

# **The Democrats and civil liberties – open questions**

After eight years of White House policies that have expanded the powers of the presidency, many civil libertarians have welcomed a change of occupants at 1600 Pennsylvania Avenue. While opinions about President-elect Barack Obama are far from uniform within the civil liberties community, many see his nascent administration as an opportunity to chart a new course for Presidential conduct as it relates to constitutional rights. Obama's proponents note that he has publicly disavowed President Bush's most expansive claims of executive authority - including his assertion that he has the power to detain U.S. citizens without criminal trials.

Whether Obama's pronouncements on these matters are real - or merely rhetorical - remains to be seen. As the Obama administration continues to take shape, we are presented with daily indicators of what the civil liberties priorities of that administration might look like. Now that the Democratic Party controls both the executive and legislative centers of power in Washington, it is worth asking pointed questions about how the Democrats actually plan to interpret the Constitution, and to safeguard individual liberties.

## **Holder at Justice**

One indication of the Obama administration's civil liberties posture has been the nomination of Eric Holder to the top job at the Justice Department. As Attorney General, Holder will be in a position to impact the constitutional rights of American citizens on a number of fronts. Firstly, Holder will be the nation's chief law enforcement officer, and will preside over a host of powerful federal police agencies. At the same time, he will also be responsible for advising the White House on the metes and bounds of its own powers, by working through the Office of Legal Counsel, or OLC. The OLC's legal opinions impact scores of executive branch agencies, and guide the President's decision making in fundamental ways. For instance, during the Bush administration, the OLC produced memos that set out the legal framework for the warrantless TSP - the "Terrorist Surveillance Program."

Eric Holder has publicly rejected some of the more contentious Bush-era security initiatives, such as the TSP, and he has pledged that the Justice

Department will steer a different course under his leadership. While this is a positive sign for civil liberties, it is also worth asking whether Holder would be willing to look back even further in time, and disavow certain Clinton-era legal opinions that were promulgated while he was serving at Justice during the 1990s.

### **Warrantless searches**

In particular, it is worth asking whether Holder would modify or repudiate the position articulated by Deputy Attorney General Jamie Gorelick during her 1994 testimony before the House Permanent Select Committee on Intelligence. At the time, Congress was debating whether to amend the Foreign Intelligence Surveillance Act to allow the secret FISA court to approve physical searches for foreign intelligence gathering, in addition to electronic surveillance. Gorelick's testimony indicated that the Clinton White House might support the desired FISA alterations, but she hastened to note that any changes to FISA could not interfere with the President's pre-existing powers to conduct physical searches in the United States without getting judicial approval. Said Gorelick:

“The Justice Department believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes.”

Those who followed the Bush-era debates over warrantless wiretapping will recognize this argument as virtually identical to the one put forth by Alberto Gonzalez to justify the Terrorist Surveillance Program. The President, so the argument goes, has search powers that cannot be constrained by Congress, even if Congress passes laws that regulate those powers. It is, in both instances, a curious interpretation of the plain language of the Constitution, which specifies that the President shall “take care that the laws are faithfully executed.”

Gorelick's testimony, little noted at the time, foreshadowed central themes of the Bush years that were to follow. In important ways, memoranda written on Clinton's watch helped to lay the intellectual foundation for the Bush administration's subsequent forays into warrantless electronic surveillance. In the wake of the TSP's disclosure by the New York Times, members of the Bush administration rushed to utilize Gorelick's testimony in their defense. In a 2006 speech at Georgetown Law School, Attorney General Alberto Gonzalez cited Gorelick's claim that,

“The President has inherent authority under the Constitution to conduct foreign intelligence searches of the private homes of U.S. citizens in the United States without a warrant.”

During Eric Holder’s confirmation hearings, it will be worth discovering whether he agrees with this assessment.

### **Classified evidence**

Soon after he was elected, Barack Obama indicated a willingness to close the military prison at Guantanamo Bay, and to initiate legal proceedings against all of the prisoners held there. Specifically, Obama expressed a desire to charge Guantanamo detainees criminally, and to try them in U.S. courts. In recent weeks, Obama’s advisors have claimed that doing this might require the creation of special national security courts to protect the classified material that these cases would likely rely on. While the details of these plans have not been released, their basic premise raises thorny questions. Creating U.S. courts that deviate from the normal standards of evidence could easily run afoul of constitutional protections, and would likely hold unintended consequences for our overall system of justice.

If criminal trials for certain Guantanamo detainees are sought, then existing procedures for handling classified information should be utilized. Congress enacted such procedures in 1981, and they have been used in multiple terrorism trials, including the trials of the original World Trade Center bombers. Other detainees – such as Taliban fighters - may fit more closely into the existing system of military courts-martial, and they should be tried there. This two-track approach would put an end to the long-running Guantanamo saga without creating a separate, quasi-constitutional court system on American soil.

### **Upcoming tests**

The Obama administration will soon face other tests of its commitment to constitutional stewardship. For instance, the Supreme Court recently granted review of the last known domestic enemy combatant case – the case of Ali Saleh al-Marri. Soon after taking office, Barack Obama will have to make a choice about whether to defend the Bush administration’s controversial theories of open-ended detention before the high court, or to chart a different path by charging al-Marri with a crime.

Likewise, the Democratic Congress will have an opportunity to demonstrate its adherence to the Constitution as it sets its upcoming legislative agenda. This is particularly true in the area of firearms law. Historically, the Democrats have used the confluence of a congressional majority and control of the Presidency to pass gun control legislation. Both the Gun Control Act of 1968 and the 1994 “Assault Weapons Ban” were born of such circumstances. Now that the Supreme Court’s *Heller* decision has affirmed the keeping and bearing of arms as an individual liberty, where will the Democratic Party position itself in relation to gun owners’ rights? Will the Democrats be satisfied with existing regulatory schemes, or will they seek to enact more sweeping and comprehensive prohibitions, and thereby challenge *Heller*’s core holding?

### **Asking the hard questions**

In recent years, congressional Democrats were frequent critics of President Bush’s constitutional record. Now that their party controls most of Washington, Democrats should continue to ask hard questions about constitutional rights, and should be ready to challenge their party’s leadership if necessary. After 9/11, certain Republican lawmakers were instrumental in curtailing some of the excesses of the Bush administration. This was true of Dick Arme, for instance, and his work to end the TIPS informant program. However, far too many congressional Republicans enabled constitutional mischief at that time by acquiescing to unreasonable White House demands. If Obama wanders off the constitutional path, Democrats in Congress ought not to repeat those mistakes, and should instead endeavor to place principles before party.

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