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9
 10 **UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

11 IN RE NATIONAL SECURITY AGENCY) MDL Docket No. 06-cv-1791-VRW
 TELECOMMUNICATIONS RECORDS)
 12 LITIGATION)

13 This Document Relates To:) **UNITED STATES’ SUPPLEMENTAL**
 ALL CLAIMS AGAINST ELECTRONIC) **BRIEF IN SUPPORT OF MOTION TO**
 14 COMMUNICATION SERVICE PROVIDER) **DISMISS, OR IN THE ALTERNATIVE,**
 DEFENDANTS (including AT&T, MCI/) **FOR SUMMARY JUDGMENT**

15 *Verizon, Sprint/Nextel, Cingular*)
Wireless/AT&T Mobility, and BellSouth)
 16 Defendants) including in:) Chief Judge Vaughn R. Walker
 06-00672 06-05268 06-06253 06-07934)
 17 06-03467 06-05269 06-06295 07-00464)
 06-03596 06-05340 06-06294 07-01243)
 18 06-04221 06-05341 06-06313 07-02029)
 06-03574 06-05343 06-06388 07-02538)
 19 06-05067 06-05452 06-06385)
 06-05063 06-05485 06-06387)
 20 06-05064 06-05576 06-06435)
 06-05065 06-06222 06-06434)
 21 06-05066 06-06224 06-06924)
 06-05267 06-06254 06-06570; and)
 22 Master *MCI/Verizon* Compl. (Dkt. 125);)
 Master *Sprint* Compl. (Dkt. 124); Master)
 23 *BellSouth* Complaint (Dkt. 126); Master)
Cingular Amended Complaint (Dkt. 455))

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INTRODUCTION

1 The Court has directed the parties to submit supplemental briefs addressing whether
2 Section 802 of the Foreign Intelligence Surveillance Act (“the Act”), 50 U.S.C. § 1885a, is an
3 unconstitutional delegation of legislative authority under the standards announced by the
4 Supreme Court in *Yakus v. United States*, 321 U.S. 414 (1944) (Dkt. 559). As set forth below,
5 Section 802 does not run afoul of the non-delegation doctrine for at least three reasons. First, the
6 statute grants the Attorney General authority to certify facts to the Court. Because certification
7 of facts is not an exercise of legislative power, the non-delegation doctrine simply does not
8 apply. Second, even if the doctrine applies, Congress supplied the requisite intelligible principle
9 by specifically and narrowly defining the conditions under which the Attorney General may
10 make a certification, and the statute’s legislative history provides further guidance, should any be
11 necessary. Third, under well-settled law, Congress may leave the decision whether and when to
12 make a certification to the Attorney General’s discretion.

ARGUMENT

14 I. THERE IS A STRONG PRESUMPTION THAT ACTS OF CONGRESS DO NOT
15 VIOLATE THE NON-DELEGATION DOCTRINE.

16 The Constitution vests “all legislative Powers herein granted in a Congress of the United
17 States,” U.S. Const., Art. I, § 1, and the non-delegation doctrine holds that “Congress generally
18 cannot delegate [this] legislative power to another Branch.” *Mistretta v. United States*, 488 U.S.
19 361, 372 (1989). To avoid an unconstitutional delegation of legislative power, Congress must
20 provide an “intelligible principle” to guide those it empowers with decisionmaking authority.
21 *See id.*

22 In the domestic context, there is a strong presumption that congressional enactments
23 comply with these requirements, so much so that the Ninth Circuit has stated that the very
24 “vitality of the nondelegation doctrine is questionable.” *Leslie Salt Co. v. United States*, 55 F.3d
25 1388, 1396 n.3 (9th Cir. 1995). This presumption of constitutionality becomes even
26 stronger—and Congress is permitted to make even broader grants of power—where, as here,
27 Congress delegates authority to the Executive in areas involving his authority over national

1 security or foreign affairs. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304,
2 321-22, 324 (1936).

3 The Supreme Court has invalidated a statute on non-delegation grounds only twice in our
4 nation's history, doing so for the first and last time in 1935. *See Panama Ref. Co. v. Ryan*, 293
5 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).¹ In the
6 Court's words, it has "almost never felt qualified to second-guess Congress regarding the
7 permissible degree of policy judgment that can be left to those executing or applying the law."
8 *Am. Trucking Assns., Inc. v. Whitman*, 531 U.S. 457, 474-75 (2001) (internal quotation omitted).
9 Moreover, as set forth further below, the Court has consistently upheld against non-delegation
10 challenge statutes that authorize, but do not require, a member of the Executive Branch to act,
11 provide a broad intelligible principle to guide his action, but then provide no further guidance
12 about whether and when to exercise his authority. *See infra* at 9-12. Thus, under well-settled
13 law, nothing in the Constitution prevents Congress from granting to the Attorney General broad
14 discretion regarding whether and when to use his authority under Section 802.

15 II. BECAUSE SECTION 802 DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO
16 THE ATTORNEY GENERAL, THE NON-DELEGATION DOCTRINE DOES NOT
17 APPLY.

18 The non-delegation doctrine prohibits Congress from delegating legislative power to
19 another branch of government, *see Mistretta*, 488 U.S. at 372, but Section 802 does not delegate
20 anything resembling legislative power. The statute does not authorize the Attorney General to
21 make law, to create rules or regulations, or to compel any act. It does not empower the Attorney
22 General to confer immunity, dismiss a lawsuit, or otherwise "alter[] the legal rights, duties, and
23 relations of persons." *INS v. Chadha*, 462 U.S. 919, 952 (1983). Congress, not the Attorney
24 General, has determined that certain lawsuits should be dismissed if the Attorney General

25 ¹ One prominent academic commentator has noted that the non-delegation doctrine "has
26 had one good year, and [220] bad ones (and counting)." Cass R. Sunstein, *Nondelegation*
27 *Canons*, 67 U. Chi. L. Rev. 315, 322 (2000). In the past twenty years, the combined vote on
28 non-delegation issues in the Supreme Court has been 53-0. *See Gary Lawson, Delegation and*
Original Meaning, 88 Va. L. Rev. 327, 330 & n.15 (2002).

1 certifies specific facts to the Court, and the Court finds the certification is supported by
2 substantial evidence. The Attorney General’s role under the statute is limited to gathering and
3 presenting these facts in furtherance of Congress’s policy judgment. The ability to present facts
4 to a court bears no resemblance to legislative power—indeed, Congress has granted this
5 authority in some form to every party in a civil suit. *See* Fed. R. Civ. P. 56(a), (e). Section 802
6 does not materially add to the Attorney General’s ability to present facts, it changes only the
7 consequence of his action: under narrow conditions specified by the statute, the Attorney
8 General’s production of facts will result in prompt dismissal of the suit. But this consequence is
9 ordained by Congress and results from Congress’s exercise of legislative authority, not the
10 Attorney General’s. Consequently, the non-delegation doctrine and its “intelligible principle”
11 standard are simply inapplicable.

12 “The Supreme Court has consistently upheld delegations, such as the one here, that
13 predicate the operation of a statute upon some Executive Branch factfinding.” *Owens v.*
14 *Republic of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008) (citing cases). In *Owens*, the Executive’s
15 factfinding (over whether a foreign nation was a state sponsor of terrorism) affected whether the
16 court had jurisdiction to hear the case, much as the Attorney General’s factfinding under Section
17 802 influences whether a civil action may lie. *See id.* at 888-89. Such Executive factfinding is
18 constitutionally permissible because, as the Supreme Court explained for the first time in 1892,
19 “[t]he legislature cannot delegate its power to make a law, but it can . . . delegate . . . power to
20 determine some fact or state of things upon which the law makes, or intends to make, its own
21 action depend.” *Field v. Clark*, 143 U.S. 649, 694 (1892); *Owens*, 531 F.3d at 892.

22 Numerous statutes reflect this principle, and Section 802 is no different from statutes
23 elsewhere in the United States Code that permit, but do not require, the Attorney General to
24 certify facts to a court, triggering consequences determined by Congress.² These statutes specify

25
26 ² *See, e.g.*, 28 U.S.C. § 2679(d) (authorizing the Attorney General to certify that a
27 defendant federal employee was acting within the scope of his office or employment,
28 automatically triggering substitution of the United States as the party defendant); 18 U.S.C.
§ 5032 (authorizing the Attorney General to certify facts triggering district court jurisdiction
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1 the conditions under which the Attorney General may make a certification, but, like Section 802,
2 none define further criteria the Attorney General should consider in deciding whether to exercise
3 his authority. No further criteria are needed, because the submission of facts to a court does not
4 implicate the legislative power vested in Congress. If Section 802 had delegated to the Attorney
5 General power to issue rules or regulations, the degree of discretion the statute afforded him
6 might determine whether he was merely executing the law or instead exercising legislative
7 power. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928). But because
8 Section 802 authorizes the Attorney General to gather and present facts to a court—a
9 fundamentally non-legislative action—the concern about discretion does not arise, and the non-
10 delegation doctrine does not apply.

11 III. SECTION 802 PROVIDES SUFFICIENT GUIDANCE FOR THE ATTORNEY
12 GENERAL'S DECISION.

13 Assuming the non-delegation doctrine is implicated at all, Congress provided the
14 Attorney General an intelligible principle by enumerating specific and narrow circumstances in
15 Section 802 that control whether and when he may make a certification. The Act permits the
16 Attorney General to certify facts to the court only when there is a pending civil action in which a
17 person is alleged to have “provid[ed] assistance to an element of the intelligence community,”
18 and only where one of five clearly defined conditions exists. *See* 50 U.S.C. § 1885a(a)(1)-(5).
19 These conditions cover alleged assistance made pursuant to (1) a court order; (2) a written
20 certification; (3) a statutory directive; (4) in connection with intelligence activity authorized by
21 the President during a specific time period, that was designed to detect or prevent a terrorist
22 attack, and if the assistance was the subject of a written request stating the activity was
23 authorized by the President and determined to be lawful; or (5) where the person did not provide

24 _____
25 over juvenile offenders); 28 U.S.C. § 1605(g)(1)(A) (authorizing the Attorney General to certify
26 that a discovery order would significantly interfere with a criminal case or national security
27 operation, automatically triggering a stay); Classified Information Procedures Act § 6(a), 18
28 U.S.C. App. 3 (authorizing the Attorney General to certify that a public hearing regarding use of
classified information may result in disclosure of such information, automatically triggering an
in camera hearing).

1 assistance. *Id.* These criteria alone are sufficient to constrain the Attorney General's discretion
2 for purposes of the non-delegation doctrine, since nearly any statutory guidance creates an
3 intelligible principle. *See infra* at 6.

4 In addition to these specific statutory limitations on whether and when the Attorney
5 General may act, the legislative history of Section 802 provides further guidance.³ Congress
6 made clear that in deciding whether and when to make a certification, the Attorney General
7 should be guided by the need to protect current and future intelligence gathering as well as the
8 national security information of the United States. As the Senate Select Committee on
9 Intelligence Report explains:

10 [E]lectronic communication service providers play an important
11 role in assisting intelligence officials in national security activities.
12 Indeed, the intelligence community cannot obtain the intelligence
13 it needs without assistance from these companies. Given the scope
14 of the civil damages suits, and the current spotlight associated with
15 providing any assistance to the intelligence community, the
16 Committee was concerned that, without retroactive immunity, the
17 private sector might be unwilling to cooperate with lawful
18 Government requests in the future without unnecessary court
19 involvement and protracted litigation. The possible reduction in
20 intelligence that might result from this delay is simply
21 unacceptable for the safety of our Nation.

22 S. Rep. 110-209 at 10 (2007), accompanying S.2248, Foreign Intelligence Surveillance Act of
23 1978 Amendments Act of 2007, Senate Select Committee on Intelligence (Dkt. 469-2).

24 In addition, Congress explained the need for Section 802(c), which provides for review
25 of the Attorney General's certification *ex parte* and *in camera*.

26 The details of the President's program are highly classified. As

27 ³ It is well-settled that courts may look to a statute's legislative history for an intelligible
28 principle. *See Mistretta*, 488 U.S. at 376 nn.9-10 (examining legislative history of Sentencing
Reform Act to understand the purposes of statutory provisions); *Lichter v. United States*, 334
U.S. 742, 785 (1948) ("standards prescribed by Congress . . . derive much meaningful content
from the purposes of the Act [and] its factual background . . .") (internal quotation omitted);
accord Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23, 31-32 (D.C. Cir. 2008);
Carciere v. Kempthorne, 497 F.3d 15, 42 & n.20 (1st Cir. 2007) *rev'd on other grounds*, 555
U.S. ____ (2009), No. 07-526; *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 797-98 (8th
Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999).

1 with other intelligence matters, the identities of persons or entities
2 who provide assistance to the U.S. Government are protected as
3 vital sources and methods of intelligence It would be
4 inappropriate to disclose the names of the electronic
5 communication service providers from which assistance was
6 sought, the activities in which the Government was engaged or in
7 which providers assisted, or the details regarding any such
8 assistance.

9 *Id.* at 9; *see also id.* at 23.

10 Therefore, in determining whether and when to make a certification under Section 802,
11 the Attorney General should consider how a lawsuit could affect current and future intelligence-
12 gathering, as well as the risks that such a suit will result in the disclosure of classified national
13 security information.

14 The foregoing demonstrates that Section 802 is far from a statute that provides “literally
15 no guidance for the exercise of discretion.” *Am. Trucking*, 531 U.S. at 474. The statute
16 authorizes the Attorney General to make a certification consistent with the broad guiding
17 principle of protecting national security, and limits the circumstances in which he make such a
18 certification to those defined in (a)(1)-(5). Section 802 guides the Attorney General with far
19 greater specificity than numerous other statutes containing “intelligible principles” the Supreme
20 Court has upheld against non-delegation challenges, including delegations of authority to
21 prevent threats to “national security,” *Fed. Engery Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548,
22 559 (1975), to set “fair and equitable prices,” *Yakus*, 321 U.S. at 426, to determine “excessive
23 profits,” *Lichter*, 334 U.S. at 785-86, and to regulate as required by “public interest,
24 convenience, or necessity.” *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943).
25 Likewise, the Ninth Circuit has found sufficient guidance in a statute that authorized the
26 President to renew an embargo against Cuba merely upon his finding that it is “in the national
27 interest of the United States.” *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437-
28 38 (9th Cir. 1996). Compared to these permissible delegations, the statutory text and purpose of
Section 802 sufficiently limit the Attorney General’s discretion.

Section 802 is also strikingly similar to the grant of authority to the Attorney General

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1 upheld by the Supreme Court in *Touby v. United States*, 500 U.S. 160 (1991). *Touby* involved a
2 statute that authorized the Attorney General to temporarily schedule a substance when doing so
3 is “necessary to avoid an imminent hazard to the public safety.” *Id.* at 163. Like Section 802,
4 the statute authorized but did not require the Attorney General to act, stating that *if* he makes the
5 relevant finding, he *may* schedule a substance. *See* 21 U.S.C. § 811(h). Also like Section 802,
6 that statute in *Touby* provided a broad intelligible principle. In *Touby*, Congress authorized the
7 Attorney General to act to “avoid an imminent hazard to the public safety,” 500 U.S. at 163,
8 whereas in Section 802, Congress authorizes the Attorney General to act to protect intelligence
9 gathering ability and national security information. Finally, the statute in *Touby* provided
10 additional, more specific criteria for the Attorney General to consider, including a drug’s history
11 and current pattern of abuse; the scope, significance and duration of abuse; and the risk to public
12 health. *Id.*; 21 U.S.C. § 811(c), (h)(3). Section 802 similarly requires that the Attorney General
13 make a certification pursuant to one of the specific conditions enumerated in (a)(1)-(5). And
14 Section 802 grants less authority to the Attorney General than the statute in *Touby* in two crucial
15 respects. First, the criteria in (a)(1)-(5) are far more specific, and thus constrain the Attorney
16 General’s discretion to a far greater degree, than the criteria in *Touby*. Second, Section 802
17 provides that a court must review the Attorney General’s certification for substantial evidence,
18 whereas in *Touby* the Attorney General’s designation was not subject to judicial review. 500
19 U.S. at 163. For these reasons, Section 802, like the statute the Court upheld in *Touby*,
20 “meaningfully constrains the Attorney General’s discretion” *Id.* at 166.

21 Section 802 finds further support from the Supreme Court’s decision in *Yakus* itself.
22 *Yakus* upheld against a non-delegation challenge a statute that authorized a Price Administrator
23 to set commodities prices “that in his judgment will be generally fair and equitable and will
24 effectuate the purposes of this Act.” 321 U.S. at 420. The Court held that the Act was a proper
25 “exercise by Congress of its legislative power,” *id.* at 423, and gave three main reasons, all of
26 which apply equally to Section 802. First, “Congress has stated the legislative objective,” *Yakus*,
27 321 U.S. at 423, which in this case is to protect the national security of the United States by

1 providing that certain civil actions against persons alleged to have assisted the intelligence
2 community “may not lie . . . if the Attorney General certifies” specific facts to the court. 50
3 U.S.C. § 1885a(a). Second, Congress “has prescribed the method of achieving that objective,”
4 *Yakus*, 321 U.S. at 423, by requiring prompt dismissal of such actions pursuant to Section 802 if
5 the Attorney General makes the described certification and the court finds the certification is
6 supported by substantial evidence. Third, Congress “has laid down standards to guide the
7 administrative determination of . . . the occasions for the exercise of . . . power” *Yakus*, 321
8 U.S. at 423. The standards contained in (a)(1)-(5) authorize the Attorney General to make a
9 certification in narrow and carefully defined circumstances, and provide with “particular[ity]”
10 the form any certification must take. *See Yakus*, 321 U.S. at 423. Finally, the statute in *Yakus*,
11 like Section 802 and the statute in *Touby*, is phrased as a permissive grant of power,
12 “authoriz[ing]” rather than requiring Executive action. 321 U.S. at 420.⁴ As discussed more
13 fully below, the non-delegation doctrine allows such permissive grants.

14 IV. CONGRESS MAY LEAVE THE DECISION ABOUT WHETHER AND WHEN TO 15 MAKE A CERTIFICATION TO THE ATTORNEY GENERAL’S DISCRETION.

16 The non-delegation doctrine does not require Congress to mandate that the Executive
17 exercise authority Congress has given him. Instead, the doctrine requires only that when
18 Congress delegates legislative power to another branch, it must provide an intelligible principle
19 to guide that branch’s exercise of such power. *Mistretta*, 488 U.S. at 372. The intelligible
20 principle for Section 802 is provided by the general guidance that the Attorney General should
21 act to protect intelligence-gathering capability and national security information, coupled with
22 the specific criteria set forth in (a)(1)-(5), which define whether and when the Attorney General
23 may make a certification. Plaintiffs argue that in addition to authorizing the Attorney General to

24
25 ⁴ The original statute at issue in *Yakus*, the Emergency Price Control Act, “authorized”
26 the Price Administrator to fix prices. 321 U.S. at 418, 421. This Act was amended by the
27 Inflation Control Act, which “directed” the President to “stabilize prices, wages, and salaries so
28 far as is practicable.” *Id.* at 421 (internal quotation omitted). The Court considered the
Administrator’s discretion under the original Act. *See id.* at 421 n.1.

1 act, and providing an intelligible principle to guide his actions, Congress must either *mandate*
2 that he act whenever certain conditions are met, or specify a checklist of *further* criteria he must
3 consider—in addition to the intelligible principle—when deciding whether to act.⁵ The
4 government is aware of no case supporting Plaintiffs’ attempt to redefine the non-delegation
5 doctrine by requiring an “intelligible principle-plus.” Instead, a long line of cases holds that to
6 survive a non-delegation challenge, a statute need only provide an intelligible principle to guide
7 the Executive’s action. *See, e.g., Am. Trucking*, 531 U.S. at 472; *Loving v. United States*, 517
8 U.S. 748, 771 (1996); *Mistretta*, 488 U.S. at 372; *Hampton*, 276 U.S. at 409.

9 In *Yakus* and *Touby*, the Supreme Court upheld statutes like Section 802 that authorize,
10 but do not require, the Executive to act; provide a broad intelligible principle to guide his action;
11 contain further, more specific criteria he must consider; but then provide no further guidance
12 about whether or when to exercise authority once these conditions are met. *See supra* at 6-8. In
13 other cases, the Supreme Court and the Ninth Circuit have gone further and have upheld the
14 constitutionality of statutes that provide only a broad intelligible principle and contain *no further*
15 *criteria* to guide the Executive’s discretion. In each category of cases, courts have made clear
16 that once Congress has specified the conditions under which the Executive is authorized to act,
17 Congress may leave the decision whether and when to act to the Executive’s discretion.

18 In *Curtiss-Wright*, the Supreme Court rejected a non-delegation challenge to a statute that
19 made violation of an arms embargo a federal crime, contingent upon the President’s
20 proclamation that an embargo would “contribute to the reestablishment of peace” in a province
21 in Argentina. 299 U.S. at 312. The statute authorized, but did not require, the President to make
22 such a proclamation, and it provided no further guidance about whether and when he should do
23 so, other than to require him to consult with other governments. *See id.* The statutory provision
24 at issue was triggered “*if*” the President decided to impose an embargo. *See id.* (emphasis

25
26 ⁵ *See* Corrected MDL Plaintiffs’ Opposition to Motion of the United States Seeking to
27 Apply 50 U.S.C. 1885a to Dismiss These Actions (Dkt. 483) at 14-20; MDL Plaintiffs’ Reply
(Dkt. 524) at 11-14.

1 added). Noting that “the form of the President’s action—*or, indeed, whether he shall act at*
2 *all*—may well depend . . . upon the nature of the confidential information which he has . . . or
3 upon the effect which his action may have upon our foreign relations,” the Court concluded that
4 it would be unwise to “lay down narrowly definite standards by which the President is to be
5 governed.” *Id.* at 321 (emphasis added).

6 Likewise, in *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court rejected a non-delegation
7 challenge and upheld a statute authorizing the Secretary of State to grant and issue passports
8 “under such rules as the President shall designate and prescribe,” where the President by
9 Executive Order had “authorized” the Secretary of State “in his discretion to refuse to issue a
10 passport” *Id.* at 7-8, 10. While the Supreme Court noted that the Secretary could only
11 exercise his authority under certain conditions defined by historical practice, *id.* at 17-18, neither
12 the Court nor the statute provided any guidance about whether or when the Secretary should act
13 once those conditions were met. Similarly, in *Loving v. United States*, the Court upheld statutory
14 provisions authorizing the President to enumerate aggravating factors sufficient to impose the
15 death penalty in courts-martial “without further guidance” for the exercise of this discretion. 517
16 U.S. at 754, 773; *see also* 10 U.S.C. §§ 818, 836, 856. The Court concluded that the delegation
17 “called for the exercise of judgment or discretion” within “the traditional authority of the
18 President” as Commander-in-Chief, *id.* at 768-69, 772, much as Section 802 calls for the
19 exercise of discretion within the traditional authority of the Attorney General to make
20 certifications of fact to the court. *See supra* n.2.

21 Courts of appeals, including the Ninth Circuit, have followed the Supreme Court’s lead
22 and required only that Congress authorize the Executive to act and provide an intelligible
23 principle to guide him. In *Freedom to Travel Campaign*, the Ninth Circuit upheld Congress’s
24 delegation of power to the President to renew an embargo against Cuba upon the President’s
25 finding that an embargo is “in the national interest of the United States.” 82 F.3d at 1437-38.
26 Beyond this intelligible principle, the statute provided no further guidance for whether or when
27 he should exercise this power. And in *Owens*, the D.C. Circuit recently upheld a statute that

1 predicated federal court jurisdiction upon the Secretary of State’s designation of the government
2 of Sudan as a state sponsor of terrorism, where Congress left the decision about whether and
3 when to exercise such designation authority to the Secretary of State’s sole discretion. *See* 531
4 F.3d at 888.

5 These decisions help explain why statutes similar to Section 802 are ubiquitous in the
6 United States Code. Numerous statutes permit, but do not require, the Attorney General to file a
7 factual certification with no more guidance than that provided by Section 802, including
8 guidance about whether and when to act. *See supra* n.2. Many more statutes permit, but do not
9 require, the Attorney General to exercise other authorities if certain conditions are met, but
10 otherwise leave the decision to act to his discretion.⁶ *Yakus* itself explicitly permits Congress to
11 grant such discretion to the Executive Branch, noting that “[i]t is no objection that the
12 determination of facts and the inferences to be drawn from them in the light of the statutory
13 standards and declarations of policy call for the exercise of judgment” 321 U.S. at 425.

14 The Supreme Court’s decision in *Field v. Clark* is not to the contrary, as Plaintiffs’ claim.
15 *See* Pls. Opp. (Dkt. 483) at 14-17; Pls. Reply (Dkt. 524) at 13. While the Court in *Field* noted
16 that the challenged statute required the President to act upon making a particular factual
17 determination, 143 U.S. at 693, nothing in the statute required the President to make a factual
18 determination in the first place. Moreover, the Supreme Court has never interpreted *Field* to
19 create a rule under the non-delegation doctrine that a statute *must require* the Executive to act.

21 ⁶ *See, e.g., United States v. Doe*, 465 U.S. 605, 616-17 (1984) (holding that in the use-
22 immunity statute, 18 U.S.C. § 6003, “Congress expressly left [the decision about whether to
23 grant immunity] exclusively to the Justice Department.”); 21 U.S.C. § 824(d) (“[t]he Attorney
24 General may, in his discretion, suspend any registration” to manufacture a controlled substance
25 where he finds an imminent danger to public health, and “may, in his discretion, seize” any
26 controlled substance owned by a registrant whose registration has expired); 8 U.S.C. § 1442(c)
27 (“[t]he Attorney General may, in his discretion” except a demonstrably loyal alien from the
28 classification “alien enemy”); 8 U.S.C. § 1157 (“the Attorney General may, in the Attorney
General’s discretion,” admit certain refugees into the United States); 8 U.S.C. § 1226a (“the
Attorney General may certify an alien” as a suspected terrorist). This list is far from
complete—Congress has made many similar grants of authority in the immigration context
alone.

1 No Supreme Court decision cites *Field* for that proposition, and subsequent decisions from the
2 Supreme Court and courts of appeals have frequently upheld statutes that did not require
3 Executive action, including *Yakus*, *Touby*, *Curtiss-Wright*, *Zemel*, *Loving*, *Freedom to Travel*,
4 and *Owens*, among others.⁷ Indeed, in *Owens*, the D.C. Circuit cites *Field* for the proposition
5 that Congress may delegate to the Executive the “power to determine some fact or state of things
6 upon which the law makes . . . its own action depend,” 531 F.3d at 891-92, even though the
7 statute at issue in *Owens* neither required the Secretary of State to declare a foreign government
8 to be a state sponsor of terrorism, nor specified criteria the Secretary should consider in making
9 that decision. *See id.* at 888.⁸

10 Finally, as the foregoing authority also makes clear, Congress’s authority to grant
11 discretion to the Executive Branch, already broad in the context of domestic affairs, is even
12 broader where, as here, the grant of power relates to the Executive’s authority over national
13 security or foreign affairs. *See Curtiss-Wright*, 299 U.S. at 321-22, 324; *Zemel*, 381 U.S. at 17;
14 *Owens*, 531 F.3d at 891. Section 802 concerns the disposition of lawsuits that seek disclosure of
15 alleged intelligence activities by the United States. It thus concerns an area in which the
16 Executive has constitutional authority to protect and control classified information and to
17 safeguard national security. *See Dep’t of Navy v. Egan*, 484 U.S. 518, 527, 529 (1988); *Haig v.*
18 *Agee*, 453 U.S. 280, 291-92 (1981).

19 As outlined above, Congress was specifically concerned that lawsuits covered by Section
20 802 would hinder vital intelligence gathering activities, and would result in the disclosure of

21
22 ⁷ *See also New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 22 n.1 (1932); *United States v. Grimaud*, 220 U.S. 506, 509 (1911).

23 ⁸ Plaintiffs unsuccessfully attempt to distinguish *Owens* by arguing that the Secretary of
24 State “had no discretion over whether the designation [as a state sponsor of terrorism] should
25 have jurisdictional consequences.” Pls Reply (Dkt. 524) at 12-13. But, of course, the crucial
26 point is that just as the Attorney General has discretion about whether to make a certification, the
27 Secretary of State in *Owens* had discretion about whether to make a designation. The
28 consequences triggered by the certification or designation are determined by Congress in the
relevant statute, and are thus outside the control of both the Attorney General and the Secretary
of State.

1 classified information that would compromise national security. In these circumstances, where
2 the Executive is granted discretion to present facts concerning national security matters to which
3 it is “immediately privy” and can readily evaluate on a case-by-case basis, Congress “must of
4 necessity paint with a brush broader than it customarily wields in domestic areas.” *Zemel*, 381
5 U.S. at 17; *Freedom to Travel*, 82 F.3d at 1438. And, through its authorization of *ex parte, in*
6 *camera* procedures for the Attorney General to make the required certification, Section 802 is a
7 congressional endorsement of the Executive’s judgment that national security information
8 concerning the allegations at issue in the pending suits against telecommunications carriers must
9 be protected from public disclosure. In this context in particular, Congress may modify existing
10 law to require dismissal of claims concerning national security matters, while leaving in the
11 hands of the Executive whether and how to present the specific national security information that
12 would trigger application of the law enacted by Congress.⁹

13 CONCLUSION

14 In this case, answering *Yakus*’s question “whether the will of Congress has been obeyed,”
15 is a simple exercise. 321 U.S. at 425. Congress authorized the Attorney General under certain
16 conditions to submit facts for the Court’s review—a non-legislative function that does not
17 implicate the non-delegation doctrine. Section 802 clearly defines the conditions under which
18 the Attorney General may make such a factual certification, so that even if the non-delegation
19

20 ⁹ For these reasons, the United States does not join the Carriers’ argument that if
21 necessary the Court should interpret Section 802 to require the Attorney General to file a
22 certification whenever the factual predicates are met (Carriers’ Supplemental Br., (Dkt. 571)).
23 By its terms, Section 802 imposes no such requirement, and this Court should not create one.
24 *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 n.16 (1993) (“we may not add terms or
25 provisions were Congress has omitted them”). There is no need for the Court to add a
26 requirement not contained in the statute since it is well-settled that the non-delegation doctrine
27 permits Congress to leave the decision whether and when to file a certification to the Attorney
28 General’s discretion. Moreover, a judicially-imposed requirement that the Attorney General file
a certification might well conflict with Congress’s promise that Section 802 does not “limit
another otherwise available immunity, privilege, or defense under any other provision of law.”
50 U.S. C. § 1885a(h). If the Attorney General is required to make a certification, this might
prevent the United States from instead asserting another available privilege, such as state secrets,
or from moving to dismiss on another ground.

1 doctrine applies, Congress has provided an intelligible principle, either in the statute itself or in
2 the statute when read with its legislative history. Congress has also granted the Attorney
3 General discretion to decide whether to file a certification or not, as permitted by well-settled
4 law. Section 802 therefore presents no delegation problem.

5 What is left for this Court to decide is also straightforward. The Attorney General's
6 certification complies with the statute and is supported by substantial evidence. Accordingly, the
7 Court should now promptly dismiss these actions.

8 February 25, 2009

Respectfully Submitted,

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