



## When Trump Takes Control of the Justice Department, Be Afraid

*America's litigious president-elect is about to run the world's most fearsome legal agency.*

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As a presidential candidate, Donald Trump threatened to sue those who crossed him: the scores of women who accused him of sexual assault, the journalists who wrote critical stories about him, and even the Republican National Committee over how it awarded delegates. He will enter the Oval Office on Jan. 20 as arguably the most litigious president in history.

And now, Trump will have vast influence in shaping the U.S. Department of Justice and FBI — and many of the powerful post-9/11 policies that tested America's legal system by pitting security concerns against civil liberties.

The Justice Department has long prided itself as a fiercely independent agency, with many career prosecutors outlasting any one presidential administration. But even some of the most controversial DOJ alumni now worry how Trump will pursue his vision of justice.

“He thinks all kinds of crazy things about prosecutions,” said John Yoo, a Berkeley law professor who, while serving at DOJ's Office of Legal Counsel in 2002 and 2003, helped write legal justifications for aggressive interrogation methods that critics call torture. Those memos have since been rescinded.

“I don't think he has a very good sense of how our law enforcement system works,” Yoo told Foreign Policy.

During the campaign, Trump distinguished himself by his volatility, his vindictiveness, and a desire to strike back at his enemies, qualities that may have served him well in the rough-and-tumble world of New York real estate.

But critics fear Trump will harness the Justice Department to pursue political prosecutions against enemies and otherwise trample civil rights. He will enter the White House after 15 years of presidents — Democratic and Republican — who have wielded nearly untrammelled executive power to conduct investigations, war, covert action, and surveillance operations.

“We are faced with a situation where Trump is going to inherit extremely broad powers that are subject to no meaningful oversight by the other two branches,” said Jameel Jaffer, the director of the Knight First Amendment Institute at Columbia University.

When Democratic nominee Hillary Clinton argued during the Oct. 9 presidential debate that “it’s just awfully good that someone with the temperament of Donald Trump is not in charge of the law in our country,” Trump quipped: “Because you’d be in jail.”

That disregard for judicial process and its outcomes has been a hallmark of the president-elect’s career. “Trump has quite openly used litigation as a harassment,” said Julian Sanchez, a senior fellow at the Cato Institute and a prominent civil libertarian. “The point,” Sanchez said, “was to make someone’s life hell.”

Throughout his career as a real estate developer and media personality, Trump frequently relied on lawsuits to address even minor slights.

In 2006, he sued journalist Timothy L. O’Brien for questioning the mogul’s net worth in his book *TrumpNation*. After spending more than \$1 million on the lawsuit, Trump failed to prove that O’Brien had shown “reckless disregard” for the media. And during the 2016 presidential campaign, he angrily pledged to “open up” U.S. libel laws to more easily win lawsuits against the media after receiving aggressive scrutiny from reporters.

While a revision to the libel law would likely require an act of Congress, Trump will have wide-ranging presidential powers as to alter how the FBI conducts its investigations and to make them more aggressive, said Michael German, a former FBI agent now a fellow at the Brennan Center for Justice.

In recent years, the Justice Department has relaxed strict standards the FBI must meet before opening and maintaining investigations. German said Trump could ease those standards “even more so than they already are.”

“It’s possible Trump could direct the FBI to investigate his enemies,” German said. And, he said, it may not require a direct order from Trump to do so: “I’m not sure it would be necessary for Trump to make such a directive — a mere mention of an organization could trigger an agent in a field office to open an investigation,” German said.

Such a move would violate decades of tradition holding that the president does not interfere in Justice Department investigations. Still, there is no explicit legal restriction to prevent Trump from directing prosecutions.

There are far more violations of federal law than police to investigate them, and the Justice Department has long fretted over how prosecutorial discretion can be turned into an instrument of repression.

“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, because no prosecutor can even investigate all of the cases in which he receives complaints,” Attorney General Robert Jackson told a gathering of U.S. attorneys in 1940. “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.”

Former DOJ officials say politically motivated prosecutions would likely spark a revolt among the career prosecutors and other civil servants in the department, as it did after the Bush administration fired nine U.S. attorneys and replaced some with political loyalists. The firings were called “fundamentally flawed” by Justice’s own internal watchdog and led to the 2007 resignation of Attorney General Alberto Gonzales.

That kind of internal policing could provide a check on Trump’s desire to retaliate against his enemies. Still, much of the Justice Department’s independence depends on whether the attorney general Trump will appoint will aggressively defend it.

Two top contenders for attorney general — former New York City Mayor Rudy Giuliani and New Jersey Gov. Chris Christie — previously served as U.S. attorneys during Republican presidential administrations. Both have shown a troubling willingness to use the Justice Department for political ends, said Carrie Cordero, a former DOJ official currently at Georgetown University Law School.

In an interview Thursday, Giuliani left open the possibility of pursuing charges against Clinton for compromising classified information included in emails sent to her unsecure homebrew server. FBI Director James Comey has declined to recommend prosecution, and closed the case last week.

“There’s one tradition in America, right? Election is over. We forget about it. There is another tradition in America which is ‘equal justice under the law,’” Giuliani told Fox News on Thursday. “And it would depend on how bad the violations are.”

During the Republican National Convention in Cleveland last July, Christie conducted a mock prosecution of Clinton while the crowd chanted, “Lock her up!”

“If he wants to lessen people’s concern about how he is going to use to wield the powers of the Justice Department, then he needs to pick an AG who was not involved in his campaign,” Cordero said.

The concerns over Trump’s use of executive authority are not limited to the Justice Department. As president, he will have immense power of surveillance and covert action programs which Democratic President Barack Obama largely inherited, and solidified, from the Republican Bush administration.

Sanchez said drone and surveillance programs are largely governed by internal policy documents — many of which are reviewed by the DOJ Office of Legal Counsel — and as president, Trump will have wide latitude to alter such rules.

“We have this massive surveillance apparatus that was created over the last 15 years with the participation of both parties and on the tacit assumption that the people in charge would always be people of integrity,” said Jaffer, whose book *The Drone Memos: Targeted Killing, Secrecy, and the Law* comes out next week. “It should have been built with the possibility in mind that the whole system could be turned over to somebody who doesn’t have the best interests of the country at heart.”

Jaffer added: “Now we are going to unfortunately find out how these powers are used by somebody who appears to be interested in using them in the most aggressive way possible.”