

AS PREDICTED, THE ADMINISTRATION FOLDS ON HORN STATE SECRETS CLAIMS

After Eric Holder came out with his "new" state secrets policy last week, I had this to say:

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.

[snip]

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.

Well, today we've got news that the government—after fighting Horn's suit for 15 years—has all of a sudden decided to settle.

The Obama Administration may be in the process of heading off a court battle over the Executive Branch's power to control classified information.

A court filing this afternoon discloses "an agreement in principle" to settle the case of Horn v. Huddle, a lawsuit brought fifteen years ago in which the Drug Enforcement Agency representative in Burma, Richard Horn, accused the CIA station chief and chief of mission of spying on him.

Now, the Administration **did** make a big show of pretending not to be bailing on this suit to protect state secrets by claiming, in an Appeals Court filing submitted the day after Holder's "new" policy that this suit met the terms of that "new" policy.

On September 23, 2009, the Attorney General issued new Policies and Procedures Governing Invocation of the

State Secrets Privilege. Those procedures apply to cases in which the government invokes the state secrets privilege after October 1, 2009. Nevertheless, the assertion of the privilege in this case satisfies the standards in the new policy concerning the applicable legal standards, narrow tailoring, and limitations on the assertion of the privilege. Moreover, the privilege as invoked in this case has been carefully reviewed by senior Department of Justice officials, who have determined that invocation of the privilege in this litigation is warranted.

But that's a load of—what do the lawyers call it? Oh yeah, horseshit. See how that Appeals Court filing boasts that "senior Department of Justice officials ... have determined that invocation of the privilege in this litigation is warranted"? Well, here's what the actual "new" policy is.

Attorney General Approval. The Department will not defend an assertion of the privilege without the personal approval of the Attorney General (or, in the absence or recusal of the Attorney General, the Deputy Attorney General or the Acting Attorney General).

Call me crazy, but I'm guessing when they boasted about "senior Department of Justice officials" they didn't mean, given that they didn't say, "the most senior Department of Justice official." And since the Attorney General himself was undoubtedly available last week (because he was in DC issuing new policies on state secrets), but apparently not one of those "senior DOJ officials" saying this case merited the state secrets invocation, I'm guessing that means their claim that this case "satisfies the standards" of the "new" policy (which includes AG approval) is, oh yes,

horseshit. A ploy, to establish a better bargaining position with Horn's attorneys.

And so once again, the Administration follows its now well-established policy of "compromising" right before Article III courts issue rulings that would reign in executive power, all in an effort to retain as much of that executive power as possible while looking all "changeey."

Richard Horn, I do hope you get well-compensated for having had your government spy on you. After having been illegally wiretapped in an effort to sabotage your efforts to cut back the flow of drugs, followed by fifteen years of fighting for justice, you've earned that compensation.