

IF YOU KEEP GETTING STOPPED AT AIRPORTS, THAT'S NOT A SECRET

This article, published yesterday morning, on the al-Haramain case provides a little background on the Administration's expanding use of State Secrets—and of judge's reluctance to challenge it.

Presidential administrations have invoked the privilege about 55 times since the U.S. Supreme Court enshrined the notion into law in a 1953 ruling and Sept. 11, 2001, according to research done by University of Texas, El Paso political science professor William Weaver.

Weaver's research found that the Bush administration has used it 39 times since 2001 to unilaterally withhold court documents from the court system, the most of any president.

At the height of Cold War tensions between the United States and the former Soviet Union, U.S. presidents used the state secrets privilege six times from 1953 to 1976.

Weaver said the privilege has never been successfully challenged in court.

"Courts are really afraid to confront the executive branch on this issue," Weaver said.

Well, that assertion was a little out of date yesterday. As Ryan Singel reports, a court in Chicago did reject one of the executive branch's sillier assertion of State Secrets back on March 25.

Eight Americans of south Asian and Middle Eastern descent who were

repeatedly detained at the border for questioning will be able to learn if they are actually on the government's terrorist watch list, a federal court in Illinois ruled last week, marking the first time that citizens have been able to learn whether they have been added to a sprawling and error-prone list used for screening at borders and traffic stops.

The government invoked the powerful state secrets privilege in the case, arguing that letting the plaintiffs know if they are or aren't on the list would harm national security since that could alert them to the fact they have been under government scrutiny.

But since the government admits it has stopped the six men and two women more than 35 times, federal Magistrate Judge Sidney Schenkier of the United States Northern Illinois District Court dismissed that argument. Instead he found that the government "failed to establish that, under all the circumstances of this case, disclosure of that information would create a reasonable danger of jeopardizing national security."

Not only did Judge Schenkier reject the Administration's claim about whether these guys were on the watch list or not (he did uphold the Administration's claim of State Secrets for its guideline for the watchlist), he made it clear that he doesn't buy the Administration's basis for such claim in its pet Unitary Executive theories.

The parties differ on whether the state secrets privilege finds its roots in common law, as plaintiffs argue ... or whether it arises from "the President's powers under Article II of the Constitution to conduct foreign affairs

and provide for the national defense," as defendants maintain ... The seminal case establishing the state secrets privilege, Reynolds, traced the origins of the privilege to common law evidence principles rather than to the Constitution. ... We had reviewed the authorities offered by the government in support of the proposition that the state secrets privilege emanates from the Constitution, and we find them unpersuasive.

Now, the timing on this is somewhat confusing. Schenkier first issued this order on March 25, but then reissued it (after correcting some typos) on April 16, which is the date on this opinion. The March 25 deadline is consistent with the first deadline Schenkier gave for turning over the documents—April 15. Schenkier has already granted the government two extensions on that deadline: first to April 29, and then to May 13. And while there are other parts of this suit that have already been appealed, it doesn't appear that the government has—yet—appealed this decision, though I suspect (and Schenkier acknowledges) that they will.

So the plaintiffs in this case are unlikely to verify that they were or are on the terrorist watch list anytime soon. But it will begin the process of challenging one of the Administration's more absurd claims of State Secrets.