

GOOD QUESTION

The Bush Administration is in Vaughn Walker's courtroom today, trying to convince him to just give the telecoms immunity with no further scrutiny.

But given the questions Judge Walker has posed to the Administration, it looks like it won't be that easy. For example, there's this question, which highlights just how nutty this retroactive immunity is:

What exactly has Congress created with § 802 (in Pub L No 110-261, 122 Stat 2467, tit II, § 201 (2008))? It does not appear to be an affirmative defense but rather appears to be a retroactive immunity for completed acts that allegedly violated constitutional rights, but one that can only be activated by the executive branch. Is there any precedent for this type of enactment that is analogous in all of these respects: retroactivity; immunity for constitutional violations; and delegation of broad discretion to the executive branch to determine whether to invoke the provision?

He goes from there to ask several more questions getting at that pesky separation of powers thing. You know—separation of powers, which says that the courts have the adjudicatory function?

In making the certification called for by section 802(a)(5), is the Attorney General performing an adjudicatory function? That is, is he not making a determination that only a court can make?

They are all good questions. And they suggest that Walker is not going to simply roll over and abdicate his Article III function. Which probably means this will be appealed beyond the

time when the Bush Administration leaves office.

Which I guess means we ought to be preparing some questions for Eric Holder about FISA at his confirmation hearing.