

THE NEW REPUBLIC



Vee Have Vays of Making You Talk

John Ashcroft's bogus rationale for ducking an important internal investigation on torture.

Emily Berman, The New Republic Published: Friday, May 30, 2008

Last week's report by the Justice Department's Inspector General reveals that working in the Bush administration really does mean never having to say you're sorry--or, indeed, anything else you don't want to for that matter. And this applies even when it's your executive branch colleagues who are trying to get you to talk.

The Justice Department's inspector general Glenn A. Fine has issued a thorough and unblinking report about the concerns FBI agents had about the harsh interrogation tactics, possibly rising to the level of torture, that were being used on detainees in Afghanistan, Iraq, and Guantanamo. These were concerns, Fine discovered, that were systematically ignored and discounted by cabinet members and other political appointees. Conspicuously absent from Fine's 437-page opus, however, is any input from one of the most important of those political appointees: former Justice Department leader John Ashcroft. The phrase "Attorney General Ashcroft declined to be interviewed for this review" or its equivalent appears repeatedly throughout the report--often followed by an indication that the report is necessarily incomplete because of it. For instance, due to Ashcroft's absence, we don't know which agency or individual made the decisions regarding what interrogation tactics would be used on specific detainees; whether Ashcroft himself objected to the use of any particular tactics; when he first became aware of his subordinates' concerns; or whether he conveyed those concerns to high-level officials outside the Justice Department and, if so, how those officials responded.

A spokesman for Ashcroft justified his non-cooperation by asserting that that "his conversations with the White House and with staff on national security matters are privileged." It's a refrain we should all be familiar with by now. White House aides haven't told Congress why the Justice Department fired U.S. attorneys who were unwilling to conduct politically motivated investigations and prosecutions; the telecommunications companies haven't told the courts what sort of surveillance the White House pressured them to conduct in the years after 9/11; and the Office of Legal Counsel hasn't explained the legal arguments supporting that surveillance or U.S. interrogation policies. Why? Because, in this administration, information about allegedly unlawful or unethical executive branch action has a tendency to be filed under "privileged."

Privileges serve an important role in American law. We're all familiar with the privilege against self-incrimination being a fundamental tenet of the criminal justice system. Doctor-patient, attorney-client, priest-penitent, and spousal privilege all protect relationships that we value. And there is a growing consensus that a reporter's source privilege is indispensable to an effective free press. But what species of privilege possibly justifies John Ashcroft's refusal to be interviewed for an internal Justice Department investigation? As it turns out, there are numerous species of confidentiality that fall under the broad rubric of "executive privilege." Problem is, none of them fits the bill here.

First of all, it can't be the state secrets privilege, which is designed to protect classified information from being leaked. This was an investigation being conducted *inside* the executive branch--it could not have resulted in improper dissemination of national-security-related material outside the confines of the executive. Investigators involved in such a sensitive project surely had security clearance, and the Inspector General's report has redacted classified information in multiple places; there was thus no risk of public disclosure of state secrets justifying a privilege assertion on that basis. Moreover, if the former attorney general was justified in declining to be interviewed on this basis, anyone who *did* cooperate improperly revealed privileged information.

Or maybe Ashcroft invoked the privilege that protects the confidentiality of interactions between the president and his close advisors? But this privilege applies only to information involving communications *with the president* (or, arguably, one of his very close aides). Plus, the report lists multiple occasions of

conversations alleged to have taken place within the Justice Department, or between the attorney general and other executive-branch agencies, such as the Department of Defense.

Perhaps he meant the privilege that shields deliberations that take place in the course of generating executive branch policies? But that's not applicable either, because many of the gaps that could be filled by the attorney general concerned an interrogation policy that *was already being implemented*.

Even if any of these categories of privilege applied to *some* things the inspector general might ask the former attorney general about, they couldn't possibly apply to *all* things that he knows on the subject. It's one thing to assert privilege in response to a particular question, as witnesses do in interviews, hearings, trials, grand jury investigations, and similar proceedings every day. It's entirely another to refuse to talk to the investigators at all.

Maybe, then, Ashcroft is claiming another species of executive privilege--the "when someone has done something wrong and we don't want to talk about it" privilege. Former President Nixon and his aides made similar claims of absolute immunity in an effort to hide the evidence of their gross misconduct during the Watergate crisis. They asserted these claims against Congress, against the courts, and against the American people. Fortunately, the Supreme Court and the rest of the country rejected this theory as inconsistent with the principles of democratic governance: Privilege exists to protect information whose dissemination would cause harm to important relationships or institutions. It cannot be permitted to shield misconduct.

The Bush Administration's fetish for secrecy--worse than Nixon's--and the accompanying aggrandizement of presidential power has done enough harm. The public deserves to know what John Ashcroft, as head of the Justice Department, knew about his employees' concerns that war crimes were being committed by American interrogators. It deserves to know if he investigated these complaints or passed them along to fellow cabinet members, White House advisors, or the president himself. And no claim of privilege should be permitted to hide, once again, the shameful way in which this president's "war on terror" has been waged.

Emily Berman is Counsel and Katz Fellow in the Liberty and National Security Program at the Brennan Center for Justice. She, along with several Brennan Center colleagues, filed a brief on Thursday in a lawsuit challenging the president's claim of executive privilege in response to a congressional investigation into the U.S. Attorney firings.

CLOSE WINDOW

Copyright © 2007 [The New Republic](#). All rights reserved.