Slate

JURISPRUDENCE

Czar Obama

The president's incredibly imperialist wielding of executive power.

By Bruce Fein

Posted Thursday, April 9, 2009, at 3:13 PM ET

President Barack Obama's claim to czarlike powers in a perpetual global war against international terrorism has been blunted by a judicial appointee of former President George W. Bush. Last week, in the case *Fadi al Maqaleh*, United States District Judge John D. Bates denied that President Obama could make suspected "enemy combatants" disappear into the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan without an opportunity for exoneration. (While President Obama has abandoned the term *enemy combatant* for Guantanamo Bay detainees, he has retained the label for detainees held elsewhere.)

Bates' ruling is a welcome check on an emerging pattern of mightily expansive claims of executive authority by the new administration. In early February, President Obama sought another imperial power before the United States Court of Appeals for the 9th Circuit in the case *Mohammed v. Jeppesen Dataplan*. The complaint alleged that the plaintiffs had been seized by American personnel, taken to airports, stripped, blindfolded, shackled to the floor of a Gulfstream V, and taken to destination countries for torture and harsh incarceration. The District Court dismissed the complaint because then-President Bush and Vice President Cheney argued that state secrets would be exposed if the case were litigated. During oral argument before the 9th Circuit, Obama echoed the state-secrets argument made by Bush and Cheney. Similarly, the president who promised "change" is wielding the tool of state secrets in aiming to dismiss, without the gathering of evidence, challenges to the National Security Agency's Terrorist Surveillance Program, which entailed warrantless phone or e-mail interceptions of American citizens on American soil in contravention of the Foreign Intelligence Surveillance Act of 1978. This defense has failed before Judge Vaughn R. Walker in early rounds of the litigation. And, again, the state-secrets privilege is the administration's response, if ancillary to a defense of retroactive immunity, in a brief filed last week to the efforts of the Electronic Frontier Foundation to sue Bush administration officials for the NSA's wiretapping.

In principle, President Obama is maintaining that victims of constitutional wrongdoing by the U.S. government should be denied a remedy to prevent the American people and the world at large from learning of the lawlessness perpetrated in the name of national security and exacting political and legal accountability. Thus Mahar Arar, who was tortured by Syrian agents, allegedly with the complicity of U.S. intelligence or immigration agents, has been denied a judicial remedy, again based on the state-secrets rule, to hide the identifies of his U.S. government persecutors. Similarly, victims of torture authorized by the president or vice president would encounter the state-secrets bar if they sought redress. Disclosing the methods of torture, the government has argued, might

enable al-Qaida detainees to prepare better psychologically or physically to resist the criminal abuse! Such reasoning more befits the pages of Alexander Solzhenitsyn's *Gulag Archipelago* than the U.S. Supreme Court opinion in *ex parte* Milligan: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

In the Bagram Prison litigation, Judge Bates summoned the observation of Alexander Hamilton writing in *The Federalist* 84: "[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." Accordingly, he held that enemy combatant detainees at Bagram who were captured outside Afghanistan and who were not Afghan citizens could challenge the constitutionality of their detentions in federal courts through writs of habeas corpus.

If President Obama had embraced the principles of a republic (which cares about injustice) instead of the arrogance of empire (which admires swagger), neither the habeas corpus nor state-secrets litigation would have been necessary. In the former case, four detainees held at Bagram for six years or more filed petitions in the United States District Court for the District of Columbia assailing the legality of their incarcerations based solely on the president's assertion that they were "enemy combatants." That concept—as defined by President Obama—sweeps far beyond persons accused of directly aiding or participating in hostilities against the United States. It includes persons who "supported hostilities in aid of enemy forces," which might encompass the provision of food, medicines, or trousers. The detainees had been captured in Tunisia, Thailand, Dubai, and an unknown location outside Afghanistan. One was an Afghan citizen, two were Yemenis, and one was Tunisian.

President Obama ratified the following charade to make "enemy combatant" determinations at Bagram, which can be the equivalent of life sentences. The initial judgment is made "in the field." It is reviewed within 75 days, and then at six-month intervals. The reviewing body is the Unlawful Enemy Combatant Review Board, a panel of three commissioned officers. It examines "all relevant information reasonably available." The detainee is denied access to a personal representative or lawyer. He is denied access to the government's evidence. He is denied an opportunity to respond in person. He is limited to submitting a written statement without knowledge of either his accusers or the allegations that must be rebutted. After its sham hearing, the UECRB makes a recommendation by majority vote to the commanding general as to whether the detainee is an "enemy combatant."

The Bagram procedures are descendents of the Spanish Inquisition. The executive branch decrees that "enemy combatant" status justifies detention, enforces the decree through executive detentions, and decides whether its enforcement decisions are correct. That combination was what the Founding Fathers decried as the "very definition of tyranny" in *The Federalist* 47. In addition, the incriminating evidence and accusers are secret. And the judges are military persons the detainee is accused of hoping to kill, which probably compromises their putative impartiality.

President Obama's claim of wartime necessity as justifying constitutional shortcuts is

unpersuasive. The United States granted accused war criminals captured in the China Theater a particularized statement of charges and a rigorous adversarial process, noted by the United States Supreme Court in the 1950 case *Eisentrager v. Johnson*. As regards state secrets, the government can always accept a default judgment, meaning an acceptance of liability for alleged injuries, if it wishes to preserve vital intelligence sources and methods. The government confronts the same choice in criminal cases—i.e., either to disclose classified information necessary for a fair trial or to drop the prosecution.

President Obama pledged to restore the rule of law. But the state-secrets-privilege wars with that promise. It encourages torture, kidnappings, inhumane treatment, and similar abuses, all carried out in the name of fighting international terrorism. That encouragement is compounded by the president's adamant opposition to criminal prosecution of former or current government officials for open and notorious abuses—for example, water-boarding or illegal surveillance. His stances on habeas corpus and state secrets flout twin verities of Justice Louis D. Brandeis: Sunshine is the best disinfectant; and, when the government becomes a lawbreaker, it invites every man to become a law unto himself.

Bruce Fein is a constitutional lawyer with Bruce Fein & Associates Inc. and author of Constitutional Peril: The Life and Death Struggle for Our Constitution and Democracy.

Article URL: http://www.slate.com/id/2215818/
