

“NEW” STATE SECRETS POLICY “SMOKE AND MIRRORS”

That’s what a spokesperson for the Center for Constitutional Rights had to say about Eric Holder’s new State Secrets policy: that it’s just “smoke and mirrors.”

The ACLU is similarly unimpressed. Ben Wizner, of the ACLU’s National Security Project, says,

On paper, this is a step forward. In court however, the Obama administration continues to defend a broader view of state secrets put forward by the Bush administration and to demand that federal courts throw out lawsuits filed by victims of torture and illegal surveillance. In recent years, we have seen the executive branch engage in grave human rights violations, declare those activities ‘state secrets,’ and thus avoid any judicial oversight or accountability. It is critical that the courts play a meaningful role in deciding whether victims of human rights abuse will have an opportunity to seek justice. Real reform of the state secrets privilege must affirm the power of the courts to reject false claims of ‘national security.’

Congressman Nadler welcomes some of the changes but promises to continue pushing a State Secrets bill through Congress.

These new requirements, particularly the requirement for the Attorney General to approve any state secrets claim only after reviewing information and determining whether the disclosure of such information would cause significant harm to national security, are significant steps toward improving the

use of the state secrets privilege. I also applaud the Attorney General's positive declaration that the state secrets privilege cannot be used to conceal unlawful conduct by the federal government or to prevent the exposure of embarrassing details. Another important change is the mandatory referral to the Inspector General of any case in which assertion of the state secrets privilege raises credible concerns.

These are all critical steps toward transparency and increased due process, and I believe that the Obama Administration has undertaken them in good faith, with both national security and justice in mind. Nevertheless, these reforms fall short of what is necessary. There is still no prohibition against dismissing entire cases from the outset, before the courts and parties have an opportunity to determine whether the information at issue is subject to the privilege and, if so, whether a case can proceed regardless.

We must not understate the extent to which the abuse of the state secrets privilege poses a major threat to our system of justice. We still need legislation to guide the courts, which do not take a consistent approach to claims of state secrets. And we must ensure that all of the necessary reforms are codified into law in order to prevent any future administration from abusing the state secrets privilege. My legislation, H.R. 984, the State Secret Protection Act, will achieve this. I look forward to working with the Obama Administration to see these critical reforms through.

Like Nadler, Senator Leahy lauded some parts of this policy—those that come from his bill on state secrets. But still called for judicial

review:

I am pleased that the Attorney General is moving in the right direction to better control assertions of the state secrets privilege. The administration policies announced today bring a higher degree of transparency and accountability to a process previously shrouded in darkness.

The Attorney General's announcement includes several concepts drawn from the States Secrets Protection Act (S.417). The new policy adopts the standard that the government can only assert the state secret privilege in relation to information that could cause significant harm to national security. It also increases the number of internal controls, including the creation of a new Department of Justice State Secrets Review Committee, and requires the Attorney General to personally approve the assertion of the state secrets privilege. These checks draw from critical concepts in the legislation. I remain especially concerned with ensuring that the government make a substantial evidentiary showing to a federal judge in asserting the privilege, and I hope the administration and the Department of Justice will continue to work with Congress to establish this requirement.

Senator Feingold is more critical than his congressional colleagues, however. He says,

The Bush administration's approach to state secrets was wrong-headed, causing significant public distrust and potentially shielding government wrongdoing and embarrassing mistakes behind a questionable legal doctrine. While I am pleased that the Obama administration recognizes that the Bush

approach was a mistake, its new policy is disappointing because it still amounts to an approach of 'just trust us.' Independent court review of the government's use of the state secrets privilege is essential. I urge the administration to work with Congress to develop legislation that sets reasonable limits on the privilege and will not be subject to change under each successive president.

I've asked for some follow-up on some of these statements—I'll update if I get them.