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Justice and the Obama Justice Department

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The following is adapted from a speech delivered on July 19, 2015, aboard the Crystal Serenity, during a Hillsdale College cruise from Lisbon to London.

If you think about it, it makes sense that in America—the only nation in the world to define itself not by blood or land, but by a law, the Constitution—the government agency charged with enforcing that law, and enforcing the laws passed under it, would be called the Department of Justice. As such, the work of the Justice Department is highly important. It plays a fundamental role in our nation's life, because its work has to do in one way or another with how honest, how fair, and how safe our country is.

That being said, I'm regretful to have to add that in a country where honesty, fairness, and safety are so strongly influenced by one department of government, over the past six years—largely because of that department's work—our country has grown less honest, less fair, and less safe than it ought to be. Let me give you some examples.

Recently we hear a great deal about the prosecution of "evildoing" corporations, but not so much about the prosecution of individuals who are the alleged evildoers. Why is that? To be specific, a lot of what we hear with respect to corporations is not about prosecutions at all—it's about "deferred-prosecution agreements" or "non-prosecution

agreements," agreements that extract enormous financial penalties. Indeed, the current Justice Department takes pride in setting record after record in terms of collecting these penalties.

Other attorneys general, myself included, made such agreements. But the penalties that have been extracted over the past six years are unprecedented. They involve numbers in the billions, and are of a scale that makes it appear that the Justice Department is acting as a profit center for the government.

Justice Department investigations begin by looking into claims, for example, of unlawful payments to foreign officials or of unsafe motor vehicles. Corporations often face disastrous collateral consequences simply from having charges brought against them, which is why they are often willing to admit to conduct that the government cannot prove, to pay enormous fines, and to accept the oversight of monitors. In return, the government agrees that no charges will be filed so long as the corporations remain on good behavior for some specified period of time. Charges are rarely brought against individuals, on the other hand, because individuals can be put in jail. When faced with this, people usually fight back—and when they fight back, they frequently win.

This process generates cynicism about the American justice system, as individuals go uncharged, billion-dollar penalties are assessed, and the ones who pay are not wrongdoers, but corporate shareholders and employees.

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The DOJ's Civil Rights Division is the one we think of as having the main responsibility for protecting fairness. Yet its recent record has indicated other priorities. Recently its Voting Section went out of its way to review a decision to change the system of municipal elections in Kinston, North Carolina, from partisan to non-partisan. That change had been approved by the voters of Kinston, which is a majority black town. Indeed, it had been approved by an overwhelming two-to-one vote.

Under Section 5 of the Voting Rights Act, the Justice Department may intervene when voting rules are changed in any state where there's historically been discrimination. But because black citizens were in the majority in Kinston, there should have been no occasion to intervene. The DOJ justified its intervention by saying that blacks were not always a majority of voters, even though they were a majority of the citizens; it argued further that the removing of party labels might deprive black voters of an identifying label necessary for them to vote for black candidates—i.e., the label "Democrat." In other words, the Justice Department was arguing that the black voters of Kinston needed the paternalism of the Justice Department to protect them from themselves.

Fairness and safety are sometimes related to one another. During the 2008 election, two members of the New Black Panther Party showed up at a polling place in Philadelphia dressed in black battle fatigues, one of them

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brandishing a nightstick and the other yelling at white voters that they would soon be ruled by a black man. The scene was described in an affidavit by a poll watcher—a veteran civil rights activist who had often supported Democratic candidates—as something he had never seen or heard of in his 40 years of political involvement.

In the waning days of the Bush administration, the DOJ's Voting Section filed a lawsuit and won a default judgment. But in the spring of 2009, after the Obama administration took over, those handling the case were directed to drop it. The only penalty left in place was a limited injunction that barred the person with the nightstick from repeating that conduct for a period of time in Philadelphia. And when the Office of Professional Responsibility looked into the matter, their finding criticized the bringing of the case more than the dropping of it.

Contrast that response with the DOJ's treatment of a 79-year-old protestor outside an abortion clinic who was sued by the Civil Rights Division's Criminal Section for praying outside the clinic and urging entrants to reconsider abortion. When that protestor was pepper sprayed by an abortion supporter for exercising his First Amendment rights, the Criminal Section did nothing.

Consider as well the 2012 case of Trayvon Martin, a young man who was shot in an encounter with a neighborhood watch member. Notwithstanding that the shooter was not a member of any police department, and that he was acquitted of criminal responsibility in the incident—nevertheless, in the wake of the case the DOJ's Civil Rights Division zeroed in on the police department of Sanford, Florida, where the incident occurred, suggesting discriminatory policing. A similar pattern—whereby a confrontation between a police officer and an African-American is followed by a Justice Department proceeding against the jurisdiction, regardless of the legal outcome or the equities of the incident—has been followed in cities such as Baltimore, New York, and Ferguson, Missouri.

State and local jurisdictions do not have the resources or the political will to fight the federal government. As a result, more than 20 cities are now operating under consent decrees secured by the Justice Department, with court-appointed monitors imposing restrictive standards on police officers who now think twice before they stop suspects or make arrests. The results are predictable. Shootings are on the rise in New York, as are quality-of-life crimes that create a sense of public disorder and social deterioration. Seattle is also a good example: a federal lawsuit and a court-appointed monitor followed on the heels of a publicized incident, and now homicides are up 25 percent, car theft is up 44 percent, and aggravated assault is up 14 percent.

One lesson to draw from all this is that personnel is policy. If you examine the resumés of people hired into the DOJ beginning in 2009, you will find that the governing credential of new hires was a history of support for left-leaning causes or membership in leftist organizations. By the time of the 2012 election, it was considered unremarkable for DOJ lawyers to display political posters on their office walls, and even outside their offices—something inimical to the spirit and mission of the Department of Justice.

* * *

When it comes to defending against terrorism, one would think that the role of the Justice Department would be relatively limited compared to that of the military and of our intelligence gathering agencies. But for six years the DOJ has played an outsized and unhelpful role. This results, in part, from a policy set by the current administration of viewing terrorism as it was viewed before 9/11—as a crime to be prosecuted rather than an act of war to be combatted.

This administration is also unwilling to draw any connection between radical Islam and terrorism. Just in the last few days, it has been reported that officials are trying to determine a motive for the conduct of Mohammad Youssuf Abdulazeez, who is accused of killing five U.S. servicemen in Chattanooga. He had travelled to Jordan and posted admiring statements about ISIS on his web page, and yet officials are puzzling over why he acted as he did. The DOJ refuses to use the word terrorism in relation to this investigation.

A man named Ali Muhammad Brown is charged with three counts of murder in Seattle, allegedly motivated by his desire to avenge attacks on Muslims by our troops in Iraq and Afghanistan. He has also been prosecuted in the state courts of New Jersey on state terrorism charges—the first time such charges have ever been filed in New Jersey's history. The charges there are based on a fourth murder that he committed—the murder of a teenager named Brendan Tevlin that had the same motivation as the Seattle murders. The maximum for this crime under the New Jersey statute is life imprisonment, whereas the federal statute carries the death penalty. But the Justice Department has declined to bring this prosecution. It's utterly beyond understanding why the DOJ would yield to a state charge with a lesser penalty—unless, of course, one realizes that it would simply prefer not to discuss the matter.

This aversion goes further, and it has further effect. In 2009, Khalid Sheik Muhammad and others were to be tried before a military commission at Guantanamo for their roles in the 9/11 attacks. The defendants had announced their intention to plead guilty and proceed to martyrdom. Notwithstanding that these detainees were in the custody of the military and the Department of Defense, the Attorney General, with the President's cooperation, suspended the trials and announced in 2010 that he would bring those defendants to Manhattan, near where the World Trade Center attack had occurred, to stand trial in a civilian court.

This plan caused a bipartisan furor. Congress went so far as to pass a statute barring the use of any federal funds to bring detainees from Guantanamo to the U.S. As a result, the plan was cancelled in 2011. But by that time the military commission had been aborted and the prosecution had to be recommenced from scratch. In addition, Khalid Sheik Muhammad and his friends got the message that the new administration's heart wasn't in it. They took to resisting every step in the process, which is still in the pre-trial stage.

Also in 2009, the Attorney General, following up on his stated belief that the CIA had violated the torture statute in the interrogation of captured terrorists, publicly disclosed what had been classified memos describing the CIA's interrogation program—a program that had not been in use since 2003. He presumably released those memos in the belief that disclosure would bring on a firestorm of criticism. The effect was to disclose to potential terrorists what was in the program so they could train to resist it, just as they train using the publicly available Army Field Manual in order to resist interrogations described in it. When the hoped-for firestorm failed to develop, the Attorney General announced that even though prior investigations of CIA conduct by career DOJ prosecutors had concluded that there was not enough evidence to justify criminal prosecution, he was going to re-open those cases. He did so without bothering to read the detailed memos by those previous prosecutors explaining why no criminal charges were warranted. You can imagine the effect on the morale of the CIA.

The re-opened investigations yielded no criminal charges, and the result was announced two years later as part of a news dump on a Friday afternoon. We currently have no interrogation program in place beyond the Army Field Manual, and in any case current policy seems to favor prosecution over capturing terrorists abroad for interrogation. This is due in part to the efforts

of the DOJ, and our ability to gather intelligence is correspondingly limited.

Defenders of current policy trumpet electronic intelligence. But electronic intelligence comes in bits and pieces, and it's very difficult to know which bits and pieces are relevant and which are simply noise. As former CIA Director Michael Hayden once put it, it's kind of like trying to solve a jigsaw puzzle when you have thousands of pieces, you don't know which ones are part of the puzzle, and you haven't been able to look at the picture on the box. Human intelligence, by contrast, comes in narrative form—which is to say you get to look at the picture.

The Obama administration also supported the recent restriction that was put on bulk intelligence gathering by the CIA, in the mistaken belief that such a policy compromised Americans' privacy. In point of fact, the only information gathered was the calling number, the called number, the length of the call, and its date. That information was saved, and when we got a suspicious telephone number—for example, the number of the Chattanooga terrorist—we could take it and figure out which numbers had called that number and which numbers had been called by it. As a result of the recent restriction, we are not going to have that information anymore. It is going to be kept by the carriers, if they agree to keep it.

Are there any bright spots in the Justice Department? The National Security Division, which handles oversight of electronic intelligence on applications to the Foreign Intelligence Surveillance Court, is the newest division in the department. Formed in 2006, it is staffed by people who are dedicated to protecting the country, and it continues to function very well insofar as the legislation that is now in place allows it to function. Otherwise, there is very little good to report.

* * *

How did we get to where we are today? Even before the 2008 election, the warning signs were there. The man who was to become U.S. Attorney General told an audience during the election campaign that the Bush administration had permitted abuses in fighting terrorism. He said there would have to be "a reckoning." During his subsequent tenure, in a moment of unguarded candor, he described himself as the President's "wingman." From the standpoint of the Justice Department, I can't overstate the demoralizing significance of an attorney general saying something like that. If I had ever described myself, during my tenure, as President Bush's wingman, I would have expected to come back to find the Justice Department building empty and a pile of resignations on my desk. Even Attorney General Robert Kennedy, President Kennedy's brother, to my knowledge never described himself in such terms. Yes, the attorney general is a member of the administration—but his principal responsibility is to provide neutral advice on what the law requires, not to fly in political formation.

The problems in the DOJ won't be solved simply by electing a less ideological president in 2016. Many of the political appointees of the past seven years will resign and take up career positions within the department, and once such people receive civil service status, it is virtually impossible to fire them. In other words, the next attorney general will be confronted with a department that's prepared to resist policy changes. This will require great patience and dedication by the new political appointees in their efforts to return the department to its true mandate—not doing justice according to your own lights, or even according to the lights of the president who appoints you, but defending law and having enough faith in law to believe that the result, more often than not, will be justice. ■