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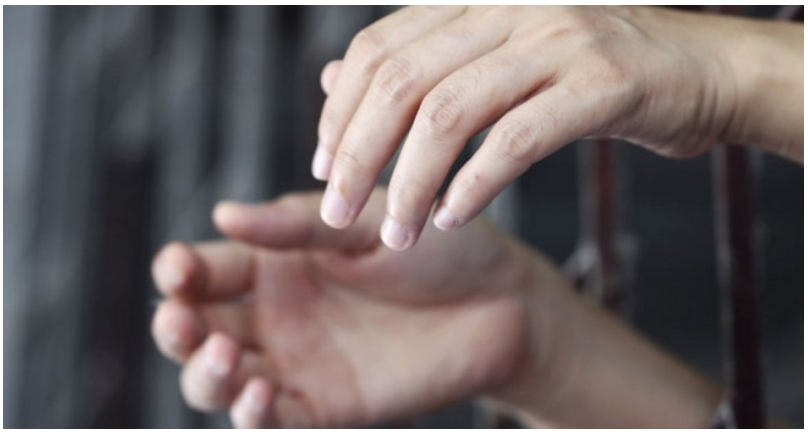
You're a Criminal Now!



In the summer of 2012, conservative author Dinesh D'Souza scored big at the box office with his motion picture *2016: Obama's America*, which detailed the many radical influences on President Barack Obama and argued that these influences portended serious trouble for the United States if Obama were reelected. The film, based on D'Souza's 2010 bestseller *The Roots of Obama's Rage*, grossed over $33 million in the United States, making it the second highest-grossing political documentary since 1982. It also undoubtedly earned D'Souza the enmity of Obama, whose campaign labeled the film "an insidious attempt to dishonestly smear the president."

About 18 months after the release of *2016*, D'Souza was indicted by a federal grand jury and charged with two felony counts for a relatively small, isolated violation of federal campaign-finance law. D'Souza, it seems, had asked friends to contribute to New York Republican Wendy Long's 2012 campaign for the U.S. Senate and then reimbursed them for their contributions, enabling him, in effect, to make contributions in excess of the legal limit. If convicted, D'Souza could have been imprisoned for up to seven years.

The U.S. Attorney's office for the Southern District of New York, which brought the case, claimed D'Souza's alleged crime had been uncovered in the course of a routine Federal Bureau of Investigation (FBI) review of Federal Election Commission (FEC) filings. Astute observers, however, smelled a rat.

"The idea of charging him with a felony for this doesn't sound like a proper exercise of prosecutorial discretion," Harvard University law professor Alan Dershowitz told the Wall Street Journal. "I can't help but think that [D'Souza's] politics have something to do with it.… It smacks of selective prosecution."

In other words, rather than stumbling across D'Souza's violation and then choosing to prosecute him for it, federal officials went searching for a law they could use to punish one of the president's harshest critics.

A Crime for Every Purpose Under Heaven

Selective prosecution is notoriously difficult to prove in court — the judge in D'Souza's case flatly rejected his claim to have been targeted unfairly — but few doubt that it occurs. With thousands of federal crimes and tens of thousands of federal regulations on the books, many of them quite nebulous, finding a law with which to bludgeon one's political enemies is a cinch.

In his aptly titled 2009 book *Three Felonies a Day: How the Feds Target the Innocent*, attorney Harvey Silverglate wrote:

It is only a slight exaggeration to say that the average busy professional in this country wakes up in the morning, goes to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware that he or she likely committed several federal crimes that day. Why? The answer lies in the very nature of modern federal criminal laws, which have become not only exceedingly numerous … and broad, but also … impossibly vague.… Federal criminal laws have become dangerously disconnected from the English common law tradition and its insistence on fair notice, so prosecutors can find some arguable federal crime to apply to just about any one of us, even for the most seemingly innocuous conduct (and since the mid-1980s have done so increasingly).

Every law, by definition, curtails someone's liberty. In some cases, that is a good thing: The freedom to rub out one's neighbor, for instance, ought not be exercised. But many federal laws, in addition to being unconstitutional, infringe on individuals' freedom to exercise their "inalienable rights" to "life, liberty, and the pursuit of happiness" (to quote the Declaration of Independence), often for the benefit of the politically favored. And the more such laws there are, the fewer liberties Americans enjoy.

No one knows exactly how many federal crimes have been defined. Numerous people over the years have attempted to count them; but as retired Justice Department official Ronald Gainer told the *Wall Street Journal*, anyone who tries "will have died and resurrected three times" and still not have the answer. Silverglate cited one such attempt:

A study by the Federalist Society reported that, by the year 2007, the U.S. Code (listing all statutes enacted by Congress) contained more than 4,450 criminal offenses, up from 3,000 in 1980. Even this figure understates the challenge facing honest, law-abiding citizens. Since the New Deal era, Congress has delegated to various administrative agencies the task of writing the regulations that implement many congressional statutes. This has spawned thousands of additional pages of text that carry the same force as congressionally enacted statutes. The volume of federal crimes in recent decades has exploded well beyond the statute books and into the morass of the Code of Federal Regulations, handing federal prosecutors an additional trove of often vague and exceedingly complex and technical prohibitions, one degree removed from congressional authority, on which to hang their hapless targets.

The phenomenon is not new. As Silverglate related, in 1940, then-attorney general and future Supreme Court justice Robert Jackson warned federal prosecutors that although there were already a great many federal criminal statutes, they must not "succumb to the temptation of first 'picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.'" That is the way of totalitarian states such as the former Soviet Union, where Lavrentiy Beria, secret-police chief under Josef Stalin, infamously bragged, "Show me the man and I'll find you the crime."

While the danger of selective prosecution has long existed, it has become increasingly acute as the number of federal crimes has waxed and presidents' tolerance for dissent has waned. Presidents now have the ability to charge almost anyone they choose with some crime — a convenient way to punish enemies and make others think twice about crossing the chief executive.

In D'Souza's case, while it is clear that he knew he was breaking or at least bending the law, it is doubtful that he expected to be criminally prosecuted for it, let alone threatened with jail time, especially when so many others get away with much more egregious violations of the same law or, if caught, are penalized monetarily. "Obama's 2008 presidential campaign was itself fined $375,000 in 2013 for failing to disclose millions of dollars in contributions and missing deadlines for refunding

millions in excess contributions," recalled the *Washington Times*. "No one was threatened with prison for that."

Former U.S. Attorney Joseph DiGenova told Newsmax.com that he found it "unusual" that D'Souza, who had no previous criminal record and only (as far as we know) violated the law this one time, was being charged with a felony. "It seems to me that a misdemeanor makes much more sense than a felony charge," he said.

Other law-enforcement experts told the website that under normal circumstances "the government would likely show little interest in investigating" a violation as small as D'Souza's ($20,000 in excess contributions — chicken feed in the world of federal campaigns). Former FEC commissioner David Mason said such minor violations are "usually resolved at a low level," not by arresting someone and threatening him with imprisonment.

D'Souza, who had initially pleaded not guilty to both felony counts, eventually pleaded guilty to one count and was sentenced to five years' probation, with the first eight months spent living in a community confinement center; a $30,000 fine; community service throughout his probation; and — believe it or not — "therapeutic counseling." All this for making a relatively small illegal contribution to a losing campaign.

While D'Souza was spared prison time, his arrest, prosecution, and sentencing — assuming they were carried out at the behest of the White House — still served a purpose: putting other administration critics on notice that they'd better watch their every step or they, too, could wind up in the dock. Indeed, more than a few Obama foes have fallen victim to his administration's use — or misuse — of federal law.

Auditory Nerve

In the time-honored tradition of Franklin Roosevelt and Richard Nixon, among others, the Obama administration has taken advantage of the income-tax code's impenetrable nature and the power it bestows on the executive branch.

Wayne Allyn Root — the 2008 Libertarian Party vice-presidential nominee, a classmate of Obama at Columbia University, and one of the president's noted critics — claimed that starting in 2011, he was subjected to not one but two suspicious income-tax audits, the second one commencing just days after he'd won a complete victory over the first one in tax court. His accountant, too, was audited, he said. Root pointed out that he'd had an unblemished tax record for the prior 30 years and had passed two previous random audits with flying colors. The chances that he'd fall victim to two successive audits, especially after thrashing the Internal Revenue Service (IRS) in the first one, and that his accountant would be audited at the same time, are "zero," he stated in an op-ed for the Blaze. The only explanation, he deduced, is that he is "on Obama's Enemies List."

"If a president can go after me because he doesn't like my political beliefs," Root averred, "than [sic] no one is safe. Today it's me, tomorrow it could be you."

Root's forecast turned out to be astonishingly accurate. In early 2010, the IRS began indefinitely delaying approval of various conservative organizations' applications for tax-exempt status. Specifically, the agency refused to process expeditiously applications from groups whose names referenced, among other things, "Tea Party" or "patriots" or who were concerned about government spending, debt, or

taxes; criticized the government; advocated education about the Constitution or Bill of Rights; or opposed ObamaCare. In addition, the agency requested more information from many of the groups, much of it highly sensitive, such as donor lists.

According to the *New York Times*, in the span of two years, the IRS approved just four tax-exemption applications from groups with conservative keywords in their names. (Liberal groups' applications, the paper found, were approved "at a fairly steady rate" during the same time period.) This had the effect of discouraging contributions to these organizations, making it difficult if not impossible for them to effectively oppose the administration's agenda.

Although the IRS initially claimed that the policy originated in its Cincinnati, Ohio, office, IRS documents and congressional testimony from IRS officials show clearly that the policy was being directed from Washington at the urging of congressional Democrats, if not the Obama administration itself. What's more, the IRS official at the center of the storm, former Exempt Organizations Division director Lois Lerner, not only approved of the foot-dragging but also, according to e-mails obtained by *National Review*, appears to have given an FEC attorney confidential tax records on a conservative organization in order to influence the commission's vote on whether to prosecute the group for alleged campaign-finance law violations. Later, in congressional testimony, Lerner would assert that she broke no laws and then refused to testify on the grounds that her testimony might incriminate her — an odd juxtaposition, to say the least.

Was the IRS campaign against the president's political foes directed from the White House? While no "smoking gun" has yet been unearthed, one interesting piece of information strongly suggests that the policy wasn't dreamed up by the agency itself: During the time period in which tax-exemption applications were being delayed, two IRS commissioners — Douglas Shulman and Sarah Hall Ingram, the latter of whom was Lerner's immediate supervisor at the time — each visited the White House more than 150 times. "Both IRS officials played significant roles in the scandal," The New American online reported.

Furthermore, the Obama IRS is known to have leaked some conservatives' confidential tax records to outsiders. The National Organization for Marriage collected $50,000 in damages from the agency for supplying its 2008 tax return, including donor lists, to the Human Rights Campaign, a gay-rights group. And according to IRS inspector general J. Russell George, there have been at least three leaks of political candidates' tax information under Obama.

Choke Hold on Business

With the massive number of federal laws and regulations on the books, it would be a trivial matter for the Obama administration to find one under which to prosecute and potentially bankrupt every business it does not like. That, however, would be time-consuming and expensive and might not succeed in every instance. Instead, after a search of the U.S. Code, the administration located a single law that it is using to cripple entire industries without ever filing charges.

The Justice Department program, known as "Operation Choke Point," employs a highly dubious interpretation of the 1989 Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). According to a May House Oversight Committee report, FIRREA "authorizes the Attorney General to seek civil money penalties against entities that commit mail or wire fraud 'affecting a federally insured

financial institution,'" but the Obama Justice Department "has radically and inappropriately expanded its own authority under FIRREA" by forcing banks to close the accounts of merchants that may pose a risk without first proving in court that said merchants are engaging in fraud.

Although the primary target of Operation Choke Point is the short-term lending industry, a legal if somewhat risky financial service, Federal Deposit Insurance Corporation (FDIC) documents show that many more industries are under attack. One 2012 memo threatened FDIC-supervised institutions with "enforcement actions" if they failed to manage the "risks associated with relationships with third-party entities that process payments for telemarketers, online businesses, and other merchants" including "credit repair companies, debt consolidation and forgiveness programs, online-gambling related operations, government grant or will-writing kits, payday or subprime loans, pornography, online tobacco or firearms sales, pharmaceutical sales, sweepstakes, and magazine subscriptions."

Given such threats from Washington, it is hardly surprising that banks are indeed closing down the accounts of legal businesses on the administration's hit list, usually citing regulatory changes or risk tolerance as the reason for doing so.

Firearms merchants — among the least popular businesses in America as far as Obama is concerned — have been particularly hard-hit by Operation Choke Point. According to the *Washington Times*, in 2012, Bank of America "suddenly dropped the 12-year account of McMillan Group International, a gun manufacturer in Phoenix, even though the company had a good credit history." When Kelly McMillan, the company's owner, publicized this occurrence on Facebook, "he found that thousands of small gun-shop owners across the country were in the same situation," the paper reported. "Banks were either dropping them, freezing their accounts or refusing to process their online sales, so he opened a credit card processing company for the gun industry called McMillan Merchant Solutions."

"The [Justice] Department's tortured legal analysis has turned FIRREA on its head," argued the House panel. "[FIRREA] was intended to help the Department *defend* banks from fraud; instead, the Department is using it to *forcibly conscript* banks to serve as the 'policemen and judges' of the commercial world." (Emphasis in original.) But it is the existence of the largely unconstitutional FIRREA — the law also expanded Fannie Mae's and Freddie Mac's missions and created the Bank Insurance Fund and new financial regulatory bodies — that makes this possible.

Stopping Unfriendly Leakers

Another "problem" the administration has solved by searching the law books is that of punishing leakers of classified information — but only selected ones. The White House itself leaks information to the press about classified operations such as drone strikes or the assassination of Osama bin Laden in hopes of scoring points with the public. At the same time, the administration viciously prosecutes — or at least persecutes — individuals who leak information that might cost it some yardage.

Under the Espionage Act of 1917, Obama, who claims to head "the most transparent administration in history," has charged seven people for leaking classified information, more than double the number given the same treatment by all previous administrations combined. Some of those charged, such as Bradley (now Chelsea) Manning and Edward Snowden, did indeed leak significant amounts of classified data, though these leaks' impact on national security appears to have been minimal. Others, however, merely informed the public of things that embarrassed the administration.

Former National Security Agency (NSA) employee Thomas Drake, for example, was charged in 2010 with 10 felony counts for telling a *Baltimore Sun* reporter that the agency had spent $1.2 billion on a data-collection program from an outside vendor when it could have developed the same program in-house for just $3 million. "The case against him collapsed," the *New York Times* reported, "and he pleaded guilty to a single misdemeanor, of misuse of a government computer." By then, he had been forced out of his job at the NSA.

In 2012, former Central Intelligence Agency (CIA) officer James Kiriakou was charged under the Espionage Act for telling journalists about the CIA's waterboarding of alleged bin Laden aide Abu Zubaydah, which he characterized as torture or very nearly so. "Meanwhile, his evil twin, former CIA officer Jose Rodriguez, has a best-selling book out [2012's *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives*] bragging about the success of waterboarding and his own hand in the dirty work," former State Department officer Peter van Buren observed in a 2012 *Mother Jones* article. (Van Buren, too, is a victim of Obama's war on whistleblowers for having authored 2011's *We Meant Well: How I Helped Lose the Battle for the Hearts and Minds of the Iraqi People*.)

In addition, as part of its Espionage Act case against former CIA agent Jeffrey Sterling, the Obama administration is taking the rare step of trying to force a journalist to reveal his sources. The investigation of Sterling, who is accused of leaking classified information to journalist James Risen that Risen subsequently published in his 2006 book *State of War: The Secret History of the CIA and the Bush Administration*, began under the George W. Bush administration for obvious reasons. Risen was subpoenaed in 2008, but after the subpoena expired as Risen fought it, the Obama administration renewed it. Risen has continued to refuse to testify despite a 2013 ruling from the Fourth Circuit Court of Appeals in favor of the government and a subsequent rejection of Risen's appeal by the Supreme Court. Should prosecutors demand his testimony, Risen says he will still keep mum, even if it means going to jail.

"I don't believe this [the Espionage Act prosecutions] is about security at all," James Spione, director of the 2014 documentary *Silenced*, told van Buren. "It is the unfair singling out of whistleblowers by a secrecy regime that is more than anything just another weapon in the state's arsenal to bludgeon its enemies while vaunting its supposed successes — if you can call blowing up unsuspecting people, their families, and friends with a remote control airplane 'success.'"

Surveil Says: More to Come

As noted previously, the Obama administration is not the first to use the ever-growing array of federal laws to its advantage, and it will probably not be the last. Indeed, if recent revelations are any indication, political prosecutions are likely to become even more commonplace.

The NSA and the Justice Department under both Bush and Obama have told federal judges that they would never use the information gathered under the NSA's vast domestic spying program in criminal prosecutions, but documents leaked by Snowden prove otherwise. In truth, the two are working together to subvert the Fourth Amendment by obtaining evidence on individual Americans without a warrant and then presenting that evidence in court with a false history of how it came into the Justice Department's possession, thereby making it appear that the evidence was obtained legally — a policy known as "parallel reconstruction."

With the NSA's enormous communications database at hand, therefore, there is little to stop the government from choosing a target (perhaps a critic of the president), finding evidence that he has broken one of the countless sweeping federal laws or regulations, and then using that evidence to prosecute that individual, claiming — as it did in the D'Souza case — to have come into possession of that evidence through perfectly legal means.

"While parallel reconstruction is deceptive, unlawful and unconstitutional, I suspect it is but the tip of a dangerous iceberg spawned by the unbridled NSA spying that Bush and Obama have given us," Judge Andrew Napolitano opined in a recent column. "When you mix a lack of fidelity to the plain meaning of the Constitution with a legal fiction, and then add in a drumbeat of fear, enforced secrecy and billions of unaccounted-for taxpayer dollars, you get a dangerous stew of unintended tyrannical consequences."

The only way to disgorge that stew from the American body politic is to shut down the NSA's domestic surveillance and repeal the myriad laws and regulations that conflict with the Constitution. Only then can Americans be "secure in their persons, houses, papers, and effects" and free to enjoy their God-given rights.

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