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## Holder's Inconsistent Constitutional Legacy

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# Holder's inconsistent constitutional legacy

*Laudable leadership on civil rights and criminal justice blunted by disregard for civil liberties*

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by [Lauren Carasik](#) [@LCarasik](#)

Attorney General Eric Holder's [announcement last week](#) of his plan to resign triggered a cascade of commentary about his tenure. The accounting was decidedly mixed: Conservatives bade him good riddance, while liberals were more divided. As the nation's first African-American attorney general, he drew wide praise for his record on civil rights, which was the centerpiece of his time in office. He refused to defend the Defense of Marriage Act, championed voting rights and made incremental but important strides in reforming the criminal justice system. But Holder's dismal record on civil liberties will tarnish his legacy.

In both word and deed, he fostered a national conversation about race, courageously speaking about his [own lived experience](#). He stood by his controversial remark shortly after he was confirmed as attorney general in which he asserted the United States remains "[a nation of cowards](#)" on the issue of racial justice. Republican leaders and the conservative media roundly and repeatedly criticized him for "[needlessly injecting politics into law enforcement](#)," often [based on meritless arguments](#). In the aftermath of the death of Trayvon Martin, an unarmed African-American teen gunned down by self-styled neighborhood watch member George Zimmerman in Florida, [Holder lamented that he was compelled to caution](#) his 15-year-old son about how young men of color should interact with the police. It was a discussion Holder had with his father decades earlier, although his father likely believed the admonitions would be unnecessary for his son to repeat.

Holder prioritized reforming the criminal justice system, calling the war on drugs and mass incarceration [moral and economic failures](#) that disproportionately affects communities of color. He [recommended changes in federal sentencing guidelines](#) that reduced the punishments for nonviolent drug offenders and

permitted the liberalization of marijuana laws in Colorado and Washington. During his tenure, the Department of Justice (DOJ) took aim at [racial profiling](#) and has launched investigations into police departments, [including in Ferguson](#), Missouri and elsewhere in St. Louis County, both for the shooting of unarmed teenager Michael Brown by police officer Darren Wilson and for allegations of widespread harassment and excessive use of force. In August, Holder won praise for the symbolic importance of his presence as tensions simmered in Ferguson.

### **Limited support for equality**

He recently said the DOJ will embrace the recommendations from the [Brennan Center for Justice](#) to cement the paradigm shift in the approach to criminal justice his office had already begun, including moving beyond a model based exclusively on enforcement to focus on efforts to reduce incarceration, crime and recidivism. Holder has denounced “stand your ground” laws and [urged states to repeal bans on felons’ voting](#). He has achieved some modest success: For the first time since 1980, the [federal inmate population has fallen](#) over the course of a year and is on target to drop even further in 2016.

Holder has spoken passionately against efforts to thwart voter participation. In remarks after the Supreme Court [gutted the Voting Rights Act](#) in [Shelby County v. Holder](#) in June 2013, [he vowed](#) to make voting rights a high priority for the department. And the DOJ has since challenged restrictive voting laws in [North Carolina](#), [Texas](#), [Ohio](#) and [Wisconsin](#).

But his support for equality and the rule of law had its limits, including accountability for the nation’s most powerful. [Impunity for corporations](#) deemed too big to jail is incompatible with a civil rights agenda that must consider economic justice for communities who bore the brunt of predatory lending and continue to suffer from the financial fallout of other corporate malfeasance. In addition, his failure to prosecute anyone for the Central Intelligence Agency’s brutal interrogation and torture tactics abroad has [eroded U.S. credibility on the rule of law](#).

Holder's record on civil rights was marred by policies that supported the suppression of civil liberties in the name of the sprawling war on terrorism. The indefinite detention of terrorist suspects in the Guantánamo Bay facility under his watch [runs afoul of international norms](#). He faced significant pushback on his initial proposal of trying Guantánamo detainees in federal courts under the principles of fairness and due process. He has since backed military commissions that many observers say [lack legitimacy](#) both domestically and internationally. Even the Navy's defense counsel for the detainees has called the military justice system at Guantánamo a "[Kafka-esque absurdity](#)." In July, Human Rights Watch and the Columbia University Law School issued a comprehensive report raising alarm about the DOJ's tactics in investigating, prosecuting and incarcerating American Muslim terrorism suspects. And in August, Maj. Jason Wright, a member of the defense team for alleged 9/11 mastermind Khalid Sheikh Mohammed, [resigned from the military](#), calling the proceedings show trials and criticizing the United States' "abhorrent leadership" on human rights.

**Obama should select an attorney general who can not only build on Holder's record on racial justice, civil rights and criminal justice reform but also vigorously respect and enforce the full panoply of rights enshrined in our Constitution.**

The [American Civil Liberties Union](#) and other activist groups denounced a [speech that Holder gave](#) at the Northwestern University School of Law in 2012 in which he argued that Barack Obama's administration had the authority to engage in targeted killings anywhere in the world without judicial review, a critical check on executive power. In May [the District of Columbia Court of Appeals](#) upheld deference to the administration in a case brought by the family of U.S. citizen Anwar al-Awlaki, who was killed in a drone attack in Yemen in 2011 after he had been placed on a kill list. Journalist Jason Leopold recently [obtained a copy of a DOJ memo](#) about the justification for extrajudicial assassination that was heavily redacted, and the human toll of both intended targets and civilian casualties remains shrouded in secrecy.

The [Freedom of the Press Foundation](#), a nonprofit that supports free speech and freedom of the press, characterized Holder as the worst attorney general on press freedom in a generation. The DOJ has prosecuted more whistleblowers and sources than the combined total from all previous administrations. In [United States v. Sterling](#), the criminal prosecution of former CIA employee and alleged leaker Jeffrey Sterling, the DOJ argued that there is no reporter's privilege in criminal cases to shield reporter and author James Risen from the obligation to reveal his source for information in a book about a botched CIA operation. The Supreme Court [declined to hear Risen's appeal](#), leaving the Fourth Circuit ruling against him to stand. Holder has promised that no reporter doing his job would go to jail [under his watch](#). But the DOJ's aggressive pursuit of journalists threatens to deter future sources, who may understandably fear the confidentiality of their disclosures. In 2013, Holder drew ire for signing off on a warrant to seize Fox News Washington correspondent [James Rosen's private emails](#), which followed condemnation of the DOJ for [seizing the phone records of Associated Press](#) reporters that May. And in a June 19, 2014, letter to Holder, a number of [human rights and media advocacy groups](#) asked him to halt the DOJ's ongoing criminal investigation into WikiLeaks and its leader, Julian Assange, arguing that the specter of criminal liability in this case chills freedom of speech.

Government transparency has fared poorly in other areas as well. In 2008, Obama campaigned on the pledge of reforming the "[state secrets](#)" privilege — the legal precedent under which the government may exclude evidence from court proceedings to protect national security. But critics have denounced Holder's expansive use of this rule to shield government activity from public scrutiny. Obama vowed that his administration would be the [most transparent in history](#), but according to The Associated Press, censorship and denials under the Freedom of Information Act (FOIA) have increased. Though Holder issued new guidance on complying with FOIA requests in 2009, the DOJ's own report on FOIA requests shows [its record is less than stellar](#).

Democracy requires informed and robust debate and the evenhanded application of our vaunted legal principles to everyone, including terrorism suspects, leakers

and [immigrants](#). This is especially true during turbulent times, when it is all too easy to lose sight of our cherished ideals. Speculation about Holder's replacement comes amid concerns that the balance in the Senate will tip to Republicans after November's elections, ensuring a [bruising confirmation battle](#). But Obama should ignore partisan pressure and select an attorney general who can not only build on Holder's record on racial justice, civil rights and criminal justice reform but also vigorously respect and enforce the full panoply of rights enshrined in our Constitution.

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*The views expressed in this article are the author's own and do not necessarily reflect Al Jazeera America's editorial policy.*