



## **Alliance for Justice Report on the Nomination of Eric Holder to be Attorney General of the United States**

On January 15 and 16, 2009, the Senate Committee on the Judiciary held hearings on President Barack Obama's choice to be the next attorney general of the United States, Eric Holder. The Committee heard from several witnesses who testified both in favor of and against the nomination, including the nominee himself. Proponents of Holder's confirmation stressed his long record of independent judgment, successful law enforcement as United States Attorney in one of the busiest offices in the country, and his commitment to the rule of law and the integrity of the Department of Justice. Opponents emphasized his involvement in two pardons issued by President Clinton and Mr. Holder's long record of support for gun control legislation. On January 28, 2009, after a week-long delay requested by committee Republicans, the committee sent Mr. Holder's nomination to the full Senate by a 17-2 vote. Only Senators Cornyn (R-TX) and Coburn (R-OK) opposed confirmation. Both senators were strong supporters of the nomination of Alberto Gonzales to be President Bush's attorney general, who failed to operate as the people's lawyer and instead furthered the White House's political goals.

The hearings, taken together with the voluminous documents written by Mr. Holder and submitted to the Committee, establish that Mr. Holder is uniquely well qualified to serve as attorney general. Below, we analyze Mr. Holder's views on a number of important issues that have arisen for the Department of Justice during the Bush administration and are likely to arise during the Obama administration. These issues include his views on:

- Scope of executive power
- Relationship between the president and the Department of Justice
- Definition of torture
- Restoring the integrity of the Department, particularly the Civil Rights Division, in the wake of years of tragic politicization
- Importance of Supreme Court precedent, as exemplified by his responses to questions about the recent decision of the Court recognizing an individual right to own firearms, a decision with which he disagrees

### **The Scope of Executive Power**

Mr. Holder's view of executive power is best captured by two key statements he made at his confirmation hearing. First, he lamented President Bush's failure to obtain congressional authorization for warrantless wiretapping. While authorization for this has

since been provided by Congress, Mr. Holder made clear that the executive branch alone may not infringe upon the privacy rights of Americans without necessary congressional oversight. He also rejected the theory, advanced repeatedly by Bush administration officials, of a unitary executive whereby the president is the ultimate arbiter of the law. These two statements comprise a far more limited view of executive power than the sweeping power endorsed by the Department of Justice over the past eight years. Moreover, these are not new positions for Mr. Holder, but are instead consistent with positions he has taken in his speeches and prior congressional testimony.

In June of last year, Mr. Holder gave a speech in which he described some of the presidential overreaching that has taken place during the Bush administration:

[O]ther steps taken in the aftermath of the attacks were both excessive and unlawful. Although we did not respond to 9/11 by interning Muslim Americans, our government authorized the use of torture, approved the secret electronic surveillance of American citizens, secretly detained American citizens without due process of law, denied the writ of habeas corpus to hundreds of accused enemy combatants, and authorized the use of procedures that violate both international law and the United States Constitution.<sup>1</sup>

For these “unlawful” actions, he stated that “[w]e owe the American people a reckoning.” At his hearing, he clarified that he meant a *public* reckoning, i.e., a public explanation and accounting, but at the same time did not foreclose the possibility of investigation or prosecution of individuals who implemented these unlawful actions. Even the promise of a public reckoning represents a welcome and dramatic reversal from the past eight years, during which the Department of Justice has actively collaborated with the Bush administration’s policy of secrecy and assertions that it is above the law.

Mr. Holder rejected the notions that the president or those acting at his behest are above the law or that the president can immunize people for violation of federal statutes. Indeed, in testimony Mr. Holder presented to the Senate Committee on the Judiciary in 1999 at a hearing on President Clinton’s pardon of several FALN members, Mr. Holder expressly recognized that even a *sitting* president could be investigated for criminal wrongdoing, although he stated his view that criminal charges could not be brought against the president.<sup>2</sup> This stands in stark contrast to the view of President Bush’s attorneys general, who would not undertake any investigations of allegations of illegal wiretapping or torture that were authorized by President Bush.

Mr. Holder’s speeches, writings, and hearing testimony establish that he adheres to a narrower view of Executive Branch power than what the Bush administration has claimed. As set forth in the discussion below, his understanding of the independent role the attorney general must play is reinforced by these views.

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<sup>1</sup> Speech of Eric Holder to American Constitution Society Annual Convention at p. 2 (June 8, 2008) (contained in Volume 7 of Holder submissions to the Committee).

<sup>2</sup> Testimony contained in Volume 8, Part 2 of Holder submissions to the Committee.

## **The Role of the Attorney General**

During the Bush administration, the Department of Justice was wrought with scandal, from politicized hiring practices and political prosecutions to the justification of torture. Under Attorneys General Ashcroft, Gonzales, and Mukasey, the Department -- most notably the Office of Legal Counsel, whose lawyers justified the use of highly controversial interrogation tactics -- too often functioned as an agent of the White House, subordinating its best legal judgment to the policy directives of President Bush. Mr. Holder made clear that he views his role differently. He testified that he will maintain distance between himself and the directives of the Oval Office, instead acting as “the People’s lawyer.” He also pledged to undertake a comprehensive review of secret opinions issued by the Office of Legal Counsel during the Bush administration, which, among other things, justified the use of torture.

Mr. Holder expressed a desire to expand the work of the Department into other areas that have a tangible impact on Americans lives. The attorney general’s office should not, in his view, only work to fight the war on terror but also to protect consumer safety and the environment, and fight against corporate greed and malfeasance.

One of the chief objections of opponents of Mr. Holder’s confirmation has been his role in President Clinton’s pardon of fugitive Marc Rich. In acknowledging that his failure to object strongly to this pardon was a mistake, Mr. Holder also stated that he has learned from that mistake. It appears that one of the lessons he learned from that error was that Department of Justice must maintain strong independence from the White House and resist White House efforts to politicize the Department. In this regard, Mr. Holder assured the Senate that he would maintain a firewall between the White House and the Department of Justice recently re-instituted by Attorney General Mukasey, a wall seriously undermined during the tenures of Attorneys General Ashcroft and Gonzales.

## **The Civil Rights Division**

Mr. Holder vowed to devote special attention to the beleaguered Civil Rights Division, calling it the “conscience” of the Department of Justice. During the past eight years, the Division took significantly fewer voter disenfranchisement cases, and failed to advance civil rights in any meaningful way. Holder, however, emphasized a return anew to the missions for which the Division was founded, and would effectuate this by staffing the Division with individuals dedicated to its mission and seeking meaningful funding for their work.

A recent report released by the Office of the Inspector General and the Office of Professional Responsibility into allegations that political or ideological affiliations were considered in hiring, transferring, and assigning cases to career attorneys in the Civil

Rights Division detailed shocking and unsettling activities.<sup>3</sup> Federal law prohibits discrimination in such activities based on political affiliation. The report showed that Bradley Schlozman, first as deputy assistant attorney general and subsequently as principal deputy assistant attorney general and acting assistant attorney general, considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division, a clear violation of the law. Moreover, the report highlighted the lack of oversight within the Department to ensure that Schlozman, or any other political operative, would engage in such lawlessness. Mr. Holder called such actions reprehensible, and promised to change course within the Division.

Mr. Holder's public statements indicate a commitment to diversity. As he said during a 1998 speech celebrating Black History Month, "[p]erhaps the greatest strength of the United States is the diversity of its people and to truly understand this country one must have knowledge of its constituent parts." For eight years, the Civil Rights Division has failed to advance diversity. Under Mr. Holder's leadership, we welcome a return to a Department cognizant of the problems of the past but aware of the possibilities of the future.

### **Defining Torture**

As the nation's top law enforcement official, the attorney general is responsible both for fighting the war on terror and for insuring that in that fight the United States abides by international law, federal statutes, and the Constitution. Unlike outgoing Attorney General Michael Mukasey, Mr. Holder appears to have a robust understanding of *both* of these responsibilities. Mr. Holder provided critical legal guidance to American officials and the world when he stated that "waterboarding is torture" and acknowledged that it leads to unreliable and often worthless statements -- a statement Mr. Mukasey repeatedly refused to make. Mr. Holder would make the Army Field Manual, the standard method used by interrogators prior to the Bush Administration, applicable to all government interrogations, and would also not permit private contractors to undertake interrogations.

During the last eight years, the Department of Justice operated under a shroud of secrecy. Controversial memos authorizing the use of torture remain unpublished. Bush Administration officials continue to deny responsibility for their actions. Responding to Mr. Holder's clear statement that waterboarding is torture, former Attorney General Gonzales stated: "I think that one needs to be careful in making a blanket pronouncement like that, if you don't have all the information, because of the affect it may have, again, on the morale and the dedication of intelligence officials and lawyers throughout the administration.." Having all of the information is precisely what is needed to move forward. While some members of Congress have urged for a full-scale investigation, neither the full Congress nor the Executive have yet called for an independent commission or special prosecutor to determine what, if any, illegal interrogation practices

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<sup>3</sup> Report of the Office of Inspector General and the Office of Professional Responsibility, January 13, 2009, "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division" available at [www.usdoj.gov/opr/oig-opr-iaph-crd.pdf](http://www.usdoj.gov/opr/oig-opr-iaph-crd.pdf).

were used, Eric Holder has been clear that “nobody is above the law.” And since he defined waterboarding as torture, Holder appears open to the possibility of investigating those who failed to act in good faith.

More broadly, Mr. Holder vowed to abide by the Geneva Conventions. Again, this is a position that the Bush administration has repeatedly evaded, seeking to preserve for itself the power to violate the Geneva Conventions. Likewise, Mr. Holder flatly rejected the use of “renditions” to transfer people detained by the United States to countries that might torture or otherwise abuse detainees -- a position the Bush administration refused to clearly adopt. Moreover, in echoing the president’s call to close the Guantanamo detention center, and promising to bring swift justice to the detainees remaining there, Mr. Holder again indicated a frank willingness to undertake commitments the Bush administration has steadfastly avoided. These commitments will put the United States back on the path to restoring its international reputation.

### **On Supreme Court Precedent**

As a United States attorney, deputy attorney general, and in private practice, Mr. Holder has been an advocate of moderate gun control regulations. The positions he took when in government service were always consistent with the policies of the president and attorney general under whom he served. After leaving government service in 2001, he filed an *amicus* brief with the Supreme Court in the *District of Columbia v. Heller*<sup>4</sup> case, in which the Supreme Court held that the Second Amendment of the Bill of Rights protects an individual right to bear arms, including a right to own handguns, and that the District of Columbia’s restriction on ownership of handguns was unconstitutional. Holder’s *amicus* brief opposed an individual right to bear arms and pointed out that the Department of Justice had also historically argued that such an individual right was not protected by the Second Amendment. During the hearings over the past two days, some opponents of Mr. Holder’s confirmation asserted that as attorney general, Holder might argue that the *Heller* decision should be overturned, limited, or interpreted so as to permit moderate regulation of guns.

Holder’s response to these assertions informs us about his respect for precedent and his understanding of the Supreme Court’s role as ultimate arbiter of the meaning of the Constitution. He stated that, if the Court were to consider revisiting the *Heller* ruling, he would give due weight to the importance of *stare decisis*, the doctrine under which prior decisions should only be overturned after careful consideration. His responses also recognized that unless and until the Supreme Court gave such an indication, *Heller* is the law of the land and must be followed. Again, this represents a contrast with the Bush administration’s view of the Supreme Court. The Bush administration, particularly with regard to the Court’s decisions affirming the right of detainees at Guantanamo to have their detention reviewed by means of habeas corpus, has appeared to view the Court as an obstacle to be circumvented rather than as the law of the land. Mr. Holder’s view is far more respectful of the Supreme Court -- even on issues of law as to which he has strong and long-standing differing views.

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<sup>4</sup> 554 U.S. \_\_ (2008).

## **An Early Test of Mr. Holder's Principles**

In the coming months, an important Supreme Court case will be briefed by the Department of Justice. The positions taken by the Department in this case will tell us a great deal about how the new direction promised by Mr. Holder will take shape.

In *al-Marri v. Spagone* (No. 08-368), the Supreme Court will review the decision by the U.S. Court of Appeals for the Fourth Circuit that would permit the president to detain a person legally present in the United States indefinitely, without ever charging the person with a crime. President Obama has ordered the attorney general to coordinate a comprehensive review of Mr. al-Marri's status together with other Cabinet officers:

"For more than 5 years, the Department of Defense has detained Ali Saleh Kahlah al-Marri as an enemy combatant in facilities within the United States. Al-Marri is the only individual the Department of Defense is currently holding as an enemy combatant within the United States.

"Because he is not held at Guantánamo Bay, al-Marri is not covered by the review mandated in the Review and Disposition Order. Yet it is equally in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal basis for al-Marri's continued detention, and identify and thoroughly evaluate alternative dispositions.

"Accordingly, I direct that a review of al-Marri's status ("Review") commence immediately."

Of course, this review ordered by the president could result in Mr. al-Marri's release or indictment. Either outcome could moot the pending Supreme Court case. But if the review is not completed by the date the government's brief is due (currently March 23, 2009), or if it confirms Mr. al-Marri's "enemy combatant" status, then the Department's brief will tell the public a great deal about Mr. Holder's views of the scope of executive power. If the review is completed first, that review itself will inform the public about how Mr. Holder believes presidential power should be exercised.

## **Conclusion**

Mr. Holder's record of exercising independent judgment, his support for a Department of Justice independent from the White House, and his more limited view of the scope of presidential power all make him worthy of rapid confirmation by the Senate as the next attorney general of the United States. By contrast, the opposition to Mr. Holder's confirmation pointed only to isolated incidents of questionable judgment in a career otherwise remarkable for its excellence and integrity.