

HOUSE JUDICIARY STATE SECRETS HEARING OPEN THREAD

I'm a little late to the the House Judiciary State Secrets Hearing (committee stream here).

Here are the witnesses:

Hon. Patricia M. Wald Retired Chief Judge U.S. Court of Appeals for the District of Columbia Washington, DC

Hon. Asa Hutchinson Senior Partner Asa Hutchinson Law Group Washington, DC

Andrew Grossman Senior Partner The Heritage Foundation Washington, DC

Ben Wizner National Security Project Staff Attorney American Civil Liberties Union Washington, DC

[Also, though it's related more generally to the two bills on this than this hearing, Secrecy News just made a recent Congressional Research Service paper on State Secrets available.]

Jerrod Nadler has had his opening statement—the big news in that was that Holder refused to make a witness available for this hearing. Jim Sensenbrenner is up noting that Obama has adopted Bush's approach on State Secrets.

Ouch.

And if I'm not mistaken, Sensenbrenner accidentally called Hillary VP, not Biden.

Conyers: The President's running away from a lot of things, that doesn't make this different. We've been here before, Ladies and Gentlemen. I'm for State Secrets. There are some secrets we've got to keep away from citizens and congresspeople and bloggers. But which ones. We didn't say "abolish state secrets."

[Man, something has made Conyers cranky.]

Conyers: [Now listing the cases in which Obama has invoked State Secrets.] It is unacceptable that the Department declined to come to this non-secret hearing. They could not provide a witness, why? There's a review pending, and until it is solved, they don't want to come before this co-equal branch of government. They could have sent someone here to say we can't talk with you guys.

Patricia Wald: Use of privilege to cut off relief. Unnecessary, produces rank injustice. US v Reynolds, ultimately it is a judge who must decide whether privilege applies. There is a consensus it's time to regularize the privilege. Nothing that I can find in this bill would make govt turn over information. Not much doubt Congress has power to regulate evidentiary rules. In al-Haramain, judge decided that FISA pre-empted state secret's privilege. Federal judges handle classified information every day. Incorporates proven techniques, good thing to have these techniques recognized in the law. Jeppesen, to me they did a very good thing in distinguishing using State secrets to dismiss as a whole. Court should weigh govt's testimony in same way as he evaluates expert testimony. The bill does require the judge to actually look at it.

Asa Hutchinson: Law enforcement background. Any assertion of state secrets should not be immune from checks and balances. A human tendency when that privilege is there to claim that privilege.

Courts have proven their ability to manage secrets: FISA, CIPA, FOIA. You could make the case there's been more loose lips in other branches of government.

Andrew Grossman: This legislation would severely limit the state secrets privilege. [The Heritage Foundation sent someone whose voice has yet to change to oppose this bill.] No evidence that it is being used more frequently or differently than before. "There's a bunch of Democrats who love state secrets too!!!" This empowers judges to usurp Congress' powers. [huh? Well, it's a novel approach.] "This is about using the Courts to make policy."

Ben Wizner: We've seen state secrets mutate into an alternative form of immunity to shield the government from accountability.

Nadler: Do you agree that the courts must grant govt substantial weight? This is one in the SJC bill but not this one.

Wald: Utmost deference, in the colloquy that followed, like exemption FOIA 1, use substantial weight, I believe I also attached to that what I later said, I meant the same kind of weight that any expert witness gets. Only weight appropriate according to expertise. I like the language in this bill.

Nadler: What are the risks of putting in "substantial deference"?

Wald: Basic principle is that judge should be decision maker, ought to make independent assessment.

Hutchinson: "Substantial deference" would undermine independent judgment.

Nadler: You'd trust expertise of courts.

Nadler: Wizner, entire subject state secrets. Govt acknowledged rendition. What are we to make of subject that entire subject matter too secret.

Wizner: Govt approach is opportunistic and

maleable.

[One note about this. Kagro noted today that this hearing is happening on the same day that SJC is marking up their bill on this. It sure seems like Nadler's pushing back hard against Leahy on this...]

Sensenbrenner: Wald, you said, "substantial weight." Have you changed your mind?

Wald: Deference not in any statute. Different stakes in FOIA and state secrets, if you're in a civil case where there's an allegation of injury, stakes are much more important. Judges have interpreted FOIA 1 differently.

Sensenbrenner: Body of law in current law, repeals does not substitute another standard. Aren't we likely to get less certainty on what is legitimate claim of suppression of information?

Conyers: Why has Obama blown this off?

Grossman: Obama likes state secrets now.

Conyers: I was afraid you'd answer.

[Someone, I don't know whom]: Are you just speculating?

Grossman: Yes. Reasonable conclusion can be drawn.

Conyers: Since you've been so expert with President, can you explain AG?

Hutchinson: Appreciate fact that AG is looking within the executive branch, but that raises the profile and necessity of Congress to act. They're working on their branch of govt, I'm glad Congress is considering it as well.

Conyers: Mr. Frank and I raise unconstitutionality more than anyone else?

Wizner: I share Wald's opinion that Congress has authority to legislate in this area. My understanding that if this were unconstitutional, it'd apply to FISA, CIPA,

FOIA. None of those intrude on President's constitutional authority, and neither would this bill.

Hutchinson: Impedes President's ability to protect. Doesn't stop from exercising state secrets. It just says that when it gets to the courts after the fact, then there's going to be a process in our system of checks and balances.

Conyers: if we were in court, Mr. Grossman, you'd be on the short end of this discussion.

Grossman: Time and time again, secrecy in some domains C-i-C powers. [names Nixon] Govt has innate power to control classified information. It is my opinion that this legislation intrudes on this power.

Nadler: Grossman, you cite these cases where SCOTUS says secret. It has always said that this is not unlimited.

Grossman: No power is absolute. No power is empty either.

Conyers: If we were in Court, Mr. Grossman, I'd ask you to come back to Chambers afterwards but I appreciate your attempts to defend your ideas.

King: Anything in history where state secrets has made it less safe. What are we trying to fix?

Hutchinson: Regardless of history, we have responsibility that potential for abuse minimized by checks and balances. I come at this as a conservative. I do not believe in an unfettered and unchecked executive branch any more than I believe in an unchecked judiciary branch. That goes against our Founding Fathers.

King: Ever gone into classified hearing and given up blackberry and cell phone and seen similar briefing already come out in news.

Hutchinson: Executive branch excels in speaking of classified information. Track record with Courts totally different. Track record is

extraordinary.

King: If the President was about to contract with a criminal enterprise to do the census to flip the congress. [Gotta attack ACORN!!!]

Grossman: No, that organization that you describe, do not concern national security.

Nadler: Sure, I'll reconsider whether ACORN should be investigated if you co-sponsor this bill.

Delahunt: What we have failed to do is look at the process of classification.

Delahunt: Grossman, why do you think this would be burdensome to review this? How many of these have you been involved in?

Grossman: I'm a researcher.

Delahunt: You ought to speak to some litigators and some judges before you say that.

Franks: Asa's on the other side of the issue. Even the most sage and wise among conservatives can be a little disoriented. Mr. Chairman, pattern of conversation you had with Grossman. Reserved under themselves the right to use same techniques if they thought were necessary. Obama called Iraq War war of choice, and yet he continues to prosecute that war. Has withdrawal timetable, same as Bush Administration. Gitmo, appears the results will be terrorists in the US or creation of something essentially the same as Gitmo. Surveillance have been left in place. I even heard the President say we cannot sustain this deficit spending. Invoked State Secrets three court cases. "Makes it hard to distinguish from its predecessor." All the elements of hypocrisy. I'm thankful that Mr. Obama has had some epiphanies.

Grossman: Not a partisan matter. There has been no disagreement.

[Hey, you think those who have unlimited power like to keep that unlimited power?]

Nadler: Purpose of hearing is to find out what's

right, not who's right.