Problematic Post 9/11 Judicial Inactivism: Immunizing Executive Branch Overreaching

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In memory of Barbara K. Olson
lative effect threatens to undermine the fundamental values of
this nation and shift power in ways that will inevitably lead to a
less just society.

There is no doubt that the Obama administration inherited
a legal and moral morass, and that in important respects it has
endeavored to restore the nation's historic commitment to the
rule of law. But if the administration continues to limit access to
justice and to assert broad, virtually unchecked power on issues of
national security, there is a great danger that the Obama admin-
istration will enshrine within the law policies and practices that
support a dangerous notion that America is in a permanent state
of emergency and that core liberties must be surrendered forever.

INTRODUCTION

Political conservatives have deployed the term "judicial activ-
ism" to stigmatize the courts' fundamental power—and responsi-
bility—to invalidate government measures that violate the U.S.
Constitution or laws. These critics contend that, by actively
exercising this core power, courts unduly oversee and overturn
decisions that instead lie within the discretion of elected officials.
Unfortunately, there has been less vocal concern about the less
The dangers of judicial inactivism are not obvious because they are couched in rulings that do not substantively address the violations at issue, let alone expressly reject the legal challenges on the merits. Instead, the rulings invoke various justiciability doctrines that preclude the courts from resolving the claims. The result is that plaintiffs' complaints are simply dismissed, which has the same practical impact as a negative ruling on the merits: the plaintiffs receive no relief, the defendants are free to proceed with their challenged conduct, and no judicial sanction deters. The justiciability doctrines are judicially created, defined by vague criteria, and unpredictably and inconsistently applied. Critics—including Supreme Court Justices—complain that judges can too easily invoke these doctrines to reject substantively disfavored claims without having to rule on the merits. ²

Post-9/11, judicial passivism has blocked review of compelling claims of gross violations of fundamental human rights, including the rights to be free from torture, forced disappearance, and targeted killing.³ Judicial inactivism has also effectively licensed the government to engage in sweeping secret surveillance of our telephone calls and emails without any basis to believe that we are engaging in any illegal activity, let alone terrorism.⁴ The Supreme Court and lower courts have reviewed and struck down some important post-9/11 measures that unduly expanded government power and restricted individual freedom. Nonetheless, the courts have held in too many other cases that challenges are non-justiciable, thus permitting serious government abuses. The Supreme Court has compounded the problem by declining to review challenges to lower courts' non-justiciability rulings.

Under both the Bush and Obama administrations, the government has regularly pressed several non-justiciability arguments to close the courthouse door to compelling claims. It has argued that plaintiffs lacked standing because they could not show that they personally suffered a particular type of injury—even though the plaintiffs had demonstrably suffered severe injuries, thereby warranting judicial redress.⁵ The government also has argued that plaintiffs' claims have become moot because the government had voluntarily ceased the complained-of conduct—even though the government maintained the option of resuming it.⁶ Finally, and most regularly, the government has argued that many cases cannot be litigated without an undue risk of revealing “state secrets” that will endanger national security—even when there is ample publicly available information to substantiate the claims and defenses.⁷

CHECKS AND BALANCES: VIGOROUS JUDICIAL REVIEW OF INVIGORATED EXECUTIVE POWER

Throughout history, during war or other national security crises, the executive branch has consistently exceeded the outer bounds of its constitutional power in order to protect our nation's security. Presidents have asserted the power to take any steps they deem necessary, including steps that violate civil liberties. This pattern has repeated regardless of political party. After all, it was no less a liberal icon than Franklin Roosevelt who authorized the internment of 120,000 Japanese-American citizens during World War II. Likewise, both post-9/11 Presidents, despite their partisan and ideological differences, have asserted executive power to trammel individual rights in the service of national security.⁸
Even assuming that a national crisis can justify the executive branch's most vigorous exercise of its power to protect the nation, the judicial branch would then have a countervailing duty to exercise its judicial review power with corresponding vigor, to ensure that the executive branch does not overstep its power or violate individual rights. In one of the earliest post-9/11 judicial rulings about competing claims of executive branch power and civil liberties, federal judge Gladys Kessler stressed these complementary roles of our government's executive and judicial branches:

The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.9

The Supreme Court's 1944 Korematsu decision has been resoundingly repudiated because the majority of the Justices uncritically accepted the government's unsubstantiated assertion that the internment of Japanese-American citizens was necessary to protect national security. Justice Jackson's dissent stressed that the Court's passive deference did even greater damage to liberty, equality, and justice than the unconstitutional executive action. As Justice Jackson concluded: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution."10

Likewise, if the Court does not review a lower court decision that in turn has not reviewed constitutional overstepping by military or executive officials, such overstepping approaches constitutional doctrine. Conduct that the courts do not halt may proceed unimpeded. Moreover, some Justices and others have argued that accepted practices, even if not affirmatively upheld by the courts, could in some circumstances "be treated as a gloss on 'executive Power'" that the Constitution vests in the President.11 In short, the Korematsu majority's judicial passivity, in exercising an unduly deferential form of judicial review, greatly damaged constitutional principles. The even more extreme judicial passivity that this essay discusses, involving no judicial review at all, likewise greatly damages constitutional principles.

THE SUPREME COURT'S MIXED POST-9/11 RECORD

After the 9/11 terrorist attacks, civil libertarians anxiously awaited indications of how actively or passively the Supreme Court would assert judicial review over claims of overreaching by the executive branch and violations of individual rights. Now that a decade has passed, with substantial Supreme Court action and inaction, the Court's record is mixed.

On the one hand, in almost all of the major post-9/11 cases that the Court has decided on the merits, it has consistently curbed the government's excesses, subjecting them to meaningful scrutiny and stressing not only the individual rights at stake, but also the essential role of judicial review.12 The Court set the tone for its robust judicial review of the executive branch in one of the first of these cases, Hamdi v. Rumsfeld, in 2004. In ringing language, Justice Sandra Day O'Connor's plurality opinion declared:

[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envi-
sions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.\textsuperscript{13}

Especially when contrasted with \textit{Korematsu}, these positive actions by the Court are cause for celebration.

On the other hand, since 9/11, the Court has also provided cause for consternation through its inaction. Specifically, the Court has declined to review a dozen important cases in which lower courts had rejected challenges to post-9/11 measures that unjustifiably expand government power and violate fundamental rights.\textsuperscript{14} Although the Justices’ decision not to review a case does not constitute a ruling on the merits, its practical impact is similar.

Of greatest concern is the Court’s failure to review lower court decisions that have rejected challenges to post-9/11 abuses not on the merits, but rather on various justiciability grounds, concluding that there should be no judicial forum for such claims. When the Supreme Court lets these lower court rulings stand, it is not only declining to exercise its own judicial review power; it is also authorizing lower courts to continue to deny any judicial recourse. In short, these cases constitute major exceptions to Justice O’Connor’s bracing words in \textit{Hamdi}: they do give the executive branch “a blank check . . . when it comes to the rights of the nation’s citizens” (and non-citizens).

Of particular concern, the Court has declined to review—and has thereby effectively authorized—lower courts’ failures to review compelling claims of serious abuses of fundamental rights, including torture, abduction, forced disappearance, prolonged incommunicado detention in inhumane conditions, the indefinite military detention of a lawful U.S. resident without criminal charge or trial, sweeping surveillance of the electronic communications of U.S. citizens, blanket denial of public and press access to important court proceedings, and retaliation against internal whistleblowing by an FBI employee about security breaches and espionage within the FBI’s counterterrorism programs.

\textbf{THE INCREDIBLY EXPANDING STATE SECRETS PRIVILEGE}

One variant of the non-justiciability theory that has done the greatest damage is the distorted state secrets evidentiary privilege that both post-9/11 Presidents have regularly pressed. However, as the term “privilege” signifies, state secrets do not give rise to a non-justiciability doctrine, and hence should never be invoked to dismiss a case outright. Rather, along with other evidentiary privileges such as the privilege against self-incrimination or the attorney-client privilege, the state secrets privilege is properly invoked to shield specific evidentiary items from being used in the lawsuit.\textsuperscript{15} Nevertheless, this privilege (rarely invoked pre-9/11) has been invoked by both the Bush and Obama administrations with increasing frequency and success as an automatic, door-closing non-justiciability doctrine. The lower-court rulings on point have been divided and inconsistent, underscoring the rampant confusion about the state secrets doctrine, which the Supreme Court should dispel.

Some courts have dismissed lawsuits that challenge serious government overreaching even before discovery takes place, based only on the government’s broad, speculative assertions that the general subject matter involves state secrets. In those cases, the courts did not ask the government to identify specific documents, or even categories of documents, as to which the privilege should apply. Nor did the courts assess whether the parties could present their claims and defenses through non-privileged mate-
rial, or whether special procedures—such as conducting portions of the litigation in camera or ex parte, i.e., confidential proceedings involving only the judge and the government—could be utilized to safeguard sensitive material.

The Supreme Court has directly discussed the state secrets privilege in only one case, in 1953: United States v. Reynolds. The Court held that the privilege was "not to be lightly invoked" and that its misuse could lead to "intolerable abuses." The Court also warned that "judicial control in a case cannot be abdicated to the caprice of executive officers."\(^{16}\)

The Reynolds Court considered only whether a specific document could be excluded from the litigation because the government insisted that this document would reveal state secrets. Although the Court accepted the government's argument that the document should be excluded, the Court stressed that plaintiffs should be able to establish their case through other government-provided evidence. The Court remanded the case so it could proceed based on this other evidence.

Specifically, Reynolds was a tort action brought by the widows of three civilians who had been killed in the crash of an Air Force plane. The government declined to produce the official accident report, claiming that the plane was engaged in a "confidential mission" to test "confidential equipment."\(^{17}\) Although the Supreme Court excluded the report, it concluded that plaintiffs could prove their case through the testimony of the surviving crew-members, which the government offered to provide. The Court stressed that the greater the need for any allegedly privileged material in a particular lawsuit, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."\(^{18}\) Accordingly, had the Court believed that the accident report was central to the plaintiffs' claims, it might well have required the government to produce it. Following the Supreme Court's remand, the Reynolds litigation did proceed and ultimately was resolved via a negotiated settlement. Reynolds provides no support for the government's and lower courts' recasting of the state secrets privilege into a non-justiciability, executive immunity doctrine.

The misapplication of the Reynolds evidentiary privilege has apparently resulted from confusing it with a separate, narrow non-justiciability doctrine that applies only to a particular type of lawsuit involving a particular type of secret evidence: a lawsuit to enforce a clandestine espionage agreement with the government. The Court has enforced this limited non-justiciability doctrine in only two cases: Totten v. United States\(^{19}\) in 1875 and Tenet v. Doe\(^{20}\) in 2005. In Tenet, the Court reaffirmed that the "sweeping holding in Totten," rendering the case non-justiciable and hence subject to dismissal at the outset, applies only to suits "where success depends on the existence of [the plaintiff's] secret espionage relationship with the government."\(^{21}\) The Totten non-justiciability rule flows from the law of contracts that is the legal basis for the lawsuits at issue. It reflects the contracts law premise that a secret employment contract is implicitly conditioned on an agreement to forego litigation to enforce it. This highly specific rule is wholly inapplicable to any other types of lawsuits involving any other types of state secrets.

Even though Reynolds emphasized that "judicial control . . . cannot be abdicated to . . . executive officers,"\(^{22}\) it did evince undue judicial inactivism in one key respect. The Court passively accepted the government's assertions that the accident report contained state secrets, without independently assessing the report. Decades later, when the report was declassified, it turned out not to reveal the asserted "details of any secret project the
plane was involved in," but instead what one historian decried as "a horror show of [governmental] incompetence, bungling and tragic error."

As Justice Douglas observed in the landmark Pentagon Papers case, government officials regularly engage in the “widespread practice” of invoking national security concerns to achieve the “suppression of embarrassing information.” The Reynolds case illustrates the government’s general tendency to exaggerate the national security benefits of secrecy, while overlooking the significant ways in which an assertion of government secrecy can actually undermine national security, as well as due process, accountability, and other essential democratic values. For example, the bipartisan commission that analyzed the intelligence failures that contributed to the 9/11 attacks criticized excessive government secrecy as one factor.

Post-Reynolds developments underscore not only that maintaining secrecy is not always beneficial to national security interests, but also that courts are fully capable of identifying and safeguarding materials whose disclosure would pose genuine national security risks. Since 1953, several important federal statutes—the Freedom of Information Act, the Foreign Intelligence Surveillance Act, and the Classified Information Procedures Act—have laid out procedures for confidential judicial evaluation of materials that the government resists disclosing on national security grounds. In enforcing these statutes, courts have permitted disclosure when appropriate and ensured secrecy when appropriate, including in high-profile terrorism prosecutions.

In four post-9/11 cases, the ACLU has asked the Supreme Court to review lower court decisions that dismissed serious civil liberties claims based on a distorted version of the state secrets privilege. The most recent such request was filed in December 2010, in Mohamed v. Jeppesen Dataplan. The Court had not yet ruled at the time this essay was completed. In the three prior cases, the Court denied review.

The Jeppesen case powerfully demonstrates the misuse of the state secrets evidentiary privilege to foreclose judicial review and immunize executive abuses. It also underscores lower court judges’ confusion about this issue. A bare majority of the Ninth Circuit supported the government’s generalized assertion that “the very subject matter of this case is a state secret.” The dissenters correctly concluded that the privilege would warrant dismissal “if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs’ allegations or a valid defense that would otherwise be available to the defendants.”

The five plaintiffs in this case were forcibly kidnapped and flown to foreign sites where they were tortured and detained incommunicado in inhumane conditions. Jeppesen organized the flights at the direction of the CIA. The Ninth Circuit dissent summarized 1,800 pages of “the voluminous public record materials submitted by Plaintiffs in support of their claims.”

CONCLUSION

The lower courts have inappropriately invoked non-justiciability doctrines to decline to review many cases challenging post-9/11 government abuses, and the Supreme Court in turn has declined to review those rulings. This double-layered judicial passivism has adversely affected not only many victims of gross human rights violations, but also our system of checks and balances. Ironically, these severe costs were stressed even by the narrow majority of
the Ninth Circuit judges who misapplied the state secrets doctrine in *Jeppesen*:

Denial of a judicial forum based on the state secrets doctrine poses concerns at both individual and structural levels. For the individual plaintiffs... our decision forecloses... judicial remedies... At a structural level, terminating the case eliminates further judicial review... one important check on alleged abuse by government officials and... contractors.32

The Supreme Court should use the pending *Jeppesen* case to reinvigorate the judicial review power to curb post-9/11 abuses by reaffirming that the state secrets evidentiary privilege is not a non-justiciability doctrine. This would be an important step toward curbing undue judicial passivism.

I have drawn the title of my essay from a well-known passage in *The Great Gatsby*:

They were careless people, Tom and Daisy—they smashed up things and creatures... and let other people clean up the mess they had made....

* This essay is an edited version of a Joseph Story Distinguished Lecture delivered by Judge Randolph at the Heritage Foundation in Washington, D.C., on October 20, 2010.