

ERIC HOLDER'S SECRETS

I wanted to call your attention to one passage of the petition for an en banc hearing of the Jeppesen case (that is, a request that the 9th Circuit revisit its decision that state secrets only applies to evidence, and not information).

These conclusions by Director Hayden and the district court have been reinforced by an additional review – following the panel decision in this case – at the highest levels of the Department of Justice. Based on that review, it is the Government's position that permitting this suit to proceed would pose an unacceptable risk to national security, and that the reasoning employed by the panel would dramatically restructure government operations by permitting any district judge to override the Executive Branch's judgments in this highly sensitive realm.

I pointed out a very similar passage in the latest government filing in al-Haramain.

Furthermore, even after the Ninth Circuit issued its decision, an additional review was conducted at the highest levels of the Department of Justice to determine whether continued invocation of the privilege was warranted in response to the plaintiffs' claims under FISA.

What these "highest levels of the Department of Justice" reviews are, apparently, are the fruits of Eric Holder's promise to review the state secrets invocations of the Bush Administration to see whether they are "legally appropriate."

I will review significant pending cases in which DOJ has invoked the state secrets privilege, and will work with leaders in other agencies and

professionals at the Department of Justice to ensure that the United States invokes the state secrets privilege only in legally appropriate situations.

I guess this is how we're going to find out the results of his review, case filing by case filing?

Mind you, the results—that the Obama DOJ continues to support Bush's sweeping invocations of state secrets to hide Bush-era crimes—are no surprise. We've been getting evidence of that in piecemeal fashion since Holder was confirmed in February.

I just think maybe Holder could do us the favor of releasing the results of his review, under his own name rather than the imperious "highest levels of the Department of Justice." Holder's DOJ (and President Obama) is about to make this a separation of power issue—but they're doing so in ways that minimize the political pressure to break with Bush's practices. This Holder review is being waved around like some gold standard in court filings, but hidden from the general public.