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The Politicization of the Department of Justice

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THE SEAL of the U.S. Department of Justice reads, "Qui Pro Domina Justitia Sequitur"—"Who prosecutes for Lady Justice." Depictions of Lady Justice are as familiar as they are instructive: she stands blindfolded while holding the scales of justice, representing her unyielding devotion to equal justice under the law. Contrary to this ideal, the DOJ today appears to be increasingly motivated by partisanship. Compounding the problem, it has access to the powers of the modern surveillance state. As someone passionate about the Constitution and the Bill of Rights, I believe there is no higher priority than addressing this danger.

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The tragic events of 9/11 marked a turning point in our nation's recent civil rights history. First the terrorists attacked us—and then, in the name of national security, we began to attack ourselves. It has become almost cliché to say that we live in a surveillance state, but we do. Ever since Congress, on a fully bipartisan basis, enacted the Patriot Act six weeks after the attacks on 9/11, the ever-present eye of the government has been searching for new and creative ways to spy on American citizens. The government has the technology to monitor all of our electronic devices, listen to our phone calls, and read our emails and text messages—all under the auspices of national security.

This special law designed for an emergency has become a permanent addition to the government's investigatory toolbox. The unfortunate reality is that the bulk of the actions taken by law enforcement under the Patriot Act have almost nothing to do with combating terrorism. Once-rare applications for surveillance warrants to the Foreign Intelligence Surveillance Court have multiplied many times in relative peacetime. Most of the spying conducted under the Patriot Act is for run-of-the-mill crimes that we've long expected law enforcement to address without special surveillance authority.

Now, it is bad enough to have a politically-neutral surveillance state controlled by the national security crowd and their DOJ cousins. But take that panopticon and put it in the hands of an executive branch willing to weaponize its reams of information against its perceived political enemies, and we've got a frightening problem on our hands.

Laws such as the Patriot Act were designed to fight the unique problem of terrorism. But they quickly morphed into a mechanism by which the government keeps constant tabs on law-abiding Americans and threatens to disrupt their lives if they dare act contrary to those in power. And it's within this world of omnipotent oversight and control that the U.S. Department of Justice now operates. They have all the tools of the surveillance state at their disposal, and the only thing standing in their way is an independent judiciary willing to enforce our constitutional rights. But we all saw how easy it is to spy on Americans—with virtually no judicial oversight—from the disgraceful episodes of broad surveillance applications, on flimsy and sometimes falsified pretexts, against citizens such as Carter Page.

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Let me discuss three recent examples that illustrate the threats we face from a politicized DOJ: the DOJ raid on Project Veritas journalists, the DOJ raid on Mar-a-Lago, and the DOJ's efforts to undermine election integrity and chill free speech.

PROJECT VERITAS RAID

In July 2021, Attorney General Merrick Garland issued a memo forbidding federal prosecutors from seizing journalists' records. He did this with much fanfare, hauteur, and virtue signaling. But even as Mr. Garland was decrying the seizure of journalists' records as a "wrong" his department would "not let . . . happen," the DOJ was in the midst of a year-long campaign of spying on Project Veritas—a campaign that involved no fewer than 19 clandestine subpoenas, orders, and warrants obtained from nine magistrate judges.

Imprimis (im-prī-mis), [Latin]: in the first place

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The secrecy of this spying campaign was maintained through the use of wide-ranging gag orders, including at least two that were obtained without notice to the judge overseeing the Project Veritas case. Through this spying campaign, we now know that the DOJ obtained approximately 200,000 Project Veritas emails from Microsoft and countless text messages (and heaven knows what else) from Apple, Google, Uber, and other still unknown companies.

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Only six months after Mr. Garland's memo was issued, the DOJ raided the homes of three Project Veritas journalists, seizing 47 electronic devices. And how did the world learn about this? Conveniently, someone leaked information about the raids to *The New York Times*—which Project Veritas happens to be suing. Indeed, *The New York Times* called Project Veritas for comment as the raids were still in progress.

What was the pretext for the raids? In the fall of 2020, confidential sources had approached Project Veritas journalists with a diary and other materials supposedly belonging to Ashley Biden, the President's daughter. The sources said that the materials had been in their possession prior to contacting Project Veritas. The Project Veritas journalists proceeded to investigate whether the materials were authentic and whether the allegations they contained against Joe Biden were true. Ultimately, Project Veritas decided it could not sufficiently verify the allegations and that it would not publish the diary's contents. It then turned the items over to local law enforcement in Florida.

The DOJ claims that Ashley Biden's belongings were stolen. Project Veritas was told they weren't, but even this is legally irrelevant. In the 2001 case *Bartnicki v. Vopper*, the U.S. Supreme Court held unequivocally that as long as journalists did not commit an alleged theft themselves, they were entitled to receive, investigate, and publish (or not publish) supposedly stolen materials. In the more recent case *DNC v. Russian Federation*, a federal court made it clear that the reporter could even ask for the stolen materials. This is not a crime—it's called journalism.

Compare the DOJ's treatment of Project Veritas to the DOJ's inaction earlier this year when a *Politico* reporter was given a U.S. Supreme Court draft opinion overturning *Roe v. Wade*. The *Politico* reporter behaved precisely with this purloined document as the Project Veritas reporters had behaved with the diary, except that the *Politico* reporter did decide to publish the draft opinion. The different reactions on the part of the DOJ seemed to hinge entirely on whose ox was being gored.

But to repeat, the Garland Justice Department was rifling through the emails and phone messages of Project Veritas journalists before Project Veritas even knew of Ashley Biden's diary. These documents contain donor information, source communications—including communications from whistleblowers within the federal government—and attorney-client communications. In its actions, the DOJ was not only ignoring court decisions

and its own policies, it was violating the Privacy Protection Act, the common law Reporter's Privilege, and the First and Fourth Amendments to the Constitution.

The Project Veritas matter is ongoing. Thanks to the DOJ's leaks to *The New York Times*, which themselves violate federal law, Judge Analisa Torres overruled the DOJ's objections and ordered the appointment of a special master to review the seized materials for various privileges. It's a hollow victory, because Project Veritas has to pay tens of thousands of dollars for the privilege, so to speak, of being able to protect its own privileged documents.

MAR-A-LAGO RAID

Although I have represented and continue to represent President Trump in several matters, I do not represent him on the matter of the DOJ's raid on his Florida home, Mar-a-Lago. But that raid is significant and worth some attention.

Consider first the raid's timing. President Biden's approval ratings have been abysmal, and it is a mid-term election year. *Bloomberg* reports that the DOJ will likely delay "charging" Trump with anything arising from the raid on his home until after the mid-terms. The effect of this is to create a cloud of perceived guilt running up to November 8, and use that as a political tool to smear pro-Trump voters and candidates. The DOJ hides behind its longstanding policy of not taking politically portentous actions close to an election—but how could the raid itself be construed as anything but such a portentous action?

President Trump and his lawyers were engaged in a cooperative dialogue with both the DOJ and National Archives representatives on the issue of storing and archiving confidential documents. He went as far as to invite the DOJ to survey the documents he had on his property, and the DOJ seemed to have expressed little urgency in pursuing the matter.

This latest episode of G-men gone wild is not all that different from the FBI strategy before and after Trump's election in 2016, when the FBI was weaponized to investigate claims of Russian collusion that ultimately proved to have been made up by Democrat operatives. But more importantly, the raid raises serious constitutional objections.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The American Founders were intensely concerned about government intrusion. Breaking into the homes of political opponents and depriving them of their possessions was common practice under the rule of the British king in colonial America. The use of general warrants and writs of assistance by the Crown was the ultimate interference with the colonists' right to political and personal autonomy. Such invasions were so pervasive, and so universally despised, that the Founders saw fit to ensure that the Constitution expressly forbids such practices.

For over 180 years after the Founding, the Supreme Court applied the Fourth Amendment's protections largely to places and things. Unsurprisingly, this meant that dwellings were given a heightened sense of protection against government intrusion. The Supreme Court has reiterated, in the 1980 case *Payton v. New York*, that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

In addition to *where* and *what* receives Fourth Amendment protection is the question of *how* the

government can conduct searches and seizures without offending the Constitution. Searches are only permitted if they are "reasonable," and a search is generally considered "reasonable" only when the government first obtains a properly issued warrant. "Properly issued" means the warrant must describe with specificity the places to be searched and the things to be seized, must be supported by probable cause, and must be issued by a "neutral and detached magistrate." Taken together, this is colloquially known as the "warrant requirement"—and it is central to any honest analysis of the Mar-a-Lago raid.

At its core, the problem with the FBI's search of President Trump's home is its inconsistency with the letter and the spirit of the Fourth Amendment. The shroud of secrecy surrounding the probable-cause affidavit used by the FBI to obtain the warrant prevents the public from judging whether the government had a valid reason for this unprecedented search. Even more, the list of places to be searched and things to be seized contained in the warrant application comprised a blanket sweep of the former president's entire private residence and offices, targeting "any evidence" supporting a potential violation of a handful of federal statutes that are the usual suspects when it comes to politicized prosecutions.

While this alone doesn't make the warrant defective, the Justice Department's "just trust us" approach to support the raid makes it nearly impossible to determine the legitimacy of the government's unprecedented actions. This leaves us no choice but to speculate. And based on the information publicly available, the DOJ's actions have all the trappings and appearances of a vindictive and politically-motivated fishing expedition.

As in the Project Veritas case, the judge in the Mar-a-Lago case has issued an order appointing a special master. In doing so, the judge pointedly observed that some of the resultant delay the government complains of is caused by the government's cutting corners, suggesting implicitly that the government abused the warrant process.

ELECTION INTEGRITY AND FREE SPEECH

As has been widely reported, the DOJ is currently issuing subpoenas to individuals who have dared to question the 2020 election results. This is occurring against the backdrop of President Biden's vendetta against what he calls "ultra MAGA Republicans." This is the type of behavior you'd expect in a third-world dictatorship.

BREAKING INTO THE HOMES OF POLITICAL OPPONENTS AND DEPRIVING THEM OF THEIR POSSESSIONS WAS COMMON PRACTICE UNDER THE RULE OF THE BRITISH KING IN COLONIAL AMERICA. THE USE OF GENERAL WARRANTS AND WRITS OF ASSISTANCE BY THE CROWN WAS THE ULTIMATE INTERFERENCE WITH THE COLONISTS' RIGHT TO POLITICAL AND PERSONAL AUTONOMY. SUCH INVASIONS WERE SO PERVASIVE, AND SO UNIVERSALLY DESPISED, THAT THE FOUNDERS SAW FIT TO ENSURE THAT THE CONSTITUTION EXPRESSLY FORBIDS SUCH PRACTICES.

Included in the DOJ's crosshairs are those who participated in the political process as alternate electors; those in Congress who voted against certifying the election results; those who organized or peacefully attended a permitted rally on the Ellipse in Washington, D.C., on January 6, 2021, even if they had nothing to do with the activities at the Capitol on that day; and those who

have raised funds from donors with a promise to investigate and challenge election fraud.

All of these activities have long historical precedents in our country and are protected by the First Amendment. Indeed, it was Democrats who challenged the presidential election results in 2000, 2004, and 2016. Let's review the evidence.

In 2000, 15 House Democrats objected to counting Florida's electoral votes. Several members of Congress called the 2000 election "fraudulent," and Texas Representative Eddie Bernice Johnson vowed that there would be "no peace" because of the allegedly stolen election.

THE 2020 ELECTION WAS RAMPANT WITH REPORTS OF IRREGULARITIES. SOME OF THESE REPORTS WERE MORE ACCURATE THAN OTHERS. BUT STATES WERE RIGHT TO TAKE APPROPRIATE STEPS TO INCREASE THE SECURITY OF THEIR ELECTIONS IN THE WAKE OF SUCH REPORTS. AND YET, FROM ITS FIRST DAYS, THE BIDEN ADMINISTRATION HAS BEEN BENT ON WAGING AN INTIMIDATION CAMPAIGN AGAINST STATES ATTEMPTING TO BOLSTER ELECTION INTEGRITY.

In 2004, Democrats in Congress forced a vote to recess the joint session of Congress counting electoral votes in order to debate perceived election irregularities in Ohio. Thirty-one House Democrats voted to reject Ohio's electoral votes and were applauded for doing so by Illinois Senator Dick Durbin, among others.

In 2016, several Democrats objected to the certification of Trump electors based on "overwhelming evidence of Russian interference" in the election. Maryland Representative Jamie Raskin objected to ten of Florida's electors based on a Florida statute that prohibits state legislators from being electors. Texas Representative Sheila Jackson Lee proclaimed, "If in that voting, you have glaring matters that speak to the failure of the electoral system, then it should be challenged."

No DOJ action was taken in any of these previous years. What has changed, if not the politicization of the Justice Department?

Elections are the engine of our republic. They ensure the peaceful transfer of power and are the primary method for the people to influence their government. And our Constitution's elections clause—Article I, Section 4, Clause 1—gives states the primary duty of regulating the time, places, and manner of elections for federal office. The DOJ's role is very limited in this regard. It has the power to administer the Voting Rights Act, a power that was once necessary to push back on Jim Crow laws. But the era of Jim Crow is long gone, and it shouldn't be up to a politicized DOJ to dictate what election integrity looks like.

The 2020 election was rampant with reports of irregularities. Some of these reports were more accurate than others. But states were right to take appropriate steps to increase the security of their elections in the wake of such reports. And yet, from its first days, the Biden administration has been bent on waging an intimidation campaign against states attempting to bolster election integrity.

Consider Georgia. The midnight ballot dump that pushed Biden ahead of Trump had all the appearances of manipulative ballot stuffing. That was followed by days of uncertainty about who won. Reports soon surfaced of massive ballot harvesting—illegal in Georgia—as well as deeply concerning evidence that Mark Zuckerberg-funded nonprofits had placed personnel in election operations in blue counties

with the effect of decreasing signature-matching efforts.

Given the backdrop in which the 2020 election took place—with new and expansive vote-by-mail procedures—it's not surprising that alarms went off and that many citizens questioned the final vote tally. So rather than allow this scenario to repeat itself in future elections, Georgia's legislature took action, enacting a package of election-reform legislation designed to bolster ballot security.

President Biden denounced these reforms—which, as many commentators noted, made voting easier than in Biden's home state of Delaware—as "Jim Crow 2.0." The DOJ sued Georgia to block the new law and issued two new guidance documents intended to put states including Georgia on notice of potential violations of federal election laws. It has used similar tactics in Arizona and Texas.

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It is not just political activists who are subject to DOJ intimidation. Attorney General Garland recently issued a guidance document prohibiting DOJ employees from speaking directly to members of Congress. This was plainly in response to at least 14 FBI whistleblowers reaching out to members of Congress—including Ohio Representative Jim Jordan and Iowa Senator Chuck Grassley—about misconduct within the DOJ. Garland's action was highly improper, but it pales in comparison to the intimidation of concerned parents at local school board meetings.

On October 4, 2021, Garland issued a memorandum directing the FBI to address "threats" at local school board meetings. This was in response to a request from the National School Boards Association that the DOJ leverage the Patriot Act and other counterterrorism tools to investigate moms and dads who were voicing their displeasure with school policies at local school board meetings.

Despite Garland's sworn testimony denying the use of counterterrorism tools to investigate concerned parents, whistleblower evidence tells a different story.

On October 20, 2021, Carlton Peeples, the Deputy Assistant Director for the FBI's Criminal Investigation Division, sent an email directing FBI personnel to use the tag "EDUOFFICIALS" for all school board-related investigations. Whistleblowers say that the FBI opened investigations into parents in every region of the country. These included an investigation of a "right-wing mom" based on her participation in a "Moms for Liberty" group and personal ownership of a gun. Another investigation was opened when a dad was deemed to "fit the profile of an insurrectionist" after complaining about school mask mandates.

It is time to wake up to the danger.

On November 11, 1762, King George's men had a warrant when they stormed and raided the home of pamphleteer John Entick. They broke open locked doors, boxes, chests, and drawers and seized his private papers and books—all because the Crown suspected Entick of fomenting political opposition against the King. If the FBI's raid on Project Veritas journalists' homes or President Trump's home at Mar-a-Lago teaches us anything, it's that the political oppression of the eighteenth century remains a threat today. But today, in addition to brute force, our government has the power of the modern surveillance state.

As a graduate of the University of Virginia Law School, I would be remiss in speaking about the Constitution and the Bill of Rights without quoting Thomas Jefferson, who wrote: "the most sacred of the duties of a government [is] to do equal and impartial justice to all its citizens." We must find a way to return our Department of Justice to that central principle of American constitutionalism, as it carries out its duties in the name of Lady Liberty. ■