OBAMA'S TWO "IFS" ON FISA: HEADS I WIN, TAILS YOU LOSE

Briefs on FISA are coming out in Northern California so fast and furious it's hard to keep them straight. Just as a reminder there are two main cases:

- al-Haramain, in which the Bush (and now Obama) Administration has invoked State Secrets to prevent lawyers for the defunct charity al-Haramain from using clear evidence that Bush wiretapped them illegally to prove that Bush wiretapped them illegally
- Retroactive immunity (Jewel/EFF), in which the Electronic Frontier Foundation is challenging the retroactive immunity statute Congress passed last year on Constitutional grounds

The Obama stance on these two cases is worth looking at in conjunction because the Obama position toward congressionally-passed law is perfectly crafted to gut civil liberties (and Article III authority), all based on Obama's interpretation of "if."

Astoundingly, both al-Haramain and retroactive immunity are almost certainly headed for the Appeals Court to rule on the meaning of two "if's" (and one "shall") appearing in FISA-related law.

"If" the Attorney General Wants the President to Avoid Penalty for Illegal Wiretapping

Here's the language Judge Walker just reviewed in FISA 1806(f) in the al-Haramain case:

> Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, **shall**, notwithstanding any other law, **if** the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance. [my emphasis]

The government (under both Bush and Obama) has argued that the "shall" in 1806(f)—requiring the District Court Judge to review *in camera* and *ex parte* the materials relating to the surveillance to see if was legal—only kicks in after the "if" tied to the Attorney General in it. That is, the District Court Judge only reviews the underlying materials if the Attorney General files an affidavit saying that an adversary hearing would harm national security.

Judge Walker thinks that's bullshit. He writes,

> But the statute is more logically susceptible to another, plainer reading: the occurrence of the action by the Attorney General described in the clause beginning with "if" makes mandatory on the district court (as signaled by the verb "shall") the in camera/ex parte review provided for in the rest of the sentence. The non-occurrence of the Attorney General's action does not necessarily stop the process in its tracks as defendants seem to contend. Rather, a more plausible reading is that it leaves the court free to order discovery of the materials or information sought by the "aggrieved person" in whatever manner it deems consistent with section 1806(f)'s text and purpose. Nothing in the statute prohibits the court from exercising its discretion to conduct an in camera/ex parte review following the plaintiff's motion and entering other orders appropriate to advance the litigation if the Attorney General declines to act.

In other words, the Executive thinks that the Court only gets to review its work "if" the Attorney General first takes action, irrespective of the clause in FISA that allows someone illegally wiretapped to sue. Whereas the Court thinks that the Executive cannot, through its own willful inaction, negate all means for redress among aggrieved persons.

"If" the Attorney General Wants Its Telecom Friends to Avoid Penalty for Illegal Wiretapping

The retroactive immunity squabble works (perhaps appropriately) in the reverse manner. With al-Haramain, if "if" means "shall" then Bush will face penalties for breaking the law. With retroactive immunity, if "if" means "shall" then the telecoms avoid penalties for breaking the law.

Here's the language Judge Walker is currently evaluating in the retroactive immunity suit:

> '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.

While Judge Walker hasn’t ruled yet, his request for additional briefing on this section makes it clear that he thinks that Congress, by using "if" in this section, didn’t give the Attorney General enough guidance about what criteria he should use to decide whether or not to issue a certification to the Court. Sure, criteria 1 through 5 are reasonably clear (though 4b deliberately substitutes a document that **claimed** the program was legal for actual legality, and never requires any lawyer to review the actual legality of the request), but there’s no explanation of what prompts the AG to certify as much to the Court. It is completely possible the AG can, on a whim, decide to screw over one

telecom and simply not issue such a certification in that case. (See bmaz for more on this.) And Walker's right about the ambiguity of this! As proof, look at how differently the telecoms and the government interpret this passage.

The telecoms (who of course want to get rid of the pesky lawsuits they're facing) argue that that "if" must be interpreted to mean "shall."

> 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 satisfied, and the word "if" simply reflects that these standards will not be met in every case. But nothing 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"). [my emphasis]

That is, if the telecoms fulfill any of the five underlying criteria, the telecoms argue, then the AG must certify to the Court that they do and the Court must ("shall") in turn dismiss the lawsuits.

But that's not what the government argues in its most recent brief. Whereas the telecoms argue the AG has to issue a certification to the Courts whenever a telecom meets one of the five criteria, the government argues—directly against the telecoms—that the AG retains discretion whether or not to issue such a certification.

> … the United States does not join the Carriers' argument that if necessary the Court should interpret Section 802 to require the Attorney General to file a certification whenever the factual predicates are met (Carriers' Supplemental Br., (Dkt. 571)). By its terms, Section 802 imposes no such requirement, and this Court should not create one. See Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 169 n.16 (1993) ("we may not add terms or provisions were Congress has omitted them"). There is no need for the Court to add a requirement not contained in the statute since it is well-settled that the non-delegation doctrine permits Congress to leave the decision whether

> and when to file a certification to the Attorney 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.

Heck, if I were Judge Walker, this disagreement is precisely what I'd point to to argue that Congress hadn't provided enough clarity to the AG. If the telecoms and the government are fighting about what "if" means, then surely its meaning is not at all clear!

"If" We Have Rule of Law

Mind you, the Obama position is not inconsistent as stated. In al-Haramain, Obama claims that 1806(f) is intended solely to give the AG discretion about whether or not to dismiss suits in FISA in cases where secrecy is threatened. And with retroactive immunity, Obama claims that the AG must retain discretion to dismiss suits in the way that best allows the government to protect sources and methods (or, from a citizen's standpoint, best hides telecom complicity in domestic spying). In fact, this consistency probably explains the greater emphasis in briefs—since Obama took over from the Dead-Enders—on the most efficacious way to maintain secrecy (and, in the retroactive immunity suit, on the language in the outdated SSCI report pertaining to protecting sources and methods). The "if" here, according to Obama's DOJ, is all about giving the AG the utmost flexibility with regards to ways to maintain the secrecy around national security issues.

And to hell with the law.

Because in both cases, this "if" gives the AG the sole discretion to determine whether someone—either the President or the telecoms—will be punished for breaking the law of the land.

Further, this guts separation of powers. Obama is arguing that the AG can order up legal results from Article III Courts—or not—according to his whim. And the Court, then, becomes no more than an instrument in the arbitrary exercise of executive power. And no one—not the telecoms, not those wiretapped illegally, and not Judges—can have any way of predicting which way the AG will rule, or whether the law means anything anymore.

If Obama gets his way, it will have the effect in this case of granting the telecoms immunity for having cooperated in illegal wiretapping, and granting George Bush immunity for having ordered it. That is, "if" Obama's AG interprets "if" the way he has threatened to.