

JUDGE WALKER BUSTS A MOVE: THE LEGAL FOUNDATION FOR IT

Immediately below, Marcy described Judge Vaughn Walker's new homework assignment to the parties in the consolidated litigation in the Northern District of California (effectively all cases except *al-Haramain* and a few others to which "section 802 of the FISA Amendments Act of 2008" are not germane). If you have not read Marcy's post, and wish to proceed into the legal weeds of this one, I heartily suggest you go back there first.

Okay, as I suggested in comments in Marcy's post, Judge Walker is looking at the Attorney General option to certify a matter for dismissal pursuant to section 802 of the FISA Amendments Act, and as to said provision:

It is the hyper-equivalent of vagueness. The provisions that are supposed to provide the guidelines, provide ... none.

Mary went to the same point but, as usual, with a lot more flesh on the bone in her comment:

... the drafting is bad. It doesn't say that if x,y and z are met, the AG SHALL give a certification and with that certification, the telcoms walk. It says that the AG MAY give a certification that x,y and z existed and if the AG gives that certification, it's an out. So it makes the certification discretionary to the AG, but then gives no standards on the exercise of the discretion. So the AG could, under the statute give the certifications to some and withhold it from others under the same factual settings.

So how is a court to know of the AG is complying with Congressional will vis a

vis the certifications – if there are no standards specified for the exercise of discretion.

Precisely. So, let's look at what Walker is legally up to here. It is my contention that he has pretty much determined that he is not down with the government's program in the least, is going to take the bold move of declaring it unconstitutional and, from all appearances, do so on multiple grounds. The one at issue here is the unfettered and infinite nature and scope of the AG certification process under section 802.

First off Judge Walker posits this:

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.

But you should have some further context to understand Walker's aim. Here is what the court actually found in in that case; from *Yakus*, 321 US at 426:

The standards prescribed by the present Act, with the aid of the "statement of considerations" required to be made by

the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare *Hirabayashi v. United States*, supra, 320 U. S. 104. Hence, we are unable to find in them an unauthorized delegation of legislative power.

In *Yakus v. United States*, the Court was evaluating the authority given to an executive branch "Price Administrator", whose job it was to determine prices of commodities during World War II, and the court found there were sufficient criteria set forth by Congress for the courts to decide, and the people to understand the basis of the decisions rationally, i.e. how the price determinations were arrived at. In short, the court in *Yakus* found the situation was not so vague as to be completely arbitrary and capricious.

Appears to me that Walker thinks the situation in respect to the AG certifications in the NDCA consolidated cases do *not* possess such requisite identifiable criteria for determining the basis thereof as *Yakus* would require, and is making darn sure that he has given the government a full chance to make their case. Before he holds that they haven't.

Secondly, in his order, Walker asks that the parties, and, again, he is clearly directing this at the government, brief as follows:

The parties are further directed, in doing so, to give consideration to two principles of statutory construction: (1) a court should treat the "plain meaning of legislation [as] conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,'" *United States v Ron Pair Enterprises*,

Inc, 489 US 235, 242 (1989); and (2) “[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.” *Clark v Martinez*, 543 US 371, 385 (2005).

Of these two demands, the key looks to be the second based on *Clark v. Martinez*. In this regard, here is the full operative section from *Clark* that Vaughn Walker is basing his inquiry upon (note *Clark* is a Scalia opinion and is therefore written in his typical oblique style that turns simple concepts into the nearly undecipherable):

If we were, as the Government seems to believe, free to interpret statutes as becoming inoperative when they approach constitutional limits, we would be able to spare ourselves the necessity of ever finding a statute unconstitutional as applied. And the doctrine that statutes should be construed to contain substantive dispositions that do not raise constitutional difficulty would be a thing of the past; no need for such caution, since whatever the substantive dispositions are they become inoperative when constitutional limits are approached. That is not the legal world we live in. The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.

Here, Walker is anticipating an argument he reasons the government will make to try to squirm out of their vagueness hole and, again, after giving them a full opportunity to brief

it, he appears ready to bite them. The Clark argument they will try is to say, in simple terms, "Gee judge, if you can't tell what the parameters of the statute are, you can just assume they are whatever could be appropriate right up to the Constitutional extreme". I don't think Vaughn Walker thinks that is going to fly in this case. Neither do I.

Ladies and gentlemen, Vaughn Walker is on a mission. As most of you know, I have thought that was the case for quite some time now. But jeebus, and seriously, I have rarely, if ever, seen a judge more on top of a subject, loaded for bear and out in front of a case as we see here. It is awesome and impressive. He is anticipating what the parties are going to argue and how appellate courts are going to rule in the next set of appeals, all from a pre-trial posture. He is treating this case with the respect, depth and care that it deserves because nothing short of our Constitution and Fourth Amendment thereto is at issue. There are precious few bright lights in the dark field of justice these days; irrespective of how it all plays out in the end, so far this sure looks like one of them.