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

IN RE: MDL Docket No 06-1791 VRW
NATIONAL SECURITY AGENCY ORDER
TELECOMMUNICATIONS RECORDS
LITIGATION

This Document Relates To All Cases
Except:

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

The United States has moved to dismiss "all claims against the electronic communication service providers" in the cases in this multidistrict litigation (MDL) matter brought by individuals against telecommunications companies. Doc #469 at 23. The single ground for dismissal in the government's motion is section 802 of FISA, part of the FISA Amendments Act of 2008, Pub L No 110-261, 122 Stat 2436 (FISAAA), enacted July 10, 2008 and codified at 50 USC § 1885a. In response to the government's motion

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1 to dismiss, plaintiffs, alleged to be customers of the various
2 telecommunications companies named as defendants in these actions,
3 have advanced a variety of constitutional challenges to the
4 provisions of FISAAA upon which the government relies in seeking
5 dismissal. Doc #483. For the reasons presented herein, these
6 challenges must be rejected and the government's motion to dismiss
7 GRANTED.

8
9 I

10 A

11 In December 2005, news agencies began reporting that
12 President George W Bush had ordered the National Security Agency
13 (NSA) to conduct eavesdropping of some portion of
14 telecommunications in the United States without warrants and that
15 the NSA had obtained the cooperation of telecommunications
16 companies to tap into a significant portion of the companies'
17 telephone and e-mail traffic, both domestic and international.
18 See, e g, James Risen and Eric Lichtblau, Bush Lets US Spy on
19 Callers Without Courts, NY Times (Dec 16, 2005). In January 2006,
20 the first of dozens of lawsuits by customers of telecommunications
21 companies were filed alleging various causes of action related to
22 such cooperation with the NSA in warrantless wiretapping of
23 customers' communications. See, e g, Hepting v AT&T Corp, C 06-
24 0672 VRW (ND Cal filed January 31, 2006). Several such cases were
25 originally venued in the Northern District of California; others
26 were filed in federal district courts throughout the United States.
27 The cases typically alleged federal constitutional and statutory
28 violations as well as causes of action based on state law such as

1 breach of contract, breach of warranty, violation of privacy and
2 unfair business practices.

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

17 On August 9, 2006, the Judicial Panel on Multidistrict
18 Litigation ordered all cases arising from the alleged warrantless
19 wiretapping program by the NSA transferred to the Northern District
20 of California and consolidated before the undersigned judge.

21 On January 5, 2007, the court ordered the plaintiffs in
22 the cases brought against telecommunications company defendants to
23 prepare, serve and file master consolidated complaints for each
24 telecommunications company defendant. See master consolidated
25 complaints at Doc #123 (T-Mobile and related companies), Doc #124
26 (Sprint and related companies), Doc #125 (MCI & Verizon companies),
27 Doc #126 (Bellsouth) and Doc #455 (Cingular & ATT Mobility
28 companies). Unlike the remaining cases in this MDL matter, no

1 government entities were named as defendants in these actions;
2 rather, the United States made itself a party by intervening in
3 these actions in order to obtain a posture from which to seek their
4 dismissal.

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

12 On September 19, 2008, the United States filed its motion
13 to dismiss all claims against telecommunications company defendants
14 in these cases, including the pending master consolidated
15 complaints. The two categories of cases not targeted for dismissal
16 in the United States' instant motion to dismiss are those brought
17 against governmental entities (Al-Haramain Islamic Foundation, Inc
18 v Bush, No C 07-0109; Center for Constitutional Rights v Bush, No C
19 07-1115; Guzzi v Bush, No C 06-6225; Shubert v Bush, No C 07-0693)
20 and those brought by the United States against state attorneys
21 general (United States v Clayton, C 07-01242; United States v
22 Palermino, C 07-01326; United States v Farber, C 07-01324; United
23 States v Reishus, C 07-01323; United States v Volz, C0 7-01396;
24 Clayton v ATT, C 07-01187). The latter six actions by the United
25 States against states are the subject of a separate motion for
26 summary judgment brought under section 803 of FISAAA, 50 USC
27 § 1885b (Doc #536) and a separate order by the court.

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B

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

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

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

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

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

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

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

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

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

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

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

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

(i) authorized by the President; and

(ii) determined to be lawful; or

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

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

Section 802(b)(1) sets out the standard for judicial review of a certification: "A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section." The statute does not define "substantial evidence," so courts presumably are to employ definitions of that standard articulated in other contexts. The United States, for example, cites a social security case, McCarthy v Apfel, 221 F3d 1119, 1125 (9th Cir 2000) (Doc #469 at 22), which defines the substantial evidence standard as "such relevant evidence as a reasonable mind might, upon consideration of the

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1 entire record, accept as adequate to support a conclusion." The
2 substantial evidence standard appears to have been in use for
3 nearly a century in federal courts in a form closely resembling
4 that in use today. In 1912, the Supreme Court applied the standard
5 in Int Com Comm v Union Pacific RR, 222 US 541, 548 ("not that its
6 decision * * * can be supported by a mere scintilla of proof, but
7 the courts will not examine the facts further than to determine
8 whether there was substantial evidence to sustain the order"); see
9 also Edison Co v Labor Board, 305 US 197, 229 (1938) ("Substantial
10 evidence is more than a mere scintilla. It means such relevant
11 evidence as a reasonable mind might accept as adequate to support a
12 conclusion.")

13 Section 802(c) specifies the manner in which the court is
14 to deal with classified information. If the Attorney General files
15 an unsworn statement under penalty of perjury that disclosure of
16 the certification and related materials would harm the national
17 security, the court is obligated under section 802(c) to do two
18 things: (1) review the certification and any supplemental materials
19 in camera and ex parte; and (2) limit public disclosure concerning
20 such certification and the supplemental materials, including any
21 public order following such in camera and ex parte review, to a
22 statement whether the case is dismissed and a description of the
23 legal standards that govern the order, without disclosing the
24 specific subparagraph within subsection (a) that is the basis for
25 the certification.

26 Section 802(d) provides, regarding the role of the
27 parties, that any plaintiff or defendant in a civil action may
28 submit to the court "any relevant court order, certification,

1 written request, or directive" for review and "shall be permitted
2 to participate in the briefing or argument of any legal issue in a
3 judicial proceeding conducted pursuant to this section, but only to
4 the extent that such participation does not require the disclosure
5 of classified information to such party." It also requires the
6 court to review any relevant classified information in camera and
7 ex parte and to issue orders or parts of orders that "would reveal
8 classified information" in camera and ex parte and maintain them
9 under seal.

10
11 C

12 The United States and the telecommunications company
13 defendants quote extensively from the October 26, 2007 report of
14 the Senate Select Committee on Intelligence to accompany Senate
15 Bill 2248 (SSCI Report), S Rep No 110-209, 110th Cong, 1st Sess
16 (2007). Doc #469 & 508, passim; SSCI report docketed at #469-2.
17 Senate Bill 2248 was the original Senate bill that, together with
18 the House bill (H 3773), resulted in the compromise legislation
19 that ultimately passed both houses on July 8, 2008 (H 6304). See
20 FISA Amendments of 2008, HR 6304, Section-by-section Analysis and
21 Explanation by Senator John D Rockefeller IV, Chairman of the
22 Select Committee on Intelligence. Doc #469-2 at 51.

23 The SSCI Report included among the committee's
24 recommendations for legislation amending FISA that "narrowly
25 circumscribed civil immunity should be afforded to companies that
26 may have participated in the President's program based on written
27 requests or directives that asserted the program was determined to
28 be lawful." Doc #469-2 at 4. The SSCI Report included a lengthy

1 summary of the instant MDL cases, leaving no room for doubt that
2 these cases were the intended target of the new immunity provision:

3 BACKGROUND ON PENDING LITIGATION

4 CIVIL SUITS AGAINST ELECTRONIC COMMUNICATION SERVICE
5 PROVIDERS

6 After the media reported the existence of a surveillance
7 program in December of 2005, lawsuits were filed against a
8 variety of electronic communication service providers for
9 their alleged participation in the program reported in the
10 media. As of the date of this Committee report, more than
11 forty lawsuits relating to that reported surveillance
12 program had been transferred to a district court in the
13 Northern District of California by the Judicial Panel on
14 Multidistrict Litigation.

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

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

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

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1 SUITS AGAINST THE GOVERNMENT

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

13 Id at 8-9.²

14 II

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

28 ² The SSCI report also contained (at 8-9) several paragraphs
describing the suits by the United States seeking to enjoin
investigations by state attorneys general into alleged warrantless
wiretapping activities conducted with the cooperation of
telecommunications companies. These suits, referred to in Part I A
above, are part of this MDL and are addressed separately.

1 In opposing the motion to dismiss, plaintiffs advance a
2 number of challenges to the constitutionality of section 802,
3 asserting that constitutional defects make the statute
4 unenforceable. These challenges are properly presented and
5 considered in the context of the instant motion to dismiss and are
6 addressed on their merits in this order. In the alternative,
7 plaintiffs contend that section 802 is not applicable to, or does
8 not require dismissal of, the cases against the telecommunications
9 company defendants.

10
11 A

12 The court turns first to plaintiffs' argument, for which
13 they cite Marbury v Madison, 5 US 137 (1803), and Boumediene v Bush,
14 553 US ___, 128 S Ct 2229 (2008), that Congress and the executive
15 branch have improperly taken actions that leave no path open for
16 adequate judicial review of plaintiffs' constitutional claims.
17 Plaintiffs assert that in enacting FISAAA, Congress has "refused to
18 provide any alternative forum or remedy" for their constitutional
19 claims. Doc #483 at 11-15. The United States and the
20 telecommunications company defendants counter that while suits
21 against telecommunications companies are foreclosed, neither the
22 statute nor the government's actions prevent plaintiffs from seeking
23 redress for their constitutional claims against the government
24 actors and entities. Doc #520 at 12. Lest any further reassurance
25 be necessary, the SSCI report states: "The committee does not intend
26 for [section 802] to apply to, or in any way affect, pending or
27 future suits against the Government as to the legality of the
28 President's program." Doc #469-2 at 9.

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1 The court agrees with the United States and the
2 telecommunications company defendants on this point: plaintiffs
3 retain a means of redressing the harms alleged in their complaints
4 by proceeding against governmental actors and entities who are,
5 after all, the primary actors in the alleged wiretapping activities.
6 Indeed, the same plaintiffs who brought the Hepting v AT&T lawsuit
7 (C 06-0672 VRW) are now actively prosecuting those claims in a
8 separate suit filed in September 2008 against government defendants
9 before the undersigned judge. Jewell v United States, C 08-4373
10 VRW, filed September 18, 2008. Jewell thus joins several other
11 cases in this MDL which seek relief only against government
12 defendants. Al-Haramain Islamic Foundation, Inc v Bush, No C
13 07-0109; Center for Constitutional Rights v Bush, No C 07-1115;
14 Guzzi v Bush, No C 06-6225; Shubert v Bush, No C 07-0693.
15 Plaintiffs' argument that section 802 violates constitutional
16 principles by leaving plaintiffs no recourse for alleged violations
17 of their constitutional rights is therefore without merit.

18
19 B

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

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

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

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

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

25 The Supreme Court refused in Klein to give effect to
26 Congress' requirement that the Court view pardons of evidence of
27 disloyalty, as the requirement prevented the Court from giving "the
28 effect to evidence which, in its own judgment, such evidence should

1 have." Id at 147. The Court delicately noted: "We must think that
2 Congress has inadvertently passed the limit which separates the
3 legislative from the judicial power." Id. The Supreme Court
4 contrasted the circumstances presented in Klein with those in
5 Pennsylvania v Wheeling Bridge Co, 54 US 518 (1851), in which
6 Congress had deemed the eponymous bridge a "post road" to avoid the
7 consequences of a condemnation action against it as a "bridge." The
8 Supreme Court upheld the new law because "[n]o arbitrary rule of
9 decision was prescribed * * * but the court was left to apply its
10 ordinary rules to the new circumstances created by the act." Klein,
11 80 US at 146-47.

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

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

1 Northwest Timber Compromise," 503 US at 433, provided that

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

9 In response to motions to dismiss based on the new statute,
10 plaintiffs argued that the above-quoted provision violated Article
11 III of the Constitution. Id at 436. The district courts upheld the
12 statute and dismissed the respective lawsuits, but the Ninth Circuit
13 (on consolidated appeals) reversed, holding that the compromise
14 violated the separation-of-powers principle under Klein because "the
15 first sentence of § 318(b)(6)(A) 'does not, by its plain language,
16 repeal or amend the environmental laws underlying this litigation,'
17 but rather 'directs the court to reach a specific result and make
18 certain factual findings under existing law in connection with two
19 [pending] cases.'" Id.

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

1 the grounds that the statute amended applicable law, thus passing
2 constitutional muster. Id.

3 The Supreme Court further developed the connection between
4 Robertson and Klein in Plaut v Spendthrift Farm, Inc, 514 US 211
5 (1995): "Whatever the precise scope of Klein * * * later decisions
6 have made clear that its prohibition does not take hold when
7 Congress 'amend[s] applicable law.'" Id at 218, citing Robertson,
8 503 US at 441. Plaut thus sets forth the principle that a statute
9 that amends applicable law, even if it is meant to determine the
10 outcome of pending litigation, does not violate the separation-of-
11 powers principle. And under Robertson, Congress amends applicable
12 law when it creates a new method to satisfy existing statutory
13 requirements, i e, when "compliance with certain new law constituted
14 compliance with certain old law." Robertson, 503 US at 440.

15 In Ecology Center v Castaneda, 426 F3d 1144 (2005), the
16 Ninth Circuit applied Robertson and Klein to facts like those in
17 Robertson: with litigation pending, Congress had enacted a forest-
18 specific management act which changed the criteria for approving
19 timber sales. Id at 1149. The Ninth Circuit held that the Act
20 changed the underlying law because it did not "direct particular
21 findings of fact or the application of old or new law to fact" but
22 still left to the district court the role of determining whether the
23 new criteria were met. Id. Ecology Center noted that a separation-
24 of-powers problem appears where "Congress has impermissibly directed
25 certain findings in pending litigation, without changing any
26 underlying law." Id at 1148, quoting Robertson, 503 US at 429. See
27 also Gray v First Winthrop Corp, 989 F2d 1564, 1569-70 (9th Cir
28 1993) ("Robertson indicates a high degree of judicial tolerance for

1 an act of Congress that is intended to affect litigation so long as
2 it changes the underlying substantive law in any detectable way.”).

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

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

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

27 Plaintiffs, meanwhile, contend that section 802 is
28 unconstitutional under the principles articulated in Klein because

1 "section 802 * * * forbids the Court from engaging in independent
2 fact-finding," Doc #483 at 30, and "section 802 violates the
3 separation of powers because it permits the Executive to dictate
4 that the Judiciary dismiss these actions without allowing the
5 Judiciary to make an independent determination of the facts on which
6 the dismissal is based." Doc #483 at 29. The United States
7 counters that "it is the Court that 'finds' whether the Attorney
8 General's certification is supported by substantial evidence
9 provided under Section 802 and, thus, whether dismissal will be
10 granted." Doc #520 at 17. Plaintiffs nonetheless contend that a
11 "substantial evidence" standard of review of the Attorney General's
12 certification, i e, his fact-finding, is "an unconstitutional
13 attempt to direct * * * particular findings of fact," citing
14 Robertson, 503 US at 438. Doc #483 at 30.

15 One amicus also argues that Congress, in enacting section
16 802, acted in a self-interested manner by "hiding unconstitutional
17 and unlawful conduct" and "hop[ing] for dismissal behind a facade of
18 judicial process" because of "intensive lobbying," "targeted
19 fundraising efforts" and "contributions" and that this somehow makes
20 section 802 unconstitutional. Doc #501 at 12-15. But the court's
21 role is limited to examining the product of the legislative process
22 to determine whether it accords with Constitutional rules for the
23 exercise of legislative power, not to second-guess that process.

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

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

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11 Plaintiffs assert that section 802(a) violates the
12 "nondelegation doctrine" under which Congress may not delegate law-
13 making power to the executive branch, citing Youngstown Sheet and
14 Tube Co v Sawyer, 343 US 579, 587 (1952). Doc #483 at 22-23.
15 Plaintiffs also quote Marshall Field & Co v Clark, 143 US 649, 692
16 (1892), the seminal case in which the Supreme Court wrote: "That
17 Congress cannot delegate legislative power to the President is a
18 principle universally recognized as vital to the integrity and
19 maintenance of the system of government ordained by the
20 Constitution." This is the most serious of plaintiffs' challenges.

21 Plaintiffs specifically assert, somewhat confusingly, that
22 Congress "has not changed the law governing plaintiffs' causes of
23 action," but, rather, "[b]y the act of filing certifications in this
24 Court, the Attorney General has purported to amend the statutes
25 governing plaintiffs' actions long after Congress enacted FISAAA and
26 the President signed it." Doc #483 at 24-25. As the court
27 understands plaintiffs' contention, section 802(a) specifies a good
28 many things that the Attorney General must do should he choose to
seek dismissal of a "covered civil action," but it does not actually

1 direct the Attorney General to take any steps up to and including
2 filing certifications, nor does it appear to establish any basis for
3 his exercise of discretion in determining whether to do so in a
4 particular case.

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

21 If Congress shall lay down by legislative act an
22 intelligible principle to which the person or body
23 authorized to fix such rates is directed to conform,
24 such legislative action is not a forbidden delegation
25 of legislative power. If it is thought wise to vary
26 the customs duties according to changing conditions of
27 production at home and abroad, it may authorize the
28 Chief Executive to carry out this purpose, with the
advisory assistance of a Tariff Commission appointed
under congressional authority.

27 Hampton & Co v United States, 276 US 394, 409 (1928). Chief Justice
28 Taft's "intelligible principle" test became the guiding principle

1 for non-delegation challenges and, indeed, remains so. See Whitman
2 v American Trucking Assns, Inc, 531 US 457, 487 (2001) (Thomas,
3 dissenting) ("this Court since 1928 has treated the 'intelligible
4 principle' requirement as the only constitutional limit on
5 congressional grants of power to administrative agencies * * *").

6 Congressional enactments during the 1930s and 1940s
7 prompted a number of non-delegation challenges; in just two of them,
8 the Supreme Court determined that Congress had delegated too much
9 legislative authority. Panama Refining Co v Ryan, 293 US 388, 430
10 (1935) (statute authorizing regulation of interstate and foreign
11 commerce in petroleum invalid because "the Congress has declared no
12 policy, has established no standard, has laid down no rule. There
13 is no requirement, no definition of circumstances and conditions in
14 which the transportation is to be allowed or prohibited.")
15 Schechter Corp v United States, 295 US 495 (1935) (statute
16 authorizing the President, upon application by "one or more trade or
17 industrial associations or groups," to approve a code of fair
18 competition for that trade or industry, violations of which were
19 subject to criminal penalties, invalid). It is tempting to view
20 Panama Refining and Schechter as akin to twin blips on an otherwise
21 flatlined electrocardiogram for the non-delegation doctrine, given
22 that no other statute has been invalidated by the courts on this
23 ground before or since. See generally Mistretta v United States,
24 488 US 372, 373-74 (1989). The telecommunications company
25 defendants have certainly pressed this view (see, for example, Doc
26 #508 at 22). But the federal courts have been presented with non-
27 delegation challenges with regularity thereafter and they are no
28 rarity in the contemporary period.

1 In reviewing a statute against a nondelegation challenge
2 to an act of Congress, "the only concern of courts is to ascertain
3 whether the will of Congress has been obeyed." Yakus v United
4 States, 321 US 414, 425 (1944). In Mistretta, the Court upheld the
5 Sentencing Reform Act of 1984 (as amended, 18 USC § 3551 et seq and
6 28 USC §§ 991-98), which created the United States Sentencing
7 Commission and authorized the Sentencing Guidelines. In finding the
8 statute a proper exercise of congressional authority, the Supreme
9 Court reaffirmed Chief Justice Taft's "intelligible principle" test
10 as the touchstone for determining non-delegation challenges to
11 congressional enactments and quoted American Power & Light Co v SEC,
12 329 US 90, 105 (1946) thusly: "This Court has deemed it
13 'constitutionally sufficient if Congress clearly delineates the
14 general policy, the public agency which is to apply it, and the
15 boundaries of this delegated authority.'" 488 US at 373.

16 The Court's Mistretta opinion identified in the Sentencing
17 Reform Act of 1984 three "goals," four "purposes," the prescription
18 of a specific tool for the Sentencing Commission to use in carrying
19 out its responsibilities — the sentencing "ranges" later embodied
20 in the Sentencing Guidelines — seven "factors" to be considered in
21 the formulation of offense categories and "[i]n addition to these
22 overarching constraints * * * even more detailed guidance to the
23 Commission about categories of offenses and offender
24 characteristics" such as recidivism, multiple offenses and other
25 aggravating and mitigating factors. 488 US at 377. The Court held
26 that the statutory scheme had set forth "more than merely an
27 'intelligible principle' or minimum standards" and quoted with
28 approval from the district court's opinion in United States v

1 Chambless, 680 F Supp 793, 796 (ED La 1988): "The statute outlines
2 the policies which prompted establishment of the Commission,
3 explains what the Commission should do and how it should do it, and
4 sets out specific directives to govern particular situations." 488
5 US at 379.

6 In this century, the Supreme Court considered a non-
7 delegation challenge in Whitman v American Trucking Assns, 531 US
8 457 (2001), this time to the Environmental Protection Agency's
9 National Ambient Air Quality Standards. The DC Circuit had
10 determined that section 109(b)(1) of the Clean Air Act, under which
11 the standards were promulgated, lacked an "intelligible principle"
12 to guide the agency's exercise of authority. The Supreme Court
13 reversed, finding that § 109(b)(1)'s directive to the EPA to
14 establish an air quality standard at a level "requisite to protect
15 public health from the adverse effects of the pollutant in the
16 ambient air" was "well within the outer limits of our nondelegation
17 precedents." Id at 473-74.

18 In considering the instant motion, the court regarded the
19 nondelegation challenge to section 802 as substantial enough to
20 warrant additional briefing. Doc ##559, 571-573. The nondelegation
21 problem presented in the instant cases is different from that in the
22 above-referenced authorities in that section 802 contains no charge
23 or directive, timetable and/or criteria for the Attorney General's
24 exercise of discretion, a point the United States admits: "Congress
25 left the issue of whether and when to file a certification to the
26 discretion of the Attorney General." Doc #466 at 22. The statute
27 does not explicitly confine the Attorney General's authority in any
28 manner or, indeed, offer any direction to the Attorney General other

1 than to prohibit him from delegating his "authority and duties"
2 under section 802 to anyone other than the Deputy Attorney General
3 (§ 802(g)). Rather, the statute's commands are directed to the
4 courts and to the parties. Yet the Attorney General's action
5 triggers the dramatic consequence of dismissal of a number of
6 lawsuits seeking substantial damages against the telecommunications
7 company defendants.

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

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

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

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

17 The telecommunications company defendants similarly
18 contend that section 802 provides only for the certification of
19 facts by the executive branch that then triggers consequences
20 determined by Congress, and not delegated legislative or rulemaking
21 activity. They contend that the Attorney General's authority under
22 section 802 is similar to that of the Secretary of State recently
23 upheld by the DC Circuit in Owens v Republic of the Sudan, 531 F3d
24 884 (DC Cir 2008). But in Owens, the court considered a challenge
25 on vagueness grounds to a congressional charge to the Secretary of
26 State in 50 USC App § 2405(j)(1)(A) authorizing her to label a
27 country a "state sponsor of terrorism" and found the terms at issue
28 "intelligible" under Whitman. 531 F3d at 893.

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

22 In these and other examples advanced in support of section
23 802, the statute at issue undeniably contains a charge to the
24 executive branch which is challenged as insufficiently clear or
25 restrictive; section 802 contains no such charge.

26 As a secondary argument, the United States asserts that an
27 intelligible principle governing the Attorney General's exercise of
28 discretion can be discerned in section 802, pointing to the narrow

1 scope of cases in which the Attorney General is authorized to act
2 under section 802 as defined in the five conditions set forth in
3 subsections (a)(1)-(a)(5). While there is no question that the
4 criteria for certification are narrowly-drawn, the lack of a charge
5 to the Attorney General remains a problem that the United States
6 does not directly acknowledge. The United States contends, however,
7 that legislative history may be used to supply an intelligible
8 principle. This requires putting aside the usually applicable canon
9 that statutory language alone controls a court's interpretation
10 absent ambiguity. Lamie v United States Trustee, 540 US 526, 534
11 (2004). For its contention, the United States accurately cites a
12 footnote in Mistretta:

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

18 488 US at 376. As noted above, however, the Court determined in
19 Mistretta that the statute itself met the Yakus standard while
20 section 802 does not appear to do so. Nonetheless, the quoted
21 language from Mistretta plainly authorizes courts to consult the
22 legislative history in construing the scope of a congressional
23 authorization or mandate to an executive agency, even absent
24 ambiguity in the statute. See also Owens, 531 F3d at 890:

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

1 provides the bounded discretion that the Constitution
2 requires.

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

15 The United States describes section 802 as "strikingly
16 similar to the grant of authority to the Attorney General" upheld by
17 the Supreme Court in Touby v United States, 500 US 160 (1991). In
18 Touby, the Court considered a challenge to § 201(h) of the
19 Controlled Substances Act, 21 USC § 811(h), under which the Attorney
20 General may schedule a substance on a temporary basis when doing so
21 is "necessary to avoid an imminent hazard to the public safety."
22 But petitioners in Touby had conceded that this language constituted
23 an "intelligible principle" and unsuccessfully challenged the
24 provision on other grounds. 500 US at 163. The United States
25 pushes the analogy to Touby too far when it asserts that section 802
26 "authorizes the Attorney General to act to protect intelligence
27 gathering ability and national security information." Doc #572 at
28 11. The quoted standard in Touby was explicit in the statute; the

1 proffered standard for section 802 is absent from the statute. At
2 best, something of the kind may be gleaned from the legislative
3 history of section 802, but the United States does not cite anything
4 from the legislative history that directly states the proposition
5 the United States would have the court accept as Congress' charge to
6 the Attorney General. Touby, therefore, is not helpful here.

7 The telecommunications company defendants argue that the
8 court can and should construe section 802 to contain a tacit mandate
9 requiring the Attorney General to file certifications in all
10 possible cases (e g, "Congress * * * imposed on the Attorney General
11 the responsibility to determine when evidence exists that would
12 satisfy the statutory standards and to submit that evidence to the a
13 court," Doc #508 at 2). The court is not aware of any precedent for
14 such a reading and, on the contrary, finds the absence of such a
15 charge striking in the context of FISAAA as a whole.

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

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

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

3 Congress could in this manner have included language in
4 section 802 specifically directing the Attorney General to undertake
5 review and to submit to the court the specified certifications. The
6 absence of a congressional charge to the Attorney General in section
7 802 is all the more surprising for the fact that numerous other
8 provisions of FISAAA contain directives to the Attorney General and
9 other agency heads: section 702(a) authorizes the Attorney General
10 and the Director of National Intelligence to target "persons
11 reasonably believed to be located outside the United States";
12 section 702(g) requires the Attorney General and the Director of
13 National Intelligence to complete written certifications prior to
14 implementing a § 702(a) authorization; section 702(1)(3) requires
15 the "head of each element of the intelligence community" to complete
16 specified annual reviews; section 707(a) requires the Attorney
17 General to provide a semiannual report to congressional committees;
18 section 105(a) authorizes the Attorney General to authorize
19 emergency employment of electronic surveillance under specified
20 circumstances; section 301 requires Inspectors General of Department
21 of Justice, Office of Director of National Intelligence, National
22 Security Agency, Department of Defense and other inspectors general
23 to provide interim reports to Congress within sixty days. The court
24 agrees with plaintiffs (Doc #573 at 22) that in light of the many
25 other provisions in FISAAA requiring the Attorney General to perform
26 a range of tasks, construing section 802 to contain a mandate to the
27 Attorney General would be especially inappropriate.

28 \\
29

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

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

22 Section 802 is not a broad delegation of authority to an
23 administrative agency like the Clean Air Act or the Sentencing
24 Reform Act; rather, its subject matter is intentionally narrow or
25 "focused" in scope. "[T]he degree of agency discretion that is
26 acceptable varies according to the scope of the power
27 congressionally conferred." Whitman, 531 US at 475. While section
28 802 does not contain a directive to the Attorney General, the United

1 States and the telecommunications company defendants correctly point
2 out that no form of rulemaking is at issue, a fact that limits the
3 potential harm from a vaguely-defined delegation of authority. As
4 the DC Circuit noted in Owens, "the shared responsibilities of the
5 Legislative and Executive Branches in foreign relations may permit a
6 wider range of delegations than in other areas," 531 F3d at 893.
7 The same can be said of the roles of these two branches in the
8 instant cases, where matters pertaining to national security are
9 concerned. The legislative history provides enough context and
10 content to provide definition for the Attorney General's scope of
11 authority even in the absence of a specific charge to carry out.
12 The Attorney General is not required to file certifications but is
13 authorized to do so. The SSCI report makes clear that Congress
14 wanted to immunize telecommunications companies in these actions.
15 "[G]athering and presenting [] facts" (Doc #572 at 7) to the court
16 is a reasonable reading of the Attorney General's role under section
17 802 and appears authorized by Marshall Field & Co v Clark and other
18 authorities.

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

22
23 C

24 Plaintiffs next advance arguments under the Due Process
25 Clause of the Fifth Amendment, specifically: (1) their causes of
26 action for violations of the First and Fourth Amendments are
27 property interests protected by the Due Process Clause and that
28 section 802 deprives them of their right to notice and an

1 opportunity to be heard before a "neutral and detached judge in the
2 first instance" (Doc #483 at 32-36); and (2) the secrecy provisions
3 allowing for certifications and supporting documentation to be
4 submitted in camera and ex parte violates due process by depriving
5 them of "meaningful notice" of the government's basis for seeking
6 dismissal and a "meaningful opportunity to oppose the government's
7 arguments and evidence" (Doc #483 at 36-39). The court addresses
8 these two arguments in turn.

9
10 1

11 Plaintiffs contend that the Fifth Amendment's Due Process
12 Clause entitles them to notice and an opportunity to be heard before
13 a "neutral and detached judge in the first instance" in a proceeding
14 under section 802 seeking dismissal of their claims against the
15 telecommunications company defendants. They argue further that the
16 Attorney General's role makes section 802 constitutionally
17 defective. Doc #483 at 32. Relying primarily on Concrete Pipe &
18 Products v Construction Laborers Pension Trust, 508 US 602, 617
19 (1993), plaintiffs argue that section 802 creates a scheme in which
20 a "biased decisionmaker [the Attorney General] makes an initial
21 decision that a later, unbiased decisionmaker is forbidden from
22 reviewing de novo but instead must accept under a deferential
23 standard of review." Id. They contend, moreover, that Concrete
24 Pipe requires de novo review in the face of an initial decision-
25 maker's alleged bias.

26 Plaintiffs acknowledge that Congress "is free to create
27 defenses or immunities to statutory causes of action" because the
28 legislative process satisfies Due Process requirements. Doc #524 at

1 27 n 16. They contend, however, that the Attorney General, not
2 Congress, has "changed the law governing plaintiffs' lawsuits." Id.

3 As previously discussed in this order, Congress has
4 manifested its unequivocal intention to create an immunity that will
5 shield the telecommunications company defendants from liability in
6 these actions. The Attorney General, in submitting the
7 certifications, is acting pursuant to and in accordance with that
8 congressional grant of authority, in effect, to administer the
9 newly-created immunity provision. Plaintiffs acknowledge that
10 "Congress * * * is free to create defenses or immunities to
11 statutory causes of action because it is 'the legislative
12 determination [that] provides all the process that is due.'" Doc
13 #524 at 27 n 16, quoting Logan v Zimmerman Brush Co, 455 US 422, 430
14 (1982). With regard to section 802, Congress held hearings and
15 plaintiffs' counsel testified in opposition to the proposed immunity
16 legislation. Doc #531 (RT, hearing held December 2, 2008) at 63.
17 To the extent that plaintiffs' due process argument rests on the
18 idea that the Attorney General has "changed the law" due to an
19 allegedly improper delegation of legislative authority, moreover,
20 the court rejected that particular challenge in the preceding
21 section. This part of plaintiffs' due process argument is therefore
22 without merit.

23
24 2

25 Plaintiffs argue as a second Due Process challenge that
26 the secrecy provisions allowing for certifications and supporting
27 documentation to be submitted in camera and ex parte violates due
28 process. They cite Brock v Roadway Express, Inc, 481 US 252, 264

1 (1987) and Hamdi v Rumsfeld, 542 US 507 (2004). Those cases held
2 that the constitutional requirement of meaningful opportunity to
3 respond necessitates notice of the factual basis for the
4 government's position, but neither opinion directly concerned
5 evidence having national security implications.

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

11 The parties' contrasting positions highlight the tension
12 between the government's concern for national security and the civil
13 litigant's due process rights. While both interests are of great
14 importance, the United States' argument prevails here. Other
15 statutes providing for ex parte, in camera procedures have withstood
16 due process challenges in other contexts having national security
17 implications. For example, in Holy Land Foundation for Relief &
18 Development v Ashcroft, 333 F3d 156, 164 (DC Cir 2003) the DC
19 Circuit upheld the exclusion from an administrative proceeding of
20 classified information, which was subject instead to ex parte, in
21 camera review under 50 USC § 1702(c). See also Global Relief
22 Foundation, Inc v O'Neill, 315 F3d 748, 754 (7th Cir 2002) (also
23 rejecting due process challenge to ex parte, in camera review
24 procedures in 50 USC § 1702(c)); People's Mojahedin Organization of
25 Iran v Department of State, 327 F3d 1238, 1242 (DC Cir 2003) (in
26 camera, ex parte submissions of classified information in a
27 designation proceeding under the Antiterrorism and Effective Death
28 Penalty Act of 1996 did not violate due process, which requires

1 "only that process which is due under the circumstances of the
2 case," specifically access to the unclassified portions of the
3 administrative record); National Council of Resistance v Department
4 of State, 251 F3d 192, 208 (DC Cir 2001) (in the process of
5 designating a foreign terrorist organization under 8 USC § 1189, the
6 Secretary of State could forego pre-designation notice to the
7 organization "[u]pon an adequate showing to the court * * * where
8 earlier notification would impinge upon the security and other
9 foreign policy goals of the United States" without offending the
10 Constitution).

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

22
23 D

24 Plaintiffs also contend that Congress' enactment of the
25 secret filing and evidence provisions of section 802 violates a
26 First Amendment right of access to documents in a civil proceeding
27 because "only a court, and not the Attorney General or Congress,"
28 can apply strict scrutiny to a proposed ban on public access to

1 court records (Doc #483 at 40-45), and thereby also trenches on the
2 authority of federal courts under Article III. Several news
3 organizations (Associated Press, Los Angeles Times, San Jose Mercury
4 News, USA Today) that have intervened in this lawsuit have joined in
5 this part of plaintiffs' motion (Doc #523). Plaintiffs cite Globe
6 Newspaper Co v Superior Court, 457 US 596, 606-07 (1982) for the
7 proposition that the government's basis for secrecy must be "a
8 compelling governmental interest * * * narrowly tailored to serve
9 that interest." Doc #483 at 42.

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

18 The United States further posits that the applicable
19 Supreme Court rule is not Globe Newspaper, but that set forth in
20 Press-Enterprise Co v Superior Court, 478 US 1 (1986), which, like
21 Globe Newspaper, concerned records in criminal proceedings. Doc
22 #520 at 29. Under the Press-Enterprise formulation, courts must
23 consider whether the "particular proceeding in question passes []
24 tests of experience and logic," including "whether the place and
25 process have historically been open to the press and general public"
26 and "whether public access * * * plays a particularly significant
27 positive role in the actual functioning of the process" in question.
28 478 US at 8-11. The United States also notes that the Ninth Circuit

1 has never found a First Amendment right of access to civil judicial
2 proceedings, a point plaintiffs have conceded. Doc #520 at 28; Doc
3 #483 at 42 n 10.

4 The court agrees with the United States that Globe
5 Newspaper gives plaintiffs little ground to stand on in the instant
6 context. The majority opinion in Globe Newspaper mapped the
7 contours of the constitutional right of access to criminal trials on
8 the part of the press and general public announced in Richmond
9 Newspapers, Inc v Virginia, 448 US 555 (1980). The Globe Newspaper
10 opinion discussed criminal proceedings specifically and noted that
11 "features of the criminal justice system, emphasized in the various
12 opinions in Richmond Newspapers, together serve to explain why a
13 right of access to criminal trials in particular is properly
14 afforded protection by the First Amendment." 457 US at 605.
15 Justice O'Connor's concurrence was at pains to state, moreover, "I
16 interpret neither Richmond Newspapers nor the Court's decision today
17 to carry any implications outside the context of criminal trials."
18 Id at 611. This is neither a criminal proceeding nor a trial; Globe
19 Newspaper therefore does not apply.

20 The court also agrees with the United States' reading of
21 Egan in this context. While "Egan recognizes that the authority to
22 protect national security information is neither exclusive nor
23 absolute in the executive branch," In Re National Security Agency
24 Telecommunications Litigation, 564 F Supp 2d 1109, 1121 (ND Cal
25 2008), Egan observes that "unless Congress specifically has provided
26 otherwise, courts traditionally have been reluctant to intrude upon
27 the authority of the Executive in military and national security
28 affairs." 484 US at 530. By enacting section 802, Congress has

1 specified that certain documents in these cases are to be reviewed
2 ex parte and in camera. The court is therefore more than usually
3 reluctant to disturb the judgment of the executive branch on First
4 Amendment grounds given this affirmative direction by the
5 legislative branch, and especially so without any judicial
6 precedent.

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

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

1 principles set forth in Egan; the court, accordingly, sees no basis
2 for finding them constitutionally defective on First Amendment
3 grounds.

4
5 E

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

19 The United States does not argue that the Department of
20 Justice is not an agency or that the filing of the certifications is
21 not an action; rather, the United States counters that "section 802
22 and its express terms, including the procedures applicable to these
23 proceedings, govern these cases," but cites no authority in support
24 of the notion that section 802's procedures automatically displace
25 those required by the APA. Doc #520 at 35. But because "the APA
26 applies even if the enabling act does not mention it and the
27 applicable procedural law is determined by the APA whether or not
28 the enabling act incorporates that law" and "[e]ven if the enabling

1 act provides procedures, the APA affects those requirements," 32
2 Charles A Wright & Charles H Koch, Federal Practice and Procedure:
3 Judicial Review § 8135 at 94, more examination of this question is
4 required.

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

12 § 704 * * * makes it clear that Congress did not intend
13 the general grant of review in the APA to duplicate
14 existing procedures for review of agency action. As
15 Attorney General Clark put it the following year, § 704
"does not provide additional judicial remedies where
the Congress has provided special and adequate review
procedures."

16 Accord, Edmonds Institute v United States Department of the
17 Interior, 383 F Supp 2d 105 (DDC 2005)("clear and simple remedy"
18 offered by Freedom of Information Act sufficient, making separate
19 action under APA unavailable). Section 802 contains highly detailed
20 procedures for judicial review of the Attorney General's actions.
21 "The fact that a suit is brought by the government * * * does not
22 fundamentally change the nature of the review of the underlying
23 administrative decision." 33 Wright & Koch, Federal Practice § 8300
24 at 46. Therefore, separate APA review is not available in these
25 cases.

26 Regarding the scope of judicial review, 5 USC § 706
27 provides that the reviewing court "shall decide all relevant
28 questions of law, interpret constitutional and statutory provisions,

1 and determine the meaning or applicability of the terms of an agency
2 action." The reviewing court must set aside "agency action,
3 findings, and conclusions" it finds to meet one of six criteria:
4 arbitrary, capricious, an abuse of discretion; contrary to
5 constitutional right; in excess of statutory jurisdiction; without
6 observance of procedure required by law; "unsupported by substantial
7 evidence in a case subject to section 556 and 557 of this title or
8 otherwise reviewed on the record of an agency hearing provided by
9 statute"; or unwarranted by the facts as determined pursuant to de
10 novo review. Section 802, in providing for review under the
11 substantial evidence standard, appears consistent with section 706
12 of the APA and therefore may be understood to take the place of APA
13 review.

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

17 F

18 Finally, plaintiffs make a series of arguments to the
19 effect that, on the merits and putting alleged infirmities in
20 section 802 aside, the Attorney General's certifications are
21 inadequate under section 802's own terms to support dismissal of
22 these actions.

23 Specifically, plaintiffs contend that: (1) substantial
24 evidence cannot support dismissal under Section 802(a)(5) in that,
25 whereas the Attorney General's public certifications state, inter
26 alia, "because there was no content-dragnet, no provider
27 participated in that alleged activity" (Doc #469-3 at 5),
28 plaintiffs' evidence establishes that there was, in fact, dragnet-

1 type surveillance by one or more of the defendant telecommunications
2 service providers (Doc # 483 at 48-52); (2) substantial evidence
3 cannot support dismissal under section 802(a)(4) in that the alleged
4 dragnet surveillance program could not have been "designed to detect
5 or prevent a terrorist attack, or activities in preparation for a
6 terrorist attack, against the United States," because its "objective
7 features * * * were not designed for the specific function of
8 detecting or preventing a terrorist attack but for the broader
9 purpose of acquiring as many communications and communications
10 records as possible, regardless of whether [they] bear any
11 connection to terrorism at all," id at 54; and (3) substantial
12 evidence cannot support dismissal under any of the first three
13 subsections of section 802 because the constraints imposed by the
14 Fourth Amendment as interpreted by Keith, 407 US 297, would not
15 allow the alleged dragnet to be lawfully authorized under any of the
16 five prongs of section 802(a)(1)-(5).

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

27 Because, however, section 802's immunity provision may
28 only be invoked with regard to suits arising from actions authorized

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1 by the president between September 11, 2001 and January 7, 2007, the
2 dismissal is without prejudice. On May 15, 2009, plaintiffs
3 submitted a "notice of new factual authorities in support of
4 plaintiffs' opposition to motion of the United States" to dismiss.
5 Doc #627. In the notice, plaintiffs cite news articles published in
6 2009 reporting post-FISAAA warrantless electronic surveillance
7 activities by the NSA. Plaintiffs argue that these articles
8 constitute "proof that the certification of former Attorney General
9 Michael Mukasey that is the sole basis for the government's pending
10 motion to dismiss is not supported by 'substantial evidence.'" Doc
11 #627 at 3. The court disagrees. The court believes that the
12 Attorney General has adequately and properly invoked section 802's
13 immunity to the extent that the allegations of the master
14 consolidated complaints turn on actions authorized by the president
15 between September 11, 2001 and January 7, 2007. The court also
16 believes, however, that plaintiffs are entitled to an opportunity to
17 amend their complaints if they are able, under the ever-more-
18 stringent pleading standards applicable in federal courts (see, e g,
19 Ashcroft v Iqbal, ___ US ___, 129 S Ct 1937 (2009)), to allege
20 causes of action not affected by the Attorney General's successful
21 invocation of section 802's immunity.

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V

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

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

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge

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