OBAMA AND STATE SECRETS

Last night, Obama suggested that his Administration may be in the process of softening their Cheneyesque stance on state secrets.

> Q Thank you, Mr. President. During the campaign you criticized President Bush's use of the state secrets privilege. But U.S. attorneys have continued to argue the Bush position in three cases in court. How exactly does your view of state secrets differ from President Bush's? And do you believe Presidents should be able to derail entire lawsuits about warrantless wiretapping or rendition, if classified information is involved?
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> THE PRESIDENT: I actually think that the state secret doctrine should be modified. I think right how it's over-broad. But keep in mind what happens is, we come into office, we're in for a week – and suddenly we've got a court filing that's coming up. And so we don't have the time to effectively think through what exactly should an overarching reform of that doctrine take. We've got to respond to the immediate case in front of us.
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> I think it is appropriate to say that there are going to be cases in which national security interests are genuinely at stake, and that you can't litigate without revealing covert activities or classified information that would genuinely compromise our safety. But searching for ways to redact, to carve out certain cases, to see what can be done so that a judge in chambers can review information without it being in open court – you know, there

> should be some additional tools so that it's not such a blunt instrument. And we're interested in pursuing that. I know that Eric Holder and Greg Craig, my White House Counsel, and others are working on that as we speak.

Now, at one level, this is unsurprising. As I reported last week, Jerry Nadler reported that Eric Holder appeared to agree in principle with Nadler's efforts to reform state secrets.

But the claim that, "we come into office, we're in for a week — and suddenly we've got a court filing that's coming up"? That I've got limited patience with. True, the Administration did have a bunch of state secrets cases come up right at the beginning of the term. True, many of those came up even before Eric Holder was confirmed.

But the most hysterical legal invocation of secrets (though not the most morally problematic one, which I consider Binyam Mohammed's case) came in response to the 9th Circuit's rejection of the Administration's al-Haramain appeal. That was February 28, more than a month after Obama was inaugurated, and several weeks after Holder was confirmed. Mind you, that was not a formal invocation of state secrets (I'll explain why I think that's significant in a second)—it was a reaffirmation of the 9th Circuit's prior ruling that state secrets had been properly invoked in that case. But it was a crazy, Cheneyesque claim to fairly unlimited powers on the part of the executive to control classification.

So I don't buy that Obama (or just as importantly, Greg Craig) has been planning to roll back Bush's use of state secrets. Rather, I think the Administration (and particularly Greg Craig) has gotten interested in "fixing" state secrets because it's going to be fixed one way or another, and by joining in now, they'll be able to limit how it gets rolled back.

Consider the way the Obama Administration dealt with the Rove and Miers' testimony. They could

(and still might, if and when Dawn Johnsen ever gets confirmed) have ended that squabble simply by withdrawing the Bradbury memo laying out absolute immunity. Or, they could have briefed the Circuit Court but argued against the claim. Instead, they negotiated a settlement that—while it left Bates' District Court ruling on the books—still left somewhat unsettled the status of absolute immunity. Greg Craig got involved in a way that yielded actual results, without ceding the principle that the executive can make crazy unilateral grabs to power.

So look where we are now. There have been a great number of rulings recently that assert the Courts' authority in determining the appropriate way to deal with classified information in trials. The 9th—the same circuit that will rule on all the pending wiretap cases—just issued a ruling which limits the invocation of state secrets to evidence, not programs.

Now, consider how that ruling hangs over the al-Haramain case. Judge Walker will now be obligated to review the pieces of evidence in the al-Haramin suit to determine what can and cannot be entered into evidence. That is precisely the stance the Cheneyesque al-Haramain brief—with its threat to take its evidence and go home rather than have Judge Walker rule on whether al-Haramain could have access to it—tried to prevent. So in the most recent of these kinds of briefs submitted by the government, it was frantically trying to claim that the government gets to determine on an evidence by evidence basis what could be used in the suit. But that stance is—so long as the recent 9th Circuit ruling stands—no longer possible.

The Courts are moving rapidly to sharply curtail state secrets. So if Obama (and Greg Craig) want to retain it, they've got just one choice—to deal with Congress. And I suspect that's what Obama (and Greg Craig and Holder) are up to—trying to influence what those "additional tools" will be.