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Obama's Civil Rights Legacy—and Ours

Today's turmoil in race relations may be a testament to the progress his administration made.

David Cole

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Barack Obama, the nation's first African-American president, formerly a civil-rights activist and constitutional lawyer, approaches the end of his second term with relatively high approval ratings, low unemployment, and 10.9 million more jobs and 20 million more Americans enjoying access to health care than when he took office. These developments, while benefiting the poor across the board, especially help African Americans, who have long been a larger proportion of the unemployed and uninsured. Donald Trump's fearmongering to the contrary, crime—whose victims are also disproportionately black and Hispanic—is at historic lows. After 40 years of unrelenting expansion, the nation's prison population has begun to shrink. And racial disparities in criminal-justice enforcement have also diminished.

Yet even before Trump's surprise election, polls reported that Americans were more pessimistic about racial division than they had been in nearly a generation. A June Pew poll found that 43 percent of African Americans believe that the country will not make the changes necessary to assure them equal rights. There has been a steady stream of incidents, many captured on video, in which police officers have shot unarmed black men. Seemingly in response, two disturbed black men ambushed and killed multiple police officers in Dallas and Baton Rouge in separate incidents in July. Campuses across the country have been roiled by racial protests. And Trump premised his presidential campaign on racial division, lashing out against Muslims, Mexicans, and Black Lives Matter.

Similar contradictions mark President Obama's specific record on civil rights and respect for the rule of law in the fight against terrorism. He has made considerable strides in these areas, and he will be sorely missed by all who care about these values. He rejected George W. Bush's theories of unchecked executive war-making powers and insisted that the fight against Al Qaeda must be conducted in accordance with domestic and international legal constraints. He forbade torture and rescinded and released the once-secret Justice Department memos that authorized the CIA's interrogation program. He promised to close Guantánamo and, despite consistent opposition from Congress and his own Defense Department, has succeeded in shrinking the prison population there to 60. Yet civil-liberties and human-rights groups have been harshly critical, accusing him of not doing more to close Guantánamo; of vastly expanding targeted killing through the use of unmanned drones; of stifling dissent by prosecuting a record number of

whistle-blowers; and of relying on excessive claims of secrecy that have obstructed accountability.

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How, in light of these contradictions, should we judge his legacy on civil and human rights? Few presidents have been more committed to civil rights and civil liberties. And, in a perverse way, the turmoil that marked race relations even before the election and the criticism from human-rights advocates that Obama has borne may well be both a cause of and a testament to the progress he has made. As Frederick Douglass famously noted, “Power concedes nothing without a demand.” And sometimes it’s precisely when what was previously unattainable appears within our grasp that our dissatisfactions are most strongly felt.

Campaign promises are made to be broken (or so we must hope as Trump prepares to assume office). Yet when one measures Obama’s accomplishments in civil rights against the goals his administration set for itself, the remarkable thing is how much he *has* delivered. The website of the 2008 Obama-Biden transition team still exists, at change.gov. Among the promises made on civil rights, Obama pledged to fight employment discrimination, expand hate-crime laws, end racial profiling, support ex-offenders’ reentry into society, eliminate sentencing disparities, expand drug courts as an alternative to incarceration, support rights for LGBTQ individuals, and repeal “don’t ask, don’t tell,” the Clinton-era policy that barred openly gay people from serving in the military.

The administration achieved many if not all of these goals. It’s been most successful in the arena of gay and lesbian rights. Obama signed into law an expansion of the hate-crime statute to include crimes motivated by antigay bias. He ended “don’t ask, don’t tell” and, more recently, lifted the ban on transgender people serving in the military. He issued an executive order barring federal contractors from discriminating on the basis of sexual orientation or gender identity. He personally endorsed marriage equality in May 2012 and refused to defend the Defense of Marriage Act, the law signed by Bill Clinton that denied federal benefits to same-sex couples married in states that recognized such marriages, thereby easing the way for its invalidation by the Supreme Court in 2013. And when the Court took up the question of same-sex marriage directly, the Obama administration supported the claimants, and Obama’s solicitor general, Don Verrilli, delivered an impassioned argument for why the Court shouldn’t defer recognition of same-sex marriage as a constitutional right. A federal bill barring employment discrimination against LGBTQ people has not passed, but there the blame lies with Congress.

The Obama administration’s most important achievements in racial justice have, appropriately, concerned criminal justice. As the recent racial unrest sparked by police shootings has underscored, America’s criminal-justice system is at the core of racial division in the United States. African Americans and Hispanics are disproportionately victimized by both crime and criminal-law enforcement. Obama, with the full-throated support of his first attorney general, Eric Holder, has been a leader on criminal-justice reform. He signed into law the Fair Sentencing Act of 2010, which reduced the disparity between sentences for crack and powder cocaine from 100-to-1 to 18-to-1. Obama was the first president to visit a federal prison. He directed the Justice Department to review the use of solitary confinement, leading to a 2016 guidance that

reduces its use in the federal prison system, especially for juveniles and the mentally ill, and urges states to follow suit. Under a clemency initiative, he has commuted the sentences of 944 people and pardoned 70 others, a substantial increase over most of his predecessors.

The Justice Department's Civil Rights Division has conducted high-profile investigations of multiple police departments for systematic civil-rights abuses, including those in New Orleans, Cleveland, Newark, and Ferguson, Missouri. The investigations produced damning reports and significant consent decrees requiring meaningful reform and ongoing oversight. Holder also issued an expanded ban on profiling by federal law-enforcement agencies and their state and local partners, though he maintained existing exceptions for border control and airport screeners.

In speeches that would have been unimaginable from any other attorney general in the past 40 years, Holder publicly questioned the efficacy and fairness of the War on Drugs and spoke out forcefully against mass incarceration. And he didn't just talk a good game: He reversed a policy instituted by George W. Bush's attorney general, John Ashcroft, that required prosecutors to charge defendants with the most serious crimes available. Instead, Holder instructed federal prosecutors to use their charging discretion wisely to prioritize the most serious crimes; to avoid charging low-level drug offenders with crimes that trigger draconian mandatory-minimum sentences; and to pursue alternatives to incarceration where appropriate. In the wake of these reforms, federal drug-trafficking cases dropped, prosecutors sought mandatory minimums in drug cases much less often, and the federal prison population fell for the first time in decades.

Obama has been a leader on criminal-justice reform, but his record on immigrants' rights is more mixed.

Even so, every time a case seeking to hold police officers accountable to constitutional constraints in their encounters with citizens reached the Supreme Court, the administration sided with the police. It advocated narrow understandings of Fourth and Fifth Amendment rights, and it pressed expansive readings of doctrines that limit remedies when police violate those rights. This past term, for example, the administration supported a ruling that allows the police to use evidence found after an unconstitutional stop if a routine record check discloses an outstanding arrest warrant. Justices Elena Kagan, Sonia Sotomayor, and Ruth Bader Ginsburg dissented, noting that in some areas, such as Ferguson, very high percentages of the population have outstanding arrest warrants, often for trivial offenses such as failure to pay a parking ticket. The ruling, the dissenters warned, invites officers to stop people for no reason at all, run their names through the system, and then search them if a warrant pops up. Among other sources, Sotomayor cited Ta-Nehisi Coates in condemning the rule as an invitation to discriminate. Yet the Obama administration sided with the police in this and every other case that came before the Court.

In other words, while the Obama administration has been willing to exercise its discretion to mitigate the ill effects of the War on Drugs and mass incarceration, it has not been willing to support more restrictive *constitutional* limits on that discretion, which would be more durable and farther-reaching. The federal government accounts for less than 2 percent of criminal-law enforcement; the rest is carried out by the states. Constitutional limits apply across the board to every police department in the country; a federal policy initiative, by contrast, affects only federal prosecutors and police. And as Trump will gleefully demonstrate on his first day in

office, executive initiatives can be reversed by a successor administration with the stroke of a pen.

Obama's record is considerably more mixed with respect to immigration and immigrants' rights. On the one hand, the president pushed for reform legislation that would have provided a path to citizenship for many undocumented immigrants, and, after that effort died in Congress, used his unilateral authority to extend "deferred action"—a status that suspends deportation efforts—to children who arrived illegally and to undocumented parents whose children are citizens or lawful permanent residents. The program directed at children provided benefits to as many as 1.7 million undocumented persons; the program directed at parents, which would have reached more than twice that number, was enjoined by the courts and thus has not taken effect. Obama deserves credit for his efforts to regularize the lives of millions of undocumented immigrants who pose no threat to society and whose deportation would divide families. But Trump is virtually certain to end that program, inflicting untold harm on deserving members of our community.

It's on the issue of transparency, particularly regarding drones, that Obama has most come up short.

Trump has promised a sweeping deportation effort. But the Obama administration itself has already undertaken one of the most aggressive deportation and border-control campaigns in memory, expelling about 2.4 million noncitizens. Apparently believing that it needed to be strict on enforcement in order to achieve reform, the administration ramped up its deportation efforts. Many individuals who have made their lives here for decades became pawns in the administration's chess game. The Obama administration has also employed harsh practices at the border that risked turning back many legitimate asylum seekers. It has opposed the appointment of counsel in deportation proceedings even for indigent children and mentally ill immigrants who, without such assistance, cannot possibly obtain a meaningful hearing. And it has supported detention policies and practices that unnecessarily lock up immigrants, even when there is no evidence that they pose a danger to the community or a risk of flight.

On national security, Obama's record is similarly mixed. As noted above, his basic approach differs sharply from that of his predecessor: While Bush resisted any legal restrictions on his authority as commander in chief, Obama has insisted on acting within the bounds of statutory, constitutional, and international law. Indeed, early in his tenure, when a panel of the US Court of Appeals for the DC Circuit ruled that his detention authority at Guantánamo wasn't limited by international law, the administration took the extraordinary step of arguing that the court had given it *too much* power, and insisted that its actions must be limited by international law. The full court then issued a decision declaring that the panel's dismissal of international law would have no precedential effect. One would be hard-pressed to identify another president who argued that a court had given him too much power.

From day one, Obama committed his administration to abjuring torture and other forms of cruel and inhuman interrogation tactics. He has tried to close Guantánamo, a task that is much easier promised than accomplished, as he has learned. Still, he has not brought a single new detainee to the prison, and has transferred many. He supported both unilateral and congressional reforms to the National Security Agency's program to collect domestic telephone metadata—although not

until Edward Snowden informed the American people of the program's breathtaking reach, spurring widespread protests. And while it is often noted that Obama has brought more prosecutions against whistle-blowers (or, in his view, leakers) than all prior presidents combined, that is probably more attributable to the enhanced ability to identify leakers in the digital age than to Obama's views on free press and free speech.

It is on the issue of transparency that Obama has most come up short. He promised that his would be "the most transparent administration in history," yet he has invoked the state-secrets doctrine to block lawsuits by torture victims; fought aggressively against Freedom of Information Act requests for documents related to a wide range of national-security initiatives; opposed a bipartisan commission to investigate torture; and kept under wraps virtually all the relevant facts concerning the administration's targeted-killing program. If the Snowden revelations and their aftermath have taught us anything, it's that accountability depends upon transparency. Snowden's leaks forced all three branches of the federal government to take more rights-protective positions. Some secrecy is of course essential, both in armed conflicts and concerning the details of security programs. Yet democracy requires that we the people know what the government is doing in our name if we are to have a chance of ensuring accountability.

Obama's secrecy with respect to drones is the most disturbing, especially given the precedent it sets for his successor. He has asserted the power to order the killing of individuals far from any battlefield, without a hearing, without any form of external accountability, and without even admitting that he has done so. If Russia or China were exercising such authority with respect to its enemies, Obama would be sounding the alarm. If another nation were dropping bombs on individuals it deemed threatening inside our borders, we would not accept its actions as lawful. Yet that is what the United States has been doing in places like Pakistan, Yemen, and Somalia for years.

Obama deserves some credit for moving toward increased transparency regarding the drone program. At the outset, the administration didn't even acknowledge that the program existed. But beginning with a speech by State Department legal adviser Harold Koh in 2010, the administration offered increasingly detailed defenses of the program; released aggregate estimates of the number of civilians it has killed; and, under court order, produced a redacted version of the 2013 Presidential Policy Guidance limiting targeted killing outside zones of armed conflict. But it still refuses to provide any details on the people it has targeted and killed, the factual and legal basis for those actions, and the number of innocent civilians killed in each strike. While there may be a legitimate basis for maintaining the secrecy of some of this information at the time of a strike, Obama has not released such information, even in redacted form, for a single one of the hundreds of strikes he has authorized over eight years. Without more detail, it is impossible to know whether the administration is adhering to the law, or even to its own policy guidelines. And if the president is to be accountable with respect to any authority, surely taking a human being's life should be at the top of the list. We often devote decades to ensuring that a decision to impose the death penalty is justified. With drone strikes, there is not even a public after-action review.

Barack Obama has done more than probably any president since Lyndon Johnson to advance civil rights, and certainly more than any on LGBTQ rights in particular. The Affordable Care Act, still his signature achievement, extended a much-needed economic right to millions. He has

presided over the first drop in the incarcerated population in nearly 40 years, and he and Eric Holder have played an important part in changing the politics of crime, helping to shift the national consensus from a tough-on-crime imperative to a smart-on-crime approach that seeks to limit incarceration. Obama's immigration efforts are disappointing, but he has provided tangible benefits to more than 1 million undocumented immigrants, and he has tried to do so for many millions more. And while he has pursued a combined military and law-enforcement response to the terrorism threat from Al Qaeda and ISIS, he has sought to conduct those campaigns within the rule of law, rather than assert that legal limits are inapplicable. His record has been far from perfect, as I've laid out above. But no president's ever will be; there are simply too many conflicting demands.

So what should we make of all the protests? It is a mistake common to all assessments of a presidential legacy to focus too narrowly on the president himself. Where Obama has succeeded, it has not been simply because he had good intentions, but because political forces emerged to demand reform. Criminal-justice reform is now a bipartisan issue, supported by the ACLU, Black Lives Matter, the Cato Institute, and the Koch brothers. Achieving marriage equality was the result of a decades-long campaign by gay and lesbian organizations and individuals coming out, defending their equal dignity, and acting strategically and patiently to develop the momentum necessary to achieve constitutional change. The push to legalize undocumented immigrants has been driven by the Dreamers, backed by important sectors of the labor movement. And human-rights groups have been ever vigilant in calling the administration to task for its shortfalls in fighting terrorism.

In his speech at the Democratic convention supporting the nomination of Hillary Clinton, Obama stressed that the operative word must be "we," not "I." A presidential legacy is, in an important sense, *our* legacy—because what presidents do is a function not only of their own desires and commitments, but of ours. It's no coincidence that much of the progress we've seen has come in the context of increasing public protests for racial justice, LGBTQ rights, immigrants' rights, and against the unending War on Terror. And that's why the protests must go on if we are to limit the damage from the next administration.