

WebMemo



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Key Questions for Eric Holder, Nominee for United States Attorney General

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The United States Senate will soon render its advice and consent on the nomination of Eric Holder as the new United States attorney general. Holder served as deputy attorney general in the Department of Justice (DOJ) during the Clinton Administration.

Many questions have arisen about various nominees' "independence" from the very President to whom the cabinet secretaries should be answerable. Not only is this the wrong question, but it rests on a misguided view of executive power in which subordinates somehow wield more authority than superiors. The proper question is one of *judgment*: Does the nominee demonstrate the kind of judgment necessary to advise and represent the President in a responsible and constitutionally appropriate way?

In at least five areas, Holder has demonstrated highly questionable judgment. The following questions should allow him to explain those actions and positions.

Question #1: Pardoning Terrorists

As deputy attorney general, you played an active role in promoting clemency for 16 members of FALN and Los Macheteros, terrorist organizations linked by the FBI to more than 130 bombings and six murders.

The *Los Angeles Times* reported last week that you instructed your staff to change its "original report recommending against commutations...with one that favored clemency for at least half the prisoners."¹ When DOJ Pardon Attorney Roger Adams resisted, your office instructed him to write an

"options memo" keeping clemency on the table. Adams said "it was such a big deal to consider clemency for a group of people convicted of such heinous crimes."

In addition to ignoring the advice of the pardon attorney, you advocated clemency in a case in which there were numerous reasons *not* to do so, including:

- Two U.S. Attorneys strongly recommended against clemency.
- The prisoners failed to reveal information about fugitives who were part of their terrorist conspiracy, despite the fact that there were ongoing investigations and prosecutions.
- The prisoners failed to provide information on the whereabouts of \$7.2 million in stolen funds.
- The prisoners had not expressed contrition. (Indeed, you instructed the pardon attorney to obtain statements to that effect. Ordinarily, existing contrition must be offered in support of clemency; it is not something to be generated after the fact.)
- Two prisoners were so set on continuing their terrorism that they refused clemency and

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remained in prison rather than agreeing to renounce violence as part of the deal.

While the decision to grant clemency ultimately rested with the President, new evidence obtained in DOJ memos suggests that you went to great lengths to advise him to do so.²

Given the seriousness of their charges, the lack of pre-clemency negotiation contrition, the well-reasoned statements of the pardon attorneys, the strong negative recommendations of the prosecuting attorneys, the presence of an ongoing investigation of the terrorist organizations to which the convicted terrorists had failed to provide assistance, and the failure to provide information about millions in stolen cash, why did you consider it appropriate to advocate so aggressively for clemency?

Question #2: Gun Rights

In last year's challenge to the District of Columbia's gun ban, you joined a brief in your capacity as a former DOJ official arguing that the Second Amendment does not provide an individual right for citizens to own firearms. Indeed, your brief referred to the DOJ's recognition of "an individual rights theory that accords constitutional protection to the possession and use of firearms for private purposes" as "unwise." Under this reasoning, it appears that many people are unwise.

- First, the Founders of the nation must have been unwise when they wrote the right of "the people" to keep and bear arms into the Second Amendment.
- Next, 55 Senators, 250 Representatives, and, notably, a majority of the Judiciary Committee, which will sit to ask you questions on Thursday, must have been unwise when they joined a brief arguing that the Second Amendment properly protects an individual right.

- And finally, a majority of the Supreme Court must have been unwise in rejecting your brief, holding that the Second Amendment does indeed guarantee an individual right.

Why did you argue to unduly restrict the constitutional rights of law-abiding citizens, and what will you do to protect law-abiding Americans' Second Amendment rights, which you have previously disparaged as "unwise"?

Question #3: Attorney-Client Privilege

As deputy attorney general, you issued what has become known as the Holder Memorandum, in which you directed federal prosecutors to consider whether corporations waived attorney-client privilege or paid for their employees' attorneys' fees when determining whether the corporations had cooperated with investigations.³ The memo encouraged prosecutors to coerce corporations to waive attorney-client privilege and to violate contractual obligations to provide a defense in order to avoid having the full-weight of a federal indictment brought against their companies.

Organizations across the political spectrum—from the American Bar Association, the American Civil Liberties Union, and the National Association of Criminal Defense Lawyers to the Chamber of Commerce, Washington Legal Foundation, and The Heritage Foundation—have denounced the coerced waiver of attorney-client privilege that began under your leadership. And in August, the United States Court of Appeals for the Second Circuit found that the policy of coercing companies to limit payments of attorneys' fees "unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment."

In at least the third policy change since you issued your now infamous memo, Deputy Attorney

1. Josh Meyer and Tom Hamburger, "Eric Holder Pushed for Controversial Clemency," *Los Angeles Times*, January 9, 2009, at <http://www.latimes.com/news/nationworld/washingtondc/la-na-holder9-2009jan09,0,6643509.story> (January 13, 2009).
2. Roger Adams, Department of Justice Pardon Attorney, letter to Kevin Ohlson regarding Holder clemency recommendation, August 31, 1998, at <http://www.latimes.com/media/acrobat/2009-01/44427240.pdf> (January 13, 2009).
3. Eric Holder, then-Deputy Attorney General, memorandum to All Competent Heads and United States Attorneys, regarding bringing criminal charges against corporations, June 16, 1999, at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> (January 13, 2009).

General Mark Filip recently modified the U.S. Attorney's Manual to make clear that federal prosecutors should not consider whether a corporation has waived attorney-client privilege when determining whether a corporation is cooperating with an investigation. While Filip's change is welcome news, it does not fully address the culture of waiver that the Holder Memo created. Other agencies have implemented policies requiring waiver, and nothing would prevent the Justice Department under your leadership from returning to the unconstitutional and pernicious Holder Memo policy.

What will you do to assure that the DOJ and other agencies respect attorney-client privilege?

We would recommend that you should first make clear that you endorse and will enforce the policy changes made by Filip. This is a good first step toward cleaning up the constitutional maelstrom that your memorandum created.

Second, you should cooperate with Congress in crafting legislation that prohibits the kind of coercive practices your memorandum spawned—not just at DOJ, but at agencies like the IRS, HUD, and the SEC. While once a change in DOJ policy might have been sufficient, the damage wrought by the Holder Memo is now sufficiently broad that it requires legislative attention. Your leadership on this issue would demonstrate dedication to the constitutional rights of defendants that were trampled by your previous policy.

Question #4: Voting Rights

As Heritage's Hans von Spakovsky has ably demonstrated, voter fraud is a serious and continuing problem.⁴ Given news accounts and pending cases involving voter fraud and voter registration fraud allegedly perpetrated by groups like ACORN, serious questions arise as to whether the DOJ will fulfill its obligation in protecting the franchise of legal voters, whose votes are diminished by the casting of illegal votes.

Those seeking answers regarding how you will respond from your record are left with more questions. You have been cavalier in the past when

questioned about voter fraud, saying on Fox News in 2004 that "I think there is a feeling among Republicans that there is a widespread amount of voter fraud out there. I don't think the statistics actually would substantiate it." While your support for cracking down on voter fraud has been tepid at best, you have shown passion for protecting some voting "rights"—those of *felons*, as evidenced by your joining a brief seeking to strike down Florida's voting law because it prohibits felons from voting as a violation of the Voting Rights Act. The Court disagreed with your brief, noting that the Constitution acknowledges the authority of the states to disenfranchise felons in the Section 2 of the Fourteenth Amendment, and finding that in enacting the Voting Rights Act, Congress "expressed its intent to *exclude* felon disenfranchisement provisions from Voting Rights Act scrutiny." *Johnson v. Bush*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (emphasis in original).

As attorney general, what will you do to investigate and prosecute allegations of voter fraud? Do you believe that the Voting Rights Act prohibits states from restricting felons from voting where, as in Florida, the law was not passed with discriminatory intent, even in light of contrary constitutional (14th Amendment) and judicial authority? As attorney general, will you respect the states' legal authority to limit the franchise to non-felons?

Question #5: Marc Rich

You played a prominent role in the pardon of Marc Rich, recommending his pardon to the White House as "neutral leaning favorable." Mr. Rich had fled the country after being indicted for racketeering, trading with the enemy (the Ayatollah Khomeini during the period that Iran was holding 52 U.S. hostages), and millions of dollars in tax evasion. He avoided extradition requests and allegedly renounced his citizenship in order to prevent extradition. For these crimes, Rich had been featured on the FBI's "Ten Most Wanted" list and was the subject of a nearly two-decades-long investigation.

Despite the fact that Rich continued to be a fugitive who refused to submit to the U.S. justice system, he was given a pardon, in violation of virtually

4. Hans A. von Spakovsky, "Democracy in Danger: Case Studies of Election Fraud," Heritage Foundation *Special Report* No. 24, October 28, 2008, at <http://www.heritage.org/Research/LegalIssues/sr24.cfm>.

every conceivable standard ordinarily applied by pardon attorneys.

The case is all the more problematic because Rich's ex-wife gave considerable sums to the Democratic Party (\$867,000) and the Clinton Library (\$450,000).

Again, the ultimate decision was the President's. But given the facts of the case, and the clear appearance of impropriety created by Rich's ex-wife's contributions to the Clinton Presidential Library, why did you recommend "neutral leaning favorable" for his pardon request? Should not the sizeable donations alone have suggested a negative response, in order to avoid the appearance of partisanship at the Justice Department?

A Question of Judgment. From pardoning terrorists and making dubious legal arguments to attempt to force states to allow felons to vote to the infamous Holder Memorandum, Holder has demonstrated highly questionable judgment. Therefore, before finalizing its advice and consent, the United States Senate should use the five questions listed above to begin answering the most important query of all: Does Eric Holder demonstrate the kind of judgment necessary to advise and represent the President in a responsible and constitutionally appropriate way?

—Robert Alt is a Senior Legal Fellow and Deputy Director of the Center for Legal and Judicial Studies at The Heritage Foundation.

For More Information

Brian W. Walsh, "Enacting Principled, Nonpartisan Criminal-Law Reform: A Memo to President-elect Obama," Heritage Foundation *Special Report* No. 42, January 9, 2009, at <http://www.heritage.org/Research/LegalIssues/sr42.cfm>.

Hans A. von Spakovsky, "Democracy in Danger: Case Studies of Election Fraud," Heritage Foundation *Special Report* No. 24, October 28, 2008, at <http://www.heritage.org/Research/LegalIssues/sr24.cfm>.

Todd F. Gaziano, "Election Reform," testimony before House Committee on Rules and Administration, U.S. House of Representatives, March 14, 2001, at <http://www.heritage.org/Research/GovernmentReform/Test031401.cfm>.

Andrew M. Grossman, "An Individual Right Rekindled," Heritage Foundation Commentary, June 30, 2008, at <http://www.heritage.org/Press/Commentary/ed063008a.cfm>.