# STATE SECRETS: HOLDER'S GAME

I'm still working on understanding this, but here's what I think the Obama Administration was trying to achieve with its "new" policy on state secrets the other day.

As I pointed out last month, the Horn case in DC and the al-Haramain case in San Francisco are moving in remarkably parallel direction towards a CIPA-like process, in which the government can be required to provide substitutions for classified information, thereby allowing a suit to move forward even in the case of highly classified information. In both cases, the judge had advocated such a CIPA-like process. Because the government basically took its toys home and refused to cooperate in both cases, both cases either have (in the case of Horn) or will be (in the case of al-Haramain, regardless of what Judge Walker rules) headed to the Circuit Court in the near future. There are reasons to believe the Circuit would support the CIPA-like process in both cases.

Add in Jeppesen (Binyam Mohamed's extraordinary rendition suit against a Boeing subsidiary), in which the 9th Circuit has already ruled that state secrets must be tied to evidence and not information, and it appears clear that the Courts might roll back state secrets as currently treated.

And, at the same time, Jerrold Nadler and Pat Leahy have been negotiating new State Secrets legislation with the Administration. Nadler and Leahy, too, have been advocating a similar kind of CIPA-like process.

What the "new" state secrets policy appears designed to do is buy time and limit the legal battlefields on which the Administration tries to stave off a CIPA-like process.

Legislatively, it appears the "new" policy (and presumably some pressure on Leahy directly) has

convinced Leahy, at least, to hold off on moving his legislation forward. He seems to be content to wait and see how this new policy plays out. Nadler, on the other hand, seems to want to push forward with legislation (so is Russ Feingold, but he's not in the same position to push forward Senate legislation as Nadler is). So at the very least, Holder's "new" policy will buy the Administration time before Congress tries to reel in executive power.

Then there's Horn. Word is that Holder will use the "new" policy to withdraw the state secrets claim in one case, and by all appearances that one case will be Horn (I don't know whether that means they will try to settle Horn, or whether they'll just move forward with what amounts to a CIPA-like process without a state secrets claim behind it.)

Now of the three cases in question (Horn, al-Haramain, and Jeppesen), Horn is the one that was the biggest slam dunk legally to support a CIPA-like process (because of the fraud involved and the Circuit Court's earlier limitation on the state secrets claim). It's the one in which the Bush Administration's claim to state secrets was most bogus. And it's the least risky one to settle or litigate.

By withdrawing the claim of state secrets in Horn (if that is indeed what will happen), the Administration will avoid having the DC Circuit joining the 9th in supporting some kind of CIPA-process in state secrets, while still giving the Administration hopes of dismissing Jeppesen and al-Haramain based on state secrets.

In other words, this is all a big bureaucratic ploy to try to keep the Bush Administration's illegal actions on extraordinary rendition and warrantless wiretapping secret.