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

16 IN RE NATIONAL SECURITY AGENCY)
17 TELECOMMUNICATIONS RECORDS)
LITIGATION, MDL No. 1791)
18 This Document Relates To: All Cases Except:)
19 *Al-Haramain Islamic Foundation, Inc. v. Bush,*)
No. 07-0109; *Center for Constitutional Rights v.*)
20 *Bush,* No. 07-1115; *Guzzi v. Bush,* No. 06-)
21 *06225; Shubert v. Bush,* No. 07-0693; *Clayton v.*)
AT&T Commc'ns of the Southwest, No. 07-1187;)
22 *U. S. v. Adams,* No. 07-1323; *U. S. v. Clayton,*)
No. 07-1242; *U. S. v. Palermino,* No. 07-1326;)
23 *U. S. v. Rabner,* No. 07-1324; *U. S. v. Volz,*)
24 No. 07-1396)

MDL Docket No. 06-1791 VRW

**PLAINTIFFS' EVIDENTIARY
OBJECTIONS TO CERTIFICATIONS
(PUBLIC AND EX PARTE IN CAMERA)
BY THE ATTORNEY GENERAL OF
THE UNITED STATES; and to MOTION
TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT**

Date: December 2, 2008
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: The Hon. Vaughn R. Walker

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INTRODUCTION

The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2467, Title II, § 201 (July 10, 2008) (“the Act”) sets forth, among other things, the procedures that the Attorney General must follow to attempt to have these actions dismissed. Section 802(b)(1) of the Foreign Intelligence Surveillance Act (“FISA”) as amended by the Act (50 U.S.C. § 1885a(b)(1)) specifically requires the Government to meet its burden with “substantial evidence.” But inadmissible evidence is no evidence at all. Nothing in the Act changes the meaning of “evidence” in particular, or the Federal Rules of Evidence (“FRE”) or Federal Rules of Civil Procedure (“FRCP”) in general. These evidentiary objections will argue that so-called evidence relied on in the Public Certification of the Attorney General of the United States (MDL Dkt. No. 469-3, hereinafter simply the “Public Certification”), and, by logical inference, in his *ex parte in camera* certification as well, are inadmissible hearsay and/or otherwise inadmissible evidence. These objections also pertain to so-called evidence relied on by the Government in its Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (MDL Dkt. No. 469, hereinafter simply the “Government Motion”). Because the Government, just like any other litigant, must make its case with admissible evidence, the Government cannot prevail.¹

In short, our arguments are:

1. The SSCI Report on which the Government relies is inadmissible, both because the report itself is hearsay not subject to any hearsay exception and because the report contains significant hearsay that runs afoul of the hearsay on hearsay rule;
2. The classified declarations of the Director of National Intelligence and the Director of the NSA are inadmissible; and
3. The public and classified certifications of the Attorney General are inadmissible.

¹ Plaintiffs’ main opposition memorandum will demonstrate that the Government cannot prevail even if all of these evidentiary objections are overruled.

ARGUMENT

I. The Government Must Make Its Case With Admissible Evidence.

Hearsay is “ ... a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FRE 801(c). “Hearsay is not admissible except as provided by [FRE 803-807 hearsay exceptions] or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” FRE 802.²

50 U.S.C. § 1885a(b)(1) provides that the Government must make its case with “substantial evidence.”³ FRE 1101(b) provides that the Federal Rules of Evidence govern these actions, including the government’s motion. Even assuming that Congress could relax evidentiary standards in these actions without running afoul of the separation of powers and due process principles set forth in plaintiffs’ main opposition memorandum, there is nothing to indicate that it tried to do so in the Act. The Act does not define either “evidence” or “substantial evidence.” Therefore, those terms must be given their normal meaning in accordance with the rules and applicable case law, including rules pertaining to hearsay.

Indeed, Congress’ use of the words “substantial evidence” in section 1885a(b)(1) contrasts sharply with its use of the words “supplemental materials” in the next subsection, 1885a(b)(2). “Supplemental materials” are materials which the court “may examine” and the Attorney General may submit them *in camera* and *ex parte*. 50 U.S.C. §§ 1885a(b)(2) and (c). However, those materials are “supplemental” only; they do not qualify as “evidence” unless they are admissible. Only that which is evidence can serve to carry the Government’s burden of demonstrating that substantial evidence supports the Attorney General’s certification.

Further, even if Congress had the power to lower the evidentiary standards applicable to these actions and had in fact lowered those standards, which it did not, hearsay or other inadmissible evidence can be admitted against the Plaintiffs only if Plaintiffs have cross-examined the hearsay declarants or have waived their right to do so. In *Richardson v.*

² There are also two categories of non-hearsay, neither applicable here: (1) a prior statement by a witness (FRE 801(d)(1)); and (2) an admission by a party opponent. FRE 801(d)(2).

³ “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.”

1 *Perales*, 402 U.S. 389 (1971), cited in the Government Motion at 15:3-4, the Supreme Court
2 described what does or does not comprise substantial evidence in the context of a disability
3 benefits administrative hearing under the Social Security Act. The evidentiary issue was the
4 admissibility of unsworn medical reports pertaining to the claimant’s condition.

5 The Court pointed out that Congress had eased the evidentiary requirements applicable to
6 right-to-benefits administrative hearings.

7 Section 205(b) [42 U.S.C. § 405(b)] directs the Secretary to make
8 findings and decisions; on request to give reasonable notice and
9 opportunity for a hearing; and in the course of any hearing to receive
10 evidence. It then provides:

11 ‘Evidence may be received at any hearing before the Secretary *even*
12 *though inadmissible under rules of evidence applicable to court*
13 *procedure.*’

14 *Id.* at 400 (emphasis added). However, even with the relaxed evidentiary standards, hearsay
15 evidence would be admissible only if the party against whom it is offered either has
16 cross-examined the hearsay declarant or has waived the right to do so:

17 We conclude that a written report by a licensed physician who has
18 examined the claimant and who sets forth in his report his medical
19 findings in his area of competence may be received as evidence in a
20 disability hearing and, despite its hearsay character and an absence of
21 cross-examination, and despite the presence of opposing direct
22 medical testimony and testimony by the claimant himself, may
23 constitute substantial evidence supportive of a finding by the hearing
24 examiner adverse to the claimant, when the claimant has not
25 exercised his right to subpoena the reporting physician and thereby
26 provide himself with the opportunity for cross-examination of the
27 physician.

28 *Id.* at 402.

29 *McCarthy v. Apfel*, 221 F.3d 1119 (9th Cir. 2000), cited in the Government Motion at
30 15:1-3, is in accord. There, the issue was whether McCarthy had been overpaid Social Security
31 benefits. The rules of evidence in such proceedings also are governed by 42 U.S.C. § 405(b) (*id.*
32 at 1125 n.8), and the Commissioner of the Social Security Administration (“SSA”) bears the
33 burden of proving both the fact and the amount of the alleged overpayment. *Id.* at 1124-25.
34 McCarthy undercut most of his case by his own admissions, but with respect to a specific alleged

1 overpayment of \$10,207.00, the only evidence offered by the Commissioner was an initial
2 determination letter by the SSA. At 221 F.3d 1126, the Court held:

3 When a claimant challenges the SSA's initial determination of the
4 amount that he was overpaid, the Commissioner must present reliable
5 evidence of the particular overpayments. The Commissioner's
6 unsubstantiated belief that particular payments were made is not
7 enough. The letter, standing alone, does not constitute substantial
8 evidence of the amount of the overpayments. The district court erred
9 in relying exclusively on this letter in rejecting McCarthy's challenge
10 to the amount of overpayments.⁴

11 Moreover, the Government's motion is properly one for summary judgment since it relies
12 on "matters outside the pleadings." FRCP 12(d). The fact that this matter comes before the
13 Court on the Government's summary judgment motion instead of at trial actually serves to
14 increase the burden the Government must meet. FRCP 56(e)(1) provides in part that affidavits in
15 support of a summary judgment motion must be based on admissible evidence, and must show
16 that the affiant is competent to testify to the matters stated therein.⁵ Hearsay in affidavits,
17 declarations (or here, the Certification by the Attorney General) is inadmissible and should not be
18 considered. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980); *Janich*
19 *Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 859 (9th Cir. 1977). "Testimony presented
20 by affidavit is different from testimony orally delivered, because the affiant is not subject to
21 cross-examination. But that fact leads to greater, not lesser, strictures imposed on the testimony
22 presented by affidavit." *United States v. Dibble*, 429 F.2d 598, 602 (9th Cir. 1970); *see also*
23 *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir. 1980).

24 ⁴ The Government also cites to *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000). An Immigration Judge
25 had denied the Pals' asylum application on the basis that their testimony was incredible. The
26 Board of Immigration Appeals affirmed, both on credibility grounds and because a State
27 Department report rebutted Mrs. Pal's fear of future persecution. *Id.* at 937. The Ninth Circuit
28 affirmed, but only on the basis of credibility, not on the State Department report. *Id.* at 939.

⁵ Note that, because a party opposing summary judgment does not seek a final judgment in its
favor, but merely the right to proceed to trial, the evidentiary standards are properly asymmetric.
While the party seeking summary judgment must submit admissible evidence and thus may not
rely on hearsay, the party opposing summary judgment need only present evidence which could be
presented in an admissible form at trial, and thus may rely on hearsay. *Fraser v. Goodale*, 342
F.3d 1032, 1036-37 (9th Cir. 2003).

1 **II. The SSCI Report is Inadmissible.**

2 **A. The SSCI Report is Hearsay.**

3 The Government relies extensively on the SSCI Report (S. Rep. 110-209 (2007),
4 accompanying S. 2248, Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007,
5 Senate Select Committee on Intelligence, Exhibit 1 [MDL Dkt. No. 469-2] to the Government
6 Motion) to prove the truth of the matters stated therein. For example, the Government argues
7 that:

8 ...[T]he Senate Select Committee on Intelligence (“SSCI”)
9 concluded that “electronic surveillance for law enforcement and
10 intelligence purposes depends in great part on the cooperation of the
11 private companies that operate the Nation's telecommunication
12 system,” [...] and that, if litigation is allowed to proceed against
13 telecommunication companies alleged to have assisted in such
14 activities, “the private sector might be unwilling to cooperate with
15 lawful Government requests in the future,” and the “possible
16 reduction in intelligence that might result from this delay is simply
17 unacceptable for the safety of our Nation.” *Id.* at 10 (emphasis
18 added). Accordingly, the special procedures established under the
19 Act for obtaining review and, where the Act is satisfied, prompt
20 dismissal of such litigation, is vital to the public interest.

21 Government Motion at 1:22-2:6. The Government continues that:

22 The SSCI found that the “details of the President’s program are
23 highly classified” and that, as with other intelligence matters, the
24 identities of persons or entities who provide assistance to the U.S.
25 Government are protected as vital sources and methods of
26 intelligence.” *See* S. Rep. 110-209 at 9. Notably, the SSCI expressly
27 stated that “[i]t would be inappropriate to disclose the names of the
28 electronic communication service providers from which assistance
was sought, the activities in which the Government was engaged or
in which providers assisted, or the details regarding any such
assistance.” *Id.*; *see also id.* (“identities of persons or entities who
provide assistance to the intelligence community are properly
protected as sources and methods of intelligence”). Thus, Section
802(a) is designed to protect information that is also subject to the
Government’s privilege assertions in this proceeding, but authorizes
judicial review to determine, through special *ex parte*, *in camera*
proceedings, under a deferential standard of review, if particular facts
and circumstances exist with respect to alleged assistance by the
provider-defendants that would warrant dismissal under the Act.

Government Motion at 11:25-12:11.⁶ As such, the SSCI Report is inadmissible unless subject to a
hearsay exception. The only exception that might apply is the public records and report exception

⁶ Plaintiffs use the two quoted passages only as examples. Plaintiffs object to each and all of the
following portions of the Government Motion on the same grounds: 1:22-2:6; 9:n.6; 9:11-12:15.

1 of FRE 803(8)(C).⁷ However, the SSCI Report cannot satisfy the requirements of that exception.

2 In *Pearce v. E.F. Hutton Group, Inc.*, 653 F. Supp. 810 (D.D.C. 1987), the court
3 considered carefully the admission of, among other things, a draft report of the Subcommittee on
4 Crime of the House Judiciary Committee and a statement by the Chairman of the Subcommittee.
5 *Id.* at 812. The court found the Report did not satisfy the requirements of the hearsay exception
6 for three reasons, two of which apply here.

7 First, to be admissible under the exception, a report must consist of factual findings. FRE
8 803(8)(C) ; *Pearce*, 653 F. Supp. at 813; *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22
9 (6th Cir.1984) (*per curiam*). The Report in *Pearce* contained no factual findings, 653 F. Supp. at
10 813, while the SSCI Report contains a broad amalgam of purported factual findings, legal
11 conclusions, opinions and forward-looking statements that the Government makes no attempt to
12 segregate.⁸

13 Second, *Pearce* found that the factual findings must be made by a Government agency
14 whose findings are deemed trustworthy. In that regard, *Pearce* has a great deal of discussion of
15 *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353 (D.D.C. 1980) (hereinafter simply
16 “AT&T”). In *AT&T*, after a thorough review of a number of FCC and State regulatory
17 commission dockets that the United States wanted to admit against AT&T, the Court found that,
18 for the most part, the dockets would be admissible. Quoting *AT&T*, *Pearce* stated:

19 _____
20 ⁷ “(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of
21 public offices or agencies, setting forth [...] (C) in civil actions and proceedings and against the
22 Government in criminal cases, factual findings resulting from an investigation made pursuant to
23 authority granted by law, unless the sources of information or other circumstances indicate lack of
24 trustworthiness.”

25 ⁸ In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), the Court held that opinions and
26 conclusions stated in an investigatory report are not inadmissible as long as they are based on a
27 factual investigation and otherwise satisfy the Rule’s trustworthiness requirement. *Id.* at 170. The
28 Court expressly declined to reach the question of legal conclusions, such as those in the SSCI
Report. Post-*Rainey*, courts have held that legal conclusions in a report are not admissible under
Rule 803(8)(C) . *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 302-303 (11th Cir. 1989)
 (“ [t]he common meaning of finding . . . comports with investigative conclusions (i.e., the results
derived from the examination of facts), but not with idle speculation or legal conclusions’ ”);
Miranda-Ortiz v. Deming, 1998 U.S. Dist. LEXIS 3260, *3 to *4 (S.D.N.Y. 1998), (“[T]he
consensus from other jurisdictions strongly favors the view that legal conclusions are not
admissible as ‘findings of fact’ under the Rule.”).

1 [I]t is significant that the public agency which made
 2 these findings is an independent regulatory
 3 commission ... operating under stringent procedural
 4 guidelines on a public record.... *That circumstance
 5 provides an element of trustworthiness which might
 6 not be present with respect to a public record
 7 generated by a person or body lacking these
 8 characteristics.*

9 *Id.* at 366 [emphasis by *Pearce*]. In the case at bar, the court is
 10 presented with documents produced by the Congress--a politically-
 11 motivated, partisan body.

12 653 F. Supp. at 813-14. *Pearce* continued:

13 Finally, even if there were factual findings, and even if they had been
 14 made pursuant to authority granted by law, this court concludes that
 15 the Draft Report lacks sufficient trustworthiness to be admitted under
 16 an exception to the hearsay rule. This determination is within the
 17 discretion of the trial court. *Bright v. Firestone Tire & Rubber Co.*,
 18 756 F.2d at 22. Rule 803(8)(C) only permits the introduction into
 19 evidence of “the factual findings of an *objective* government
 20 investigation.” *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d
 21 1196, 1199 (11th Cir.1986). Given the obviously political nature of
 22 Congress, it is questionable whether any report by a committee or
 23 subcommittee of that body could be admitted under rule 803(8)(C)
 24 against a private party. There would appear to be too great a danger
 25 that political considerations might affect the findings of such a
 26 report.

27 *Id.* at 814 (citations omitted) (emphasis by the Court).⁹

28 To similar effect is *Bright*, 756 F.2d 19. Plaintiffs attempted to introduce evidence of,
 among other things, portions of a report of the Moss Committee, a subcommittee of the
 Committee of the House of Representatives on Interstate and Foreign Commerce. *Id.* at 21-22.
 Plaintiffs argued that they were admissible under the public records hearsay exception. *Id.* at 22.
 The trial court refused to admit them, and the Court of Appeals affirmed. First, the Court stated
 that “[m]uch of the proffered evidence comprises the Committee's subjective conclusions
 regarding Firestone's culpability, rather than factual findings.” *Id.* Second, the Court stated:

⁹ In the next few paragraphs, *Pearce* discusses *Hobson v. Wilson*, 556 F.Supp. 1157, 1181
 (D.D.C.1982), in which a minor piece of evidence from a special Senate Select Committee created
 for a specific investigation (The Church Committee) was admitted. However, though the Senate
 Select Committee on Intelligence (“SSCI”) is designated as a Select Committee, it is a regular,
 ongoing committee, not a one-time committee. It was created in 1976 and has been in existence
 continuously since. SSCI Report at 1; SSCI web site, “Jurisdiction,”
<http://intelligence.senate.gov/jurisdiction.html>.

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The report was based on hearsay regarding lawsuits and customer complaints without any investigation into the ground for those complaints. Defendant attached to its memorandum regarding admissibility of the report a copy of an order of the United States District Court for the District of South Carolina that found that one Firestone dealer had submitted approximately 600 false complaint forms to Firestone as part of a scheme to defraud Firestone. The unverified nature of the evidence relied on by the Committee is sufficient reason for the District Court to find in its discretion that the report is not trustworthy enough to be admissible.

Id. at 22-23.

In *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986) , a different Circuit reached a similar conclusion:

The rule permits the introduction into evidence of the factual findings of an objective government investigation. The subcommittee report did not contain the factual findings necessary to an objective investigation, but consisted of the rather heated conclusions of a politically motivated hearing. As such, the report was properly omitted from evidence. (Citations omitted.)

Anderson v. City of New York, 657 F. Supp. 1571 (S.D.N.Y. 1987) is to the same effect. There, the Court considered a report of a subcommittee of the House Judiciary Committee. *Id.* at 1577. The Court held that the report was unreliable and thus inadmissible hearsay. *Id.* at 1578. The Court questioned whether even veteran Committee members have the appropriate expertise in, among other things, evaluating the credibility of witnesses, particularly if the Committee is hearing primarily from only one side. The Court stated that “...[c]ongressional hearings [...] do not fit closely the judicial meaning of hearings, at least in comparison to the hearings held by administrative agencies in their quasi-judicial capacity.” *Id.* at 1579. At 1579-80, the Court concluded its discussion:

In sum, because the Report is the result of hearings which lack procedural due process protections, because the Report articulates findings based upon a dubious, highly charged process of essentially “interviewing” interested parties, and because of the serious policy implications of admitting the Report in evidence, this Report has no place as evidence in the instant action. The Report lacks the ordinary indicia of reliability, is not based on the personal knowledge of the reporter, and contains the testimony of interested parties, not experts. This Court, therefore, rules it inadmissible and will not consider it in deciding the instant motion for summary judgment. (Footnote omitted.)

1 *Richmond Medical Ctr for Women v. Hicks*, 301 F. Supp. 2d 499 (E.D.Va. 2004), *vacated*
2 *on other grounds*, 127 S. Ct. 2094 (2007), *aff'd* 527 F.3d 128 (4th Cir. 2008), is similar:

3 The four documents related to H.R. 760, which was a bill in the
4 United States Congress later passed by both houses with slightly
5 altered text (Exhibits L, M, N, and O), are also irrelevant and contain
6 hearsay not covered by an exception. These documents may not be
7 admitted under Federal Rule of Evidence 803(8)(C). Each of the
8 exhibits lacks an indicia of trustworthiness. Courts have consistently
9 excluded congressional reports, finding that they did not satisfy the
10 requirements of Rule 803(8)(C) because of the inherently political
11 nature of the reports. The House Report (Exhibit L) represents the
12 political position of the representatives who voted for it. It is
13 untrustworthy and inadmissible. Defendants also submitted the first
14 26 pages of House Report 108-58 (Exhibit M), a 154-page report. It
15 is also political, untrustworthy, and inadmissible. (Citations
16 omitted.)

17 *Id.* at 512. The clear weight of authority is that reports of Congressional committees do not satisfy
18 the requirements to be admitted as a hearsay exception under FRE 803(8)(C).

19 The Government may cite to *Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers*
20 *and Employees of Outside Loc. Unions and Dist. Counsel (Iron Workers) Pension Plan*, 467 F.
21 Supp. 2d 91 (D.D.C. 2006). In *Barry*, the court ruled on a motion *in limine* to exclude a Senate
22 Report and a House Report prior to an expected bench trial. After surveying various cases on the
23 admissibility of Congressional reports as public records, the *Barry* court concluded that the
24 critical issue was the trustworthiness of the particular report. Specifically, the court found that:

25 The courts focused on (1) whether the findings and conclusions are
26 the product of serious investigation rather than political
27 grandstanding and relatedly, (2) whether members of the minority
28 party refused to join in the report or otherwise noted their dissent.

29 *Id.* at 100. The court admitted the Senate Report and excluded the House Report. The key
30 difference was the seriousness of the investigative process undertaken in each body and the
31 indication of serious dissent to the House Report.

32 The SSCI Report does not reflect the trustworthiness necessary to be admitted under the
33 public record exception to the hearsay rule. The issue of the renewal of FISA and the issue of
34 telecom immunity were deeply political. Moreover, the seriousness of the Senate's investigation
35 was undermined by Administration brinksmanship. The SSCI Report itself acknowledges the
36 point at page 2. Even more forcefully, Senator Rockefeller, the Chairman of SSCI, wrote:

1 Even now, six years after the warrantless surveillance program was
2 initiated, the Administration continues to withhold from Congress
3 without justification the documents and information it needs to have
4 a full accounting of what happened under the program. The
5 Administration's unwillingness to provide a complete disclosure of
6 these facts is short-sighted and untenable.

7 Additional Views of Chairman Rockefeller, SSCI Report at 28. Similarly, Senator Nelson noted:

8 I am sympathetic to the notion that companies may have acted in
9 good faith to provide the government with assistance during a
10 national security crisis, but I believe it's premature to grant them
11 immunity. The committee received critical documents only 48 hours
12 before the vote. I believe we need more time to gain a full
13 understanding of the President's warrantless surveillance program
14 before deciding whether the companies should receive retroactive
15 immunity.

16 Additional Views of Senator Nelson, SSCI Report at 42. In their Minority View, Senators
17 Feingold and Wyden wrote that:

18 We strongly supported Senator Nelson's amendment to strip from the
19 bill a provision providing blanket immunity to private entities alleged
20 to have cooperated with the Administration's warrantless
21 wiretapping program. The arrangements made by the Administration
22 the week of the mark-up to provide limited access to certain
23 documents related to the program were unfortunately inadequate.
24 More importantly, nothing in the documents, or anything else that we
25 have seen in the course of our review of the program, has convinced
26 us that a sweeping grant of immunity for private entities should have
27 been included in this legislation.

28 Minority Views of Senators Feingold and Wyden, SSCI Report at 48. In short, the Administration
cannot undermine the integrity of the Senate's investigation and then advocate the trustworthiness
of the resulting report.¹⁰

¹⁰ Also relevant are the Tenth Circuit's observations on the analysis of "trustworthiness" required by Rule 803(8)(C) : "The lack of formal procedures and an opportunity to cross-examine witnesses are proper factors in determining the trustworthiness of the finding. . . . the trustworthiness of a report is particularly questionable when its conclusion would not be admissible by the direct testimony of the maker or the opportunity to cross-examination had been denied." *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 822 (10th Cir. 1981). The Court further noted that trustworthiness was suspect when a report's findings are " 'merely the opinion of one whose official office and duty does not rise to the dignity of an adjudicator of causes and effects.' " *Id.*

1 **B. Even if Initially Admissible, the SSCI Report is Based on Inadmissible**
2 **Multiple Hearsay.**

3 The SSCI asserts that it held a number of hearings, had many classified briefings,
4 interviewed several Executive Branch attorneys, received formal testimony from companies
5 alleged to have participated, and reviewed correspondence between the Executive Branch and
6 those companies. SSCI Report at 2. “Based on its inquiry” (*Id.*), the SSCI reached a number of
7 conclusions, including that a form of civil immunity should be granted to companies that may
8 have participated in the warrantless surveillance program. *Id.* at 2-3. “The Committee’s decision
9 to include liability relief for providers was based in significant part on its examination of the
10 written communications from U.S. Government officials to certain providers. The Committee
11 also considered the testimony of relevant participants in the program.” *Id.* at 9.

12 Hearsay within hearsay is admissible only if each part of the combined statements
13 conforms to a hearsay exception. FRE 805. Plaintiffs in these cases have had no opportunity to
14 see those written communications or to cross-examine those witnesses.

15 Furthermore, even if the Draft Report had been admissible, testimony
16 before a congressional committee is manifestly hearsay. No
17 opportunity for cross-examination of the Subcommittee’s witnesses
18 was ever given to Mr. Bell. It is one of the most fundamental rules
19 of evidence that such testimony is inadmissible. Under no stretch of
20 the imagination could such evidence fit within one of the exceptions
21 to the hearsay rule—least of all rule 803(8)(C) which only applies to a
22 government report of factual findings, not to witness testimony.

23 *Pearce*, 653 F. Supp. at 815.¹¹ In the typical case of a government investigative report admitted
24 under Rule 803(8)(C), most if not all of the relevant witnesses will be available for examination by
25 the party against whom the report is admitted, either by deposition or at trial. Even if the report is
26 admitted, the party against whom the report is admitted can thus challenge the report’s findings by
27 presenting testimony from witnesses heard by the investigative body, or what is often more

28 ¹¹ *Barry* specifically did not decide the hearsay within hearsay issues: the Senate report came
before the Court on defendant’s motion *in limine* before the plaintiff had specified which specific
parts of the report on which he intended to rely. 467 F. Supp. 2d at 102. The Court agreed with the
rule that hearsay within hearsay is not admissible unless each component part qualifies for its own
exception to the hearsay rule. The defendant gave a number of examples of hearsay within
hearsay. However until such later time as plaintiff would be required to designate the portions of
the report that he sought to have admitted for the truth of the matters stated therein, the Court could
not, and thus did not, make a specific ruling. *Id.*

1 important, testimony from witnesses the investigative body never heard. *See Ellis v. International*
2 *Playtex, Inc.*, 745 F.2d 292, 303 (4th Cir. 1984). Plaintiffs have no such opportunity here.¹²

3 **III. The Classified Declarations of the DNI and the Director of the NSA are Inadmissible.**

4 In his Public Certification, the Attorney General states that he reviewed "... the classified
5 declarations submitted for *in camera*, *ex parte* review by the Director of National Intelligence
6 ("DNI") and the Director of the NSA..." in both *Hepting* and the *Verizon/MCI* actions. Public
7 Certification at 3:9-12. Without regard to whether the classified declarations were appropriate
8 for consideration in the context of the Government motions regarding the state secrets privilege,
9 they are merely "supplemental materials" and constitute inadmissible hearsay here. As we
10 argued earlier in these objections, the Government must make its case with substantial evidence,
11 and nothing in the Act has changed the common meaning of that phrase. Though the Act
12 authorizes the Attorney General to submit to the court unspecified supplemental materials, 50
13 U.S.C. § 1885a(b)(2), neither the Act nor the FRE allow evidence to be used against a party
14 when the party has not even had the opportunity to see the evidence, let alone to cross-examine
15 the hearsay declarant. *Blair Foods, supra*, 610 F.2d at 667; *Janich Bros.*, 570 F.2d at 859;
16 *Dibble*, 429 F.2d at 602.

17 **IV. The Public and Classified Certifications of the Attorney General are Inadmissible.**

18 Obviously, we cannot know what is stated in the classified certification of the Attorney
19 General, or what supplemental materials, if any, may have been submitted with it. For precisely
20 that reason, the classified certification is inadmissible, as argued in Part III, *supra*.

21 As to the Public Certification, we note that the Attorney General does not claim to know
22 everything he states of his own firsthand knowledge. Rather, he states in paragraph 3 that his
23 statements "are based on my personal knowledge *and* information made available to me in the
24 course of my official duties" (Emphasis added.) The SSCI Report is hearsay to the Attorney
25 General. So too are the classified declarations of the DNI and the Director of the NSA filed in

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27 ¹² Nor do they have the opportunity to cross-examine those who prepared the SSCI Report. *See*
28 *Hines*, 886 F.2d at 303 ("While the inability to cross-examine the investigator cannot *per se*
invalidate the report since Rule 803(8) does not depend on the availability of the declarant, it is
nonetheless a proper factor to take into consideration when deciding trustworthiness.").

1 the *Hepting* and *Verizon/MCI* cases. The Attorney General did not reach his conclusions without
2 them; to the contrary, at 7:1-9, the Attorney General relies expressly on them.

3 The Government might contend that the Attorney General's Public Certification is in the
4 nature of expert testimony. Under FRE 703, the facts or data on which an expert bases his
5 opinion need not themselves be admissible in evidence. There is an important caveat, however.
6 The facts or data must be supplied to the other side:

7 Since pretrial discovery of an expert's underlying facts and data is
8 often essential to preparing an effective cross-examination, failure to
9 provide such discovery may be a sufficient basis for requiring prior
disclosure on direct examination or even barring the expert's
testimony entirely.

10 29 C. Wright & V. Gold, *Federal Practice and Procedure*, § 6294, p. 428-9 (1997). FRCP
11 26(a)(2)(B) requires specifically that the expert must disclose, among other things, the data or
12 other information considered in forming the expert's opinion.

13 As noted in the preceding section, the bulk of the materials on which the Attorney
14 General purports to rely have not been made available to the plaintiffs. Without them, the
15 plaintiffs are unfairly disadvantaged with respect to any opportunity to rebut them, and the
16 Attorney General's Public Certification is no more than conclusory and inadmissible.¹³

17 **V. Even If The Government's Evidence Is Otherwise Admissible, It Should Be Excluded**
18 **Under FRE 403.**

19 In pertinent part, FRE 403 provides that "[a]lthough relevant, evidence may be excluded
20 if its probative value is substantially outweighed by the danger of unfair prejudice" Plaintiffs
21 acknowledge that FRE 403 objections are more likely to be sustained if the proffered evidence is
22 to go to a jury.

23 Here, however, Plaintiffs face a unique situation. It is not common that a party offers
24 evidence, especially evidence exclusively within its control, when the opposing party can not see
25 the evidence, can not do discovery attacking the credibility and probative value of the evidence
26 and can not do discovery aimed at uncovering other, independent evidence. There can be little

27 ¹³ As the Court is aware, Plaintiffs have on many occasions requested the right to do targeted
28 discovery, including most recently at the September 12, 2008 Case Management Conference. See
also the FRCP 56(f) Declaration of Cindy Cohn, filed concurrently herewith.

1 doubt that Plaintiffs will be prejudiced unfairly if the Government's proffered evidence is
2 admitted under such circumstances. Thus, in addition to the grounds previously stated, Plaintiffs
3 object to all of the Government's evidence discussed in these objections on the grounds of FRE
4 403.

5 **CONCLUSION**

6 50 U.S.C. § 1885a(b)(1) requires the Government to make its case with substantial
7 evidence. Stripped of hearsay and other inadmissible evidence, the Government has offered no
8 evidence at all against the Plaintiffs. These evidentiary objections should be sustained and the
9 Government's motion should be denied.

10 DATED: October 16, 2008

Respectfully submitted,

11 _____
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