OBAMA'S NEW STATE SECRETS POLICY IS REAFFIRMATION OF BUSH'S POLICY

Back in mid June, testifying before the Senate Judiciary Committee, Attorney General Eric Holder announced that the Obama Administration's long promised new policy on state secrets use would be revealed "within days".

Over three months later, and on the eve of oral argument in *al-Haramain v. Obama*, the most dangerous case to the government's unfettered use of state secrets, the Administration has conveniently leaked word that its long awaited new policy on state secrets will be made public, perhaps as soon as today.

From Charlie Savage at the New York Times:

> The Justice Department is preparing to impose new limits on the government assertion of the state secrets privilege used to block lawsuits for national security reasons. The practice was a major flashpoint in the debate over the escalation of executive power and secrecy during the Bush administration.
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> The new policy, which could be announced as early as Wednesday, would require approval by Attorney General Eric H. Holder Jr. if military or espionage agencies wanted to assert the privilege to withhold classified evidence sought in court or to ask a judge to dismiss a lawsuit at its onset.
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> "The department is adopting these policies and procedures to strengthen public confidence that the U.S. government will invoke the privilege in court only when genuine and significant

> harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests," says a draft of a memorandum from Mr. Holder laying out the policy and obtained by The New York Times.

In a nutshell, the Administration's new policy requires that a state secrets claim must be run by the DOJ leadership before being invoked in court. What, this wasn't being done before?

Contrast this effectively meaningless policy from the Administration with that contemplated by Senators Pat Leahy and Russ Feingold in proposed Senate legislation on state secrets policy (Jerrold Nadler has a similar proposal in the House), which would:

> Provide a uniform set of procedures for federal courts considering claims of the state secrets privilege
> Codify many of best practices that are already available to courts but that often go unused, such as in camera hearings, non-privilege substitutes, and special masters
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> Require judges to look at the evidence that the government claims is privileged, rather than relying solely on government affidavits
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> Forbid judges from dismissing cases at the pleadings stage, before there has been any document discovery, while protecting innocent defendants by allowing cases to be dismissed when they would need privileged evidence to establish a valid defense
>
> Require judges to order the government to produced unclassified or redacted versions of sensitive evidence when possible to allow cases to move forward safely
>
> Establish security procedures to ensure

> that secrets are not leaked during litigation, including closed hearings, security clearance requirements, sealed orders, and expedited appeals
>
> Establish congressional reporting requirements
>
> Address the crisis of legitimacy surrounding the privilege by setting clear rules that take into account both national security and the Constitution

As can be discerned, there is quite a difference in the quality and seriousness of policy proposals. The Obama Administration has done nothing but put the proverbial lipstick on the existing baked pig.

Now why, lo after all these months, would the Administration suddenly announce their "new policy" at this instant? One reason certainly might be the fact that oral argument on plaintiffs' motion for summary judgment in the absolutely critical state secrets case of *al-Haramain v. Obama* are scheduled for this morning in front of Judge Vaughn Walker in the Northern District of California.

The *al-Haramain* case is a perfect storm of problems for the government, there is warrantless wiretapping, the surveillance invaded an attorney-client relationship, there is known proof in the form of the sealed surveillance log under the protective custody of the court, and at least some of the surveillance is known to have occurred during the period after the infamous "John Ashcroft hospital scene" when Jim Comey and other DOJ officials revolted and the Bush Administration was unquestionably illegally operating their program under the insufficient signature of White House Counsel Alberto Gonzales.

But the monster problem that may be lurking beneath even this surface is that when Bush's DOJ submitted declarations to the court describing their program and why state secrets

were being invoked in 2006, they did not describe the underlying process by which they picked targets, to wit data mining. And the existence of data mining is a huge problem, because all activities in that regard had been rendered illegal and were specifically defunded by Congress in the Appropriations bill for that year.

Tack in the distinct possibility that the government made material misrepresentations about their data mining and warrantless surveillance to the FISA Court and that illegally information thusly obtained inappropriately made its way into the affidavit for the search warrant executed on the al-Haramain Foundation in Oregon, and you see the veritable cornucopia of problems the government could be so determined to stop inquiry into in the al-Haramain litigation before Judge Walker. Some or all of this may be the subject of the famous "inaccuracies" the government has tried to surreptitiously clean up since Obama took office.

There is a lot the government has to hide in *al-Haramain*, and they are desperate to do just that. It would be a perfect time to whip out a ruse in the form of a "new state secrets policy". Even if there is nothing at all new about it. To any extent this is the motivation behind the timing of the Obama Administration's new state secrets policy, it is unlikely to sway Vaughn Walker, he is quite adroit at spotting the government's pigs, even when they are well dressed and wearing lipstick.

Oh, and one other thing, it is pretty hard to take seriously the Administration's claims for their "new policy" that:

> The new policy would also direct the Justice Department to reject a request to use the privilege if officials decide the motivation for doing so is to "conceal violations of the law, inefficiency or administrative error" or to "prevent embarrassment."

That claim defies credulity on a morning when the government is going to waltz into open court in San Francisco and blatantly do all of those things under an unconscionable claim of state secrets. Disingenuousness of this level is most certainly not "change we can believe in".