

MORE ON HOLDER'S "NEW" STATE SECRETS POLICY

Here is the Holder memo announcing a "change" in the state secrets process. As bmaz has said, the change is procedural only—it still retains all the ability to invoke state secrets with the executive with little recourse to those whose suits have been hindered by the invocation of state secrets.

But I did want to point out a few details. First, this policy goes into effect on October 1. While it's unlikely, the one week in question does give Article III Courts a week to act to change the underlying reality with regards to state secrets.

Second, note that the policy replaces real courts with IG investigation (this is from the DOJ press release):

Referral to Inspectors General. The policy implements a referral process to relevant Offices of Inspector General whenever there are credible allegations of government wrongdoing in a case, but the assertion of state secrets privilege might preclude the case from moving forward.

That is, if you want to sue the government for rendering you to be tortured, for wiretapping you illegally, or for bugging your DEA office in Burma, if your case gets dismissed for state secrets, you'll have the satisfaction of knowing that an Inspector General will investigate your allegations.

Big whoop. In at least Horn and al-Haramain (and arguably, Jeppesen) that investigation has already been done. In fact, in Horn, one of the things the government is asserting state secrets on are IG Reports!!

And that's what the Obama Administration intends to replace Article III review with!

Finally, there's this:

6. Classification Authority

The department or agency with classification authority over information potentially subject to an invocation of the privilege at all times retains its classification authority under Executive Order 12958, as amended, for any successor order.

I hope the lawyers correct me if I'm wrong, but this is designed to be a blow against Article III efforts to order the government to give lawyers litigating these issues the need to know, and thereby access to classified information under dispute.

Mind you, if I were an Article III judge I would be unimpressed by this "new" policy, so it may not do Holder any good.