

By Adam Serwer

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#### **How a smearing of Justice Department lawyers as "terrorist sympathizers" traveled from the conservative media to the United States Senate.**

The "Gitmo Nine" aren't terrorists. They weren't captured fighting for the Taliban. They've made no attempts to kill Americans. They haven't declared war on the United States, nor have they joined any group that has. The Gitmo Nine are lawyers working in the Department of Justice who fought the Bush administration's treatment of suspected terrorists as unconstitutional. Now, conservatives are portraying them as agents of the enemy.

In the aftermath of September 11, the Bush administration tried to set up a military-commissions system to try suspected terrorists. The commissions offered few due process rights, denied the accused access to the evidence against them, and allowed the admission of hearsay -- and even evidence gained through coercion or abuse. The Bush administration also sought to prevent detainees from challenging their detention in court. Conservatives argued that the nature of the war on terrorism justified the assertion of greater executive power. In case after case, the U.S. Supreme Court sided with the administration's critics.

"These lawyers were advocating on behalf of our Constitution and our laws. The detention policies of the Bush administration were unconstitutional and illegal, and no higher a legal authority than the Supreme Court of the United States agreed," says Ken Gude, a human-rights expert with the Center for American Progress, of the recent assault on the Justice Department. "The disgusting logic of these attacks is that the Supreme Court is in league with al-Qaeda."

The attorneys who challenged the Bush administration's national-security policies saw themselves as fulfilling their legal obligations by fighting an unconstitutional power grab. At heart, this was a disagreement over process: Should people accused of terrorism be afforded the same human rights and due process protections as anyone else in American custody? But rather than portray the dispute as a conflict over what is and isn't within constitutional bounds, conservatives argue that anyone who opposed the Bush administration's policies is a traitor set to undermine America's safety from within the Justice Department.

"Terrorist sympathizers," [wrote](#) *National Review's* Andrew McCarthy in September, "have assumed positions throughout the Obama administration."

Since Obama took office, the question of detention procedure has been reintroduced and more deeply politicized. The Bush-era military commissions turned out to be woefully ineffectual and were widely seen as skewed against the defendants. Yet they produced only three convictions during the entire administration, in part because the U.S. Supreme Court kept knocking them down for failing to meet minimal due process standards. Meanwhile, civilian courts tried more than a hundred terrorism cases. But much to the disappointment of human-rights advocates, the Obama administration, while choosing to try the alleged September 11 plotters in civilian court, has opted to continue many Bush-era policies, including reformed military commissions.

Nevertheless, McCarthy, a former assistant U.S. attorney, blamed the "al-Qaeda bar" -- the attorneys who secured due process rights for detainees -- for Bush-era setbacks. "The principal reason there were so few military trials is the tireless campaign conducted by leftist lawyers to derail military tribunals by challenging them in the courts," McCarthy [wrote](#) in November. "Many of those lawyers are now working for the Obama Justice Department." In December, an unsigned *National Review*

editorial referred to the series of "pro-terrorist" rulings by the courts that affirmed rights for individuals accused of terrorism.

Justice Department lawyers aren't the only ones who have represented accused terrorists. American military personnel have as well, often successfully. Major Eric Montalvo (retired), who acted as a defense counsel in the Guantanamo Bay military commissions, said that the accusation that lawyers who fought the Bush administration's policies were "terrorist sympathizers" was absurd. "That's not sympathy for a terrorist -- that's sympathy for the rule of law, the American way of doing business."

Lt. Col. David Frakt, who has represented detainees both in military and civilian courts, said that the lawyers who secured due process rights for detainees were ultimately vindicated. "There is an assumption there that has proven to be a fallacy, which is that everyone at Guantanamo was a terrorist," Frakt says, pointing to the fact that the government has lost three-quarters of the habeas petitions filed by detainees at Guantanamo. "What we have seen over and over and over is that the vast majority of detainees at Guantanamo are innocent."

Even former military prosecutors have expressed views similar to those of the Gitmo Nine. Col. Morris Davis (retired) served as the former chief prosecutor for the Guantanamo Bay military commissions and has since argued that they should be abandoned. But initially, when the commissions were formed, he volunteered to be chief defense counsel. "I thought for the good of our system, they needed zealous representation," says Davis. He dismissed the charge that having represented a detainee indicated "sympathy" for terrorist goals. "I don't think that anyone, because they signed up to represent a detainee means they've signed up with al-Qaeda."

"[McCarthy] was a prosecutor for a number of years, so he knows better than that," Davis adds. "I think he's just saying it for the shock value of it."

McCarthy is no stranger to shock value -- he entertains a number of fringe beliefs, including the [possibility](#)

that Barack Obama was not born in the United States and that former Weather Underground member William Ayers

[wrote](#)

the president's autobiography. Nonetheless, because of his experience as a prosecutor in the trial of Sheik Omar Abdel Rahman, the mastermind behind the first World Trade Center bombing, McCarthy wields a great deal of influence in conservative circles on national-security matters. When Attorney General Eric Holder testified in front of the Senate regarding his decision to try Khalid Sheik Mohammed and the other alleged 9/11 conspirators in civilian courts, Sen. John Kyl read aloud from an

[op-ed](#)

McCarthy had published just the day before, in which McCarthy alleges that "leftist lawyers" actively sought to aid "America's enemies."

Holder shrugged off the op-ed's insinuations: "I'm not worried about McCarthy."

In the same hearing, Sen. Chuck Grassley demanded that Holder identify the number of attorneys in the Justice Department who had litigated on behalf of suspected terrorist detainees, or at least offer a list of the recusals. He argued that "this prior representation creates a conflict-of-interest problem for these individuals." Holder said he would consider Grassley's request and assured him that "we're very sensitive to that concern and mindful of it, and people who should not participate in certain decisions do not do so." Holder added that he had already recused himself because his former law firm, Covington and Burling, had been involved in

detainee cases. Grassley subsequently formalized his request in a letter to Holder, and separately, the rest of the Republicans on the Judiciary Committee wrote a joint letter to the Justice Department demanding that Holder identify the attorneys by name.

On Feb. 18, Assistant Attorney General Ronald Weisch responded to Grassley's inquiries, saying, "Only five of the lawyers who serve as political appointees in those components represented detainees, and four others either contributed to amicus briefs in detainee-related cases or were otherwise involved in advocacy on behalf of detainees." Weisch said that some lawyers had recused themselves from specific cases. But he added that it was common for lawyers in the Justice Department, who go in and out of public practice, to "make legal arguments on behalf of the United States that are contrary to legal arguments they made previously on behalf of a prior client in private practice." Prosecutors become defense lawyers, and vice-versa.

But it was too late for reasoning. By this point the rest of the conservative media had begun taking up the cause, referring to the lawyers Weisch had mentioned as the Gitmo Nine. At the *Washington Examiner*

, Byron York accused Holder of "stonewalling" Congress. "Who are the Gitmo 9?" McCarthy [demanded](#)

to know from his perch at *National Review*

. Then, last Friday, Republicans responded to Weisch, accusing the Justice Department of being "at best nonresponsive and, at worst, intentionally evasive." The *Washington Times*

followed up, [echoing](#)

McCarthy's demand for the identities of the so-called Gitmo Nine. By that point, two Justice Department lawyers, Deputy Solicitor General Neal Katyal and Human Rights Watch former senior counsel Jennifer Daskal, had already been identified. Unlike the Republican senators, whose concerns were centered around "potential conflicts of interest," the *Times*

editorial argued that "the public has a right to know if past work for terrorist detainees has biased too many of Mr. Holder's top advisers." It was a delicate way of suggesting that lawyers who were holding the government to its constitutional obligations were in fact, if not agents of, sympathetic to al-Qaeda.

On Tuesday, all attempts at subtlety were abandoned. Keep America Safe, the conservative advocacy group which was founded by Liz Cheney to defend torture and oppose civilian trials for suspected terrorists and which has close ties to McCarthy, turned the Gitmo Nine into the "al-Qaeda Seven." The group put out a Web video demanding that Holder name the other

Justice Department lawyers who had previously represented terrorist detainees or worked on similar issues for groups that opposed the Bush administration's near-limitless assumption of executive power. "Whose values do they share?" a voice asks ominously. "Americans have a right to know the identity of the al-Qaeda Seven." The ad echoed McCarthy's references to the "al-Qaeda bar" from months earlier.

"This is exactly what Joe McCarthy did," said Gude. "Not kind of like McCarthyism; this is exactly McCarthyism."

The attorneys who secured greater due process rights for detainees weren't attempting to prevent terrorists from being punished -- they were attempting to prevent the government from assuming limitless power to imprison people indefinitely based on mere suspicion. Not all of those fighting the Bush administration's policies even believed that terrorists should be tried in civilian courts. Katyal, who litigated the 2006 *Hamdan v. Rumsfeld* case in which the Supreme Court decided in the detainees' favor, advocated for using military courts martial -- and later, authored an op-ed for *The New York Times* alongside former Bush lawyer Jack Goldsmith arguing for a new "national security court" to try terrorists. Still, Katyal held that Bush's general policy for trying terrorists "closely resemble those of King George III."

For human-rights advocates, there's something bitter about conservatives targeting those attorneys who worked to curtail the Bush administration's abuses of power. Two weeks ago, the government released a long-awaited Office of Professional Responsibility report recommending professional sanctions for John Yoo and Jay Bybee, two former lawyers in the Bush administration's Office of Legal Counsel who gave the green light for the use of torture in interrogations. OPR's recommendations were overruled by David Margolis, a high-ranking Justice Department official. Margolis nevertheless acknowledged that Yoo and Bybee exercised "poor judgment," and said that it was a "close question" as to whether Yoo "intentionally or recklessly provided misleading advice to his client."

Conservatives have since claimed that Yoo and Bybee were "exonerated" by the report. Last week, at a Senate Judiciary Committee hearing on the OPR report, Sen. Jon Cornyn of Texas said that "the Department's decision in this matter should once and for all put to rest any notion that John Yoo, Jay Bybee, and their associates deserve anything other than the thanks of a grateful nation for their service."

"The right is treating the lawyers who came up with the justification for torture as heroes, and the lawyers like Katyal who helped restore the rule of law as villains," says Frakt. "They've just got their heads screwed on backwards."

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