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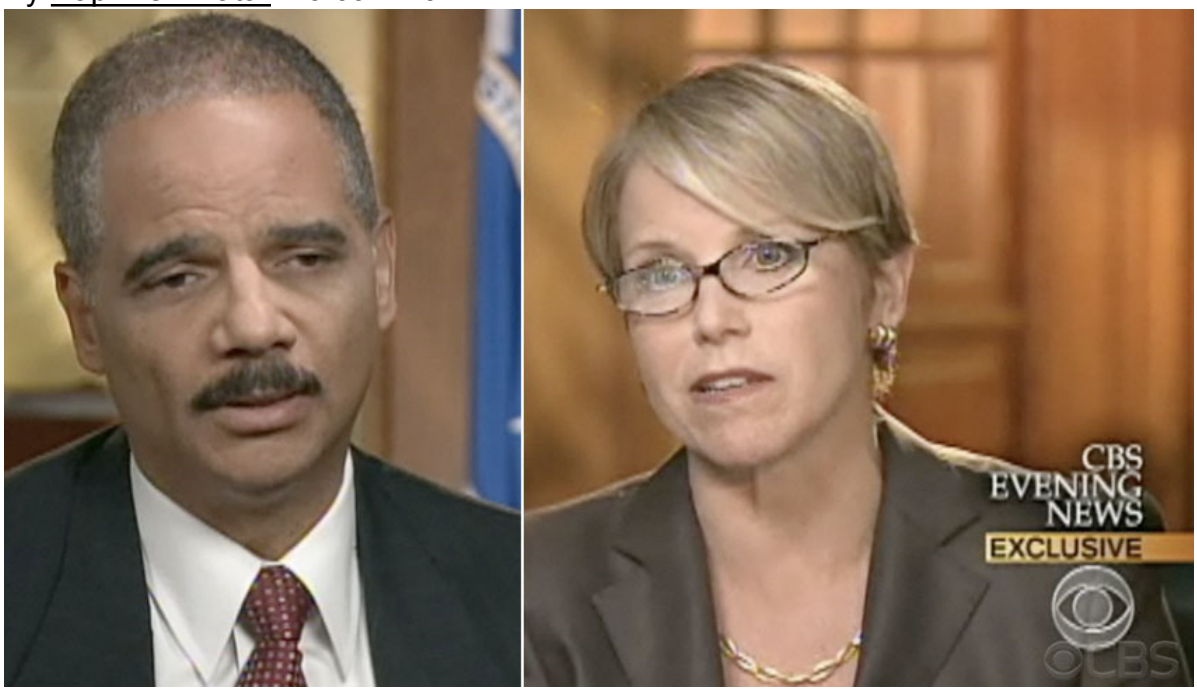
Big Break From Bush on 'State Secrets' Unlikely Under Obama

Attorney General Says Justice Department Considering Reversal on One of 20 Cases

By Daphne Eviatar 4/9/09 12:01 AM



Attorney General Eric Holder and Katie Couric (CBS News)

In an interview that aired Wednesday night on the CBS Evening News, Attorney General Eric Holder suggested to Katie Couric that the Obama administration is unlikely to depart dramatically from the Bush administration's position on the use of the state secrets privilege, noting just one case out of about 20 currently under review in which the Justice Department is seriously considering changing its stance. He did not say which case that was.

Most likely, the reversal won't come in the case of *Jewel v. NSA*, because Holder's Justice Department Friday again broadly asserted the "state

secrets" privilege as a grounds for dismissing the case, brought by AT&T customers alleging the government used dragnet surveillance to monitor the domestic telephone communications of millions of ordinary Americans.

Illustration by: Matt Mahurin

The Department of Justice – first under President George W. Bush and now under President Obama – has repeatedly invoked this executive privilege, which allows the president to prevent public disclosure of evidence in court by claiming that its release would endanger national security. And increasingly, the Department of Justice has used the privilege not only to prevent public disclosure of documents, but to dismiss entire cases brought by victims of illegal policies, claiming that the subject matter of the case itself is a state secret, and that even the judge shouldn't review the documents in private. A recent report by the Constitution Project, a bipartisan think tank, found that the Bush administration used the privilege to seek "blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs" in 92 percent more cases per year than in the previous decade.

Last night, Holder told Couric that after he took over the attorney general's office, he asked lawyers in the Justice Department to see "if there's a way where we can be more surgical, whether there is a way in which we can share more information." The state secrets privilege, he said, is appropriately invoked "at certain times", but "I want to make sure that we only do it where it's absolutely necessary. I would only apply the doctrine where national security was at stake, where the lives of the American people were at stake," he said.

Yet it's difficult to see that standard at work in the recent cases where the Justice Department has invoked the state secrets privilege.

For example, in a federal court in San Francisco on Friday, the Obama Justice Department moved to dismiss the *Jewel* case based in part on the state secrets privilege. The AT&T customers who filed suit, represented by the Electronic Freedom Foundation, claim the National Security Agency illegally intercepted their calls and obtained their phone records as part of a broad-reaching, ongoing national security surveillance program and in violation of the First and Fourth Amendments of the United States Constitution, the separation of powers doctrine and federal statutes.

In its legal brief filed with the court, the government's lawyers claim the case must be dismissed because allowing it to go forward at all would disclose information about the NSA surveillance program, which is itself a state secret. Disclosure of the information the customers want to see, claims the government, "which concerns how the United States seeks to detect and prevent terrorist attacks, would cause exceptionally grave harm to national security," Justice Department lawyers said in their filing.

This is the second attempt by ordinary AT&T customers to learn more about the government's secret domestic wiretapping program and to hold the government or a company that assisted it accountable. An earlier case, also brought by the Electronic Frontier Foundation against AT&T itself, was quashed when, after the Bush administration had made the state secrets arguments in court, Congress passed a law granting immunity to AT&T and other telecommunications companies from lawsuits from customers who claimed the companies helped the government spy on them.

The broad use of the state secrets privilege to dismiss entire court cases challenging unlawful government actions has outraged civil liberties and open government groups such as the American Civil Liberties Union and Center for Constitutional Rights. Such advocates had counted on Obama's promises in the first days of his presidency to run a more transparent government than his predecessor. But the Obama Justice Department already, in several cases seeking information about Bush administration counter-terrorism activities, has invoked the state secrets privilege to prevent the disclosure of critical evidence.

For example, in *Al-Haramain Islamic Foundation v. Obama*, which TWI has been following, the Obama administration asserted that the Bush administration's domestic warrantless wiretapping program, or Terrorist Surveillance Program, is a state secret that cannot be revealed without endangering national security. Never mind that President George W. Bush had himself acknowledged the program's existence, and President Obama has said it is no longer operative.

And in *Mohammed v. Jeppesen Dataplan*, which TWI first wrote about in January, the Obama administration asserted the state secrets privilege to seek dismissal of a case brought by five victims of the Bush administration's "extraordinary rendition" program — which transferred prisoners to foreign countries for interrogation under torture. In that case, the victims, including Binyam Mohamed, the British resident I've written about, sued the subsidiary of Boeing that allegedly assisted the CIA in its torture program. The Bush administration immediately swooped in and convinced the federal court to dismiss the case because the now-defunct extraordinary rendition program is supposedly a "state secret." In February, the Obama administration, to the surprise of even some of the judges sitting on the U.S. Court of Appeals for the Ninth Circuit that day, continued to maintain that argument.

During last night's interview, Couric asked Holder whether he thought the state secrets doctrine had been abused by the Bush administration.

"Well, I don't know," said Holder. "On the basis of the two, three cases we've had to review so far, I think that the invocation of the doctrine was correct. We - reversed - are in the process of looking at one case. But I think we're very likely to reverse it."

Presumably, the three cases he's referring to are the *Jewel*, *Al-Haramain* and *Jeppesen Dataplan*. But Holder went on to say that there have been more than 20 such assertions in cases that are still open. He added that a report on the Justice Department's use of the privilege is being prepared, and his "hope is to be able to share the results of that report with the American people."

Marc Ambinder, who obtained an early transcript of the interview, wrote Wednesday in The Atlantic that a senior Justice Department official "declined to elaborate" on in which case Holder was planning to reverse the department's position.

Congress, meanwhile, may not leave the matter in Holder's hands. In February, Rep. Jerold Nadler (D-N.Y.) and several co-sponsors introduced the State Secrets Protection Act of 2009, which would require a federal judge to look at the disputed evidence rather than dismiss the case outright based solely on the government's assertion that its disclosure would endanger national security. A parallel bill was introduced in the Senate by Sen. Patrick Leahy (D-Vt.) and has six co-sponsors.