legislative authority. *Panama Refining Co v Ryan*, 293 US 388, 430 (1935) (statute authorizing regulation of interstate and foreign commerce in petroleum invalid because "the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.") *Schechter Corp v United States*, 295 US 495 (1935) (statute authorizing the President, upon

application by "one or more trade or industrial associations or groups," to approve a code of fair competition for that trade or industry, violations of which were subject to criminal penalties, invalid). It is tempting to view *Panama Refining* and *Schechter* as akin to twin blips on an otherwise flatlined electrocardiogram for the non-delegation doctrine, given that no other statute has been invalidated by the courts on this ground before or since. See generally *Mistretta v United States*, 488 US 372, 373-74 (1989). The telecommunications company defendants have certainly pressed this view (see, for example, Doc #508 at 22). But the federal courts have been presented with nondelegation challenges with regularity thereafter and they are no rarity in the contemporary period.

In reviewing a statute against a nondelegation challenge to an act of Congress, "the only concern of courts is to ascertain whether the will of Congress has been obeyed." *Yakus v United States*, 321 US 414, 425 (1944). In *Mistretta*, the Court upheld the Sentencing Reform Act of 1984 (as amended, 18 USC § 3551 et seq and 28 USC §§ 991-98), which created the United States Sentencing Commission and authorized the Sentencing Guidelines. In finding the statute a proper exercise of congressional authority, the Supreme Court reaffirmed Chief Justice Taft's "intelligible principle" test as the touchstone for determining nondelegation challenges to congressional enactments and quoted *American Power & Light Co v SEC*, 329 US 90, 105 (1946) thusly: "This Court has deemed it 'constitutionally sufficient if Congress clearly delineates

the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" 488 US at 373.

The Court's *Mistretta* opinion identified in the Sentencing Reform Act of 1984 three "goals," four "purposes," the prescription of a specific tool for the Sentencing Commission to use in carrying out its responsibilities – the sentencing "ranges" later embodied in the Sentencing Guidelines – seven "factors" to be considered in the formulation of offense categories and "[i]n addition to these overarching constraints * * * even more detailed guidance to the Commission about categories of offenses and offender characteristics" such as recidivism, multiple offenses and other aggravating and mitigating factors. 488 US at 377. The Court held that the statutory scheme had set forth "more than merely an 'intelligible principle' or minimum standards" and quoted with approval from the district court's opinion in *United States v Chambless*, 680 F Supp 793, 796 (ED La 1988): "The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." 488 US at 379.

In this century, the Supreme Court considered a non-delegation challenge in *Whitman v American Trucking Assns*, 531 US 457 (2001), this time to the Environmental Protection Agency's National Ambient Air Quality Standards. The DC Circuit had determined that section 109(b)(1) of the Clean Air Act,

under which the standards were promulgated, lacked an "intelligible principle" to guide the agency's exercise of authority. The Supreme Court reversed, finding that § 109(b)(1)'s directive to the EPA to establish an air quality standard at a level "requisite to protect public health from the adverse effects of the pollutant in the ambient air" was "well within the outer limits of our nondelegation precedents." Id at 473-74.

In considering the instant motion, the court regarded the nondelegation challenge to section 802 as substantial enough to warrant additional briefing. Doc ##559, 571-573. The nondelegation problem presented in the instant cases is different from that in the above-referenced authorities in that section 802 contains no charge or directive, timetable and/or criteria for the Attorney General's exercise of discretion, a point the United States admits: "Congress left the issue of whether and when to file a certification to the discretion of the Attorney General." Doc #466 at 22. The statute does not explicitly confine the Attorney General's authority in any manner or, indeed, offer any direction to the Attorney General other than to prohibit him from delegating his "authority and duties" under section 802 to anyone other than the Deputy Attorney General (§ 802(g)). Rather, the statute's commands are directed to the courts and to the parties. Yet the Attorney General's action triggers the dramatic consequence of dismissal of a number of lawsuits seeking substantial damages against the telecommunications company defendants.

The United States' primary argument in its supplemental brief is that section 802 does not delegate legislative power, but rather "permit[s], but do[es] not require, the Attorney General to certify facts to a court, triggering consequences determined by Congress." Doc #572 at 7. Therefore, the United States asserts, "the non-delegation doctrine and its 'intelligible principle' standard are simply inapplicable." Id. Like plaintiffs, they cite *Marshall Field & Co v Clark*, but contend that section 802 is like the tariff law upheld in that case. They point to that opinion's emphasis on "factfinding" as a permissible delegation to the executive branch:

> The proper distinction * * * was this: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

143 US 649, 694 (1892). The United States contends that section 802 is like other statutes "that permit, but do not require, the Attorney General to certify facts to a court, triggering consequences determined by Congress." Doc #572 at 7.

The United States cites the following specific examples: 28 USC § 2679(d) (when Attorney General certifies that a defendant federal employee was acting within the scope of his office or employment in a civil action, United States "shall be substituted" as the party defendant); 18 USC § 5032 (unless the Attorney General "after investigation" certifies facts to the United States district court, juveniles may not be prosecuted in the United States courts); 28 USC § 1605(g)(1)(A) (upon request of the Attorney General together with certification that a discovery order would significantly interfere with a criminal case or national security operation, court "shall stay" discovery against the United States); Classified Information Procedures Act § 6(a), 18 USC App 3 (authorizing the Attorney General to certify that a public hearing regarding use of classified information may result in disclosure of such information, automatically triggering an in camera hearing). Doc #572 at 7-8 n 2.

The telecommunications company defendants similarly contend that section 802 provides only for the certification of facts by the executive branch that then triggers consequences determined by Congress, and not delegated legislative or rulemaking activity. They contend that the Attorney General's authority under section 802 is similar to that of the Secretary of State recently upheld by the DC Circuit in *Owens v Republic of the Sudan*, 531 F3d 884 (DC Cir 2008). But in *Owens*, the court considered a challenge on vagueness grounds to a congressional charge to the Secretary of State in 50 USC App § 2405(j)(1)(A) authorizing her

to label a country a "state sponsor of terrorism" and found the terms at issue "intelligible" under *Whitman*. 531 F3d at 893.

The telecommunications company defendants also rely on a New Deal-era case, *Currin v Wallace*, 306 US 1 (1939), in which the Supreme Court upheld the Tobacco Inspection Act of August 23, 1935, which provided for the Secretary of Agriculture to inspect and certify tobacco for sale, but only in markets in which two-thirds of the growers had voted in favor of such action in a special referendum. Id at 6. The telecommunications company defendants characterize the congressional grant to the executive branch in *Currin* as turning "not only upon discretionary factual determinations by the Executive, but also upon the favorable vote of *private citizens*." Doc #508 at 22. But defendants misread *Currin* in describing the Secretary of Agriculture's factual determinations as "discretionary." The Court rejected just such a characterization of the Act: "We find no unfettered discretion lodged with the administrative officer. * * * [T]he Secretary acts merely as an administrative agent in conducting the referendum. The provision for the suspension of a designated market * * * sets forth definite as well as reasonable criteria." 306 US at 17. The Court was untroubled by the Act's provision for referenda, observing that the predication of executive action on the outcome of a vote had been upheld in *Hampton & Co*. Id at 16.

In these and other examples advanced in support of section 802, the statute at issue undeniably

contains a charge to the executive branch which is challenged as insufficiently clear or restrictive; section 802 contains no such charge.

As a secondary argument, the United States asserts that an intelligible principle governing the Attorney General's exercise of discretion can be discerned in section 802, pointing to the narrow scope of cases in which the Attorney General is authorized to act under section 802 as defined in the five conditions set forth in subsections (a)(1)-(a)(5). While there is no question that the criteria for certification are narrowly-drawn, the lack of a charge to the Attorney General remains a problem that the United States does not directly acknowledge. The United States contends, however, that legislative history may be used to supply an intelligible principle. This requires putting aside the usually applicable canon that statutory language alone controls a court's interpretation absent ambiguity. *Lamie v United States Trustee*, 540 US 526, 534 (2004). For its contention, the United States accurately cites a footnote in *Mistretta*:

> [The] legislative history, together with Congress' directive that the Commission begin its consideration of the sentencing ranges by ascertaining the average sentence imposed in each category in the past, and Congress' explicit requirement that the Commission consult with authorities in the field of criminal sentencing provide a factual background and statutory context that give content to the mandate of the Commission.

488 US at 376. As noted above, however, the Court determined in *Mistretta* that the statute itself met the *Yakus* standard while section 802 does not appear to do so. Nonetheless, the quoted language from *Mistretta* plainly authorizes courts to consult the legislative history in construing the scope of a congressional authorization or mandate to an executive agency, even absent ambiguity in the statute. See also *Owens*, 531 F3d at 890:

> When we review statutes for an intelligible principle that limits the authority delegated to a branch outside the legislature, we do not confine ourselves to the isolated phrase in question, but utilize all the tools of statutory construction, including the statutory context and, when appropriate, the factual background of the statute to determine whether the statute provides the bounded discretion that the Constitution requires.

The United States does not contend that the legislative history should be read to confer a mandatory duty on the Attorney General to prepare certifications for all telecommunications company defendants for which it is possible to do so. (Indeed, while the telecommunications company defendants urge such an interpretation, the United States specifically declines to join in or endorse that argument. Doc #572 at 17 n 9.) Rather, the United States contends that a discretionary authorization to act, as opposed to a mandate to do so, "to protect intelligence gathering ability and national security information," Doc #572 at 11, can be found in the legislative history of section 802 and that

this is sufficient to withstand plaintiffs' nondelegation challenge.

The United States describes section 802 as "strikingly similar to the grant of authority to the Attorney General" upheld by the Supreme Court in *Touby v United States*, 500 US 160 (1991). In *Touby*, the Court considered a challenge to § 201(h) of the Controlled Substances Act, 21 USC § 811(h), under which the Attorney General may schedule a substance on a temporary basis when doing so is "necessary to avoid an imminent hazard to the public safety." But petitioners in *Touby* had conceded that this language constituted an "intelligible principle" and unsuccessfully challenged the provision on other grounds. 500 US at 163. The United States pushes the analogy to *Touby* too far when it asserts that section 802 "authorizes the Attorney General to act to protect intelligence gathering ability and national security information." Doc #572 at 11. The quoted standard in *Touby* was explicit in the statute; the proffered standard for section 802 is absent from the statute. At best, something of the kind may be gleaned from the legislative history of section 802, but the United States does not cite anything from the legislative history that directly states the proposition the United States would have the court accept as Congress' charge to the Attorney General. *Touby*, therefore, is not helpful here.

The telecommunications company defendants argue that the court can and should construe section 802 to contain a tacit mandate requiring the Attorney General to file certifications in all possible cases (e g,

"Congress * * * imposed on the Attorney General the responsibility to determine when evidence exists that would satisfy the statutory standards and to submit that evidence to the a court," Doc #508 at 2). The court is not aware of any precedent for such a reading and, on the contrary, finds the absence of such a charge striking in the context of FISAAA as a whole.

Congress could have made the authorization for the executive branch to certify facts pursuant to an explicit charge to the agency in question. An example of this type of statute is 50 USC App § 2405(i), which provides that special licensing requirements come into play for exports to countries for which the Secretary of State has made specific determinations of a factual nature (e g, "The government of such country has repeatedly provided support for acts of international terrorism"); but the authority is in furtherance of a charge from Congress spelled out elsewhere in the same act:

> In order to carry out [enumerated policies], the President may prohibit or curtail the exportation of [ ] goods, technology or other information * * * to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations

and the subsection lists the specific executive branch agencies authorized to carry out the charge. 50 USC App § 2405(a)(1).

Congress could in this manner have included language in section 802 specifically directing the Attorney General to undertake review and to submit to the court the specified certifications. The absence of a congressional charge to the Attorney General in section 802 is all the more surprising for the fact that numerous other provisions of FISAAA contain directives to the Attorney General and other agency heads: section 702(a) authorizes the Attorney General and the Director of National Intelligence to target "persons reasonably believed to be located outside the United States"; section 702(g) requires the Attorney General and the Director of National Intelligence to complete written certifications prior to implementing a § 702(a) authorization; section 702(l)(3) requires the "head of each element of the intelligence community" to complete specified annual reviews; section 707(a) requires the Attorney General to provide a semiannual report to congressional committees; section 105(a) authorizes the Attorney General to authorize emergency employment of electronic surveillance under specified circumstances; section 301 requires Inspectors General of Department of Justice, Office of Director of National Intelligence, National Security Agency, Department of Defense and other inspectors general to provide interim reports to Congress within sixty days. The court agrees with plaintiffs (Doc #573 at 22) that in light of the many other provisions in FISAAA requiring the Attorney General to perform a range of tasks, construing section 802 to contain a mandate to the Attorney General would be especially inappropriate.

Finally, the telecommunications company defendants argue essentially "no harm, no foul" regarding the statute's lack of standards governing the Attorney General's discretion to submit or not submit a certification: "That the Attorney General might exercise discretion as to whether to tender a certification is * * * purely conjectural – he has done so here – and not a matter of constitutional significance." Doc #508 at 22. The court is not persuaded that a constitutional defect in a statute can be cured by the executive's zealous execution of that statute. See *Whitman*, 531 US at 472 ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"). The statute's language, legislative history and context must be susceptible of a constitutionally adequate interpretation.

After carefully considering all the briefing, the court concludes that while the nondelegation challenge presents a close question, section 802, properly construed, does not violate the constitutional separation of powers. From the foregoing discussion, the court now distills the following salient points in determining that section 802 is not an unconstitutional delegation by the legislative branch to the executive branch.

Section 802 is not a broad delegation of authority to an administrative agency like the Clean Air Act or the Sentencing Reform Act; rather, its subject matter is intentionally narrow or "focused" in scope. "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally

conferred." *Whitman*, 531 US at 475. While section 802 does not contain a directive to the Attorney General, the United States and the telecommunications company defendants correctly point out that no form of rulemaking is at issue, a fact that limits the potential harm from a vaguely-defined delegation of authority. As the DC Circuit noted in *Owens*, "the shared responsibilities of the Legislative and Executive Branches in foreign relations may permit a wider range of delegations than in other areas," 531 F3d at 893. The same can be said of the roles of these two branches in the instant cases, where matters pertaining to national security are concerned. The legislative history provides enough context and content to provide definition for the Attorney General's scope of authority even in the absence of a specific charge to carry out. The Attorney General is not required to file certifications but is authorized to do so. The SSCI report makes clear that Congress wanted to immunize telecommunications companies in these actions. "[G]athering and presenting [ ] facts" (Doc #572 at 7) to the court is a reasonable reading of the Attorney General's role under section 802 and appears authorized by *Marshall Field & Co v Clark* and other authorities.

Accordingly, the court concludes that section 802 does not suffer from the constitutional infirmity of excessive delegation to the Attorney General.

C

Plaintiffs next advance arguments under the Due Process Clause of the Fifth Amendment, specifically: (1) their causes of action for violations of the First and Fourth Amendments are property interests protected by the Due Process Clause and that section 802 deprives them of their right to notice and an opportunity to be heard before a "neutral and detached judge in the first instance" (Doc #483 at 32-36); and (2) the secrecy provisions allowing for certifications and supporting documentation to be submitted in camera and ex parte violates due process by depriving them of "meaningful notice" of the government's basis for seeking dismissal and a "meaningful opportunity to oppose the government's arguments and evidence" (Doc #483 at 36-39). The court addresses these two arguments in turn.

1

Plaintiffs contend that the Fifth Amendment's Due Process Clause entitles them to notice and an opportunity to be heard before a "neutral and detached judge in the first instance" in a proceeding under section 802 seeking dismissal of their claims against the telecommunications company defendants. They argue further that the Attorney General's role makes section 802 constitutionally defective. Doc #483 at 32. Relying primarily on *Concrete Pipe & Products v Construction Laborers Pension Trust*, 508 US 602, 617 (1993), plaintiffs argue that section 802

creates a scheme in which a "biased decisionmaker [the Attorney General] makes an initial decision that a later, unbiased decisionmaker is forbidden from reviewing de novo but instead must accept under a deferential standard of review." Id. They contend, moreover, that *Concrete Pipe* requires de novo review in the face of an initial decision-maker's alleged bias.

Plaintiffs acknowledge that Congress "is free to create defenses or immunities to statutory causes of action" because the legislative process satisfies Due Process requirements. Doc #524 at 27 n 16. They contend, however, that the Attorney General, not Congress, has "changed the law governing plaintiffs' lawsuits." Id.

As previously discussed in this order, Congress has manifested its unequivocal intention to create an immunity that will shield the telecommunications company defendants from liability in these actions. The Attorney General, in submitting the certifications, is acting pursuant to and in accordance with that congressional grant of authority, in effect, to administer the newly-created immunity provision. Plaintiffs acknowledge that "Congress * * * is free to create defenses or immunities to statutory causes of action because it is 'the legislative determination [that] provides all the process that is due.'" Doc #524 at 27 n 16, quoting *Logan v Zimmerman Brush Co*, 455 US 422, 430 (1982). With regard to section 802, Congress held hearings and plaintiffs' counsel testified in opposition to the proposed immunity legislation. Doc #531 (RT, hearing held December 2, 2008) at 63. To the

extent that plaintiffs' due process argument rests on the idea that the Attorney General has "changed the law" due to an allegedly improper delegation of legislative authority, moreover, the court rejected that particular challenge in the preceding section. This part of plaintiffs' due process argument is therefore without merit.

2

Plaintiffs argue as a second Due Process challenge that the secrecy provisions allowing for certifications and supporting documentation to be submitted in camera and ex parte violates due process. They cite *Brock v Roadway Express, Inc*, 481 US 252, 264 (1987) and *Hamdi v Rumsfeld*, 542 US 507 (2004). Those cases held that the constitutional requirement of meaningful opportunity to respond necessitates notice of the factual basis for the government's position, but neither opinion directly concerned evidence having national security implications.

The United States responds that courts have "uniformly" upheld laws and procedures providing for ex parte use of classified evidence because of the compelling state interest in protecting national security, citing recent cases from the Seventh and DC Circuits.

The parties' contrasting positions highlight the tension between the government's concern for national security and the civil litigant's due process rights. While both interests are of great importance, the

United States' argument prevails here. Other statutes providing for ex parte, in camera procedures have withstood due process challenges in other contexts having national security implications. For example, in *Holy Land Foundation for Relief & Development v Ashcroft*, 333 F3d 156, 164 (DC Cir 2003) the DC Circuit upheld the exclusion from an administrative proceeding of classified information, which was subject instead to ex parte, in camera review under 50 USC § 1702(c). See also *Global Relief Foundation, Inc v O'Neill*, 315 F3d 748, 754 (7th Cir 2002) (also rejecting due process challenge to ex parte, in camera review procedures in 50 USC § 1702(c)); *People's Mojahedin Organization of Iran v Department of State*, 327 F3d 1238, 1242 (DC Cir 2003) (in camera, ex parte submissions of classified information in a designation proceeding under the Antiterrorism and Effective Death Penalty Act of 1996 did not violate due process, which requires "only that process which is due under the circumstances of the case," specifically access to the unclassified portions of the administrative record); *National Council of Resistance v Department of State*, 251 F3d 192, 208 (DC Cir 2001) (in the process of designating a foreign terrorist organization under 8 USC § 1189, the Secretary of State could forego pre-designation notice to the organization "[u]pon an adequate showing to the court * * * where earlier notification would impinge upon the security and other foreign policy goals of the United States" without offending the Constitution).

Section 802(d) provides for parties to submit documents and briefs to the court in connection with a proceeding under section 802. Section 802 is not, therefore, a fully ex parte procedure in the sense that the process for securing a FISA warrant under 50 USC § 1804 or an arrest warrant in the criminal context is ex parte. Section 802 evinces a clear congressional intent that parties not have access to classified information. Given the special balancing that must take place when classified information is involved in a proceeding, the court is not prepared to hold that the Constitution requires more process than section 802 provides in the circumstances of this case.

D

Plaintiffs also contend that Congress' enactment of the secret filing and evidence provisions of section 802 violates a First Amendment right of access to documents in a civil proceeding because "only a court, and not the Attorney General or Congress," can apply strict scrutiny to a proposed ban on public access to court records (Doc #483 at 40-45), and thereby also trenches on the authority of federal courts under Article III. Several news organizations (Associated Press, *Los Angeles Times*, *San Jose Mercury News*, *USA Today*) that have intervened in this lawsuit have joined in this part of plaintiffs' motion (Doc #523). Plaintiffs cite *Globe Newspaper Co v Superior Court*, 457 US 596, 606-07 (1982) for the proposition that the government's basis for secrecy must be "a compelling

governmental interest * * * narrowly tailored to serve that interest." Doc #483 at 42.

The United States asserts, as it has throughout this litigation, that the executive branch is responsible for the protection and control of national security information, citing *Department of the Navy v Egan*, 484 US 518 (1988), and counters that "no First Amendment right exists to receive or disclose classified information in general, let alone the classified information filed in this court under express congressional authorization." Doc #520 at 28.

The United States further posits that the applicable Supreme Court rule is not *Globe Newspaper*, but that set forth in *Press-Enterprise Co v Superior Court*, 478 US 1 (1986), which, like *Globe Newspaper*, concerned records in criminal proceedings. Doc #520 at 29. Under the *Press-Enterprise* formulation, courts must consider whether the "particular proceeding in question passes [] tests of experience and logic," including "whether the place and process have historically been open to the press and general public" and "whether public access * * * plays a particularly significant positive role in the actual functioning of the process" in question. 478 US at 8-11. The United States also notes that the Ninth Circuit has never found a First Amendment right of access to civil judicial proceedings, a point plaintiffs have conceded. Doc #520 at 28; Doc #483 at 42 n 10.

The court agrees with the United States that *Globe Newspaper* gives plaintiffs little ground to stand on in

the instant context. The majority opinion in *Globe Newspaper* mapped the contours of the constitutional right of access to *criminal trials* on the part of the press and general public announced in *Richmond Newspapers, Inc v Virginia*, 448 US 555 (1980). The *Globe Newspaper* opinion discussed criminal proceedings specifically and noted that "features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment." 457 US at 605. Justice O'Connor's concurrence was at pains to state, moreover, "I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials." Id at 611. This is neither a criminal proceeding nor a trial; *Globe Newspaper* therefore does not apply.

The court also agrees with the United States' reading of *Egan* in this context. While "*Egan* recognizes that the authority to protect national security information is neither exclusive nor absolute in the executive branch," *In Re National Security Agency Telecommunications Litigation*, 564 F Supp 2d 1109, 1121 (ND Cal 2008), *Egan* observes that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." 484 US at 530. By enacting section 802, Congress has specified that certain documents in these cases are to be reviewed ex parte and in

camera. The court is therefore more than usually reluctant to disturb the judgment of the executive branch on First Amendment grounds given this affirmative direction by the legislative branch, and especially so without any judicial precedent.

The idea that there is a presumptive right of public and press access to court proceedings as discussed in some of the cases plaintiffs cite (e g, *Grove Fresh Distributors, Inc v Everfresh Juice Co*, 24 F3d 893, 897 (7th Cir 1994)) as a common-law tradition and a tenet of good government seems uncontroversial, but plaintiffs' attempt to attach a strict scrutiny standard to limitations on access in the present context is not well-founded. It is fair to say that there is an equally uncontroversial presumption that the public and the press will *not* have access to court proceedings involving classified information. The court concludes that Congress' resolution of these competing presumptions in section 802, a focused and narrowly-drawn enactment, does not offend the Constitution.

Plaintiffs raise two other, related, objections to subsections 802(c) and (d) based on the First Amendment in this part of their brief. Subsection (d) requires the court to use ex parte, in camera procedures to prevent the disclosure of classified information. Subsection (c) restricts public access to the certifications and/or supplemental materials filed pursuant to section 802 if the Attorney General files a sworn affidavit asserting that disclosure "would harm the national security of the United States." This provision appears consistent with the principles set forth in

Egan; the court, accordingly, sees no basis for finding them constitutionally defective on First Amendment grounds.

E

Plaintiffs contend that the Attorney General's filing of a certification under section 802(a) is "a final agency action" that requires adherence to the rules for final agency actions under the Administrative Procedures Act (APA), 5 USC § 551 et seq, and that this in effect grafts additional standards of review onto the review procedures set forth in section 802 itself – standards allegedly not met here. Doc # 483 at 58-59. Specifically, plaintiffs assert that the court must review the "whole record" and determine whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory . . . authority[ ] or limitations," or "contrary to constitutional right, power, privilege, or immunity." Id, citing 5 USC § 706.

The United States does not argue that the Department of Justice is not an agency or that the filing of the certifications is not an action; rather, the United States counters that "section 802 and its express terms, including the procedures applicable to these proceedings, govern these cases," but cites no authority in support of the notion that section 802's procedures automatically displace those required by the APA. Doc #520 at 35. But because "the APA applies even if the enabling act does not mention it and

the applicable procedural law is determined by the APA whether or not the enabling act incorporates that law" and "[e]ven if the enabling act provides procedures, the APA affects those requirements," 32 Charles A Wright & Charles H Koch, *Federal Practice and Procedure: Judicial Review* § 8135 at 94, more examination of this question is required.

Specific statutory procedures providing for judicial review of agency action apply in context, and the APA's general provisions fill in the interstices. 5 USC § 704 provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." In *Bowen v Massachusetts*, 487 US 879, 903 (1988), the Supreme Court explained:

> § 704 * * * makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action. As Attorney General Clark put it the following year, § 704 "does not provide additional judicial remedies where the Congress has provided special and adequate review procedures."

Accord, *Edmonds Institute v United States Department of the Interior*, 383 F Supp 2d 105 (DDC 2005) ("clear and simple remedy" offered by Freedom of Information Act sufficient, making separate action under APA unavailable). Section 802 contains highly detailed procedures for judicial review of the Attorney General's actions. "The fact that a suit is brought by the government * * * does not fundamentally change the

nature of the review of the underlying administrative decision." 33 Wright & Koch, *Federal Practice* § 8300 at 46. Therefore, separate APA review is not available in these cases.

Regarding the scope of judicial review, 5 USC § 706 provides that the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The reviewing court must set aside "agency action, findings, and conclusions" it finds to meet one of six criteria: arbitrary, capricious, an abuse of discretion; contrary to constitutional right; in excess of statutory jurisdiction; without observance of procedure required by law; "unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute"; or unwarranted by the facts as determined pursuant to de novo review. Section 802, in providing for review under the substantial evidence standard, appears consistent with section 706 of the APA and therefore may be understood to take the place of APA review.

In summary, plaintiffs' contention that the APA imposes requirements additional to section 802 is without merit.

F

Finally, plaintiffs make a series of arguments to the effect that, on the merits and putting alleged

infirmities in section 802 aside, the Attorney General's certifications are inadequate under section 802's own terms to support dismissal of these actions.

Specifically, plaintiffs contend that: (1) substantial evidence cannot support dismissal under Section 802(a)(5) in that, whereas the Attorney General's public certifications state, *inter alia*, "because there was no content-dragnet, no provider participated in that alleged activity" (Doc #469-3 at 5), plaintiffs' evidence establishes that there was, in fact, dragnet-type surveillance by one or more of the defendant telecommunications service providers (Doc # 483 at 48-52); (2) substantial evidence cannot support dismissal under section 802(a)(4) in that the alleged dragnet surveillance program could not have been "designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States," because its "objective features * * * were not designed for the specific function of detecting or preventing a terrorist attack but for the broader purpose of acquiring as many communications and communications records as possible, regardless of whether [they] bear any connection to terrorism at all," id at 54; and (3) substantial evidence cannot support dismissal under any of the first three subsections of section 802 because the constraints imposed by the Fourth Amendment as interpreted by *Keith*, 407 US 297, would not allow the alleged dragnet to be lawfully authorized under any of the five prongs of section 802(a)(1)-(5).

While plaintiffs have made a valiant effort to challenge the sufficiency of certifications they are barred by statute from reviewing, their contentions under section 802 are not sufficiently substantial to persuade the court that the intent of Congress in enacting the statute should be frustrated in this proceeding in which the court is required to apply the statute. The court has examined the Attorney General's submissions and has determined that he has met his burden under section 802(a). The court is prohibited by section 802(c)(2) from opining further. The United States' motion to dismiss must therefore be, and hereby is, GRANTED.

Because, however, section 802's immunity provision may only be invoked with regard to suits arising from actions authorized by the president between September 11, 2001 and January 7, 2007, the dismissal is without prejudice. On May 15, 2009, plaintiffs submitted a "notice of new factual authorities in support of plaintiffs' opposition to motion of the United States" to dismiss. Doc #627. In the notice, plaintiffs cite news articles published in 2009 reporting post-FISAAA warrantless electronic surveillance activities by the NSA. Plaintiffs argue that these articles constitute "proof that the certification of former Attorney General Michael Mukasey that is the sole basis for the government's pending motion to dismiss is not supported by 'substantial evidence.'" Doc #627 at 3. The court disagrees. The court believes that the Attorney General has adequately and properly invoked section 802's immunity to the extent that the allegations

of the master consolidated complaints turn on actions authorized by the president between September 11, 2001 and January 7, 2007. The court also believes, however, that plaintiffs are entitled to an opportunity to amend their complaints if they are able, under the ever-more-stringent pleading standards applicable in federal courts (see, e g, *Ashcroft v Iqbal*, ___ US ___, 129 S Ct 1937 (2009)), to allege causes of action not affected by the Attorney General's successful invocation of section 802's immunity.

V

For the aforestated reasons, the United States' motion to dismiss (Doc #469) is GRANTED. Also for the reasons set forth herein, plaintiffs' hearsay objections to the SSCI report and to the public and classified declarations submitted by the United States (Doc #477) are OVERRULED; these documents are admissible for the purposes discussed herein.

Plaintiffs may amend the master consolidated complaints in a manner consistent with this order within thirty (30) days of the date of this order.

IT IS SO ORDERED.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION *This Document Relates to:* ALL ACTIONS AGAINST ELECTRONIC COMMUNICATION SERVICE PROVIDERS (including all *AT&T, MCI/Verizon, Sprint/Nextel BellSouth, Cingular/AT&T Mobility* Defendants; Master Consolidated Complaints (Dkts. 124, 125, 126, 455) (*See List on Caption to Motion*)	MDL Dkt. No. 06-1791-VRW PUBLIC CERTIFICATION OF THE ATTORNEY GENERAL OF THE UNITED STATES (Filed Sep. 19, 2008) Date: December 2, 2008 Time: 10:00 a.m. Courtroom: 6, 17th Floor Chief Judge Vaughn R. Walker

I, Michael B. Mukasey, hereby state and declare as follows pursuant to 28 U.S.C. § 1746:

1. I am the Attorney General of the United States and have held this office since November 9, 2007. The purpose of this declaration is to make the certification authorized by Section 201 of Title II of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261 ("FISA Act of 2008" or "Act"), which establishes statutory protections for electronic communication service providers ("providers") in civil actions alleging that

they have furnished assistance to an element of the intelligence community. Section 802 of Title VIII of the FISA, as amended, now provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending" that either:

> (1) any assistance by that person was provided pursuant to an order of the Foreign Intelligence Surveillance Court ("FISC" or "FISA Court") directing such assistance; or
>
> (2) any assistance by that person was provided pursuant to a certification in writing under Sections 2511(2)(a)(ii)(B) or 2709(b) of Title 18; or
>
> (3) any assistance by that person was provided pursuant to a directive or directives issued pursuant to the Protect America Act ("PAA") or the FISA Act of 2008; or
>
> (4) in the case of a "covered civil action" (which is defined under the Act as an action alleging that a provider-defendant furnished assistance to an element of the intelligence community and seeks monetary or other relief from the provider related to that assistance, *see* 50 U.S.C. § 1885(5)) the assistance alleged to have been provided by the electronic communications service provider was –
>
> > (A) in connection with an intelligence activity involving communications that was –

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the [provider] indicating that the activity was

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

See 50 U.S.C. § 1885a(a)(1)-(5). "Assistance" is defined to mean "the provision of or the provision of access to, information (including communication contents, communication, records, or other information relating to a customer or communication), facilities, or another form of assistance." *See* 50 U.S.C. § 1885(1).

2. As set forth below, and as described in more detail in my accompanying classified certification, I hereby certify that the claims asserted in the civil actions pending in these consolidated proceedings

brought against electronic communication service providers fall within at least one provision contained in Section 802(a) of the FISA. In addition, as also set forth below and in my accompanying classified certification, I have concluded that disclosure of my classified certification, including the basis for my certification as to particular provider-defendants, would cause exceptional harm to the national security of the United States and, pursuant to Section 802(c)(1) of the FISA, must therefore be reviewed *in camera, ex parte* by the Court. *See* 50 U.S.C. § 1885a(c)(1).

3. The statements made herein and in my classified certification are based on my personal knowledge and information made available to me in the course of my official duties, including the information set forth below and in my classified certification and any "supplemental materials" that may accompany my classified certification as defined in Section 802(b)(2) of the FISA, *see* 50 U.S.C. § 1885a(b)(2). I have also met with officials of the National Security Agency ("NSA") to discuss this matter, and during these meetings I have confirmed with these NSA officials that the statements herein and in my classified certification are true and accurate and have been verified with the NSA. In addition, I have reviewed the classified declarations submitted for *in camera, ex parte* review by the Director of National Intelligence ("DNI") and the Director of the NSA in *Hepting et al. v. AT&T et al.* (06-cv-00672-VRW) (hereafter the *Hepting* action) and

in the actions brought against the *MCI/Verizon* Defendants (MDL 06-cv-1791-VRW) (hereafter the *MCI/Verizon* actions). I have also reviewed the Court's decision in the *Hepting* action, which denied motions to dismiss brought by the United States and the AT&T Defendants in that case. *See Hepting et al. v. AT&T et al.,* 439 F. Supp. 2d 974 (N.D. Cal. 2006). I have also reviewed the First Amended Complaint in the *Hepting* action (hereafter "*Hepting* FAC") and the consolidated complaints against the: (i) *MCI/Verizon* Defendants (Dkt. 125); (ii) *Sprint/Nextel* Defendants (Dkt. 124); (iii) *BellSouth* Defendants (Dkt. 126) and *AT&T Mobility/Cingular Wireless* Defendants (Dkt. 455) (hereafter the "*Verizon," "Sprint," "BellSouth,"* and "*Cingular"* Complaints).[1]

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[1] ***Dismissed Defendants:*** I am advised that all of the provider-defendants in a fifth, consolidated master complaint (Dkt. 123) have now been dismissed by stipulation and, accordingly, I need not provide a certification as to these defendants (T-Mobile, Comcast Telecommunications, McLeod USA Telecommunications Services, and Transworld Network Corp.). *See* Dkts. 162, 164, 184, 185. In addition, a number of Verizon entities have been dismissed by stipulation and, therefore, I need not provide a certification as to these entities. *See* Dkt. No. 230 (dismissing Cellco Partnership dba Verizon Wireless; NYNEX Corp.; GTE Wireless Inc.; GTE Wireless of the South, Inc; NYNEX PCS Inc.; Verizon Wireless of the East LP; Verizon Internet Services Inc.; Bell Atlantic Entertainment and Information Services Group; Verizon Internet Solutions Inc.; Verizon Technology Corp.; and Verizon Advanced Data, Inc.). Other dismissed defendants as to which I need not provide a certification are: Bright House Networks, LLC (*see* Dkt. 169); Charter Communications LLC (*see* Dkt. 170); TDS Communications

(Continued on following page)

I. Summary of Allegations

4. The allegations raised in these consolidated proceedings against the provider-defendants are substantially similar to the allegations first raised in the *Hepting* action against AT&T Defendants. *See Hepting,* 439 F. Supp. 2d at 996 (summarizing allegations). First, plaintiffs allege that, following the terrorist attacks of September 11, 2001, the provider-defendants assisted the NSA in dragnet collection of the ***content*** of "millions of communications made or received by people inside the United States" for the purpose of analyzing those communications through key word searches to obtain information about possible terrorist attacks. *See Hepting* FAC ¶ 39; *Verizon* Compl. ¶ 165; *BellSouth* Compl. ¶ 64; *Cingular* Compl. ¶ 53; *Sprint* Compl. ¶ 44. Second, plaintiffs also allege that the provider-defendants assisted the NSA by divulging to the NSA ***records*** concerning the plaintiffs' telephone and electronic communications or by providing the NSA with access to databases containing such records. *See Hepting* FAC ¶¶ 51-63; *Verizon* Compl. ¶¶ 168-71, 174-75; *Sprint* Compl. ¶¶ 48-50, 53-54; *BellSouth* Compl. ¶¶ 68-70, 73-74; *Cingular* Compl. ¶¶ 57-59, 62-63. Plaintiffs allege that the foregoing assistance and activities were undertaken without judicial authorization and in violation of federal statutory provisions and the First and Fourth Amendments to the Constitution (as well

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Solutions, Inc. (*see* Dkt. 85); and Embarq Corporation (*see* Dkt. 235).

as various state law and constitutional provisions). *See Hepting* FAC ¶¶ 2, 81, 83, 90-149; *Verizon* Compl. ¶¶ 177, 201-89; *Sprint* Compl. ¶¶ 56, 72-141; *BellSouth* Compl. ¶¶ 76, 101-216; *Cingular* Compl. ¶¶ 65, 90-321. In sum, plaintiffs allege that the provider-defendants furnished "assistance" (as defined in Section 801(1) of the FISA) to the Government in form of: (1) the alleged content-dragnet; and (2) the alleged collection of records about telephone and electronic communications.

II. Summary of Certification

5. As set forth below, this public certification addresses the allegations raised by the plaintiffs that the provider-defendants assisted the Government with respect to: (i) the alleged content-dragnet; and (ii) to the extent it may be at issue, the interception of content under the Terrorist Surveillance Program; and (iii) the alleged provision of communication records.

A. Content Surveillance Allegations

1. *Content-Dragnet Allegations*

6. First, the plaintiffs have alleged a content surveillance program of "far greater scope" than the post-9/11 program confirmed by the President – called the "Terrorist Surveillance Program" ("TSP") – in which the President authorized the NSA to intercept certain "one-end" international communications to or from the United States that the Government

reasonably believed involved a member or agent of al Qaeda or affiliated terrorist organization. *See Hepting,* 439 F. Supp. 2d at 994. While confirming the existence of the TSP, the Government has denied the existence of the alleged dragnet collection on the content of plaintiffs' communications. *See id.* at 996; *see also* Public Declaration of Lt. Gen. Keith Alexander, Director of the National Security Agency, in the *Verizon/MCI* Actions (Dkt. 254) ¶ 17. As set forth below and in my classified certification, specific information demonstrating that the alleged content dragnet has not occurred cannot be disclosed on the public record without causing exceptional harm to national security. However, because there was no such alleged content-dragnet, no provider participated in that alleged activity. Each of the provider-defendants is therefore entitled to statutory protection with respect to claims based on this allegation pursuant to Section 802(a)(5) of the FISA, *see* 50 U.S.C. § 1885a(a)(5).

2. *Terrorist Surveillance Program*

7. Second, while the plaintiffs do not appear to challenge the provider-defendants' alleged assistance to the NSA in the conduct of the publicly acknowledged TSP, my certification nonetheless also encompasses whether or not any provider-defendant assisted the NSA with that activity. Specifically, I certify with respect to any assistance with the TSP that the provider-defendants are entitled to statutory protection based on at least one of the provisions

contained in Section 802(a)(1) to (5) of the FISA, which includes the possibility that a provider defendant did not provide any assistance. *See* 50 U.S.C. § 1885a(a)(1)-(5). As set forth below and in my classified certification, disclosure of the basis for my certification with respect to any alleged assistance furnished by particular provider-defendants under the TSP would cause exceptional harm to national security and is therefore encompassed within my classified certification submitted for *ex parte, in camera* review pursuant to Section 802(c)(1) of the FISA, 50 U.S.C. § 1885a(c)(1).

B. Communication Records Allegations

8. Third, my certification also encompasses whether or not any provider defendant assisted the NSA through the provision of records concerning telephone and electronic communications. In particular, I certify that the provider-defendants are entitled to statutory protection based on at least one of the provisions contained in Section 802(a)(1) to (5) of the FISA, which includes the possibility that a provider defendant did not provide any assistance. *See* 50 U.S.C. § 1885a(a)(1)-(5). As set forth below, disclosure of the basis for my certification with respect to any alleged assistance furnished by particular provider-defendants to the NSA concerning the communication records allegations would cause exceptional harm to national security and is therefore encompassed within my classified certification submitted for *ex*

parte, in camera review pursuant to Section 802(c)(1) of the FISA, 50 U.S.C. § 1885a(c)(1).

III. Harm to National Security From Disclosure of Classified Certification.

9. Section 802(c)(1) of the FISA, as amended, provides that if the Attorney General attests in a declaration that disclosure of a certification under Section 802 of the Act, or any supplemental materials submitted therewith (if any), would harm the national security of the United States, the Court shall review the certification *ex parte,* and *in camera. See* 50 U.S.C. § 1885a(c)(1). I hereby make the declaration required by this provision with respect to the contents of my classified certification. In sum, I have determined that disclosure of my classified certification, including the basis of my certification for particular provider defendants, would cause exceptional harm to the national security of the United States. I concur with the judgment of the Director of National Intelligence and the Director of the NSA previously set forth for the Court in their classified declarations (referenced above), as well as with the conclusion of the Senate Select Committee on Intelligence, that disclosure of the identities of persons alleged to have provided assistance to the Government on intelligence matters, as well as disclosure of activities in which the Government is alleged to have been engaged, and the details of such activities, are properly protected as intelligence sources and methods. *See* S. Rep. No. 110-209, at 10 (2007), Report of the Senate

Select Committee on Intelligence to accompany S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments of 2007. (Exhibit No. 1 to United States' Motion to Dismiss or for Summary Judgment).

Conclusion

10. For the foregoing reasons, and those set forth in my classified certification, pursuant to Section 802(a) of the FISA, I hereby certify that the claims asserted in the civil actions pending in these consolidated proceedings against the electronic communication service provider-defendants fall within at least one provision contained in Section 802(a)(1)-(5) of the FISA that would entitle these defendants to statutory protection from the pending civil actions. *See* 50 U.S.C. § 1885a(a)(1)-(5). In addition, pursuant to Section 802(c)(1) of the FISA, I have concluded that disclosure of my classified certification, including the basis for the certification as to particular provider-defendants, would cause exceptional harm to national security for the reasons set forth in that certification and must therefore be reviewed *in camera, ex parte* by the Court. *See* 50 U.S.C. § 1885a(c)(1).

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

DATE: 9/19/08 /s/ Michael B. Mukasey
MICHAEL B. MUKASEY
Attorney General of the
United States