By Glenn Greenwald

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The case of *Mohamed v. Jeppesen* -- brought by five victims of Bush's torture/rendition program against the Boeing subsidiary that shipped them to be tortured -- was the Obama DOJ's first test of its commitment to restore basic accountability and the rule of law. Back in February, it resoundingly failed that test when they demanded that the case be dismissed in its entirety by invoking the same radicalized version of the "state secrets" privilege which the Bush DOJ, to great controversy, repeatedly invoked. That was the first sign that things would go terribly awry with Obama's rule of law and civil liberties record. This warped rendition of the "state secrets" doctrine transforms it from a long-standing, simple evidentiary privilege (i.e. *, this specific document is too sensitive to use in the litigation*) into a sweeping, dangerous shield of immunity for government lawbreaking (i.e. , *courts have no right to review the legality of the crimes we commit in secret*).

The Obama administration now insists that courts must dismiss lawsuits alleging presidential lawbreaking whenever the CIA Director claims the lawsuit would jeopardize state secrets; or, as the ACLU Brief puts it , "torture victims must be denied a day in court based on an Affidavit submitted by their torturers." The Obama DOJ has gone on to invoke that same Bush-created version of the secrecy theory to demand dismissal of numerous other cases alleging various types of lawbreaking by the Executive Branch.

In April, a three-judge panel of the Ninth Circuit emphatically rejected the Bush/Obama "state secrets" argument and refused to dismiss the *J eppesen* case. The appellate court made clear that the Obama DOJ was literally arguing that "the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, **immunizing the CIA and its partners from the demands and limits of law**

." The court instead held that the proper use of the state secrets privilege allows the government to object to the use of specific documents on a case-by-case basis, not to shield itself from judicial review when it is accused of breaking the law. The appellate court thus ordered the District Court to proceed to what the country urgently needs: a ruling on the plaintiffs' claims that the law was broken, and their rights violated, when they were "rendered" and tortured by the Bush administration.

Rather than let that crucial precedent stand, the Obama DOJ instead asked the full 9th Circuit to vacate the ruling and instead dismiss this case. The Oral Argument on the government's appeal is being held today in San Francisco at 1:00 pm EST, and my guest today on *Salon Radio* is Ben Wizner of the ACLU, who is arguing the case for the plaintiffs. We discuss the significance of this appeal and the reasons the DOJ's position is so threatening to basic accountability and the rule of law.

Notably, Wizner emphasizes that -- in light of the DOJ's announcement that it will not prosecute anyone who tortured in accordance with the Bush-OLC torture memos -- cases of this type are now the sole remaining avenue for obtaining a judicial ruling as to whether the Bush torture program was illegal. If the Obama DOJ succeeds in blocking any such judicial adjudication, it means that some future administration (or even the current one), armed with its own John Yoo, can once again claim that torture is legal and the President has the power to order it. That's one reason why it's so vital to obtain judicial rulings on whether these Bush programs were illegal: because only judicial rulings of that type can prevent similar arguments from being invoked in the future. You can listen to the 10-minute discussion by clicking here . A transcript will be posted shortly.

One last point: when the Obama DOJ first began invoking the very same version of the "state secrets" privilege that infuriated progressives for years (as well as Obama himself), two defenses were typically offered by some Obama supporters: (1) Obama was only doing this because he secretly hoped to lose and thus give us the gift of good precedent; and (2) this was the fault of hold-overs from the Bush DOJ, not Obama appointees. Yet now, the Obama DOJ is aggressively seeking to have vacated one of the best judicial rulings ever that limits the state secrets privilege. Moreover, its own internal guidelines now require the personal approval of Eric Holder before the "state secrets" privilege can be asserted in a judicial proceeding, meaning that Holder himself approves of the positions on this appeal. That ought to conclusively prove how wrong those excuses were. There's simply no getting around the fact that -- as TalkingPointsMemo thoroughly documented -- the Obama DOJ is vigorously advocating the exact same "state secrets" privilege as the Bush DOJ created

, and is doing so with the same result: to shield the Executive Branch from judicial review when it breaks the law.

UPDATE: *Slate*'s Dahlia Lithwick has a characteristically insightful article -- which I highly recommend reading -- on how "each time an opportunity arises to assess the legality of Bush-era torture, the Obama administration shuts it down," and how "the practical effect of this effort will be to **ratify such policies and the legal architecture that supports them**." Think about that in terms of what Obama promised and what his supporters expected in this area.

The transcript of my discussion with Wizner is now available here .

UPDATE II: The full Oral Argument in the *Jeppesen* case, held today, can be listened to or downloaded here .