OBAMA DOJ CLAIMS JOURNALISTS ARE LIKE DRUG USERS

HuffPo has a good write-up of Friday's Fourth Circuit hearing on whether James Risen is entitled to a reporter's privilege in the Jeff Sterling case. It describes Judge Robert Gregory challenging DOJ appellate lawyer Robert Parker's claims that there is no privilege at all. And while Charlie Savage described the two other judges as harder to read, both stories noted Albert Diaz calling Branzburg v. Hayes—the SCOTUS precedent—"clear as mud."

I'm particularly interested in the way Gregory pushed back against Parker. He made a distinction between the crime that reporter Paul Branzberg witnessed—the preparation and consumption of hash—for which he was called to testify to a grand jury, and what Risen allegedly witnessed.

> "I don't think there would be a balancing test because there's no privilege in the first place," Parker said. "The salient point is that Risen is the only eyewitness to this crime."
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> Gregory told Parker that the Supreme Court's *Branzburg v. Hayes* decision — which Parker cited as precedent for forcing journalists to testify when they had witnessed a crime — involved the witnessing of a different crime, "not the disclosure itself."
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> Parker said what Risen did was "analogous" to a journalist receiving drugs from a confidential source, and then refusing to testify about it.
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> "You think so?" Gregory asked, clearly unconvinced.
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> "The beneficiary of the privilege is the

> public … the people's right to know," Gregory said. "We need to know what the government is doing," he noted. "The king never wants anyone to disclose."

The challenge is interesting as a threshold level, because the Obama Administration has built a lot of their attacks against leaks on the notion that journalists are witnesses to a crime (Patrick Fitzgerald obtained Judy Miller's testimony on the same basis, though he did so though an application of the balancing test that Parker wants to throw out altogether).

Obama's DOJ has gone further, though: they appear to have approved the use of National Security Letters to obtain journalists' contacts in the most recent update of the DIOG. That would appear to allow them to learn the identity of sources journalists phone or email **without any judicial review**. Which in turn allows DOJ to determine a crime has been committed and based on that, eliminate journalists' confidentiality because they were "witnesses" to what DOJ has unilaterally determined is a crime.

If Gregory rejected the government's argument based on leaks being a different kind of crime, it would not only protect Risen's sources for his MERLIN story, but it would mean the government would have to curtail its use of NSLs to get journalist contacts (at least in the Fourth Circuit).

But this passage is revealing for another reason. As I said above, Branzberg was subponaed because he **witnessed the use** of illegal drugs. But Parker, in constructing his analogy, said receiving classified information from a source is like **receiving illegal drugs**, not just witnessing them. Note what that misapplication of the analogy does: It is not illegal to witness the use of drugs, but it is illegal to possess illegal drugs.

In other words, though no law supports such a suggestion, DOJ is now arguing that journalists

who receive classified information are themselves criminals, just like those who possess hash.

Someone’s smoking something awful at DOJ.