IF IT'S [WAS] FRIDAY, IT MUST BE STATE SECRETS, HIDING ABUSE OF POWER, IN THE 9TH CIRCUIT

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A quick word about scheduling. I'm going to take a break from Dick Cheney for a bit so I can hit some other issues. Later today or tomorrow, I'm going to take a look at the torture documents which Mary and MadDog started exploring in this thread. But then I need to turn back to PATRIOT in anticipation of the mark-up of the House bill, which is probably going to be on Wednesday.

But for the moment, I want to take a look at Eric Holder's state secrets invocation yesterday.

The case is one of the remaining surveillance suits for the government's "dragnet" collection of telecom signals, parallel to EFF's Jewel case. The government had already invoked state secrets in 2007. But after the Jeppesen decision this spring, EFF reactivated the case (yeah, I'm sure this is not the legal term). And so now, to try to throw the case out again, the government is reasserting its state secrets invocation.

The case is interesting for a couple of reasons. First, the timing. The Administration is invoking state secrets under its "old-is-new" state secrets policy, something Holder focuses on in his statement on the invocation.

> Last month, I outlined new policies and procedures containing a system of internal and external checks and balances that the Department will follow each time it invokes the state secrets privilege in litigation. We designed those procedures to provide greater accountability for the use of the privilege and to ensure that the Department invokes the privilege only to the extent that it is absolutely necessary to protect national security. The procedures require a thorough, multi-stage review and rely upon robust judicial and congressional oversight.
>
> The present case was reviewed under this new process. The Director of National Intelligence and the Director of the National Security Agency certified to the Department that disclosing information at issue in the case would jeopardize national security and provided classified information to support that conclusion. A review committee of senior Department officials, the Associate Attorney General, and the Deputy Attorney General all reviewed that information. Based on the recommendations from this review process, as well as my own personal review of the information provided, I concluded that we had no alternative but to assert the privilege to prevent the exposure of intelligence sources and methods.

As such, it appears that DOJ wants to pitch this invocation as hopey-changey proof of the reasonableness of its new process.

But then, even in his statement, Holder is invoking state secrets in a 9th Circuit case assuming that the government will win its Jeppesen case. Holder describes how DOJ attempted to carve out a part of this suit that could go forward while still protecting state

secrets.

> As part of our internal Department review, we specifically looked for a way to allow this case to proceed while carving out classified information, and ultimately concluded there was no way to do so.

That statement assumes the Executive—and not the Courts—gets to decide how much of a case gets thrown out with a state secrets invocation, an assumption that flies in the face of the Jeppesen decision. Curiously, though, a statement making that assumption also ends with the kind of humility we haven't seen from the Holder DOJ in related suits.

> Ultimately, the judicial system will determine whether we have drawn the line at the appropriate place, as is lawful and appropriate under our system of checks and balances. As always, we will respect the outcome of that process.

Recall, for example, the number of times the Holder DOJ has told Vaughn Walker (the judge in this case, too) that they didn't really like his decision that FISA trumps state secrets and so were going to just ignore it. The same DOJ is now saying that the Courts really do get the final say.

But then look at these two references to ongoing intelligence operations—and the denial of any wrong-doing.

> I did so only because I believe there is no way for this case to move forward without jeopardizing **ongoing intelligence activities** that we rely upon to protect the safety of the American people.
>
> [snip]
>
> Much like previous litigation in which the government asserted the privilege,

> the core claims in this case involve questions about **ongoing intelligence operations**, and allowing it to proceed would disclose critical activities of high value to the national security of this country.
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> We are not invoking this privilege to conceal government misconduct or avoid embarrassment, nor are we invoking it to preserve executive power. Moreover, we have given the court the information it needs to conduct its own independent assessment of our claim by filing a classified submission outlining the underlying facts and providing a detailed record upon which it can rely.

Though Holder wants to pretend that al-Haramain and Jeppesen were about ongoing programs, they in fact were about discrete crimes committed in the past, in programs that have—at least allegedly—been changed since the time of the crime. But here he emphasizes the ongoing nature of what we all know to be dragnet collection of US person and foreign data.

But I think the emphasis on "ongoing" programs and the claim that the invocation does not cover up crimes is a deliberate test for Walker. That is, Holder is asserting this is a legal program that can't be litigated openly because, even though it is legal, Americans can't know about it. I'm sure the secret declarations have a bunch of legalese describing how this ongoing dragnet collection is now legal, brought under compliance with FISA through a bunch of fancy lawyering and a damned compliant Congress. (Not that I buy that, but I do think that is what Holder is saying.)

In other words, I suspect that DOJ is not only trying to get out of litigating this case, but they're testing the libertarian-minded Vaughn Walker to see whether he buys the legality of this program even while buying off on its secrecy.

It’s an interesting test, seeing as how Congress is about to further institutionalize such a program with its PATRIOT reauthorization.