

STATE SECRETS NON-COMPROMISE COMPROMISE ARCHITECT TO REPLACE KAGAN

The great news just keeps coming.

Remember the “new” state secrets policy DOJ announced last year? It basically amounted to a promise that the Attorney General would review any invocation of state secrets to make sure such an invocation was really really secret rather than just sort of secret but really embarrassing, along with a promise that an Inspector General (but not a court) would investigate in case of wrong-doing (at the time, some of the existing state secrets invocations had already been investigated by IGs). Here’s how I described the “new” policy when it was announced.

What the “new” state secrets policy appears designed to do is buy time and limit the legal battlefields on which the Administration tries to stave off a CIPA-like process.

Legislatively, it appears the “new” policy (and presumably some pressure on Leahy directly) has convinced Leahy, at least, to hold off on moving his legislation forward. He *seems* to be content to wait and see how this new policy plays out. Nadler, on the other hand, seems to want to push forward with legislation (so is Russ Feingold, but he’s not in the same position to push forward Senate legislation as Nadler is). So at the very least, Holder’s “new” policy will buy the Administration time before Congress tries to reel in executive power.

Then there's Horn. Word is that Holder will use the "new" policy to withdraw the state secrets claim in one case, and by all appearances that one case will be Horn (I don't know whether that means they will try to settle Horn, or whether they'll just move forward with what amounts to a CIPA-like process without a state secrets claim behind it.)

Now of the three cases in question (Horn, al-Haramain, and Jeppesen), Horn is the one that was the biggest slam dunk legally to support a CIPA-like process (because of the fraud involved and the Circuit Court's earlier limitation on the state secrets claim). It's the one in which the Bush Administration's claim to state secrets was most bogus. And it's the least risky one to settle or litigate.

By withdrawing the claim of state secrets in Horn (if that is indeed what will happen), the Administration will avoid having the DC Circuit joining the 9th in supporting some kind of CIPA-process in state secrets, while still giving the Administration hopes of dismissing Jeppesen and al-Haramain based on state secrets.

In other words, this is all a big bureaucratic ploy to try to keep the Bush Administration's illegal actions on extraordinary rendition and warrantless wiretapping secret.

Well, the guy Obama plans to replace Kagan with is the architect of this "smoke and mirrors" policy.

The White House is poised to name Don Verrilli, an associate White House counsel, as solicitor general after Elena Kagan is confirmed to the Supreme Court. Verrilli joined the Obama

administration as an associate deputy attorney general, where he helped his close friend, Attorney General Eric Holder, craft the Justice Department's new state secrets doctrine guidelines.

[snip]

Verrillii's trial balloon appointment as SG will be viewed suspiciously by civil libertarians for his authorial role in the state secrets drama and for his record of fighting on behalf of industry against tech entrepreneurs. But he's got the trust of Holder, Bauer, and President Obama.

I can't wait to see what Obama has in store next to whittle away at the rule of law.