

*From the Los Angeles Times*

## NEWS ANALYSIS

### **Bush has successfully defended anti-terrorism policies**

**Domestic surveillance, rounding up Muslim men after Sept. 11, harsh interrogations -- the administration has beat back nearly all legal challenges to its controversial programs.**

By David G. Savage

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Reporting from Washington — Second in a series of occasional reports on President Bush's legacy.

George W. Bush will end his presidency in retreat, forced to compromise on several fronts. Free-market economics have given way to massive government bailouts, and an assertive, unilateral foreign policy has yielded to one more attuned to world opinion. But in his defense of the war on terrorism, Bush has succeeded in beating back nearly all legal challenges -- including those to some of his most controversial policies.

Among them are a domestic surveillance program to intercept international phone calls, the rounding up of Muslim men for questioning after the Sept. 11 attacks, the holding of suspects in military custody in this country without filing charges, harsh interrogations -- some have called it torture -- of suspects arrested abroad, and the detention of foreign captives at a military prison at Guantanamo Bay, Cuba.

Because of the administration's successful defense of such policies, they not only will be a part of Bush's legacy but will be around for his successors. Even if Barack Obama rejects or sharply modifies Bush's positions, the precedents will remain for future chief executives.

Soon after Sept. 11, Bush said that as commander in chief he had the "inherent" power to act boldly in the nation's defense, regardless of whether Congress or the courts agreed.

His claim has been much criticized. It also has not been accepted by Congress or endorsed by the Supreme Court. The justices have said the president must act according to the law, not in spite of it.

Nonetheless, Bush's anti-terrorism policies have not been blocked by the courts or Congress. When the Supreme Court struck down Bush's use of special military trials at Guantanamo on grounds that he had no legal basis for creating them, Congress passed the Military Commissions Act to authorize the trials.

When critics claimed the National Security Agency was violating the Foreign Intelligence Surveillance Act by intercepting calls without a warrant, Congress passed a law to authorize such wiretapping. The same measure also granted legal immunity to telephone companies that had cooperated with the administration.

Bush's tenure has been particularly frustrating for civil libertarians. They had believed that when the government violated the Constitution, someone could go to court and challenge it. But it's not clear that truism is still true.

Bush's lawyers have succeeded not by proving the constitutionality of the policies but by using procedural barriers to prevent lawsuits from going forward.

When the American Civil Liberties Union sued over the warrantless wiretapping, Bush's lawyers said the plaintiffs

had no standing because they could not prove that their phones had been tapped. The government also refused to answer questions about whether the plaintiffs had been tapped, pleading national security.

When civil libertarians sued on behalf of men who said they had been wrongly abducted and tortured by the CIA, Bush's lawyers argued that the cases involved "state secrets." The courts agreed and dismissed the lawsuits.

"It has been a sad story," said Melissa Goodman, an ACLU lawyer. "The government has thrown up roadblocks. . . . We have never gotten judges to rule whether their acts have violated the Constitution or whether torture is unconstitutional."

Guantanamo may be the exception, albeit a partial one. The Supreme Court on three occasions struck down Bush's policies regarding the holding and trying of prisoners there. But the administration resisted making changes.

In June, the court ruled -- for the second time -- that prisoners had a right to plead for their freedom before a judge. A few hearings got underway in the fall. Last month, a judge ruled that five Bosnian men had been wrongly held as "enemy combatants," and on Dec. 16 three of them were flown home to Bosnia. They were the first prisoners set free from Guantanamo as a result of judge's order.

But the Guantanamo litigation has overshadowed the fact that Bush administration lawyers prevailed in blocking most other challenges.

When the government is sued, its lawyers can throw up an array of barriers. They can say the officials who carried out the policy have immunity from being sued. They can say the plaintiffs do not have standing to sue or lack enough evidence to show the policy is unconstitutional.

"This is a Catch-22," said Harold Hongju Koh, dean of Yale Law School. "They can say, 'You don't know we did it, so you can't sue.' Or, 'If you know we did it, you can't sue because it's a state secret.' The government makes these procedural arguments in every case, and it means you essentially never get a ruling on the merits."

If the people involved are foreigners, administration lawyers have said they have no rights under the Constitution.

Four British Muslims who had been shipped to Guantanamo and were freed years later sued former Defense Secretary Donald H. Rumsfeld and other Pentagon officials. They alleged they had been tortured at Guantanamo and subjected to religious harassment. Last year, the U.S. Court of Appeals in Washington threw out the lawsuit on the grounds that the men had no rights.

"Guantanamo detainees lack constitutional rights because they are aliens without property or presence in the United States," the court ruled.

But the lawsuit is not dead. The Supreme Court on Dec. 15 issued a one-line order telling the appeals court to rethink its ruling.

In several cases, federal judges declared Bush-era policies unconstitutional, but those rulings were thrown out by appeals courts. The Supreme Court refused to hear the challenges.

Perhaps civil libertarians made a mistake by relying on lawsuits to challenge government policies, said Richard Samp, counsel for the [Washington Legal Foundation](#). "If you are trying to uncover wrongdoing, tort suits are not the way to do it," he said.

But others said innocent people wrongly abducted and punished had no other way to hold the government accountable. They cited the case of the German car salesman who was wrongly abducted by the CIA in a case of mistaken identity.

Khaled Masri, a German citizen of Lebanese descent, was on vacation in the Balkans in 2003 when he was pulled from a tour bus at a border crossing. He was questioned and his passport was taken. After several days, he was

turned over to the CIA, which chained him and flew him to Afghanistan. Masri said he was beaten and tortured for weeks.

About six months later, U.S. officials confirmed he was not the wanted terrorist Khalid Masri, who had been living in Germany.

Masri was flown to Albania and dropped off on a country road at night. He made his way back to Germany. With the help of the ACLU, he filed a suit against the CIA and then-Director George J. Tenet, contending that he had been wrongly abducted and tortured. Administration lawyers blocked the suit from being heard because it could expose state secrets.

In 1953, the Supreme Court upheld the so-called state secrets privilege in a Cold War-era case involving the crash of a B-29. Three widows of the crash victims sued and sought the official accident report. The Air Force refused, saying military secrets were at issue. The high court ruled for the Air Force, but without examining the report.

Several years ago, the report was declassified. It revealed only that the plane had been poorly maintained.

The state secrets privilege found new life in recent years. These days, it does not just shield a secret document from being heard in court. Bush's lawyers have said that if a state secret may be exposed, the lawsuit must be dismissed.

A federal judge and a U.S. court of appeals threw out Masri's lawsuit without a hearing. Last year, when the ACLU appealed, Bush's lawyers said the Supreme Court should not allow such suits to expose secrets.

"The government has a compelling interest in protecting national security information, and the responsibility to do so falls on the president as head of the executive branch and as commander in chief," wrote Paul D. Clement, then the U.S. solicitor general.

In a one-line order, the high court dismissed Masri's suit.

ACLU lawyer Ben Wizner called it a sad day. "By denying justice to an innocent victim of this country's anti-terror polices, the court has provided the government with complete immunity for its shameful human rights and due process violations," he said.

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