

Obama, Civil Liberties, And The Presidency: An Interview With Gene Healy

By: Radley Balko – March 15, 2013

Gene Healy has been one of the more prominent and consistent critics of presidential power going back to the Clinton administration. (Disclosure: Healy is a friend and a former colleague.) In 2000 Healy, vice president of the libertarian Cato Institute, authored the study "Arrogance of Power Reborn: The Imperial Presidency and Foreign Policy in the Clinton Years." In 2006, Healy and fellow Cato scholar Tim Lynch set their sights on President Bush with *Power Surge: The Constitutional Record of George W. Bush*.

In 2008, Healy took a broader, more historical look at the issue with his book *The Cult of the Presidency: America's Dangerous Devotion to Executive Power*. The book looked at the evolution of the office of president from George Washington through George W. Bush, and was praised across the ideological spectrum, including from Ezra Klein and George Will at the Washington Post, the Economist, and Glenn Greenwald at The Guardian. Healy has now published an ebook update to the book, *False Idol: Barack Obama and the Continuing Cult of the Presidency*.

I asked Healy a few questions about the update to his book over email.

Let's start with the fun question: In terms of civil liberties, who was the worst American president in U.S. history?

I'm going to go with Woodrow Wilson: the pointless carnage of WWI, conscription, Espionage Act prosecutions on a scale much greater than the Alien and Sedition Acts, military surveillance, racial segregation of federal employees, and the Palmer Raids. Wilson wasn't just a monstrous president in terms of civil liberties he was an absolutely pivotal figure in the presidency's transformation from a limited "chief magistrate" to an extraconstitutional monstrosity that promises everything and guarantees nothing, except public frustration and the steady growth of federal power.

Are there any notable common elements among the presidents who have been predictably bad at respecting civil liberties -- political ideology, a friendly Congress, etc?

I don't see political ideology as an essential factor. The imperial presidency is a bipartisan monstrosity, birthed by progressives, brought to maturity by conservative "unitarians."

But yes, a compliant Congress is often a factor. For one thing, presidents feel freer to use

force abroad under unified government, and as William G. Howell and Jon C. Pevehouse have shown "the White House's propensity to exercise military force steadily declines as members of the opposition party pick up seats in Congress." Divided government also results in more vigorous policing of the incumbent administration's conduct, including many more congressional oversight hearings.

Have presidents who serve in wartime been unusually bad for civil liberties?

Without a doubt. There's a reason presidents continually repair to militaristic framing of their policies -- War on Drugs, War on Terror -- war is a powerful argument for unified command and suspension of constitutional niceties.

A notable exception to the rule was James Madison, who, Ritika Singh and Benjamin Wittes note, "eschewed the authority to detain American citizens in military custody or try them in military tribunals, and more generally, declined to undertake the sorts of executive overreaches we have come to expect -- and even encourage -- from our presidents in war." As Justice Scalia observed in his *Hamdi* dissent, Madison apparently believed American citizens were entitled to damages for false imprisonment if they were summarily locked up as "enemy combatants." I think that's fairly powerful evidence of the original understanding of civil liberties in wartime.

Have any presidents been a net *good* for civil liberties? If not, can you think of any who were less awful than the others?

Well, despite Lincoln's manifold abuses of civil liberties, you've certainly got to weigh emancipation heavily in his favor. (See Jeffrey Rogers Hummel on Lincoln's complicated legacy).

It usually goes unrecognized, but Warren Harding, the Rodney Dangerfield of U.S. presidents, and his taciturn successor, Calvin Coolidge, both had decent civil-liberties legacies.

As I wrote in my first book:

Harding's good nature and liberal instincts led him to overrule his political advisers and pardon 25 nonviolent protesters that Wilson had locked up, including Eugene Debs. "I want him to eat his Christmas dinner with his wife," Harding said. History remembers Harding's successor, Calvin Coolidge, mostly for his reticence and for fiscal policies that combined Yankee parsimony with generous tax cuts. Less well known is Coolidge's admirable record on civil liberties. Coolidge ordered the release of Wilson's remaining political prisoners, and his attorney general, Harlan Fiske Stone, put an end to political surveillance by the Federal Bureau of Investigation, abolishing the FBI's General Intelligence Division. "The Bureau of Investigation," Stone declared, "is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty."

Alas, Coolidge also inadvertently set the seeds for undoing that policy when he promoted the young J. Edgar Hoover. Personnel is policy, like they say.

You've made the point that historians tend to rate some of the worst violators of civil liberties among the greatest presidents. Can you explain why you think that is?

The scholars who fill out the scorecards in the perennial presidential rankings game definitely exhibit perverse values. Why is Wilson routinely a Top Ten favorite, while Harding's nearly always dead last? Sure, Teapot Dome -- but are kickbacks for oil leases really worse than 117,000 dead doughboys?

I don't think the rankers are awarding *extra credit* for civil liberties violations. I don't think, for example, that Japanese internment helped FDR get a top five ranking. But it seems pretty clear that the graders hate normalcy. Presidents who simply preside over peace and prosperity are boring, and court historians seem to prize excitement above all else.

I've long suspected that participants in these surveys are unconsciously rewarding crusading presidents who get us into wars -- and, as discussed, wartime usually brings a crackdown on domestic liberties.

Last year, economists David Henderson and Zachary Gochenour released a study, "War and Presidential Greatness," that provides empirical support for my simmering suspicion about a "combat bonus" in the presidential rankings.

Henderson and Gochenour's study is a sober, scholarly paper that comes to an absolutely horrifying conclusion: "military deaths as a percentage of population is a major determinant of greatness in the eyes of historians." They found "a strong positive correlation between the number of Americans killed during a president's time in office and the president's rating."

How much culpability does Congress have in the erosion of civil liberties? The Supreme Court?

Congress deserves a great deal of blame. On paper, it really is the "most dangerous branch." Its formal powers are so great it could not only rein in all executive abuses, it could even, as the constitutional scholar Charles Black once commented, "shrink the White House staff to one secretary, and... with a two-thirds vote... put the White House up at auction." (I sometimes find myself wishing it would.)

The Court certainly hasn't lived up to its appointed role as "bulwark of our liberties," but in the end, it can't save us from ourselves.

Let's turn to Obama. Many progressives and libertarians have been disappointed with his civil liberties record after four years. Where do you think he ranks among recent presidents? Among all presidents?

Among recent presidents? On civil liberties, the differences with Bush are negligible. There's been "a powerful continuity" between "43" and "44" says Gen. Michael Hayden, who as 43's NSA head ran the Bush administration's illegal wiretapping program.

The New Republic's legal affairs editor, Jeffrey Rosen, predicted in early 2008 that, if elected, Obama would be "our first civil libertarian president." No such luck. As I point out in my new ebook:

In several key areas, “44” has gone even further than “43” in pushing extravagant claims of executive power. George W. Bush never publicly asserted a presidential right to summarily execute American citizens abroad, far from any battlefield. President Obama both claims that authority and has exercised it: in the September 2011 Predator strike on New Mexico-born Anwar al-Awlaki.

As General Hayden put it last year: “We needed a court order to eavesdrop on [Awlaki], but we didn’t need a court order to kill him. Isn’t that something?” I’d say so.

As far as where Obama fits in among all presidents in American history, I wouldn’t hazard a guess while we’re this close to the action. I don’t have the same confidence in my judgment this early that the presidential scholars who participated in the 2010 Siena Research Institute survey seem to have. Just 18 months into his first term, they decided Barack Obama’s already the 15th best president we’ve ever had.

But one of Obama’s main legacies has been ratifying George W. Bush’s legacy of permanent war and permanently enhanced federal power.

Why do you think he has abandoned many of the civil liberties positions he took during his first campaign?

In fact, Obama started “growing in office” before he even got in office. In the summer of 2008, as the election loomed, Senator Obama broke his campaign promise to filibuster “any bill that includes retroactive immunity for telecommunications companies” that had broken the law by assisting President Bush’s warrantless wiretapping efforts. Since then, among other things, he’s reauthorized the PATRIOT Act with the presidential autopen.

The surest explanation for why presidents behave the way they do is the “Pogo Principle”: we have met the enemy and he is us.

From *False Idol* (again, with the self-quoting!):

What Americans demand from the presidency shapes the president’s incentives, and those incentives play a far larger role in executive power’s growth than any given president’s character flaws. The “God of All Things” is, as we’ve seen, responsible for securing the warranties on American cars and for getting us a lower rate on our mortgages. So of course he’s also the guardian of our safety, responsible for shielding us from any possible terrorist attack. “It’s 3 a.m., and your children are safe and asleep,” the famous 2008 Hillary Clinton campaign ad declared, over images of helpless babes, “but there’s a phone in the White House, and it’s ringing.” It’s a “dangerous world,” the narrator insisted. “Who do you want answering the phone?”

The facts are: (1) the terrorist threat is anything but existential; and (2) there’s not much the president can do in an open society of 313 million people to provide seamless protection against any possible attack. We demand it anyway—and presidents know there’s a political price to be paid for failing to do the impossible. As Obama’s former national security adviser James L. Jones put it, “Who wants to be the guy that says we don’t need [these powers] anymore and then three weeks later something happens?”

From your own research of past administrations, do you anticipate he’ll get worse in the second term, or will the fact that he won’t be running for reelection allow him to take firmer stands on some of these issues?

Hope springs eternal—as Jeff Rosen proved last March in another TNR piece entitled “The President Should Finally Fight for Civil Liberties.” He admitted his “first civil libertarian president” prediction had bellyflopped, but wrote, “If Obama wins a second term, I hope reelection gives him the freedom to redeem that unfulfilled promise.”

But this is, again, the triumph of hope over experience. There’s no sign that “letting Obama be Obama” would result in a rollback of the National Surveillance State or the ever-expanding Game of Drones. In fact, in his most recent State of the Union, as Micah Zenko points out, the president seems to have expanded the definition of who can legally be eliminated via flying robot assassin.

It seems like once a president claims a new power that violates civil liberties, there's no going back--or at least there's no way to prevent future presidents from claiming the same powers. Is there any way to undo the damage on issues like indefinite detention, torture, assassinations, and so on? That is, are there any steps a civil liberties-minded president could take with a willing Congress to limit the power of future presidents in these areas?

We shouldn’t expect there to be a real “civil-liberties-minded president” in our future. I’ve been giving Jeff Rosen a hard time, but he wasn’t wrong -- Obama had the sort of background you rarely see in presidents: a seemingly high-minded, left-leaning former law professor with something of a pro-civil liberties record as a state senator. Still, nobody who does what it takes to grab the Ring is going to turn around and say, once in office, “you know what, now that I’ve arrived -- I’d like less power.”

Unless and until the public makes Congress demand it, there won’t be a rollback of the National Security/Surveillance State. We saw a halting, partial rollback in the ‘70s. We likely won’t see it again unless and until there’s a demand for a new Church Committee.

So most presidents have been pretty awful for civil liberties. Why do you think that is?

The answer has a lot to do with what I suggested in #8, above: It’s our fault. The American intelligentsia favors “transformative presidents” who upend the constitutional order in wartime. The ordinary voters like peace and prosperity better than the presidential rankers do, but they’re not overly exercised about vanishing liberties. A 2010 Washington Post-ABC News poll showed that almost two-thirds of Americans supported TSA’s adoption of full-body scanners. In 2012, Gallup reported that 54 percent of us think the agency’s doing a “good”-to-“excellent” job. Meanwhile, “Support for drone strikes against suspected terrorists stays high, dropping only somewhat when respondents are asked specifically about targeting American citizens living overseas.”

“If only the czar knew” was supposedly a common lamentation uttered by 19th-century Russian peasants facing the business end of the czarist state. Then, as now, a better lament might be, “If only the czar cared.” And yet, if we don’t care about lost liberties, why should he?