

# VAUGHN WALKER: OKAY MR. HOLDER, I'D LIKE TO SEE YOUR WORK NOW

Judge Vaughn Walker, who is preparing to rule on whether telecom retroactive immunity is constitutional, has given the parties a new homework assignment (h/t MD). He has asked for a brief addressing this question.

Nonetheless, section 802 appears to contain “literally no guidance for the exercise of discretion” by the Attorney General. *Whitman v American Trucking Assns*, 531 US 457, 474 (2001). It appears to leave the Attorney General free take no action at all or to take action to invoke section 802’s protection on behalf of one or more “persons” based on any consideration of his choosing; no charge or directive, timetable and/or criteria for the Attorney General’s exercise of discretion are apparent. The parties are directed to address whether section 802 runs afoul of the principle the Supreme Court set forth in *Yakus v United States*, 321 US 414, 425 (1944):

[T]he only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

Now, I invite the lawyers to correct me, but I think Walker, probably having taken a peek at that document he'll one day review in the al-Haramain case which proves the Bush Administration was violating FISA, is likely looking for clarification about what Congress meant when they said the Attorney General had to certify something as legal.

If Congress said the AG had to certify something as legal, he seems to be asking, is the AG doing the will of Congress is he says something is legal when it's clearly not? Or, were they really asking the AG to make an assessment of the legality of the activity?

That's my guess, anyway.

But what I find particularly interesting is this part of the order:

In their supplemental briefs, the parties may paraphrase and/or refer to arguments made in previously-filed briefs, but should not repeat them verbatim.

I think that's judge politesse for,

Say, Mr. AG, I'd really appreciate seeing some of your original lawyering work on this one, please. I've seen what the dead-enders want to give me, and I'm not really interested in seeing their stale arguments rehashed again. Unless, of course, you're really willing to adopt their completely indefensible position as your own?

Ah. I'm probably reading too much into this. But it does seem clear that Walker wants something that is guaranteed to be the handiwork of the Obama Administration.