FUNNY TELECOM GAMES ON RETROACTIVE IMMUNITY

There are two funny things in the telecom brief in response to Judge Walker's questions about the retroactive immunity statute. (Here is EFF's brief and Eric Holder's.)

Don't Cite the Statute

First, in spite of the fact that Walker asked the parties to address a specific question about a specific clause of the FISA Amendment Act, the telecom lawyers don't get around to actually discussing the language of that clause until page 15 of a 17 page brief. There's a reason for that. Once they do discuss the clause in question, they're faced with precisely the problem that Walker (and bmaz and Mary) have identified: the language doesn't tell the Attorney General whether he **has** to give the telecoms immunity, or simply **can** give immunity, at his whim.

> Here, § 802(a) does not expressly state whether certification is mandatory or discretionary. It provides merely that a "civil action . . . shall be promptly dismissed, if the Attorney General certifies to the district court" that at least one of the five criteria in § 802(a) has been met (emphasis added). The Attorney General cannot submit a certification unless the standards of § 802(a) have been satis-fied, and the word "if" simply reflects that these standards will not be met in every case. But noth-ing in the statute specifies whether the Attorney General may decline to certify after determining that a case is eligible for certification. The statute does not state, for instance, that the decision whether to certify is committed to the "discretion" of the

> Attorney General. Nor does the statute use permissive language, such as the word "may."
>
> While Section 802 also does not specify that certification is mandatory, what is critical for purposes of constitutional avoidance is that it fairly admits of that construction. Section 802(e) refers to the "authority and duties of the Attorney General" (emphasis added). The use of the word "duties" indicates that § 802 imposes some mandatory obligation on the Attorney General, but the statute does not expressly identify which of the tasks it describes are mandatory. This ambiguity could be resolved by reading § 802 as imposing on the Attorney General a "dut[y]" to certify if he finds the predicate facts, if it were necessary to construe the statute in this way in order to save its constitutionality. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (courts must "'give effect, if possible, to every clause and word of a statute'"); United States v. LSL Biotech., 379 F.3d 672, 679 (9th Cir. 2004) (courts must "strive to avoid constructions that render words meaningless").

They're left, then, with basically asking Walker to read the "can" language throughout as "must."

> But because it is "fairly possible" for the Court to read § 802 as mandatory, the Court's "plain duty is to adopt" that construction if necessary to avoid a serious constitutional issue.

The Outdated Senate Report

The other problem with the brief is that the telecom lawyers repeatedly cite the SSCI report on its FISA amendment to prove that the legislative intent for this law is clear. (DOJ

cites the report in its brief, too, but not to get to the idea of good faith.)

> Here in particular, we know for certain the motivating pur-poses that Congress embodied in § 802. Congress embarked on two years of study and debate of the circumstances under which litigation against telecommunications providers alleged to have assisted the government should proceed—including this litigation in particular. It ultimately concluded that granting immunity to companies that either did not provide the assistance alleged, or provided any assistance **in good faith**, would enhance the nation's security by ensuring that private parties cooperate in intelligence activities in the future, and by preventing the disclosure of classified information. See S. Rep. No. 110–209, at 9-12 (2007).
>
> [snip]
>
> First, Congress sought to address the concern that "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation." S. Rep. 110-209, at 10. It observed that the "possible reduction in intelligence" that could result from this delay is simply unacceptable for the safety of our Nation." Id. Congress thus concluded that it was appropriate to "exten[d] immunity" to electronic communication service providers that acted, if at all, "on a **good faith** belief that the President's program, and their assistance, was lawful." Id.
>
> [snip]
>
> As discussed above, Congress enacted § 802 to further the public interest of

> protecting national security. It also sought to protect the private right of carriers who either did not do what was alleged or acted in **good faith**. S. Rep. 110–209, at 9–12. [my emphasis]

Note the date on the report: 2007. This is the report that SSCI released after **its version** of the legislation passed the committee, a full eight months before the final legislation passed both houses of Congress—in significantly different form.

Here's the language in Section 802a in the bill discussed in the Senate report:

> SEC. 802. PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES.
>
> (a) Requirement for Certification-
>
> (1) IN GENERAL- Notwithstanding any other provision of law, no civil action may 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 court that—
>
> (A) any assistance by that person was provided pursuant to an order of the court established under section 103(a) directing such assistance;
>
> (B) 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;
>
> (C) any assistance by that person was provided pursuant to a directive under sections 102(a)(4), 105B(e), as in effect on the day before the date of the enactment of the FISA Amendments Act of 2007, or 703(h) directing such assistance; or

> (D) the person did not provide the alleged assistance.
>
> (2) REVIEW- A certification made pursuant to paragraph (1) shall be subject to review by a court for abuse of discretion.

And here's Section 802a of the bill Walker asked the parties to respond to:

> 'SEC. 802. PROCEDURES FOR IMPLEMENTING STATUTORY DEFENSES.
>
> '(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**
>
> **‘(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. [my emphasis]

To be fair, the "if" before the AG certification is in both—so the problem Walker is looking at exists in both. But clause 802(a)4 **doesn’t exist** in S.2248, the bill the Senate report discusses (though the language exists elsewhere in the bill). And for good reason. That’s because the bill passed by Congress narrowed the definition of who gets immunity (not enough, but significantly). That narrowing was made to make the amorphous "good faith" that the telecoms cite repeatedly from the SSCI report more concrete.

In other words, faced with the fact that Congress wrote this statute too vaguely, the telecom lawyers have gone and found a legislative history they can point to that they claim should guide Walker’s deliberation. But

it’s legislative history pertaining to a different bill and—significantly—a different Section 802a. And in doing so, they resuscitate the notion that all it took for telecoms to get their immunity is good faith.