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Political Prosecutions: Abusing Discretion in the Service of Politics

Craig Trainor

TOPLINE POINTS

- ★ Prosecutors enjoy vast, and nearly unreviewable, discretion over how and when to bring criminal charges against individuals or groups.
- ★ This immense power can be used to persecute, rather than prosecute, if exercised without judicious restraint.
- ★ The historic parallels between the Biden Administration's weaponization of the DOJ and the investigative and prosecutorial abuses of the past are striking.

The FBI's Recent Raid on President Trump's Home Demonstrates the Perils of Partisan Law Enforcement and How It Affects All Americans.

Former President Donald J. Trump made his fortune in Manhattan real estate. Jose Alba made his living as a clerk in an Upper Manhattan bodega. The similarities seem to end with a shared connection to New York City, but the two men may have something far more consequential in common: They both offended the political sensibilities of progressive law enforcement actors.

On July 2, 2022, Alba, at 61 years old, was charged with murder and imprisoned on $250,000 bail in Rikers Island after using deadly force to defend himself against an attack by Austin Simon, a 35-year-old violent predator with an extensive criminal history (Fenton, 2022). Manhattan District Attorney Alvin Bragg, who was elected in 2021 on a platform of rebalancing prosecutorial discretion in favor of decriminalization and ending so-called mass incarceration, approved the murder charge of Alba and initially requested the court set bail at

$500,000. The assault was captured on video surveillance. To any honest observer, it was clear Alba was justified in using lethal force to defend himself. After a chorus of public outrage over the charging decision, Bragg dismissed the case against Alba (Campanile, 2022).

Despite running as a progressive prosecutor committed to emptying "carceral institutions," Bragg did not hesitate to jail Alba in Rikers Island, a squalid, dysfunctional, and violent house of detention (Mangual, 2021). The rationale is troubling: Bragg viewed Simon, who was black, poor, and in and out of the criminal justice system, as both victim and constituent. For this reason, upon being sworn in, Bragg announced that he would not prosecute whole classes of street crimes but would actively pursue and punish white collar criminal offenders, who do not generally qualify as societal victims (Hogan, 2022). This belies reformist claims and reveals that progressive prosecutors are less concerned with emptying prisons than they are with who resides within them. Therein lies the common thread from Alba's Washington Heights bodega to President Trump's Palm Beach estate.

The FBI's recent raid on former President Trump's private residence, Mar-a-Lago, raises concerns that the agency may have run afoul of former United States Attorney General Robert Jackson's famous admonishment "that the greatest danger of abuse of prosecuting power lies" in "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." While the information necessary to draw definitive conclusions is currently being withheld by the Department of Justice (DOJ), this conduct at least appears to implicate the principles upon which the Supreme Court has held that, despite a prosecutor's virtually unreviewable discretion, selective prosecutions targeting individuals for impermissible reasons, such as political activity, cannot stand in an American courtroom.

What is more, the historic parallels between prior White Houses—Presidents Lyndon B. Johnson's and Richard M. Nixon's—improperly employing the DOJ to target their political enemies provides for a stark reminder of what is potentially at stake in this case. The same holds true for the FBI's historical abuses of Americans' civil rights and liberties under the directorship of J. Edgar Hoover, who ran the agency and its predecessor from 1924 to 1972.

Attorney General Robert Jackson Warned America About the Tyranny of Politicized Prosecutors in His Famous Speech, 'The Federal Prosecutor.'

Robert Jackson is the only person in American history to hold the office of a U.S. Supreme Court Justice, a U.S. Attorney General, a U.S. Solicitor General, and a Nuremberg War Crimes Prosecutor. In 1940, while he was Attorney General, he gave a speech that

is considered the prosecutorial and law enforcement gold standard: "The Federal Prosecutor."

In it, Jackson articulated the following principles that demonstrate how dangerous prosecutorial and law enforcement discretion can be when used to target unpopular persons or political opponents. Among the speech's most relevant insights, paralleling contemporary times, include:

- The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous (Jackson, 1940).

- Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases. If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. *Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted* (Jackson, 1940).

- With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, *it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm*—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense—*that the greatest danger of abuse of prosecuting power lies* (Jackson, 1940).

- It is here that law enforcement becomes personal, and *the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself* (Jackson, 1940).

- In times of fear or hysteria, political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views (Jackson, 1940).

- The qualities of a good prosecutor are . . . [a] sensitiveness to fair play and sportsmanship [which] is perhaps the best protection against the abuse of power, and the

> citizen's safety lies in the prosecutor who tempers zeal with human kindness, *who seeks truth and not victims, who serves the law and not factional purposes*, and who approaches his task with humility (Jackson, 1940).

On any number of these principles, the conduct of Attorney General Merrick Garland's DOJ raises serious questions. This concern is not limited to the raid on President Trump's home. Indeed, last year, Attorney General Garland created a maelstrom of controversy when he demonstrated a willingness to unleash the apparatus of federal power against concerned parents at school board meetings who objected to Critical Race Theory, oppressive COVID-19 policies, or having their children share bathrooms with students of the opposite sex (Camera, 2021).

With thousands of criminal laws on the books, law enforcement discretion is an integral part of our system. Federal law enforcement and prosecutorial norms have, therefore, evolved to hold that cases should be pursued in which "the offense is most flagrant, the public harm the greatest, and the proof the most certain" (Jackson, 1940). Under this standard, or any other reasonable guidance, Attorney General Garland's directive to the FBI to investigate active and vocal parents at school board meetings as potential domestic terrorists not only beggars belief but also casts a presumptive cloud of suspicion over his judgment in other sensitive cases.

Since the DOJ's investigative and charging decisions are largely unreviewable by federal courts, these norms are a necessary function of basic justice. The separation of powers principle restrains judicial review of these decisions because the executive branch exercises sole control over criminal prosecutions. The prudent use of discretion is, therefore, more important today than in 1940 because the federal criminal code has expanded exponentially since then. Without any mechanism for substantive review, federal prosecutors exercise the exclusive discretion to decide to prosecute any federal crime that is supported by probable cause, which is the minimal constitutional requirement to obtain an arrest warrant, a search warrant, or an indictment. By extension, as the principal investigative arm of the DOJ, the FBI shares in this discretion, subject to a federal prosecutor's decision on whether to take the FBI's case to the grand jury for indictment.

The capture of these agencies by progressive political actors who view the law as politics by other means is cause for grave concern, especially among those who deviate from received political orthodoxy. As then-Attorney General Jackson explained, "the prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous" (Jackson, 1940).

Despite the DOJ's Virtually Unreviewable Discretion, There Are Narrow Constitutional Constraints on Prosecutorial Decisions.

Notwithstanding the virtually unreviewable discretion federal law enforcement authorities enjoy, there are narrow constitutional constraints on that discretion. Specifically, "selective prosecution" is prohibited because the "equal protection component of the Due Process Clause of the Fifth Amendment" mandates that prosecutorial discretion "may not be based on an unjustifiable standard such as race, religion, or other arbitrary classifications" (U.S. v Armstrong, 1996).

Where a criminal defendant meets the heavy burden of demonstrating "that the administration of a criminal law is directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law," courts will invoke their authority to dismiss the case because it was brought upon on an unconstitutional rationale (U.S. v Armstrong, 1996).

Selective prosecution claims can be divided into two subsets: "those based on claims of racial discrimination; and those based on other constitutionally impermissible infringements, such as First Amendment violations" (Jampol, 1997). The First Amendment provides a basis for relief for those targeted for political reasons (NAACP v Button, 1963).

As a practical matter, however, selective prosecution claims generally sound in the equal protection category and, even then, are rarely granted. As Justice Antonin Scalia observed, "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive—its prosecutorial discretion—we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully" (Reno v. American-Arab Anti-Discrimination Comm., 1999). Nevertheless, the constitutional considerations that inform the prohibition on selective prosecution should serve as an objective standard on which to judge the actions of the Biden DOJ and FBI.

The Weaponization of the DOJ And the FBI Is Not Novel, But the Time Has Come to End the Practice.

The weaponization of the DOJ and the FBI to harass and punish the perceived political enemies of the White House is not new. Indeed, President Lyndon B. Johnson directed the FBI to investigate and to report back to him on "the planned activities and strategies of those in the public, Congress, and the media" who opposed his policies in Vietnam (Theoharis, 2004). Likewise, President Richard M. Nixon employed the DOJ to investigate Members of Congress and journalists whom he deemed political enemies (Kutler, 1990), (Schlesinger, Jr.,

1973). Nixon Attorneys General John Mitchell and Richard Kleindienst readily permitted the DOJ to be deployed for political gain (Baker, 1992).

Similarly, J. Edgar Hoover's abuses of power as FBI Director are legion and a well-established matter of public record. Under his direction, the FBI "usurped citizens' liberties, treated black citizens as if they were a danger to society, and used deception, disinformation, and violence as tools to harass, damage, and . . . silence people whose political opinions the director opposed" (Medsger, 2014).

The historical parallels between the Biden FBI's unprecedented raid on the private residence of the current president's chief political rival—former President Trump—and the investigative and prosecutorial abuses Presidents Johnson and Nixon and Director Hoover unleashed on their political opponents are striking. Under these circumstances, nothing less than full transparency is in order.

If, as Marx famously put it, "History repeats itself first as tragedy, and then as farce" (Marx, 1951), then the farce in this instance is failing to learn from previous abuses of power and naively ignoring the potential that President Biden, Attorney General Garland, and the captured political leadership of the FBI would weaponize their immense and unreviewable discretion to harass and threaten their political opponents. With public discussion around the next presidential election beginning in earnest, the timing of the raid does not suggest a coincidence.

It is reasonable to conclude that norms of independent judgment and fair play have not worked to restrain the partisan impulses of the Biden DOJ. As a result, calls for aggressive oversight and effective reforms, such as mandating reporting to Congress on contacts between the White House and the DOJ on politically sensitive cases, can no longer serve as meaningless pundit talking points, invariably contingent on whose ox is being gored. Rather, these measures have become a nonpartisan legal, political, and moral necessity to maintain constitutional government and protect the rights and liberties of all Americans, whether they be a hardworking bodega clerk or a former President of the United States.

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Annotation:

- "Show me the man and I'll show you the crime" was how the notorious head of Stalin's secret police, Lavrentiy Beria, allegedly put it.
- Because prosecutors enjoy immense power and discretion, the Supreme Court has imposed upon them a duty to seek justice. Specifically, the Court announced that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Then-Attorney General Jackson would echo this principle in his famous speech: "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Jackson, *The Federal Prosecutor*.
- The DOJ does not know the total number of federal criminal laws after attempting to quantify them for over two years. *See* Shameema Rahman, *Frequent Reference Question: How Many Federal Laws Are There?* Library of Congress (Mar. 12, 2013). They settled on an estimated 3,000 criminal laws. *See id.*
- Probable cause is defined as "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243-244, n.13 (1983). Indeed, the Supreme Court has made clear that "[p]robable cause is not a high bar." *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (internal citation and quotation marks omitted).

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NAACP v. Button, 371 U.S. 415, 431 (1963). Last retrieved October 18, 2022, from https://supreme.justia.com/cases/federal/us/371/415/.

Annotation:

- Plurality Opinion: "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. The right was enshrined in the First Amendment of the Bill of Rights."

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Concluding Annotation:

- One potential statutory reform could include regular reporting on contacts between the White House and the DOJ. In 2007, the Senate Judiciary Committee took up the Security from Political Inference in Justice Act of 2007, S. 1845, 110th Cong. The committee favorably reported the bill by a 14-2 vote, but the full Senate took no action on it. The legislation would have required the DOJ and the White House to submit semiannual reports listing "any communications relating to an on-going investigation conducted by the [DOJ] in any civil or criminal matter" between the two entities. In 2019, Senators Whitehouse, Harris, and Blumenthal proposed nearly identical legislation—Security from Political Interference in Justice Act of 2019—for rank partisan ends. This, in and of itself, militates against the measure. Nevertheless, given recent events, it is an option that must be seriously considered.

BIOGRAPHY

Craig Trainor *is Senior Litigation Counsel with the America First Policy Institute's Constitutional Litigation Partnership.*