

Are Ex-Bush Officials Liable For Post-Sept. 11 Acts?

by ARI SHAPIRO



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Susan Walsh/AP

Former Attorney General John Ashcroft is sworn in on July 17 prior to testifying at a House Judiciary Committee hearing. His decisions following the Sept. 11 attacks are now coming under scrutiny in the court system.

September 15, 2009

text size **A A A**

Eight years after the terrorist attacks of Sept. 11, 2001, many legal theories that the Bush administration relied on to detain people remain controversial and legally murky.

Now some former detainees are trying to hold Bush administration officials personally accountable — and clarify the legality of the government's more creative anti-terrorism policies — through civil lawsuits against people who held senior positions at the Justice Department and other parts of the federal government. The results of the suits have been mixed, with judges throwing some out and letting others proceed.

The most recent such decision came down in California, against former Attorney General John Ashcroft. After Sept. 11, 2001, Ashcroft ordered that some Americans be held without charge as material witnesses to terrorism. In a [2-1 ruling](#), the court said the imprisonment violated the detainees' rights. The two Bush-appointed judges in the majority called Ashcroft's behavior "repugnant to the Constitution," and they said Ashcroft could be held

personally liable.

Ashcroft's spokesman, Mark Corallo, fears that "people are not going to want to come into the government if they think they have to hire a lawyer the minute they take the oath of office."

Corallo, who was the Justice Department's communications director under Ashcroft, said, "People come into the executive branch because they want to serve America. They should not be faced with legal bills for things that they did in their capacity in good faith."

The fear of driving people away from government is one concern in these sorts of cases, says George Washington University law professor Orin Kerr. The other consideration is the constitutional rights of the American people. Kerr says the law tries to strike a delicate balance.

"On the one hand, you want government officials to be very concerned about the Constitution, to be absolutely concerned about following the law. On the other hand, sometimes the law is unclear. And you don't want government officials to be so worried that they take a very conservative view every step of the way and don't take the steps they need to protect public safety," says Kerr.

Not All Officials Actions Are Immune From Suits

In some areas, the law says government officials have total immunity from suits. For example, prosecutors cannot be sued for charging someone with a crime. But in other instances, people can be personally liable even for actions they take in a professional, governmental capacity. The key question is whether the law was clear enough at the time that the official should have known that his actions were illegal.

A few months ago, [a Bush-appointed judge in California ruled](#) that former Justice Department lawyer John Yoo can be held personally accountable for authorizing harsh treatment of former detainee Jose Padilla.

"Holding people accountable in that way is the best way for future governments to ensure that their employees are really doing what we expect them to do," says human rights lawyer Vincent Warren. He directs the Center for Constitutional

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Rights, a nonprofit human rights group that has brought some of these civil lawsuits.

Warren argues that it is important for powerful government officials to know that if they break the law, they will pay a price.

"We don't want to have a society in which every government official decides that they're going to turn a blind eye to torture, abuse, detention and other illegalities because the president really wants it to happen," he says.

A High Threshold For Suing Government Officials

There is a high bar for lawsuits like these to proceed. "The gatekeeping that the courts are doing here is allowing only the strongest cases to go forward when you're going after the highest-level supervisory officials," says Florida International University law professor Howard Wasserman.

Many cases against top government officials have been thrown out. The Supreme Court rejected one against Ashcroft in a [5-to-4 decision last May](#). And courts may yet reject cases that are currently alive.

Professor Kerr believes a better outcome would be for the courts to use these lawsuits to finally clarify some legal policies.

"The challenge since Sept. 11, 2001, from a legal standpoint, has been, 'How do you get courts to clarify what the law is?' " Kerr says. "Eight years later, it looks like the way to do that is through a civil lawsuit that works its way through the courts, that raises immunity issues, but also lets the courts address core legal questions of how the Constitution applies to the war on terror."

Kerr predicts that many of these cases will eventually reach the Supreme Court and force the justices to "make the law clear and say exactly what the rules are."

But Kerr anticipates that even if courts decide that the Bush administration's detention policies are not legal, the ruling may well say that the issue was ambiguous enough to absolve government officials from personal liability for their actions.

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- Vincent Warren, human rights lawyer

comments

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D B (Nipit) wrote:

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"When America's servants act in good faith, in good clear conscience in their daily decision making processes, then none should fear retaliation of judicial judgment when, in the event of doubt, each pursued and documented guidance from superiors and followed these guide lines."

Wednesday, September 16, 2009 2:33:20 PM

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G N (owyheekid) wrote:

Clearly the right is bitter and are looking under every rock for their "I told you so" moment about President Obama.

The fact is, President Obama hasn't done anything wrong yet. He'll spend his entire first term in office cleaning up after the events that took place under the previous administration. Frankly partisan politics beyond election day are stupid beyond measure - we live in a single country and we should not want any administration to fail. People love their bandwagons though.

ACORNs *purpose* is a noble one - this is yet another irrational partisan politics attempt to demonize President Obama. Some years back a couple of Marines raped a girl in Okinawa. Does supporting the Marine Corp or our Troops mean that I condone rape or that I condone the actions of those two Marines?

I'd still like to know how President Bush trained to be a pilot *in* the Texas Air National Guard - while we're throwing rocks at our favorite glass house.

Wednesday, September 16, 2009 11:28:56 AM

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frank ryan (fryan5) wrote:

Brad Littlejohn,

You quoted me saying "I hope that the Centrist and Conservatives will expose these radicals for what threat they pose to America, and stop their plans to subvert this great Country."

Gee, I thought I wrote that passage regarding Jones, Sunstein and Lloyd, and not in regards to the subject of this thread. No matter, the statement still stands when we are talking about the radicals this president surrounds himself with. Remember who said that we should judge him by the people he surrounds himself with? That's correct, Obama.

He must be attracted to radical ideals to have Jones, Sunstein and Lloyd in the administration.

And let us never forget how he asked ACORN to be part of the Transition Team by helping to formulate what the new administration would work on.

Let the judgements that Mr. Obama has called down upon himself begin.

Tuesday, September 15, 2009 6:01:54 PM

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david bockoven (davy_B) wrote:

As to the claim that the "Unitary Executive" had authority to an unlimited sweep of action in pursuit of goals they deemed essential -- How does this differ from an absolute dictatorship?

Why have "Conservatives not wanted to address this? Have "Conservatives" lost a conservative concern with American Freedom? With pursuing lawbreakers? I think so.

Tuesday, September 15, 2009 3:08:02 PM

[Recommend \(2\)](#)

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Michael Saunders (consultantaz) wrote:



Several writers have correctly focused on the issue - what has happened to the Rule of Law . The answer to that is that Bush and company trampled on it, again and again and, regrettably, many people fell for their antics under the created paranoia engendered by the White House. What people should be asking is, who benefitted from it all and the answer to that will give us the answer to the original question - should there be prosecution. I strongly hold this would not be a so called witch hunt. It would be the true pursuit of law. However, when it comes to the political arena, war mongering and profit margins, I sense that courage will be sorely lacking , the country will continue to rail at the current administration which is trying to clean up the eight year mess and the most guilty of malfeasance in office will retire in style with greatly enhanced bank accounts!

Tuesday, September 15, 2009 2:01:36 PM

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david bockoven (davy_B) wrote:

Top ex-Bush officials relied on "legal opinions" to legitimize their actions. They were aware that these "opinions" were made up on the spot to cover their butts, not to clarify constitutional authority or illegality. Prove that, and you've proved actions in bad faith, which is most of the way to a crime.

It is not the functionaries on the ground trying to follow guidelines who should be pursued (except when they exceeded guidelines which they thought were the legal limit). Big shots who knew their justification was bogus, but took action anyway because of their "Conservative" beliefs, are liable for examination of their actions.

If prosecutors find the probability of crimes, do we want prosecutors to cover up those crimes? (Justice Department prosecutors are "career employees," not appointees of convenience by Republicans or Democrats. They are expected to act in the interest of law and order, not in the interest of political advantage.)

I'd rather not see it happen, because I don't want the massive distraction from the future, which desperately needs attention. On the other hand, I don't want these "Conservatives" running around with the impression that their functionaries had a legal right. They didn't.

Tuesday, September 15, 2009 2:01:09 PM

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Teresa B (BSomebody) wrote:

If we prosecute members of the last administration and those carrying out the orders sent down by them, the fallout could be horrendous for this polarized country. But if we don't, we allow those who bent or broke our laws to go unchecked in a system that has checks and balances for exactly the kinds of abuse of power exhibited in the Bush II years.

I remember clearly how outraged I was during the Bush years when we had to stand by and watch that man and his cronies take away our liberties and discredit the United States throughout his term. Yet we had just had to live through 8 years of investigation into a sitting president's life that ended in impeachment. I found, and find Bush's actions much more reprehensible than what Clinton was charged with. Granted Clinton was a fool for lying under oath. A president should never do that. Yet Bush II's acts were far more devastating to our country.

Once the Patriot Act was put in place, the administration and its misdeeds were kept behind closed doors. I don't think it should stay there. This is not a witch hunt. There is evidence pointing to abuse of power. People are worried about Obama when through Bush we lost all credibility in the world arena. And we are less safe than ever.

Tuesday, September 15, 2009 1:32:46 PM

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G N (owyheekid) wrote:

"Frank Smith (Frank_Z) wrote:

They broke the law. What happened to the people who went on at length about "Rule of Law" during the Clinton impeachment."

That's the point. Some of these guys are really scum of the earth. Some of them are guilty of being Arab/Persian and in easy pickup range of a US sweep. Ever wonder why so many of them haven't been charged with anything? I'm curious how many illiterate goat farmers we have locked up in prison for being at the wrong place at the wrong time.

Tuesday, September 15, 2009 12:56:46 PM

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G N (owyheekid) wrote:

@Eric Beckerman (Uzi)

"Enemy Combatants" are not covered under Article 4, they are covered under Article 3.
"Unlawful Combatants" is the label used to deny individuals protections under the Geneva Conventions. In the case of Al Qaeda members it certainly applies.

The important thing is there is a distinction - not everyone who has been killed or captured in this mess we created falls neatly into one or the other. Lumping everyone into a single category so that we can treat them as harshly as we want to makes us no better than the worst of the worst regimes in recent history.

Tuesday, September 15, 2009 12:52:11 PM

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Frank Smith (Frank_Z) wrote:

We should prosecute anyone involved in torture (up to and including the president) for the sake of our national credibility.

Think how hypocritical we look to the rest of the world when we criticize the tyranny of some other nation while it is common knowledge that we have held people without trial and tortured them.

Tuesday, September 15, 2009 11:00:16 AM

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