

NADLER AND STATE SECRETS

Yesterday, Jerrold Nadler announced he will hold a hearing on state secrets on Thursday.

Congressman Jerrold Nadler (NY-08), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, will chair a legislative hearing on H. R. 984, the State Secret Protection Act of 2009, his bill to reform the state secret privilege. This hearing will examine the standard of review for what qualifies as a state secret and how best this privilege should be reformed. The hearing will take place on Thursday, June 4th at 2:00pm in Rayburn House Office Building, Room 2141, Washington, D.C.

The state secret privilege allows the government to withhold evidence in litigation if its disclosure would harm national security. The purpose of the privilege is to protect legitimate state secrets; but if not properly policed, it can be abused to conceal embarrassing or unlawful conduct whose disclosure poses no genuine threat to national security. Nadler's bipartisan bill, the State Secret Protection Act of 2009, co-sponsored by Rep. Thomas Petri (WI-6), would ensure meaningful judicial review of the privilege and prevent premature dismissal of claims. The bill aims to curb abuse of the privilege while protecting valid state secrets.

As it happens, at the same time they announced this, Nadler was speaking on a panel with me about accountability for torture (I'm looking for video—but it may take a while to find it). And he focused closely on state secrets.

Interestingly, he was speaking of state secrets as a means of accountability for not just torture but (obviously) illegal wiretapping.

Mind you, Nadler is also pushing for an independent prosecutor on torture, so he's not proposing lawsuits as the sole means for accountability. But he's thinking of it as a means for accountability.

It seems there are a few problems with that. First, timing. Yes, if state secrets were changed, Binyam Mohamad's suits could move forward. But for others, a lawsuit would just begin to wend its ways through the courts, but take years and years to resolve.

Furthermore, it's not just state secrets that protects the wrong-doers. It's also protections of federal employees from suit. While a lawsuit might expose the wrong-doing of the Bush Administration, it's not going to land Dick Cheney in jail.

And, ultimately, it's a concession of Congress' own failures. When Chris Anders, ACLU's legislative counsel, argued that indefinite detention would not pass Congress, Nadler pointed to the FISA Amendment Act as an example of how craven Congress can be. (Nadler was warning that we need to be very vigilant against any bill on indefinite detention.)

We definitely need to fix state secrets—and between the 9th Circuit Court of Appeals and Congress, I think that'll happen (Nadler also predicted that Anthony Kennedy would vote with us if it ever got to SCOTUS). But if it's going to be a means of accountability, we need to do more to make the individuals who implemented these policies personally responsible.