CONSOLIDATED CASE NOS.
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS LITIGATION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated,
Plaintiffs-Appellants,

v.

AT&T CORPORATION, AT&T, INC.,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellee.

On Appeal from the United States District Court
for the Northern District of California, MDL No. 06-1791-VRW (Walker, C.J.)

JOINT BRIEF FOR TELECOMMUNICATIONS CARRIER DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees submit the following corporate disclosure statements:

AT&T Defendants. Appellee AT&T Inc. has no parent corporation, and no publicly held corporation owns 10% or more of AT&T Inc.'s stock. The remaining AT&T Defendants[*] are all wholly owned subsidiaries, either directly or indirectly, of AT&T Inc., and therefore the remaining AT&T Defendants are corporations whose shares are not publicly held or publicly traded.

Sprint Defendants. Appellee Sprint Nextel Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Sprint Nextel Corporation is the indirect, ultimate parent corporation of Appellees Sprint Communications Company L.P., Nextel West Corp., and Sprint Spectrum L.P. No other publicly held corporation owns 10% or more of the stock of these subsidiaries.

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[*] The named AT&T Defendants include 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, and SBC Long Distance, LLC d/b/a AT&T Long Distance. Some of the complaints in this case contain apparent misnomers, and the term "AT&T Defendants" should also be construed to include any other wholly owned direct or indirect subsidiary of AT&T Inc. that is a Defendant-Appellee.

Verizon Defendants. Appellee Verizon Communications Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Verizon Communications Inc. is the indirect, ultimate parent corporation of Appellees Verizon Florida LLC,** Verizon Global Networks Inc., Verizon Maryland Inc., Verizon Northwest Inc., Verizon Business Global LLC,*** and MCI Communications Services, Inc. No other publicly held corporation owns 10% or more of the stock of these subsidiaries.

** Before November 16, 2006, Verizon Florida LLC was named Verizon Florida Inc., the entity named as a defendant in one of the suits in these proceedings.

*** Before November 21, 2006, Verizon Business Global LLC was named MCI, LLC, the entity named as a defendant in one of the suits in these proceedings.

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STATEMENT OF JURISDICTION

Defendants do not dispute the Jurisdictional Statement presented by Plaintiffs (at 6).

INTRODUCTION

These consolidated cases concern assistance that Defendants, a group of telecommunications carriers, allegedly provided to the federal intelligence community in the aftermath of the September 11, 2001 terrorist attacks. Plaintiffs, a group of Defendants' customers, claim that this alleged assistance violated the Constitution, the Foreign Intelligence Surveillance Act of 1978 ("FISA"), and other federal and state laws. The truth of Plaintiffs' allegations, and the merits of their legal arguments about the conduct alleged, are not before this Court. The sole question on appeal is whether Congress could constitutionally enact new § 802 of FISA, 50 U.S.C. § 1885a. The district court found, and Plaintiffs do not now dispute, that § 802, if constitutional, terminates these cases.[1]

Section 802 was the product of extensive debate and factfinding by Congress, which determined that some telecommunications carriers (whose identities remain classified) had indeed assisted the United States with some secret surveillance activities undertaken in the period following September 11. Congress

[1] By submitting this brief, Defendants do not waive any other privileges, immunities, or defenses that may be available to them should § 802 be held unconstitutional. *See* Br. of Telecomms. Carrier Defs. in Supp. U.S. Mot. Dismiss at 31-32 nn.43-45, MDL No. 06-1791 (filed Nov. 5, 2008) (Dkt. No. 508).

further determined that, to the extent carriers relied on specific assurances from senior executive officials that the assistance rendered was lawful, they acted in good faith. Congress also recognized the dilemma faced by carriers that either rendered no assistance or did so in response to a preexisting statutory directive, but could not defend themselves because the government had invoked the state-secrets privilege.

Based upon these findings, substantial bipartisan majorities in both Houses of Congress concluded that it would be unfair and would endanger national security for private entities to bear the financial and reputational impact of litigation over the legality of the government's conduct. Congress therefore created a narrow, focused immunity, conditioned on personal certification by the Attorney General that the factual prerequisites for immunity had been met in a particular case, and on judicial review of that certification to ensure that it is supported by substantial evidence, including an *in camera* review of classified evidence.

Congress had the power to make that judgment and to create that new immunity. Plaintiffs' half-dozen creative attempts to challenge § 802 are meritless.

BACKGROUND AND STATEMENT OF FACTS

1. Section 802, the statutory provision at the center of this case, provides that "a civil action may not lie or be maintained in a Federal . . . court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed," if the Attorney General makes one of five listed certifications. 50 U.S.C. § 1885a(a). It provides for the Attorney General to certify to a court that any assistance was provided under an order of the Foreign Intelligence Surveillance Court, under a certification pursuant to 18 U.S.C. § 2511(2)(a)(ii)(B), under a national-security letter, or under a directive by the Attorney General to assist in FISA-authorized warrantless surveillance; or that any assistance 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.

50 U.S.C. § 1885a(a)(1)-(4). The Attorney General may also certify that the alleged assistance was not actually provided. *See id.* § 1885a(a)(5).

The Attorney General's certification is subject to judicial review by the district court to determine whether it is supported by substantial evidence. *See id.* § 1885a(b)(1). The court may also review supplemental materials, including any "court order, certification, written request, or directive" pursuant to which assistance was provided. *Id.* § 1885a(b)(2); *see also id.* § 1885a(d) (any party may provide such materials to the court). If the Attorney General declares that public disclosure of the certification or supplemental materials "would harm the national security of the United States," then such review must be *ex parte* and *in camera*, and the court may not disclose the part of § 802(a) on which the Attorney General has relied. *Id.* § 1885a(c). The grant or denial of a § 802 motion is immediately appealable. *See id.* § 1885a(f).

2. Congress enacted § 802 after thorough investigation and debate of the best solution to a significant national-security problem. Members of the Senate Select Committee on Intelligence heard evidence that, during the "period following the terrorist attacks of September 11, 2001," some telecommunications carriers had provided assistance to the government as part of a program whose "expressed purpose . . . was to 'detect and prevent the next terrorist attack'" on the United States. ER391 (S. Rep. No. 110-209, at 9 (2007) ("S. Rep.")). The evidence before the Committee included hearings, classified briefings, review of relevant documents and correspondence (including classified material), and answers to the

Committee's written questions. The Committee took testimony not only from executive branch officials and attorneys, but also from telecommunications carriers, and received statements from experts on national-security law and civil liberties. *See* ER384 (S. Rep. at 2). Counsel for Plaintiffs also gave testimony.

The Committee decided that it "would be inappropriate to disclose" which carriers provided assistance, what assistance they provided, or any details of the government's intelligence activities. ER391 (S. Rep. at 9). It further stated that § 802 was not meant as an "assessment about the legality" of those activities. *Id.* The Committee found, however, that some carriers that had cooperated with the government "had a good faith basis for responding to the requests for assistance they received" because of the "unique historical circumstances of the aftermath of September 11, 2001," and had "relied on written representations that high-level Government officials had assessed the program to be legal." ER391-92 (S. Rep. at 9-10). The Committee also found that, whether they had assisted the government or not, and whether they had relied on existing statutory procedures or not, carriers would be unable to defend themselves because the government's assertion of the state-secrets privilege would prevent them from introducing evidence one way or another and from raising defenses available under existing law. *See* ER393-94 (S. Rep. at 11-12).

Perhaps most importantly, the Committee found that "the intelligence community cannot obtain the intelligence it needs without assistance from" telecommunications carriers and that voluntary cooperation with lawful requests might be more difficult for the government to obtain prospectively because of the "scope of the civil damages suits" with which carriers were threatened. ER392 (S. Rep. at 10). Such difficulties could result in "delay . . . [that would be] simply unacceptable for the safety of our Nation." *Id.*

Balancing these concerns, the Committee recommended (in the form of what became § 802(a)(4)) a "focused retroactive immunity" that was "limited in scope" to "discrete past activities" undertaken in "response to an unparalleled national experience," ER390, 392, 393 (S. Rep. at 8, 10, 11), while § 802(a)(1)-(3) and (a)(5) established immunities applying to ongoing and future, as well as past, alleged conduct. At the same time, § 802(b) provides for judicial review of the Attorney General's certification to ensure that immunity will be granted only when supported by substantial evidence. Because, in its view, "an assertion of [the] state secrets [privilege] over the same facts would likely prevent all judicial review over whether, and under what authorities, an individual assisted the Government," the Committee concluded that § 802(b) "serves to expand judicial review to an area that may have been previously non-justiciable." ER394 (S. Rep. at 12).

3. On September 19, 2008, then-Attorney General Mukasey submitted two certifications (one public, one sealed) to the district court pursuant to § 802(a). In the public certification, the Attorney General separated Plaintiffs' allegations into three categories, each of which he declared was within at least one subsection of § 802(a).

First, addressing Plaintiffs' allegations that Defendants had assisted the government in "dragnet collection [of] the content of plaintiffs' communications," the Attorney General stated (consistent with the government's previous public position) that no such dragnet collection had taken place. ER435. He therefore certified that, as to these allegations, Defendants "did not provide the alleged assistance." 50 U.S.C. § 1885a(a)(5), *cited at* ER435.

Second, although observing that Plaintiffs did not appear to challenge the lawfulness of the government's Terrorist Surveillance Program ("TSP"), a particular set of intelligence activities that the government had publicly acknowledged, the Attorney General certified that at least one of the § 802(a) conditions was met for each defendant with regard to the TSP, without specifying (on the public record) which one. *See* ER436.

Third, addressing Plaintiffs' allegations that Defendants had assisted the government by providing "records concerning telephone and electronic communications" other than the communications themselves, the Attorney General

again certified that at least one of the § 802(a) conditions was met for each defendant with regard to the alleged conduct. *Id.*

The Attorney General further declared that disclosure of his classified declaration, with details about the basis for his determinations, "would cause exceptional harm to the national security of the United States" by revealing "intelligence sources and methods." ER436-37.

Relying on the Attorney General's certification, the United States moved to dismiss the action. Plaintiffs opposed, arguing both that § 802 was unconstitutional and that the Attorney General's certification was not supported by substantial evidence. In support of their arguments, Plaintiffs submitted eight volumes of materials. *See* ER439, 440.

4. The district court (Walker, C.J.) found that § 802 was constitutional and that the Attorney General's certification met its requirements. The court rejected Plaintiffs' argument that § 802 denies them any remedy for their constitutional claims, noting that Plaintiffs retain the ability to "proceed[ ] against governmental actors and entities who are, after all, the primary actors in the alleged wiretapping activities," and citing several parallel proceedings against governmental defendants. ER12. It rejected their argument that § 802 encroaches on judicial authority to interpret the Constitution, reasoning that § 802 neither "interpret[s] the Constitution [n]or affect[s] plaintiffs' underlying constitutional

rights." ER13. And it rejected their argument that § 802 unconstitutionally intrudes on judicial resolution of a pending case, concluding that, because the statute "amends substantive federal law" to "create[ ] a . . . narrowly-drawn and 'focused' immunity," and "provides a judicial role, albeit a limited one," it does not violate the separation of powers. ER14-20.

The district court also rejected Plaintiffs' argument that § 802 violates the nondelegation doctrine for lack of an express textual mandate telling the Attorney General in which cases to submit certifications. The court determined that § 802's "intentionally narrow . . . scope," and its link to "matters pertaining to national security," where executive discretion is generally tolerated, supported its constitutionality. In light of those factors, the court found that § 802's "legislative history provides enough context and content to provide definition for the Attorney General's scope of authority." ER20-33.

Finally, the district court rejected Plaintiffs' due process arguments. It reasoned that "the legislative determination" that immunity was appropriate had "provide[d] all the process that [was] due." ER35 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)) (internal quotation marks omitted). It further concluded that the use of sealed evidence subject only to *in camera* review was appropriate in light of the "special balancing that must take place when classified information is involved in a proceeding." ER37.

Before the district court, Plaintiffs also argued that § 802 violates the First Amendment right of access to civil proceedings and that the Attorney General's certification was unsupported by substantial evidence or was arbitrary and capricious under the Administrative Procedure Act. The district court rejected these arguments as well. *See* ER37-45. Plaintiffs have now abandoned them.

This appeal followed.

SUMMARY OF ARGUMENT

Plaintiffs raise arguments under three different constitutional provisions. The district court properly rejected each of them.

I. Section 802 does not violate Article I.

A. The Attorney General's certification that the requirements of § 802 are met in this instance does not repeal or amend any statute, but merely triggers application of a new immunity defense that was duly enacted according to constitutionally prescribed procedures. Plaintiffs' contention that the Attorney General has amended FISA without bicameralism or presentment therefore lacks merit. Congress changed the law—as Plaintiffs acknowledge it may—by creating a new immunity defense. The Attorney General performed a traditional executive function by invoking that defense in court after concluding that the requirements established by Congress for immunity were satisfied. His action implemented, rather than changed, the duly enacted law.

B. Section 802 does not violate the nondelegation doctrine. Congress has specified the factual circumstances on which immunity is conditioned. In certifying that those facts exist, the Attorney General performs an executive, not a legislative, function. Any discretion he has over whether to certify is not legislative discretion. Innumerable statutes provide executive branch officials with discretion in their implementation, especially in the critical area of national security. Furthermore, the purpose, history, and context of § 802 show how Congress intended the Attorney General to exercise any discretion he possesses, including in these lawsuits. In the alternative, this Court can avoid any constitutional question (though no serious question exists) by construing the statute to require the Attorney General to file a certification when one of the statutory conditions exists.

II. Section 802 is consistent with due process. Plaintiffs have no protected liberty interest at stake, and their property interest (if any) in their unadjudicated causes of action deserves minimal weight. They received all the process they are due.

A. Plaintiffs' attacks on the Attorney General as biased are irrelevant because it is undisputed that he did not act as an adjudicator in this case. In addition, those attacks fail because the Attorney General's institutional role and public positions on policy matters do not establish bias.

B. Plaintiffs received a hearing before a district court judge whom they do not accuse of bias. The substantial-evidence standard applied by the district court is consistent with due process, particularly in light of the traditional deference accorded the executive in matters of national security.

C. The use of *ex parte*, *in camera* review likewise does not violate due process. It is well established that *ex parte* proceedings are permitted in national-security cases if necessary to protect classified information. Any protected interest that Plaintiffs may have is outweighed by the government's strong interests in avoiding disruption of its counterterrorism intelligence-gathering and in keeping secret its intelligence sources and methods.

III. Section 802 does not violate Article III.

A. Section 802 gives the courts a meaningful role, and its substantial-evidence standard fits well within accepted notions of the judicial role. Plaintiffs' contrary arguments are wholly unsupported by precedent. If anything, § 802 authorizes greater judicial scrutiny than courts typically apply to analogous executive branch submissions.

B. Section 802 does not deny Plaintiffs a remedy for their constitutional claims, because it does not bar them from pursuing any cognizable claims they may have against government officials. Nothing in Article III or due process

prevents Congress from making a considered judgment that constitutional claims against certain private actors should not proceed.

ARGUMENT

I. SECTION 802 DOES NOT VIOLATE ARTICLE I

Plaintiffs argue that § 802 impermissibly delegates Congress's lawmaking function to the Attorney General in violation of the bicameralism and presentment requirements of Article I, § 7, and of the nondelegation doctrine. *See* Br. 13-36. These arguments are meritless. Section 802 is a new immunity defense contained in a statute that Congress passed and the President signed. Whether that defense applies in a particular case turns on the existence of specified facts, which the Attorney General is authorized to certify to a court. In tendering a certification, the Attorney General performs a traditional executive function and does not make, amend, or repeal any law.

A. Section 802 Does Not Violate Article I, § 7

1. Section 802 Does Not Authorize the Attorney General To Amend or Repeal Any Statute

Plaintiffs' lead argument (at 14) is that § 802 is unconstitutional because, when the Attorney General filed the certification in this litigation, he impermissibly "change[d] or negate[d] the effect of existing law" without going through a legislative process. This argument relies 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. It fails because § 802 is utterly unlike the line-item veto.

The Line Item Veto Act purported to authorize the President to "'cancel in whole'" spending and tax provisions that had been passed by Congress and signed into law, thereby giving "the President the unilateral power to change the text of duly enacted statutes." *Id.* at 436, 447. Congress's attempt to convey that authority, the Court held, was irreconcilable with the Constitution's "'finely wrought' procedure" for enacting laws, which requires that a bill become law only in the same form as passed by Congress and signed by the President. *Id*. at 439-40. Our research has revealed no case since *Clinton* itself striking down a statute on the "narrow ground," *id.* at 448, adopted in that case.

Section 802 lacks the key feature that rendered the Line Item Veto Act unconstitutional: it does not authorize the executive to "change the text," *id.* at 447, of FISA or any other statute. The provisions of FISA and other federal statutes that Plaintiffs allege Defendants have violated remain in force, as do the associated statutory causes of action. Those causes of action are now merely subject to an additional defense embodied in a duly enacted statute.[2] There is no

[2] This new immunity defense is similar to numerous other statutory and common-law defenses that historically have protected private parties assisting federal law enforcement or intelligence activities in good faith. *See*, *e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii), 2520(d), 2703(e), 2707(e); 50 U.S.C. §§ 1805(h), 1842(f), 1861(e); Protect America Act of 2007, Pub. L. No. 110-55, § 105B(*l*), 121 Stat.

sense in which that defense authorizes the Attorney General "to create a different law." *Id*. at 448.

Plaintiffs assert (at 18) that "[t]he enactment of section 802 did not change the legal force or effect of a single word of the law establishing the causes of action that plaintiffs have sued upon," and therefore that the change in law must be taking place by the action of the Attorney General rather than that of Congress. On the contrary, Congress has added new language to FISA (one of the laws on which Plaintiffs rely) to establish a new defense. Congress's decision to create that defense through a single provision of broad applicability rather than by separately amending each relevant statute makes no constitutional difference. Nothing in the Constitution or the separation of powers bars Congress from modifying existing law through an "entirely separate [new] statute." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439-40 (1992).

Plaintiffs further argue that, although § 802 did not change the law, the Attorney General's certification did, by "depriv[ing] the federal statutes under which plaintiffs sued of any legal force or effect in these lawsuits." Br. 20 (citation and internal quotation marks omitted). They say it was thus the functional

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552, 554-55; *Smith v. Nixon*, 606 F.2d 1183, 1191 (D.C. Cir. 1979); *Halperin v. Kissinger*, 424 F. Supp. 838, 846 (D.D.C. 1976), *rev'd on other grounds*, 606 F.2d 1192 (D.C. Cir. 1979).

equivalent of a partial repeal of those statutes. *See id.* Both the premise of this argument and the conclusion Plaintiffs draw from it are wrong.

First, the Attorney General's certification did not deprive the statutes creating Plaintiffs' claims of legal force. Any defendant who successfully invokes a defense or immunity terminates a pending lawsuit. That termination is not a repeal or amendment of the underlying law. It is not uncommon for executive officials to have authority to trigger a defense or immunity for another party. For example, the government can trigger immunities in civil litigation by certifying that an individual is acting within the scope of federal employment,[3] or by informing a court that a defendant is a foreign head of state.[4] It can extinguish claims against a foreign state in favor of an administrative settlement process.[5] It can grant an individual immunity from the use of testimony or its fruits in a criminal prosecution in order to compel that person's testimony.[6] These executive actions do not "nullify" anything or violate the separation of powers; they are

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[3] *See* 28 U.S.C. § 2679(d) (provision of Federal Tort Claims Act authorizing certification); *see also United States v. Smith*, 499 U.S. 160, 165-69 (1991) (immunity persists even if there is no remedy against the government).

[4] *See Ye v. Zemin*, 383 F.3d 620, 623-25 (7th Cir. 2004) (applying head-of-state immunity based on submissions by the Departments of Justice and State).

[5] *See Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981).

[6] *See* 18 U.S.C. § 6003. Previous federal immunity statutes have authorized a grant of immunity from prosecution for the entire transaction to which compelled testimony related, an even closer analogue to § 802 immunity. *See Kastigar v. United States*, 406 U.S. 441, 451-52 (1972).

simply part of the legal landscape that defines the contours of liability and the rules of adjudication. The immunity defense authorized by § 802 is no different.

Second, even if the Attorney General's certification could be said to negate in part the legal force or effect of the statutes creating Plaintiffs' claims, it would not follow that the Attorney General has partially repealed those statutes. Plaintiffs' contrary contention (at 14) rests on the mistaken view that any executive action that "negate[s] the effect of existing law" is an impermissible partial repeal. That proposition, if accepted, would cut a swath through the United States Code. An electronic search of the unannotated U.S. Code for the words "may waive" yields more than 900 statutes, most of which authorize executive officials to waive laws in specified circumstances.[7] On Plaintiffs' erroneous view, these statutes all

[7] Among them are many statutes authorizing executive branch officials to waive existing laws in the interest of national security. As examples, under 10 U.S.C. § 433(b), the Secretary of Defense "may . . . waive compliance" with "laws or regulations pertaining to the management and administration of Federal agencies" that would otherwise apply to a commercial activity that is a cover for intelligence-collection activities. Under 10 U.S.C. § 2410i(c), the Secretary of Defense "may waive [a] prohibition" on defense contracting with foreign entities that comply with a secondary boycott of Israel. And, under 22 U.S.C. § 4316(c), the Secretary of State "may waive" travel restrictions that she must otherwise impose on certain foreign nationals if "the national security and foreign policy interests of the United States so require." *See also, e.g.*, 6 U.S.C. § 1135(m)(3); 10 U.S.C. § 119(e)(1); *id.* § 184(f)(3); *id.* § 382 note; *id.* § 532(f); *id.* § 2208(j)(2); 14 U.S.C. § 666(a); 21 U.S.C. § 1903(g)(1); 22 U.S.C. § 2295a(d)(2)(A); *id.* § 2796a(b); *id.* § 6713(e)(5); *id.* § 7207(a)(3); *id.* § 8425(b); 49 U.S.C. § 44908(b); 50 U.S.C. § 402a(e)(5).

unconstitutionally authorize those officials to "negate the effect of existing law" without bicameral passage and presentment.

Executive waivers have never been understood as partial statutory repeals. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2192 (2009) (statute authorizing the President to exempt Iraq from certain laws "did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation"). Such waivers are both "routine[]" and "a far cry from the line-item veto at issue in *Clinton*," *Acree v. Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004) (Roberts, J., concurring in the judgment), and courts have rejected the argument that they violate Article I, § 7, *see, e.g.*, *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (rejecting argument that Attorney General's discretionary authority to suspend deportation laws violates Article I, § 7).[8] If executive waivers (the entire point of which is to negate the effect of existing law) do not effect partial repeals in violation of Article I, § 7, then a certification under § 802 (which merely triggers a litigation defense) certainly does not.

2. *Field* Confirms § 802's Constitutionality

Seeking to extend *Clinton*'s "narrow" holding, 524 U.S. at 448, Plaintiffs argue (at 22-26) that the distinctions *Clinton* drew between the Line Item Veto Act

[8] *See also Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124-26 (D.D.C. 2007); *County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693, at *6-*7 (W.D. Tex. Aug. 29, 2008); *Smith v. Federal Reserve Bank*, 280 F. Supp. 2d 314, 323-24 (S.D.N.Y. 2003).

and the tariff statute upheld against a nondelegation challenge in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), should control this Court's decision. But the Court in *Clinton* "did not purport to adopt a three-part test based on these distinctions to determine whether a particular [statute] is constitutional." *Defenders of Wildlife*, 527 F. Supp. 2d at 125. Where, as here, a statute does not implicate "the power to amend or repeal duly enacted laws, . . . the holding of *Clinton* is inapplicable." *Id*. at 126.

Indeed, *Field* confirms rather than undermines § 802's constitutionality. That case rejects the proposition that "a law is less than a law[ ] because it is made to depend on a future event or act" or empowers executive officials "to determine some fact or state of things upon which the law makes . . . its own action depend." 143 U.S. at 694 (internal quotation marks omitted). Because § 802 deals with "assistance to . . . the intelligence community," Congress anticipated that the facts bearing on the specified conditions for immunity would be under the control of the executive and potentially subject to the state-secrets privilege. *See* ER393 (S. Rep. at 11). It therefore authorized the Attorney General to gather, evaluate, and present those facts to a court while protecting their secrecy. As *Field*'s reasoning makes clear, those kinds of activity are archetypal execution of the law. *Cf. Chadha*, 462 U.S. at 953 n.16 (observing that the Attorney General "acts in his presumptively Art[icle] II capacity" when he exercises authority delegated by statute).

Congress has frequently enacted statutes that attach legal consequences to factual submissions by the executive.[9] And "[t]he Supreme Court has consistently upheld delegations . . . that predicate the operation of a statute upon some Executive Branch factfinding." *Owens v. Republic of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008).[10] In making such factual determinations, the executive exercises no legislative function but is the "mere agent of the law-making department to ascertain and declare the event upon which [Congress's] expressed will was to take effect." *Id.* at 891-92 (internal quotation marks omitted; alteration in original). So long as Congress has prescribed the consequences of the relevant facts—as it did in *Field* and as it has done here—the executive does not exercise legislative power by deciding when to invoke legal rules. *See id.* at 889-93.

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[9] *See, e.g.*, 18 U.S.C. § 5032 (jurisdiction over trial of juvenile defendant in federal court triggered by Attorney General's certification of several predicate facts); 28 U.S.C. § 2679(d)(1) (substitution of United States as defendant in tort suit against federal employee triggered by Attorney General's certification that employee acted within scope of employment); 42 U.S.C. § 1973b(b) (applicability of Voting Rights Act provisions triggered by Attorney General's and Census Director's unreviewable factual determinations); *see also infra* note 28 (cases concerning diplomatic and foreign sovereign immunity predicated on executive certification).

[10] *See also, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939) (rejecting a nondelegation argument because "Congress [had] exercise[d] its legislative authority in making [a] regulation and in prescribing the conditions of its application," although those conditions included actions by both government and private actors); *Jones v. United States*, 137 U.S. 202, 209-10, 217 (1890) (upholding a statute requiring certain "facts and conditions . . . specified [to] appear to the satisfaction of the president in order to enable him to exercise the discretionary power conferred").

In any event, *Clinton*'s three-part analysis of *Field* casts no doubt on the constitutionality of § 802. *First*, like the statute at issue in *Field* (and unlike the Line Item Veto Act), § 802 creates a process by which the executive may ascertain facts unavailable to the enacting Congress. Plaintiffs mistakenly focus only on the facts surrounding "these actions." Br. 22. But, as Plaintiffs do not dispute, § 802 applies "to lawsuits against persons who assist the intelligence community in the future" as well. Br. 33. It is therefore not the case that "*every* exercise of the [certification] power will necessarily be based on the same facts and circumstances that Congress considered." *Clinton*, 524 U.S. at 444 n.35. Rather, once its attention had been drawn to the problem of potential private liability for alleged assistance to the intelligence community by the facts of these cases, Congress created a new mechanism to address that problem in both existing and future cases. Even as to existing cases, moreover, it was reasonable (and certainly not unconstitutional) for Congress to incorporate the additional safeguard of requiring a specific executive declaration, under penalty of perjury and subject to judicial review, before the immunity defense it created would apply.

Second, neither *Clinton* nor *Field* held, as Plaintiffs contend (at 23-24), that executive authority to act when certain facts exist must always be mandatory in order to be valid. Many of the statutes the Court discussed approvingly in *Field*—dating to the 1790s—granted the President discretionary authority to alter or

suspend the application of existing laws in specified circumstances. *See* 143 U.S. at 684-91. *Clinton* distinguished those statutes because they related to foreign affairs, an area in which "the President has a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." 524 U.S. at 445 (internal quotation marks omitted). Traditional executive discretion and independent authority also characterize the closely related areas of intelligence and national security in which § 802 operates. *See infra* pp. 34-35. In any event, as discussed below, this Court may interpret § 802 to impose a mandatory duty and should do so if necessary to avoid a serious constitutional question. *See infra* pp. 35-37.

Third, when the Attorney General files a certification, he in no way "reject[s] the policy judgments that Congress made in enacting statutes creating liability for unlawful surveillance." Br. 24. It is impossible to know what the lawmakers who drafted the statutes giving rise to Plaintiffs' causes of action would have said about private liability under the extraordinary circumstances that later prompted the enactment of § 802. But, even if that could be determined, it would not matter. The relevant policy judgment here is the policy judgment expressed in § 802, which is "the most recent expression of the legislature's will." *Boudette v.*

Barnette, 923 F.2d 754, 757 (9th Cir. 1991). The Attorney General's certification gives effect to that judgment, rather than conflicting with it.[11]

At bottom, Plaintiffs are simply wrong that "Congress ducked the fundamental legislative choice of whether or not to nullify" the statutes creating their causes of action. Br. 25; *accord* Br. 24. Far from ducking anything, Congress grappled with the competing policy considerations relating to carrier immunity during a multiyear legislative process involving extensive public debate and private classified briefings. Congress considered a variety of proposals, ultimately adopting one that did not wholly abrogate Plaintiffs' statutory and common-law causes of action. Plaintiffs concede (at 16-17) that Congress could have abolished their causes of action outright,[12] but they offer no persuasive reason why Congress could not take the more carefully calibrated approach of § 802.

In short, when the Attorney General gathers and presents to the court facts that are uniquely within the possession of the executive branch, he does not amend or repeal anything, but simply invokes a defense that Congress enacted and that is

[11] In *Clinton*, moreover, the Line Item Veto Act authorized the President to cancel statutory provisions that were enacted *after* that Act itself. Here, § 802 authorizes the creation of a narrow and focused immunity from actions based on statutory provisions enacted *before* § 802. There is therefore no concern in this case that Congress has attempted to "yield up" the "powers . . . of other Congresses to follow." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring).

[12] Plaintiffs' reliance (at 17-18) on cases upholding statutes abolishing causes of action is misplaced. Those cases *rejected* Article III and due process challenges to those statutes; they have nothing to do with Article I, § 7.

now part of the law governing Plaintiffs' causes of action. Article I, § 7, is not implicated.[13]

B. Section 802 Does Not Violate the Nondelegation Doctrine

Plaintiffs next argue that § 802 violates the nondelegation doctrine. This argument, too, is incorrect. Only twice in the nation's history has the Supreme Court struck down a statute on nondelegation grounds, both times in 1935. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). Only one court of appeals has ever done so; its decision was swiftly vacated by the Supreme Court, and the statute was subsequently upheld. *See South Dakota v. Department of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); *South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005).

The nondelegation doctrine is exceedingly narrow. It does not apply at all unless Congress seeks to delegate power that is "legislative" in nature. Even when the doctrine does apply, its demands are modest: Congress need only provide "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). The Supreme Court has repeatedly rejected nondelegation challenges to statutes

[13] For the same reasons, Plaintiffs' suggestion (at 21-22) that § 802 impermissibly authorizes the Attorney General to preempt state law in violation of the Supremacy Clause also fails. Congress, not the Attorney General, subjected Plaintiffs' state-law causes of action to a preemptive federal immunity defense.

that provide such minimal guidance as that the official should act in the "public interest" or to protect "national security."[14] Section 802 does not run afoul of this doctrine.

1. The Attorney General's Performance of a Traditional Executive Function Raises No Nondelegation Issue

As an initial matter, the nondelegation doctrine is inapplicable here because § 802 authorizes the Attorney General to take essentially executive, not legislative, action. Article I of the Constitution vests in Congress "[a]ll legislative Powers herein granted." U.S. Const. art. I, § 1. "From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). As both the text of Article I and the Supreme Court's formulation of the doctrine make clear, it applies only when Congress attempts to delegate *legislative* power. *See, e.g., Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.").

Accordingly, "the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers." *Id.* at 465. If

[14] *E.g., National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976); *see also Mistretta v. United States*, 488 U.S. 361, 373-74 (1989).

Congress vests an agency with quasi-legislative power, such as the power to engage in rulemaking (or the functionally equivalent power to establish binding norms through adjudication), it must provide an intelligible principle to cabin the agency's discretion. But, when the authority conferred is executive in nature, no nondelegation issue even arises. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("there is no question of inappropriate delegation of legislative power" when "Congress . . . is implementing an inherent executive power"); *United States v. Allen*, 160 F.3d 1096, 1108 n.16 (6th Cir. 1998) ("[T]his case does not involve a delegation of legislative authority; thus, the 'intelligible principle' language . . . is not relevant.").

That is the situation here. Section 802 does not confer legislative power on the Attorney General. It does not authorize the creation of "defined and binding rule[s] of conduct." *Yakus v. United States*, 321 U.S. 414, 424 (1944).[15] Congress, not the Attorney General, altered the legal rules governing Plaintiffs' causes of action by enacting a new defense and defining the circumstances in which that defense would be available. The Attorney General is authorized only to determine

[15] The statutes struck down in both *Schechter Poultry* and *Panama Refining* attempted to authorize the President to make or authorize binding rules of conduct. *See Panama Ref.*, 293 U.S. at 414-15 (statute "purport[ed] to authorize the President to pass a prohibitory law"); *Schechter Poultry*, 295 U.S. at 529 ("The codes of fair competition which the statute attempts to authorize are codes of laws.").

when those circumstances exist in a particular case and then to invoke the defense in litigation. That is an executive function.[16] Indeed, if the decision to file a § 802 certification implicated the nondelegation doctrine, it is hard to see how innumerable discretionary litigation decisions that the Department of Justice routinely makes for the United States and that profoundly affect the rights of individuals—for example, whether to initiate a criminal prosecution or civil action, or whether to invoke defenses such as sovereign immunity and qualified immunity—could pass constitutional muster.

United States v. Jensen, 425 F.3d 698 (9th Cir. 2005), illustrates the principle that controls. In that case, a criminal defendant raised a nondelegation challenge to an enhanced sentencing provision in the drug statutes. He had received a sentence of life imprisonment without parole, triggered by the U.S. Attorney's filing of a special statutory notice under 21 U.S.C. § 851(a) concerning his prior convictions. Section 851, like § 802 here, sets forth the conditions for and consequences of a prosecutorial filing but supplies no textual standard to govern whether a prosecutor should or should not file where he has discretion to do so. Joining the Sixth and Eleventh Circuits, this Court found that § 851(a) does not impermissibly delegate legislative authority because it affords prosecutors a power

[16] *See* 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States . . . is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

akin to that traditionally exercised by the executive branch in making charging decisions. *See id.* at 707 (following *United States v. Crayton*, 357 F.3d 560 (6th Cir. 2004), and *United States v. Cespedes*, 151 F.3d 1329 (11th Cir. 1998)).

The same is true of § 802. That provision does "not in any real sense invest the [Attorney General] with the power of legislation," *J.W. Hampton*, 276 U.S. at 410. It instead merely authorizes him to invoke a defense in litigation. The nondelegation doctrine is inapplicable.

2. Section 802 Contains an "Intelligible Principle"

Even if the nondelegation doctrine applied, its "intelligible principle" requirement would be more than satisfied in light of § 802's criteria for certification; the narrow field in which it operates; its purpose, history and context; and traditional executive authority over matters involving national security.

a. The requirement of an intelligible principle is rarely an obstacle. Since *Panama Refining* and *Schechter Poultry*, the Supreme Court has "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 517 U.S. 748, 771 (1996). The lenient requirements of the nondelegation doctrine are further relaxed when the agency's discretion operates in a narrow domain. *See, e.g.*, *Whitman*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

Section 802 contains an intelligible principle because the Attorney General may file a certification under § 802 only upon finding that one of the enumerated factual predicates is met. *See Algonquin*, 426 U.S. at 559 (statute "easily fulfill[ed]" the intelligible-principle requirement because it "establishe[d] clear preconditions to Presidential action"). Because Congress narrowly defined the circumstances in which the Attorney General may act, including specific factual findings he must make before filing a certification, this case is unlike *Panama Refining*. In that case, the challenged statute provided "no definition of circumstances and conditions" in which the President was authorized to exercise the delegated power, 293 U.S. at 430, and did "not require any finding by the President as a condition of his action," *id.* at 415.

Moreover, any discretion the Attorney General may have is exercised in an exceedingly narrow field—the limited universe of lawsuits challenging alleged assistance to the intelligence community by a particular category of private actors. This case is thus unlike *Schechter Poultry*, in which the findings that conditioned the President's power did not meaningfully constrain him, but instead left him with essentially "unfettered discretion to make whatever laws he [thought might] be needed or advisable for the rehabilitation and expansion of trade or industry." 295 U.S. at 537-38.

The conditions enumerated in § 802(a) thus supply the requisite intelligible principle by defining the circumstances in which the Attorney General may file a certification. Were this not sufficient, scores of statutes would be unconstitutional. Congress routinely authorizes executive agencies to take discretionary action if a specified condition exists, without separately providing a standard for an agency's determination whether to act when the condition is satisfied. For example, the Controlled Substances Act provides that, "*[i]f* the Attorney General finds" that temporarily adding a drug to the schedule of prohibited substances is "necessary to avoid an imminent hazard to the public safety," he "*may*" do so. 21 U.S.C. § 811(h)(1) (emphases added). Just as here, the statute specifies the factors the Attorney General must consider in making the predicate determination, *see id*. § 811(h)(3), but does not textually compel the Attorney General to examine those factors in any particular case or to schedule a substance after making the predicate finding. Yet the Supreme Court easily rejected a nondelegation challenge to the statute. *See Touby*, 500 U.S. at 165.[17]

[17] There are a broad range of statutes that similarly permit, but do not mandate, executive action if certain conditions have been met. As examples, the Attorney General has discretion to admit refugees to the United States in cases of "special humanitarian concern," and also to terminate refugee status after determining that an individual was not entitled to it. 8 U.S.C. § 1157(c)(1), (4). The Secretary of the Interior has discretion, "to the extent he deems advisable," to protect under the Endangered Species Act certain animal species that are not listed as endangered or threatened. 16 U.S.C. § 1533(e). And the Secretary of Transportation has discretion to protect a private air carrier from damage suits arising out of an act of

Courts likewise consistently reject nondelegation challenges to statutes that authorize—but do not require—executive action upon a determination that specified prerequisites have been met.[18] *See, e.g.*, *Yakus*, 321 U.S. 414 (discretionary authority to impose price ceilings upon making specified finding); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (discretionary authority to ban sale of arms upon making specified finding); *New York Cent. Sec.*, 287 U.S. 12 (discretionary authority to approve acquisition of railroad upon making specified finding). Section 802 is no different.

b. Even if Congress were required to set forth conditions under which the executive *must* act (as opposed to when it *may* act), § 802's purpose, history, and context would provide constitutionally sufficient guidance to the Attorney

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terrorism, imposing a cap on compensatory damages (with the government assuming responsibility for damages exceeding the cap). *See* 49 U.S.C. § 44303(b). *See also, e.g.*, 7 U.S.C. § 77(a)(1); *id.* § 2009cc-8(c)(2); *id.* § 2015(*o*)(4); 8 U.S.C. § 1103 note; *id.* § 1182(e); *id.* § 1226a(a)(3); *id.* § 1227(a)(3)(C)(ii); *id.* § 1324c(d)(7); *id.* § 1442(c); 10 U.S.C. § 377(c); 16 U.S.C. § 668dd(d)(2); *id.* § 1853a(c)(2); 19 U.S.C. § 1641(c)(2); 21 U.S.C. § 824(d); 26 U.S.C. § 6325(b)(1); 28 U.S.C. § 1605(g)(1)(A); 42 U.S.C. § 17616(a)(3)(C); 50 U.S.C. § 2783(c); 50 U.S.C. app. § 5 note; *supra* note 7 (examples of statutes granting discretionary authority to waive laws upon making specified findings).

[18] Plaintiffs' contrary argument (at 23) misreads *Field*. Although the tariff statute there imposed a mandatory duty if the President made certain factual determinations, the Court did not hold that such a mandatory duty is *necessary* to avoid a nondelegation problem. On the contrary, it noted that "[h]alf the statutes on our books . . . depend[ ] on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." 143 U.S. at 694 (internal quotation marks omitted).

General in deciding whether to issue a certification. Contrary to Plaintiffs' contention (at 31-36), the Supreme Court has long recognized that, in determining whether Congress has provided an intelligible principle (a question of constitutional law, not one of statutory interpretation), courts must look beyond the statute's text to "the purpose of the Act, its factual background and the statutory context." *Lichter v. United States*, 334 U.S. 742, 785 (1948) (internal quotation marks omitted).

In the *Intermountain Rate Cases*, 234 U.S. 476, 481, 486-89 (1914), for example, the Supreme Court rejected a nondelegation challenge to a provision of the former Interstate Commerce Act that authorized the Interstate Commerce Commission to exempt carriers from the Act's requirements in "special cases, after investigation"—an authority the Court later described as "undefined except as the general purposes of that Act implied the basis for affording exemption." *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). If this Court concludes that an intelligible principle is required to guide the Attorney General's decision whether to file a certification, it may therefore draw upon § 802's purpose, history, and context to provide one.[19] Plaintiffs' contrary argument (at 34-36) relies on

[19] *See also Owens*, 531 F.3d at 890 (examining statute's purpose, history, and context); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008) (per curiam) (same), *cert. denied*, 129 S. Ct. 1002 (2009); *Carcieri v. Kempthorne*, 497 F.3d 15, 42 (1st Cir. 2007) (en banc) (same), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009); *Taxpayers of*

general statements, taken out of context, about the importance of statutory text. They cite no case applying the nondelegation doctrine in the way they urge.

The purpose of § 802 is plain: Congress sought to encourage private cooperation with properly authorized intelligence activities and to make the government alone responsible for defending those activities. It concluded that requiring private entities to bear the burden of that defense both treated those entities unfairly and created an "unacceptable" risk of impeding effective intelligence collection by the federal government. ER393 (S. Rep. at 11). These legislative objectives more than satisfy the nondelegation doctrine. Indeed, the plain congressional goal of protecting the intelligence community's ability to gather information needed to defend the country would be enough to constrain executive discretion in this context. *See, e.g.*, *Algonquin*, 426 U.S. at 548 (President authorized to impose quotas and fees on imports as he deemed necessary to ensure that they did not "threaten to impair the national security"). Here, the policies animating the statute and expressed in the legislative history are even more specific.

As applied to these cases, moreover, there can be no doubt that "the will of Congress has been obeyed." *Yakus*, 321 U.S. at 425. It was this very litigation that

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Michigan Against Casinos v. Norton, 433 F.3d 852, 866 (D.C. Cir. 2006) (same); *South Dakota*, 423 F.3d at 795-97 (same); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999) (same).

focused Congress's attention on the broader question whether litigation should proceed against carriers alleged to have assisted the intelligence community, and Congress contemplated that certifications would be filed in these cases. *See* ER389 (S. Rep. at 7) (citing the "more than forty lawsuits . . . in the Northern District of California"). It is implausible to contend that the Attorney General had insufficient guidance from Congress.

c. The nondelegation question is made even easier because § 802 operates in the domain of the President's core authority over defense and intelligence matters. Congress has more leeway to delegate power in areas where the executive has independent constitutional authority. *See, e.g.*, *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996) ("[A] delegation improper domestically may be valid in the foreign arena."). National security, including the "classif[ication] and control [of] access to information bearing on national security," is such an area. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The Supreme Court has never struck down a delegation in the foreign-affairs or national-security arena, and has held that, in these areas, Congress may delegate rulemaking power to the executive "without further guidance." *Loving*, 517 U.S. at 773; *see also Curtiss-Wright*, 299 U.S. at 324 (with

respect to foreign affairs, Congress may "leave the exercise of the power to [the executive's] unrestricted judgment").[20]

Accordingly, even if it were true that § 802 contained "no standards at all" (at 31), the statute still would not violate the nondelegation doctrine. Any discretion the Attorney General may exercise under § 802 is well within constitutional bounds.

3. Alternatively, § 802 Can Be Construed To Impose a Mandatory Duty

Plaintiffs' nondelegation argument depends on reading § 802 as giving the Attorney General discretion whether to file a certification after he has determined that the factual prerequisites are satisfied. For the reasons set forth above, Plaintiffs' arguments fail even on that reading of § 802. In the alternative, the Court can and should construe § 802 to mandate certification when one of its factual prerequisites is met, and so avoid any constitutional concern.

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[20] *See also Zemel v. Rusk*, 381 U.S. 1, 7-8, 17 (1965) (upholding statute authorizing the President to "grant and issue passports . . . under such rules as the President shall designate and prescribe") (internal quotation marks omitted; alteration in original); *Knauff*, 338 U.S. at 540 n.1, 542-43 (upholding statute making it unlawful for an alien to enter or depart the country "except under such reasonable rules, regulations, and orders . . . as the President shall prescribe") (internal quotation marks omitted); *Doe v. Rumsfeld*, 435 F.3d 980, 986 (9th Cir. 2006) (upholding statute granting the President discretionary "stop-loss" authority to suspend laws governing military separation "during 'times of national emergency'").

Section 802(a) is silent on whether certification is mandatory or discretionary. It provides only that a "civil action . . . shall be promptly dismissed, *if* the Attorney General certifies to the district court" that at least one of the criteria in § 802(a) has been met. 50 U.S.C. § 1885a(a) (emphasis added). The word "if" reflects that these criteria will not be met in every case, but the provision does not expressly commit the decision whether to certify to the discretion of the Attorney General, nor does it use permissive language such as the word "may."[21] Section 802(e), however, refers to the "duties" of the Attorney General under § 802, *id.* § 1885a(e), which suggests an obligation rather than a discretionary authorization.

The Supreme Court has not hesitated to adopt saving mandatory constructions of statutes more explicitly permissive than § 802. *Zadvydas v. Davis*, for instance, involved a statute providing that aliens subject to removal within 90 days "may be detained beyond the removal period." 533 U.S. 678, 682 (2001) (internal quotation marks omitted). The Court noted that, "while 'may' suggests discretion, it does not necessarily suggest unlimited discretion." *Id.* at 697. The Court therefore construed the statute to contain an "implicit limitation" on the time an alien could be held. *Id.* at 689. Likewise, in *United States v. Witkovich*, the

[21] Even expressly permissive language may impose a mandatory duty when, as here, Congress intended the official to act in the public interest or for the benefit of a third party. *See, e.g.*, *Supervisors v. United States*, 71 U.S. (4 Wall.) 435, 446-47 (1866); *Mullaney v. Hess*, 189 F.2d 417, 419-20 (9th Cir. 1951).

Court declined to adopt a "literal[ ]" reading of the phrase "as the Attorney General may deem fit and proper" because a narrower construction would avoid "constitutional doubts." 353 U.S. 194, 195, 199 (1957). Here, reviewing a statute with no such explicitly permissive language, this Court's "plain duty is to adopt" a mandatory construction of § 802 if it perceives any serious constitutional question. *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (internal quotation marks omitted).

II. SECTION 802 DOES NOT VIOLATE DUE PROCESS

Each step of the procedure that led to the dismissal of Plaintiffs' claims was fully consistent with due process. Congress's decision to create a new substantive immunity is not subject to a procedural due process challenge (the only kind that Plaintiffs raise). With regard to that decision, the "legislative determination provide[d] all the process that [was] due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Indeed, Plaintiffs do not appear to dispute that Congress could, consistent with due process, have eliminated entirely their causes of action.

Plaintiffs say, however, that the Attorney General's certification and the district court's ruling pursuant to § 802 fell short of due process. That contention should be rejected on multiple grounds. As an initial matter, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Mfrs. Mut. Ins. Co. v.*

Sullivan, 526 U.S. 40, 59 (1999). In this case, it is far from clear that Plaintiffs have met even this basic precondition.

Section 802 does not deprive Plaintiffs of a cognizable liberty interest. The liberty interests they cite (at 36) are their Fourth Amendment right to be free from unreasonable searches and seizures and their First Amendment right to speak freely. The Attorney General did not, through his certification, and the district court did not, when it approved that certification, search Plaintiffs, seize their persons or effects, or prevent them from speaking. Rather, what Plaintiffs have lost is one (but not all) of their remedies for past alleged searches and constraints on their speech. They cite no authority for the proposition that they have a protected liberty interest in that claimed remedy.

Further, § 802 deprives Plaintiffs of at most a minimal property interest. As this Court explained in one of the very cases on which Plaintiffs rely (at 37), "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained," and this Court has "rejected . . . procedural due process challenges to statutes cutting off the right to sue on this ground." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005) (emphasis and internal quotation marks omitted); *see also Austin v. City of Bisbee*, 855 F.2d 1429, 1435-36 (9th Cir. 1988) (explaining that a cause of action "is inchoate and affords no definite or enforceable property right until reduced to final judgment") (internal

quotation marks omitted).[22] In the due process balancing inquiry, Plaintiffs' interest is thus entitled to little if any weight, and the process they received was enough under the circumstances to satisfy the Constitution's flexible demands. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *see also Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

A. The Attorney General Was Neither an Adjudicator Nor Biased

The Attorney General's implementation of § 802 did not violate due process. The Attorney General was not acting as an adjudicator, and his conduct is therefore not subject to the standards that Plaintiffs invoke, which apply to judges and quasi-judicial administrators. In any event, Plaintiffs' focus (at 40) on the Attorney General's "institutional responsibilities" raises no due process question even under the standard applicable to judicial and quasi-judicial acts.

1. As all parties appear to agree, the Attorney General did not perform the quasi-judicial function of adjudicating Plaintiffs' claims or Defendants'

[22] Because it is clear that Plaintiffs' due process challenges fail for other reasons, this Court need not address whether Plaintiffs had *any* protected property interest in their unadjudicated causes of action. *Cf.*, *e.g.*, *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989-90 (9th Cir. 1987) (discussing the issue). However, Defendants reserve the right to argue that Plaintiffs had no such interest. Defendants do not concede, as Plaintiffs argue (at 37), that *Logan* or *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), settled that question categorically for all causes of action. More recent Supreme Court precedent strongly suggests that neither did so. *See Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001) ("assum[ing], without deciding," that a "claim for payment under [certain] contracts" amounted to a protected property interest).

immunity to those claims.[23] Instead, he performed the executive function of presenting evidence to the district court in a manner that protected classified information. *See supra* pp. 25-28. Because no one has contended that the Attorney General acted as an adjudicator, Plaintiffs' arguments (at 39-40) that he failed to meet the due process standards that apply to adjudicators are irrelevant. *See Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 618-20 (1993) (holding that the due process requirements for adjudicators do not apply to parties such as plaintiffs or prosecutors).[24] And Plaintiffs do not contend (nor could they) that the Attorney General was biased under the harder-to-meet standard that applies to government actors in a nonadjudicatory role, such as prosecutors. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243-44 (1980).[25]

2. Even taken on their own terms, moreover, Plaintiffs' accusations of bias against the Attorney General lack merit. As the Supreme Court has

[23] *See* Br. 39-40 ("Attorney General Mukasey did not act as an adjudicator and did not conduct an adjudication.").

[24] Both *Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley*, 114 F.3d 840, 843-44 (9th Cir. 1997), and *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995), on which Plaintiffs rely (at 40), involved claims of bias on the part of adjudicators.

[25] *See also Baran v. Port of Beaumont Navigation Dist.*, 57 F.3d 436, 444-45 (5th Cir. 1995) ("strict requirements of neutrality" are inapplicable to "nonjudicial decisionmakers," who must only "serve the public interest and not be motivated by improper factors or otherwise act contrary to law") (internal quotation marks omitted).

recognized, even an adjudicator's policy views rarely implicate the Due Process Clause, *see Tumey v. Ohio*, 273 U.S. 510, 523 (1927), and courts "presum[e]" that adjudicators act with "honesty and integrity," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Due process concerns generally arise only when an adjudicator has a personal or institutional "*pecuniary* interest in reaching a conclusion against" a particular party in a case before him. *Tumey*, 273 U.S. at 523 (emphasis added); *see also United Farm Workers of Am. v. Arizona Agric. Employment Relations Bd.*, 727 F.2d 1475, 1478 (9th Cir. 1984) (en banc) (existence of a financial interest is the "cornerstone of unconstitutional bias in the adjudicatory context").

Plaintiffs do not attempt to show that the Attorney General had any financial interest, personal or institutional, in the outcome of these cases. Rather, they contend (at 40-41) that the Attorney General labored under a "structural" or "institutional" bias arising from his "policymaking duties" within the executive branch. That contention, however, describes a condition that is pervasive in the modern administrative state. Executive officials routinely hold both policymaking and adjudicatory responsibilities, and that combination of roles does not offend due process. *See Withrow*, 421 U.S. at 47, 52; *see also Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104-07 (D.C. Cir. 1988) (explaining that *Withrow* rejected any "due process challenge directed broadly to combinations of purposes or functions in the modern administrative state").

For similar reasons, the Attorney General's prior public statements concerning § 802 raise no due process concerns. A decisionmaker who has gained "familiarity with the facts of a case . . . in the performance of [a] statutory role" or "taken a position, even in public, on a policy issue related to the dispute" is not disqualified absent a "showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (internal quotation marks omitted); *see also FTC v. Cement Inst.*, 333 U.S. 683, 700-03 (1948) (rejecting a claim that an agency was unconstitutionally biased because of prior statements that certain pricing practices violated federal antitrust law). Here, the Attorney General's statements merely expressed agreement with the policy judgment embodied in § 802. Without more, these general policy views—which coincide with Congress's own, *see, e.g.*, ER454; Decl. of Kurt Opsahl Ex. 73, MDL No. 06-1791 (filed Oct. 16, 2008) (Dkt. No. 479)—do not even remotely suggest that the Attorney General could not carry out his statutory responsibilities fairly and do not "overcome the presumption of [his] honesty and integrity," *Hortonville*, 426 U.S. at 497.

B. Section 802's Substantial-Evidence Standard Is Constitutional

Chief Judge Walker's conscientious (and undisputedly impartial) review and approval of the Attorney General's certification likewise did not offend due

process. Congress is free to define the standards under which civil actions proceed, and there is nothing constitutionally objectionable about the familiar substantial-evidence standard it chose in § 802.

1. Section 802 provides for some deference to the executive, but Congress intended to—and did—authorize the district court to undertake a meaningful, independent judicial review of the facts.[26] It is hardly unknown for a court to hold that an official's or agency's position is unsupported by substantial evidence in the record as a whole. *See, e.g.*, *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909 (9th Cir. 2006). The Attorney General bore the burden of establishing a statutory prerequisite for immunity, and, in assessing whether he had met that burden, the district court permitted Plaintiffs to submit more than 3,000 pages of documentary material. *See* MDL No. 06-1791, Dkt. Nos. 486-495. Plaintiffs have offered no basis for concluding that the evidentiary standard the district court applied was constitutionally inadequate.

That is particularly so in light of "the need to defer to the Executive on matters of foreign policy and national security." *Al-Haramain Islamic Found., Inc.*

[26] *See* 154 Cong. Rec. S6371, 6383 (daily ed. July 8, 2008) (noting court's "important role in determining whether statutory requirements for liability protection have been met") (statement of Sen. Rockefeller); *id.* ("substantial evidence" standard "is a higher, tougher standard than the 'abuse of discretion' test we had in the Senate bill"); *id.* (Plaintiffs "are provided the opportunity to brief the legal and constitutional issues before the court and may submit documents to the court for review. Whatever it is they want to submit, they can submit.").

v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) ("acknowledg[ing] the need to defer to the Executive on matters of foreign policy and national security"). For example, courts routinely show "great deference" to the government's position in determining whether documents are exempt from disclosure under the Freedom of Information Act on the ground that they would reveal intelligence sources and methods, *see, e.g.*, *CIA v. Sims*, 471 U.S. 159, 179 (1985), and accord "substantial weight" to government affidavits, *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992).[27] Courts have given *conclusive* weight to the executive's views in matters involving immunities related to foreign affairs.[28] Executive certifications invoking the state-secrets privilege are similarly entitled to even greater deference than certifications under § 802. *See, e.g.*, *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) ("utmost deference").

Further, there is no reason to think a standard less deferential than substantial evidence would be more likely to yield a correct result given the nature

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[27] *See also Berman v. CIA*, 501 F.3d 1136, 1140-42 (9th Cir. 2007); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

[28] *See Ye*, 383 F.3d at 625 ("[T]he Executive Branch's suggestion of [head-of-state] immunity is conclusive and not subject to judicial inquiry."); *United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004) (giving conclusive weight to State Department certification that criminal defendant did not have diplomatic status and rejecting argument that procedures violated due process); *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984) ("[C]ourts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status.").

of the factual questions at issue in § 802 or would strike a more appropriate balance between competing interests. *See Mathews*, 424 U.S. at 334-36 (process due depends on relevant "balance of interests"); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 528-34 (2004). The factual questions at issue are straightforward, and turn largely on whether a defendant received one of the forms of written authorization specified in § 802 or participated in the alleged intelligence activities at all.[29] Because the most probative evidence is classified, the government is the only party in a position to provide the court with that evidence. In light of the straightforward nature of the issues to be resolved, little would be gained from a less deferential mode of review. By requiring the district court to undertake meaningful, independent consideration of evidence submitted to it while giving appropriate deference to the executive branch, the substantial-evidence requirement thus reasonably balances Plaintiffs' minimal (or nonexistent) interest in their causes of action, *see Fields*, 413 F.3d at 956, against the government's substantial interest in preserving national security.[30]

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[29] Indeed, the objective nature of the factual questions at issue in the certification "as a practical matter limit[s] the opportunity [the Attorney General] might otherwise have to act unfairly toward [Plaintiffs]." *Concrete Pipe*, 508 U.S. at 632 (upholding rebuttable presumption requiring arbitrator to treat plan actuaries' calculation of amount of employer withdrawal liability as conclusive).

[30] Plaintiffs argue (at 43) that the deference embodied in § 802's substantial-evidence requirement renders it an "appellate standard of review," rather than a "standard of proof for a trial *de novo*." Because the Attorney General conducted

2. Plaintiffs' reliance on *Concrete Pipe* is misplaced. That case (which had nothing to do with national security) involved a challenge to an assessment imposed on a company that withdrew from a multi-employer pension plan. The Court concluded that the plan trustees who imposed the assessment were biased in favor of imposing greater withdrawal liability. As fiduciaries of the ERISA plan, the trustees bore an "unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties," and they faced the threat of "personal liability" for any breach of that fiduciary duty. 508 U.S. at 616-17 (internal quotation marks omitted). In addition, the trustees had a pecuniary interest in maximizing the plan's assets to avoid personal liability for any shortfall of funds. *See id.* at 617. In this case, by contrast, the Attorney General did not stand to gain personally and certainly owed Defendants no fiduciary obligation.

In any event, the Court in *Concrete Pipe rejected* the employer's due process challenge. *See id.* at 621-30. In so doing, the Court did not hold, as Plaintiffs contend (at 43), that anything other than "trial *de novo*" on all legal and factual

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no adjudication, the district court necessarily had no appeal before it. Instead, it received evidence from the government and submissions from Plaintiffs and decided whether, in light of "the record as a whole," the Attorney General had supported his submission with "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Desrosiers v. Secretary of HHS*, 846 F.2d 573, 576 (9th Cir. 1988). Plaintiffs offer no persuasive reason why it was either impossible or unconstitutional for the district court to make that determination in the first instance.

questions, with no deference to the executive branch, would violate due process. To the contrary, even given the trustees' strong financial incentives and fiduciary obligation, the Court approved a burden-shifting framework under which the trustees' initial liability determination was "presumed correct" unless the employer met its burden to disprove the trustees' factual determinations by a preponderance of the evidence. *Concrete Pipe*, 508 U.S. at 611, 629-30. The difference between that framework and the procedure created by § 802 is not of constitutional dimension, especially in light of traditional judicial deference in matters concerning national security.[31]

3. Plaintiffs' reliance on *Hamdi v. Rumsfeld* is also misplaced. Plaintiffs' interest in their causes of action against the carriers (if they have one at all) is modest compared to the "elemental . . . liberty interests" of the detainees in *Hamdi*, who faced indefinite detention. 542 U.S. at 529. Moreover, unlike Plaintiffs here, who have little or no actual knowledge about the facts relevant to

[31] Plaintiffs also err when they rely on *Marshall v. Jerrico* for the proposition that due process requires "trial *de novo*" by an adjudicator who owes no deference to the Attorney General. Br. 42. In that case, the Court rejected a due process challenge to an agency enforcement scheme on the ground that the asserted bias (a pecuniary interest) was "too remote and insubstantial to violate the constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions." 446 U.S. at 243-44; *see also id.* at 250-51. The decision did not turn on the availability of nondeferential review, which the Court mentioned only in passing in describing the statutory scheme. *See id.* at 245, 247.

§ 802 immunity, individuals accused of being terrorists will almost always possess important evidence about their past conduct. A decisionmaking process that did not give weight to that evidence would increase the risk of error and unfairness—a concern not present here. Finally, the standard rejected in *Hamdi* was not substantial evidence, but a significantly more deferential "some evidence" standard. *See id.* at 527.[32] Indeed, the Court in *Hamdi* specifically recognized that Congress could adopt a presumption in favor of the government's evidence without violating due process. *See id.* at 534. If that approach is permissible in dealing with the weighty interests at stake in *Hamdi*, there can be no doubt that the substantial-evidence requirement of § 802 comports with due process.[33]

C. Section 802's Procedure for *Ex Parte, In Camera* Review Is Constitutional

The district court also correctly rejected Plaintiffs' due process challenge to the *ex parte* procedure for consideration of a certification under § 802 when the Attorney General submits a declaration that disclosure of the certification "would

[32] The "some evidence" standard "does not require examination of the entire record," but only of those portions that support the government's position. *E.g.*, *Superintendent, Massachusetts Corr. Inst. v. Hill*, 472 U.S. 445, 455 (1985). The substantial-evidence standard adopted by § 802, on the other hand, requires the district court also to weigh "the evidence that detracts from" the government's position. *Desrosiers*, 846 F.2d at 576.

[33] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which Plaintiffs also cite (at 44 n.6), was a habeas corpus Suspension Clause case that involved no due process issue comparable to the ones Plaintiffs raise. It has no relevance here.

harm the national security of the United States." 50 U.S.C. § 1885a(c). Section 802 strikes an appropriate balance between competing interests and is similar to other statutes and procedures providing for *ex parte* review of national-security information that have been upheld against constitutional challenge.

1. Congress has enacted numerous statutes providing for *ex parte* review of national-security information in civil cases, and courts have consistently held that these provisions do not violate due process. For example, the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189, and the International Emergency Economic Powers Act, 50 U.S.C. § 1702(c), authorize *ex parte* review of classified evidence in proceedings to freeze the assets of organizations that are determined to assist or sponsor terrorism. In *Holy Land Foundation for Relief & Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), the D.C. Circuit rejected the plaintiff's complaint that its designation as a terrorist entity was based upon classified evidence to which it had no access, emphasizing "the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive's compelling interest in withholding national security information from unauthorized persons." *Id.* at 164 (internal quotation marks omitted).[34] The D.C. Circuit has likewise upheld aviation regulations

[34] *See also Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 208 (D.C. Cir. 2001).

permitting revocation of airman certificates based on classified intelligence reports that are reviewed by the court *ex parte*. *See Jifry v. FAA*, 370 F.3d 1174, 1182-84 (D.C. Cir. 2004). And *ex parte* review of classified materials to determine whether the state-secrets privilege has been properly invoked is "unexceptionable." *Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir. 1998).

Courts have also consistently rejected due process challenges by criminal defendants to *ex parte* judicial review under 50 U.S.C. § 1806(f) of the lawfulness of FISA surveillance being used against them by the prosecution. Denying one such challenge, this Court explained that "Congress has a legitimate interest in authorizing the Attorney General to invoke procedures designed to ensure that sensitive security information is not unnecessarily disseminated to *anyone* not involved in the surveillance operation in question." *United States v. Ott*, 827 F.2d 473, 477 (9th Cir. 1987); *see also, e.g.*, *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982).

In this case, even if § 802 said nothing about *in camera* review, Attorney General Mukasey could have invoked the state-secrets privilege as to his certification. If, upon review of the certification *in camera* and *ex parte*, the court concluded that it provided the carrier defendants with a defense under § 802, then the carriers would be entitled to summary judgment. Because § 802 deprives

Plaintiffs of nothing to which they would otherwise have been entitled, Plaintiffs' assertion that § 802 violates due process is plainly wrong.

2. Plaintiffs recognize that the process due in any given situation depends on the relevant "balance of interests." Br. 52; *see Mathews*, 424 U.S. at 334-35. They do not dispute that, in one class of cases involving classified national-security information—terrorist designation cases—the relevant balance permits *ex parte* review. They nevertheless summarily assert (at 51-52) that the balancing is materially different for § 802. That assertion cannot withstand scrutiny.

First, the nondisclosure provisions Plaintiffs challenge further the government's paramount interest in safeguarding the confidentiality of its intelligence-gathering sources and methods. *See Egan*, 484 U.S. at 527; *Al-Haramain*, 507 F.3d at 1204. Congress found that the "highly classified" information at issue in these cases included "sources and methods of intelligence," ER391 (S. Rep. at 9), and Plaintiffs cannot dispute that finding.

Second, Plaintiffs' interest here is less weighty than the comparable interests in the designation context. Entities designated as terrorist organizations face crippling consequences, such as "order[s] blocking all of [their] assets." *Holy Land Found.*, 333 F.3d at 159. By contrast, Plaintiffs' property interest in their unadjudicated claims, if it exists at all, is modest. *See supra* pp. 38-39.

Third, as discussed, the risk of an erroneous deprivation is much smaller here than in the designation context. Determining whether an organization should be designated as a terrorist entity is more complicated than assuring that the requirements of § 802 have been met. *See supra* pp. 44-45, 47-48. Accordingly, permitting Plaintiffs access to the government's submission would not meaningfully decrease the already small risk of error under § 802. For all of these reasons, *ex parte* proceedings are as appropriate here as in the designation context.

3. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995) ("*AADC*"), is not to the contrary. In *AADC*, this Court affirmed an injunction prohibiting the Immigration and Naturalization Service ("INS") from using undisclosed classified evidence to deny legalization to resident aliens that the government alleged were members of a group that advocated unlawful acts. *See id.* at 1054, 1066-71. The Court found that, in the context of a legalization hearing, the applicable "statutory scheme d[id] not support use of summary process which relies on secret information." *Id.* at 1068.

Having already reached that conclusion, the *AADC* Court went on to state that the INS's procedures violated due process. The Court wrote that the aliens, who had resided in the United States "for more than a decade," had a "strong liberty interest in remaining in their homes." *Id.* at 1068-69. By contrast, the government had offered "no evidence" in support of its claimed national-security

interest. *Id.* at 1069. Further, the Court found an "exceptionally high risk" that failing to disclose the evidence against the aliens would result in an erroneous decision regarding whether they were members of a group that "advocate[d] prohibited doctrines." *Id.* at 1069-70; *see also id.* at 1054 n.4. The *AADC* Court thus concluded that *ex parte* proceedings violated due process. This latter discussion was unnecessary to the Court's decision and so was *dicta*. In any event, the balance of interests in *AADC* was quite different from the balance here. As discussed above, Plaintiffs' interest is insubstantial or nonexistent, the government's interest (supported by extensive bipartisan congressional findings) is significant, and the risk of error is low.

4. Plaintiffs suggest (at 52) that 50 U.S.C. § 1806(f) offers a model for adjudicating this case but overlook that § 1806(f) anticipates that the determination of the lawfulness of FISA surveillance generally will be conducted "in camera and ex parte." 50 U.S.C. § 1806(f). Disclosure of relevant information may occur "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id*. Our research has revealed no instance (and Plaintiffs cite none) in which a court has ordered disclosure of classified information under the provision.[35]

[35] *See United States v. Sattar*, No. 02 Cr. 395, 2003 WL 22137012, at *6 (S.D.N.Y. Sept. 15, 2003) (stating that, as of late 2003, the government had represented it was also unaware of any such order).

Plaintiffs' reliance on the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. III, is similarly misplaced. CIPA, too, contemplates that a court will make *ex parte* determinations in dealing with classified material. *See* 18 U.S.C. app. III §§ 4, 6(c)(2). Further, CIPA applies to criminal cases (as does, in almost all circumstances, § 1806(f)), where the liberty interest is stronger. In criminal cases, the government also has the option of declining to prosecute, and so ensuring that classified information is not disclosed.

In any event, the procedures established by § 1806(f) and CIPA are not constitutionally required here. Congress could reasonably conclude that the details of sources and methods that litigation subject to § 802 would disclose are particularly sensitive and deserve especially careful judicial treatment, and that the minimal property interests of plaintiffs in such cases are not as weighty as the liberty interests of the criminal defendants who usually seek disclosures under § 1806(f) or CIPA.

Finally, Plaintiffs' contention (at 53) that § 802 violates due process by limiting the contents of court orders also should be rejected. As demonstrated above, *ex parte* proceedings did not deprive Plaintiffs of due process. It necessarily follows that due process did not require the district court to reveal the content of any protected materials relevant to the court's decision. In the state-secrets and other contexts calling for *ex parte* and *in camera* review of classified

information, courts have emphasized that the information at issue should not be disclosed in the course of deciding the case or the government's claim of privilege. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Al-Haramain*, 507 F.3d at 1203. Surely they have not violated the Constitution in doing so.

III. SECTION 802 DOES NOT VIOLATE ARTICLE III

Plaintiffs' final two arguments concern Article III. They say that § 802 unconstitutionally deprives the courts of a meaningful role in reviewing the Attorney General's certification and unconstitutionally deprives Plaintiffs of the ability to seek injunctive relief against the telecommunications carriers for claimed constitutional torts. These arguments fail. The district court performs a traditional judicial function when it conducts substantial-evidence review under § 802, and Plaintiffs have no constitutional right to sue a particular class of private defendants for alleged constitutional violations where Congress has not foreclosed alternative remedies against the government.

A. Section 802 Preserves an Independent Judicial Role

Plaintiffs' argument (at 54) that § 802 impermissibly requires the courts to engage in "meaningless" review of the Attorney General's certification lacks merit. Congress expressly preserved an independent role for the courts in reviewing the factual basis for a certification under § 802 by adopting a substantial-evidence standard. This standard fits well within accepted notions of the judicial role.

1. Decades of precedent recognize that courts perform a proper judicial function under Article III when they review executive or administrative factual determinations under deferential standards. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) (courts reviewing for substantial evidence do not "abdicate the conventional judicial function"); *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (Article III does "no[t] require[ ] that . . . all determinations of fact in constitutional courts shall be made by judges"); *United States v. Raddatz*, 447 U.S. 667, 682 n.10 (1980) ("The *Crowell* Court rejected a wholesale attack on any delegation of factfinding to the administrative tribunal."). These cases foreclose Plaintiffs' argument that substantial-evidence review is constitutionally suspect. That argument would also invalidate many statutes providing that administrative agencies' factual findings are "conclusive" if supported by substantial evidence. *E.g.*, 12 U.S.C. § 1848; 15 U.S.C. § 78y(a)(4); 19 U.S.C. § 2395(b). And deferential review is particularly appropriate here because § 802 implicates intelligence-gathering and national security—areas in which courts have traditionally given substantial and even conclusive weight to executive factual submissions. *See supra* pp. 34-35.

In addition, there is no merit to Plaintiffs' contention (at 57) that § 802 violates Article III by confining judicial review to "the government's evidence alone." Section 802(d) permits participation by the parties, and Plaintiffs

submitted reams of material below. *See* ER456-521. It is true that, as a practical matter, the most probative evidence will be provided by the government because the government's intelligence activities and the private assistance it receives are tightly held secrets. *See supra* pp. 44-45. But that practical outcome results from the nature of the relevant factual questions and raises no constitutional concern.

2. Plaintiffs rely (at 55-56) on *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Crim v. Handley*, 94 U.S. 652 (1877). Those cases do not help them. *Plaut* held only that Congress may not compel the courts to reopen final judgments, which § 802 clearly does not do. 514 U.S. at 240. And the language Plaintiffs quote from *Crim* concerns only the common-law rules for reexamining facts found by a jury under the Seventh Amendment; it has nothing to do with Article III. 94 U.S. at 657.[36]

[36] Before the district court, Plaintiffs relied heavily on *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), which contains broad language that has never been applied literally, suggesting that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. On appeal, Plaintiffs do not even cite *Klein*, and for good reason. As the district court explained, *see* ER14-20, § 802 poses no problem under *Klein* because Congress did not direct the court to make particular findings or otherwise purport to dictate an outcome to these cases, but rather amended applicable law by enacting a new immunity defense. *See, e.g., Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1150 (9th Cir. 2005) (legislation affecting pending cases is permissible "so long as it changes the underlying substantive law in any detectable way") (internal quotation marks omitted).

B. Congress May Eliminate Remedies Against Private Parties for Alleged Constitutional Violations

1. Finally, there is no merit to Plaintiffs' claim (at 58) that § 802 violates Article III and due process by "den[ying them] any judicial remedy . . . for their federal constitutional claims" against Defendants. As the district court correctly concluded, § 802 in no way prevents Plaintiffs from "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." ER12. Because § 802 does not affect suits against the ultimate authors of the constitutional violations Plaintiffs allege occurred, this case does not remotely present "the 'serious constitutional question' that would arise if a statute were construed to deny any judicial forum for a colorable constitutional claim," *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Congress's decision to leave undisturbed suits against the government and government officials was a deliberate choice arrived at during the lengthy and careful legislative process, and was important to the bill's broad bipartisan support. *See* ER390 (S. Rep. at 8) ("Nothing in [§ 802] is intended to affect . . . suits against the Government or individual Government officials."). Multiple complaints in the MDL seek relief—including injunctive relief—against government actors for the same alleged constitutional violations. *See* ER12 (listing some but not all such cases). As Plaintiffs have conceded, these cases "raise identical legal questions" as

the cases against the carriers. Admin. Mot. by Pls. To Consider Whether Cases Should Be Related at 3, *Hepting v. AT&T Corp.*, No. C 06-0672 (N.D. Cal. filed Oct. 21, 2008) (Dkt. No. 383).

Section 802 therefore creates no constitutional problem. The Supreme Court has squarely held that Congress may eliminate remedies against particular defendants alleged to have participated in unconstitutional government action when claims against the government remain available. *See Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 343 (1937) ("the substitution of an exclusive remedy directly against the government" for a constitutional claim against a particular state actor "is not an invasion of [a] constitutional right"); *Burrill v. Locomobile Co.*, 258 U.S. 34, 38 (1922) ("[W]e do not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as here, the remedy offered is adequate and backed by the responsibility of the State."). *Anniston* and *Burrill*, moreover, involved claimed refunds of unconstitutional taxes, where due process requires a "clear and certain remedy." *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912).

2. The district court recently ruled that the plaintiffs in *Jewel v. NSA*, No. C 08-4373, and *Shubert v. Obama*, No. C 07-0693, lacked standing to pursue their claims against the government defendants in those cases. The correctness of

that decision is not yet before this Court. Whether correct or not, it bears no implications for the present appeal.

If some or all plaintiffs lack standing to bring suit directly against government officials for the same injuries alleged in this case, that is because they have suffered the kind of "widely shared" injuries for which "the political process, rather than the judicial process . . . , provide[s] the more appropriate remedy." *FEC v. Akins*, 524 U.S. 11, 23 (1998). Any plaintiffs who can show a specific, concrete injury can proceed against the government defendants without any difficulty of standing.[37] As for those who cannot, Article III can scarcely be interpreted to *prohibit* an action against the government actors who allegedly devised an unconstitutional scheme and yet at the same time *require* one against private actors whose alleged role in the alleged scheme was distinctly secondary.

3. Plaintiffs identify nothing that carves their claim out from the general principle that Congress has control over the remedies available in the federal courts. The cases they cite (at 60) stand only for the proposition that courts generally have power to award equitable relief for constitutional violations.[38]

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[37] For example, this Court observed in *Al-Haramain* that the plaintiffs in that case might be able to establish standing based on a particular classified document allegedly showing that they had been surveilled, if they could overcome the government's assertion of the state-secrets privilege. *See* 507 F.3d at 1205-06.

[38] Before the district court, Plaintiffs claimed they also had a constitutional right to a damages action against Defendants. On appeal, Plaintiffs limit their argument to

None holds that such relief is constitutionally required against particular defendants. Congress undoubtedly has the power to limit or eliminate injunctive relief for constitutional violations when adequate alternative relief remains available. *E.g.*, *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990) (holding that the Tax Injunction Act barred constitutional claims); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 (1974) (same for Anti-Injunction Act); *American Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1038 (9th Cir. 2007) ("Congress may restrict the availability of injunctive relief" for constitutional violations if its intent to do so is clear) (internal quotation marks omitted). Here, remedies against government agencies and officials remain available to those who can show injury from agency or official conduct. Congress thus acted well within its authority when it eliminated claims against Defendants.

Plaintiffs argue that injunctive relief against Defendants is necessary to "prevent and deter" future violations, Br. 59; *see generally* Br. 58-60, but offer no persuasive explanation why. According to Plaintiffs' own allegations, federal officers and agencies—not Defendants—instigated, directed, and controlled the alleged electronic-surveillance activities giving rise to the claimed constitutional

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injunctive relief, presumably in belated recognition of the Supreme Court's holding that the Constitution does not "confer a right of action for damages against private entities acting under color of federal law." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001).

injuries. The United States and its officers enjoy no immunity from suits seeking to enjoin them from violating the Constitution.[39] *See* 5 U.S.C. § 702; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). An injunction against government officials would be a more complete and effective remedy than one against particular private telephone companies.

Even were that not the case, § 802 still would be constitutional. Congress may eliminate constitutional remedies even when alternative remedies are "not as effective" and "do not provide complete relief for the plaintiff." *Bush v. Lucas*, 462 U.S. 367, 372, 388 (1983); *see also Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). That is because, even for constitutional claims, "[t]he Constitution . . . leaves the remedies to Congress." *Burrill*, 258 U.S. at 38. As Professor Hart taught, "the denial of one remedy while another is left open, or the substitution of one for another," is constitutionally unproblematic. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953).

CONCLUSION

For the reasons set forth above, the district court's judgment should be affirmed.

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[39] For the same reason, § 802 does not, as Plaintiffs claim (at 61), "allow Congress and the Executive, and not the courts, to be the ultimate arbiter of the content of constitutional rights." A dismissal under § 802 says nothing about the constitutionality or legality of the alleged surveillance activities.

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Respectfully submitted,

/s/ Michael K. Kellogg

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RULE 25-5(e) ATTESTATION

In accordance with Ninth Circuit Rule 25-5(e), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ Michael K. Kellogg

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees state that the appeals in *McMurray v. Verizon Communications Inc.*, No. 09-17133 (9th Cir. docketed Sept. 28, 2009), and *Conner v. AT&T Corp.*, No. 09-17754 (9th Cir. docketed Dec. 10, 2009), are related to this case because they arise out of cases that were consolidated in the district court.

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 28-4 FOR CASE NUMBER 09-16676 ET AL.

I certify that this brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4 and granted by court order dated November 19, 2009. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is 15,388 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Michael K. Kellogg

February 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 10, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first-class mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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