



Written by [Joe Wolverton, II, J.D.](#) on November 2, 2009

Obama Follows Bush Administration's Suit Regarding Warrantless Wiretaps

In American politics there is no adage truer than "The more something changes the more it stays the same." The latest piece of evidence offered to prove this maxim is the Obama administration's request that a lawsuit in San Francisco seeking damages against the government for information obtained through a warrantless wiretap be thrown out because of potential threats to national security.

Specifically, Attorney General Eric Holder argues that prosecution of the lawsuit would undermine crucial ongoing intelligence work. This is exactly the tactic the Bush administration had used since the September 11, 2001 terrorist attacks to quash lawsuits it considered as obstacles to the warrantless gathering of intelligence data necessary to the waging of the "War on Terror." President Obama vowed during the presidential campaign to end such governmental legal obstructions such as warrantless surveillance in the name of national security, but since taking office he has repeatedly retreated from that position.



The legal argument supporting the Obama administration's request is called the State Secrets Privilege. Simply, the State Secrets Privilege is a rule of evidence brought about through a courts' application of legal precedent. An assertion of the privilege involves the government asking a court to exclude certain evidence (or, as in the present case, dismiss the suit altogether) based on nothing more than an affidavit submitted by the Justice Department asserting that for reasons it need not disclose, the case or evidence in question would threaten national security. This is the first time the Obama administration has attempted invocation of the privilege under a new policy announced last month to set stricter standards as to who was authorized to invoke the protection of the privilege. Interestingly, George W. Bush issued an executive order (Executive Order 13233) extending the blanket of the privilege's protection to former Presidents and their representatives. President Obama has not rescinded that order.

In a press conference, Attorney General Holder argued that the information that would be divulged in the process of discovery in the suit in question (filed by an organization claiming that their communications were illegally recorded by agents of the government) would jeopardize "ongoing intelligence activities that we rely upon to protect the safety of the American people." Specifically,



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Holder remarked that if the suit was allowed to proceed the government would risk exposure of vital intelligence gathering methods and sources.

According to a Justice Department spokesman, the judge in the case, U.S. District Judge Vaughn Walker, received from the Attorney General's office a dossier of classified material supporting the government's request that the suit be dismissed. The Attorney General promises that the Obama administration will abide by the judge's independent decision as to whether or not the government has presented a sufficiently compelling argument for dismissal. This is at least a slight improvement over the previous administration's policy of absolute refusal to disclose to any judge any information it considered germane to national security.

Feeling abandoned once again by a man they saw as their leader and deliverer, liberal civil rights organizations have filed suit in San Francisco seeking to block the government's move. Said Kevin Bankston of the Electronic Frontier Foundation regarding the President's decision, "The Obama Administration has essentially adopted the position of the Bush administration in these cases, even though candidate Obama was incredibly critical of both the warrantless wiretapping program and Bush administration's abuse of the state secrets privilege." Bankston further lamented this latest change of direction and called it "incredibly disappointing."

Disappointing maybe, but certainly not unexpected. The Obama administration has decided to "dance with the ones that brung 'em" and disregard the limits on the power of government as articulated in the United States Constitution and to faithfully pursue the unconstitutional and frightening expansion of executive power. His actions in many aspects of the waging of the "War on Terror" demonstrate his adherence and the adherence of those he selected as his agents to the noxious "Unitary Executive Theory." Under the philosophy undergirding this theory, the President, as commander-in-chief of the armed forces (Article II, Section 2 of the Constitution) cannot be bound by acts of Congress contrary to his own orders. By invoking the State Secrets Privilege in cases even nominally impacting "national security," President Obama can avoid judicial review of government maneuvers, thus preventing a ruling on the constitutionality of executive directives. In this situation, therefore, the only check left on the conglomeration of power into the hands of an all-mighty executive is the impeachment power of the United States Congress (Article I, Section 3; Article II, Section 4).



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