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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; United  
States v Adams, No C 07-1323; United  
States v Clayton, No C 07-1242;  
United States v Palermino, No C  
07-1326; United States v Rabner, No  
07-01324; United States v Volz, No  
07-1396  
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE  
NOTICE OF THE FOLLOWING QUESTIONS TO BE ADDRESSED AT THE HEARING  
SCHEDULED DECEMBER 2, 2008 AT 10:00 AM:

1. Given the extensive information about the telecommunications carriers' cooperation with the government in the wake of the September 11, 2001 attacks that is publicly known and acknowledged by the government, how is the national security harmed if this cooperation is certified on the public record?
2. What exactly has Congress created with § 802 (in Pub L No 110-261, 122 Stat 2467, tit II, § 201 (2008))? It does not appear to be an affirmative defense but rather appears to be a retroactive immunity for completed acts that allegedly violated constitutional rights, but one that can only be activated by the executive branch. Is

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1           there any precedent for this type of enactment that is  
2           analogous in all of these respects: retroactivity;  
3           immunity for constitutional violations; and delegation of  
          broad discretion to the executive branch to determine  
          whether to invoke the provision?

- 4           3.    Is due process not compromised by the lack of an open  
5           adversarial process? How can national security concerns  
6           warrant such a compromise here? What is the harm in  
          disclosing past cooperation in connection with  
          adjudicating immunity for that past cooperation?
- 7           4.    If the Attorney General certifies that a defendant in a  
8           suit for assistance to an element of the intelligence  
9           community did not provide such assistance and the person  
          did not in fact do so, how are plaintiffs harmed by a  
          dismissal based on the Attorney General's certification?
- 10          5.    How does the Attorney General show by substantial  
11          evidence that a person did not provide assistance and is  
12          entitled to relief under section 802(a)(5)? Of what  
          would such substantial evidence consist?
- 13          6.    Some of the parties describe section 802 as providing  
14          immunity. How can that characterization be reconciled  
15          with section 802(a)(5) which provides for dismissal of an  
16          action even in the case of a person who did not provide  
17          assistance to an element of the intelligence community?
- 18          7.    To the extent that section 802(a)(5) requires dismissal  
19          of an action against a person who did not provide  
20          assistance if the Attorney General submits a  
21          certification under that provision, is the Act simply one  
22          that provides the Attorney General unlimited discretion?  
23          Inasmuch as the Attorney General can provide immunity  
24          under section 802(a)(5) to a person who did not provide  
25          assistance, is not his authority under the FISA  
26          amendments essentially boundless?
- 27          8.    Inasmuch as the plaintiffs have a claim against the  
28          government for allegedly unlawful surveillance even after  
          enactment of the FISA amendments, are not the claims  
          against the telecommunications carriers displaced by the  
          claims against the government?
9.    In making the certification called for by section  
          802(a)(5), is the Attorney General performing an  
          adjudicatory function? That is, is he not making a  
          determination that only a court can make?
10.   If a person assists the government pursuant to one of the  
          provisions referred to in section 802(a)(1)-(4), but the  
          person's activities go beyond that authorized (e g,  
          conducting surveillance for a longer period than  
          authorized), how does the Attorney General make his

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certification under this section? Under this scenario, is there not a danger that the Attorney General's certification could hide the unauthorized conduct? What is the district court's function in such a case?

11. What facts must be determined by the court under the substantial evidence standard in section 802(a)(4)? How does the substantial evidence standard compare to the showing required under 50 USC § 1804 to obtain an electronic surveillance order from the FISC? Should the court assume that it is about the same?

IT IS SO ORDERED.



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VAUGHN R WALKER  
United States District Chief Judge

United States District Court  
For the Northern District of California