FURTHER COMMENTS FROM JERROLD NADLER ON THE "NEW" STATE SECRETS POLICY

Given that Congressman Jerrold Nadler was one of the members of Congress who responded to DOJ's "new" state secrets policy by reiterating the need for legislation reforming state secrets, I asked his office for more information of where they think the "new" policy leaves efforts for legislation. A spokesperson provided the answers below.

I was curious, first of all, whether the "new" policy was a result of negotiations that have been going on for several months with Congress. It was not. Rather, it was the result of the DOJ review of the outstanding state secrets claims made by the Bush Administration.

> This policy came out of the order from Attorney General Holder that the Department of Justice review all pending cases where the state secret privilege had been asserted and was not the result of negotiations with Congress. However, we have met in the past several months with various members of the review team and have shared with them our concerns regarding overbroad use of the privilege, including our dismay regarding the continued assertion of the privilege in an effort to seek premature dismissal of cases at the initial pleading stages, and the Administration's continued resistance to independent court review of state secret assertions. Some of those issues still need to be addressed, which highlights the fact that voluntary executive branch reform – while welcome – is not sufficient.

Of course the policy seems to have caused the Senate, at least, to back off efforts for reform of state secrets. Nadler's spokesperson reinforced that impression–noting that a number of members of Congress who had been supporting reform now think it is less urgent.

> We are continuing to work with colleagues to build support for Congressman Nadler's bill (H.R. 984). Some Members may now feel that legislative reform is less important because of the Department of Justice's new policy, and we likely will need to do some work to explain that – even if the voluntary internal policy were perfect – executive branch assertion of the privilege is just one part of the equation. The other part of the equation – how courts handle state secret claims – cannot be addressed any other way except through legislative action. Right now, courts are struggling to apply existing case law and they vary greatly in treatment of privilege claims, with some courts simply deferring to assertions of harm made by agency officials and other courts undertaking a more rigorous review of those claims. Rather than having each court develop its own standards and procedures, the better way to ensure that valid state secrets are protected while maximizing fairness to litigants is by providing uniform standards and procedures. Doing this will ensure that national security is protected while restoring the privilege to its appropriate scope, which will – in turn – rebuild the public's confidence that the state secret privilege is not being misused. We know that the Administration shares these goals, and we are hopeful that they will join in our effort to obtain much-needed legislative reform.

Finally, I asked specifically about the way that the Administration had refused to give lawyers in the al-Haramain and Horn cases the "need to know" to conduct a CIPA-like process, even in cases where the Courts had limited or rejected the application of state secrets. Nadler's spokesperson reassured me that they, too, are following how the Admininstration is approaching these cases.

> We have also been following, and are concerned by, some of the arguments being asserted in al-Haramain and Horn and will continue monitoring those cases and considering what, if any, adjustments in our legislative proposal are necessary. With regard to affirmation of classification authority in the new policy, we agree that the underlying authority to classify information should remain intact, but also believe that where the Attorney General has decided that the state secret privilege is not appropriate in a given case, or a judge has otherwise ruled that the state secret privilege does not apply or does not prevent disclosure to opposing counsel, the Department should not then use its classification authority as an auxiliary route for avoiding disclosure. **By doing so, this Administration seems to be embracing – in the guise of classification authority rather than state secret privilege – its predecessor's argument that the courts simply lack the authority to disagree with the executive branch's claim of secrecy**. Congressman Nadler's bill (H.R. 984), as well as Senator Leahy's, makes clear that courts must review the information that the government seeks to withhold and determine whether the claimed risk of significant harm to national security that might result from its public disclosure is valid. **Our Constitution demands nothing less**. [my

> emphasis]

I guess it’s time to start persuading members of the Judiciary Committees how important real state secrets reform remains.