

**Written Testimony of Gene P. Hamilton, Executive Director, Executive
Vice President, and General Counsel America First Legal Foundation
Submitted to the House Committee on the Judiciary
Select Subcommittee on the Weaponization of the Federal Government
“Hearing on the Weaponization of the Federal Government”
May 15, 2024**

Chairman Jordan, Ranking Member Plaskett, and distinguished members of the Subcommittee on the Weaponization of the Federal Government. Thank you for inviting me to testify before the Subcommittee on this important matter.

The American people and American society have flourished for nearly 250 years—set above and apart from all other societies in recorded history—not because of some rare accident but because of the grace of God and the brilliance of our Founding Fathers, who created a system uniquely designed to foster the ideal conditions for individual liberty, human success, and societal flourishing. A system where, as James Madison described in Federalist 51, ambition counteracts ambition amongst the branches of government.¹ A system where, as Madison described in Federalist 47, the accumulation of all powers, legislative, executive, and judicial, were placed into different hands to avoid tyranny.² A system with a strong judiciary, as described by Alexis de Tocqueville after observing it in action, which plays a crucial role in preserving individual liberty and maintaining the balance of power within the government.³

¹ THE FEDERALIST NO. 51 (James Madison).

² THE FEDERALIST NO. 47 (James Madison).

³ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 142, 137 (Harvey C. Mansfield & Delba Winthrop trans., Chicago Press 2002) (1840).

But this system was always predicated upon the continued existence of a just and moral society,⁴ where action in the pursuit of justice and morality would counteract the worst of human ambition. It was also predicated upon the continued existence of a federal government strong enough to do what the governed had consented to in the Constitution, but not so omnipotent as to be able to undermine the liberties of the individuals and the States that had consented to its creation.⁵ And arguably, as explained by Madison in Federalist 47, it was also predicated upon a recognition that the concentration of power in the hands of a few—whether in the government or the private sector—was a recipe for tyranny.

Of course, the mere existence of words on paper alone does not guarantee any individual's rights. After all, governments throughout history have failed to uphold certain rights and privileges “guaranteed” to their people.⁶ Rather, it is the *action* taken by principled people that fulfills those guarantees and secures those individual liberties. It is the *action* taken by principled public officials who recognize the actual stakes of national failure. And it is the *action* taken by individual branches of government that counteracts the ambitions of others.

Put differently, there have certainly been highs and lows over those roughly 250 years, yet the American ideal has always been that individuals have at least some fighting chance of earned success. And the *individual* has had at least some chance

⁴ See Letter from John Adams, to Massachusetts Militia (Oct. 11, 1798) (available at <https://bit.ly/3WGA28K>).

⁵ THE FEDERALIST NO. 51 (James Madison).

⁶ See, e.g., CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS, Dec. 5, 1936, art. 125 (providing written guarantees of free speech, press and assembly, when no such rights were respected in practice).

of prevailing against those—whether in the public or private sector—who seek to weaponize the levers of power against his or her liberty. In America, thanks to the wisdom and foresight of our Founding Fathers and the courage of those divinely empowered stewards of our national history, our Davids have always had a chance against our Goliaths.⁷

Sadly, surveying today’s social, economic, and political landscape, we see that our future contains no such guarantees. We live in unprecedented times where the concentration of power in the federal government—particularly in the executive branch—has served as the fulcrum through which other powers in society oppress the individual and undermine the foundation upon which our national success resides. The epicenters of governmental power are in bed not only with our media and our corporate tycoons but also with global elitist powers and international organizations.

The evidence shows that the Biden Administration’s Department of Justice has failed to protect law-abiding citizens and has ignored its most basic obligations. It has become at once utterly unserious and dangerously politicized. Prosecution and charging decisions are infused with racial and partisan political double standards.⁸ Immigration laws are ignored.⁹ The Federal Bureau of Investigation harasses

⁷ 1 Samuel 17.

⁸ Emma Colton, *Chip Roy Demands DOJ Explain Light Sentence for Floyd Riot Arsonist Who Killed Father of 5*, FOX NEWS (Feb. 10, 2022), <https://fxn.ws/4bzKdA1>; Chris Enloe, *DOJ Asked for Lenient Sentence for 2020 Rioter Who Burned Down Pawn Shop, Killing One Man. Prosecutors Even Cited MLK*, BLAZE MEDIA (Jan. 29, 2022), <https://bit.ly/3UDVJ6U>; Chris Pandolfo, *House Republicans Release 1,000-Page Report Alleging Politicization in the FBI, DOJ*, FOX NEWS (Nov. 4, 2022), <https://fxn.ws/44KRfpR>; Brooke Singman, *Cruz Slams “Politicized” Biden DOJ for Appointing Trump Special Counsel: “Absolutely Disgraceful,”* FOX NEWS (Nov. 19, 2022), <https://fxn.ws/4binHmp>.

⁹ See, e.g., *BREAKING: AFL Sues DHS, Obtains Astounding Data: Barely One-Tenth of One Percent Of Illegal Minors DHS Let Into the United States Were Later Deported*, AMERICA FIRST LEGAL FOUND. (Mar. 8, 2023) <https://bit.ly/4bi5oa3>.

protesting parents (branded “domestic terrorists” by some partisans) while working diligently to shut down politically disfavored speech on the pretext of its being “misinformation” or “disinformation.”¹⁰ A department that prosecutes numerous FACE Act cases while ignoring dozens of violent attacks on pregnancy care centers and/or the coordinated violation of laws that prohibit attempts to intimidate Supreme Court Justices by parading outside of their homes¹¹ has clearly lost its way. A department that has twice engaged in covert domestic election interference and propaganda operations—the Russian collusion hoax in 2016 and the Hunter Biden laptop suppression in 2020—is a threat to the Republic.¹²

We live in a time in which any attempt even to *describe* the current state of affairs has been labeled as “disinformation,” “misinformation,” “malinformation,” and worthy of censorship,¹³ or worse, content worthy of subjecting an individual to

¹⁰ See, e.g., *BOMBSHELL DOCUMENTS – America First Legal Lawsuit Reveals CISA Knew About Mail-in Voting Risks in 2020 While Censoring Related Narratives as ‘Disinformation,’* AMERICA FIRST LEGAL FOUND. (Jan. 22, 2024), <https://bit.ly/4amxXCb>; *America First Legal Sues the Federal Election Commission for Refusing to Charge Biden Campaign and DNC for Illegal Collusion with the Intelligence Community in Disseminating the Infamous “Letter of 51,”* AMERICA FIRST LEGAL FOUND. (Feb. 26, 2024), <https://bit.ly/44lQt6p>; *AFL Lawsuit Uncovers More Audacious CDC Documents Revealing The Biden Administration’s Blatant Complicity With Big Tech To Push Disinformation And Suppress And Censor Free Speech,* AMERICA FIRST LEGAL FOUND. (Sept. 6, 2022), <https://bit.ly/3UHb46x>.

¹¹ *Six Defendants Convicted of Federal Civil Rights Conspiracy and Freedom of Access to Clinic Entrances (FACE) Act Offenses for Obstructing Access to Reproductive Health Services in Tennessee,* U.S. DEP’T OF JUST. (Jan. 30, 2024), <https://bit.ly/44ltBUP>; Joe Bukuras, *2023 Witnessed Continued Attacks on Pro-life Pregnancy Centers, Churches,* CATHOLIC NEWS AGENCY (Dec. 29, 2023), <https://bit.ly/44CHcwR>.

¹² John Solomon, *FBI Email Chain May Provide Most Damning Evidence of FISA Abuses Yet,* THE HILL (Dec. 5, 2018), <https://bit.ly/4bUlkzx>; Post Editorial Board, *The FBI Knew RussiaGate Was a Lie—But Hid That Truth,* NEW YORK POST (June 11, 2022), <https://bit.ly/4bgYT7C>; Jesse O’Neill, *FBI Pressured Twitter, Sent Trove of Docs Hours Before Post Broke Hunter Laptop Story,* NEW YORK POST (Dec. 19, 2022), <https://bit.ly/3yjsjmT>.

¹³ See, e.g., *ELECTION INFRASTRUCTURE GOVERNMENT COORDINATING COUNCIL AND SUBSECTOR COORDINATING COUNCIL, JOINT MIS/DISINFORMATION WORKING GROUP, MIS-, DIS-, AND MALINFORMATION,* <https://bit.ly/4bEn9A7>; *National Terrorism Advisory System Bulletin,* U.S. DEP’T HOMELAND SEC. (Feb. 7, 2022), <https://bit.ly/3WY5eRd>.

criminal prosecution and the deprivation of individual liberty at the hands of the state. In this new and unprecedented world, everyone—including a former President of the United States—is threatened by the federal Leviathan and private elites who seek total domination and control over every aspect of human life.

Dissent is no longer celebrated. Dissent is no longer tolerated. And even *memes* are prosecuted.¹⁴ Dissent, in the eyes of the current powers that must be, must be *eliminated*. To them, ambition must no longer counteract ambition; rather, ambition must *demolish* all competing ambitions, and the individual liberties and rights of the people must be stamped out to advance radical agendas under the guise of benignly or misleadingly labeled campaigns with buzzwords, like “protecting democracy,” “combating misinformation,” “fighting bigotry,” or “enhancing tolerance.”

At times, the threats to our continued existence as the leading nation of the free world seem insurmountable, particularly because the Biden Administration—and most notably, the Department of Justice under the leadership of Merrick Garland—appears to have embarked on a journey of political persecution of those with whom it disagrees, with the end result being the total social, economic, and political domination of the populace.

The Biden Administration appears to have taken nearly every opportunity to silence, and even imprison, its opposition. In addition, the Biden Administration has engaged in an obsessive-compulsive campaign of division and spoliation of the public

¹⁴ *Press Release: Social Media Influencer Douglass Mackey Sentenced after Conviction for Election Interference in 2016 Presidential Race, United States Attorney’s Office, E. Dist. of N.Y., U.S. DEPT OF JUST.* (Oct. 18, 2023), <https://bit.ly/3wyOzbR>.

fisc based on the immutable characteristics of American citizens. Its efforts—empowered by the complicit media that is financed and amplified by anti-American tycoons, and often weaponized by our foreign adversaries as means of sowing division and hatred amongst the populace—are incessant and relentless.

My organization, America First Legal Foundation,¹⁵ has worked ceaselessly for over three years to expose, stand up against, and fight these unconstitutional and illegal abuses of power, educating the American people and enhancing the public discourse surrounding these issues. For example, we were the first to expose the unlawful and unconstitutional collusion by the Biden Administration with social media companies to censor Americans’ speech online.¹⁶ We were the first to highlight the rotten attempt by Merrick Garland and the Department of Justice to silence the First Amendment rights of proud parents across the United States in an attempt to influence the outcome of the Virginia gubernatorial race.¹⁷ And we stopped and eventually forced Congress to repeal a racially discriminatory farm loan forgiveness program that the Biden Administration championed and that the Department of Justice vigorously defended.¹⁸

While it has been our privilege to work on these and other critical issues and to fight against the imposition of modern-day tyranny, I’d like to draw this

¹⁵ *America First Legal*, AMERICA FIRST LEGAL FOUND., <https://aflegal.org/>.

¹⁶ *AFL Lawsuit Reveals Damning CDC Documents Proving Government Collusion With Big Tech to Censor Free Speech and Promote Biden Administration Propaganda*, AMERICA FIRST LEGAL FOUND. (July 27, 2022), <https://bit.ly/3UISIHR>.

¹⁷ Letter from Gene P. Hamilton, Vice President & Gen. Couns. America First Legal Found., to the Hon. Henry J. Kerner, Special Couns., Off. of the Special Couns. (Mar. 3, 2022) (available at <https://bit.ly/44Ci2OV>).

¹⁸ See Order Granting Class Certification and Plaintiff’s Motion for a Preliminary Injunction, *Miller v. Vilsack*, No. 4:21-cv-0595-O, 2021 WL 11115194 (N.D. TX, July 1, 2021).

Subcommittee’s attention to just a *few* of the ways that the Biden Administration has abused the powers and tools of government to politically persecute former President Donald J. Trump.

The political persecution of President Trump by the Biden Administration is unlawful,¹⁹ unprecedented, and un-American. But make no mistake, as unfair and distressing as this political persecution appears, the American people must understand that the intended impact of the Administration’s conspiracy extends far beyond a conviction, civil judgment, or other personal consequence to President Trump; instead, the intended result is to chill dissent, silence speech, and convince the American people that the weight of the federal government can be forcefully weaponized against anyone who stands in the way of this new unholy alliance of special interests seeking to change our way of life and system of government. Thus, the Administration has President Trump in its crosshairs to demonstrate its power and discourage *anyone* now and in the future from challenging its agenda.

Accordingly, for the Biden Administration and its allies, the ends always justify the means. No lie will not be told. No law will not be twisted or broken. There is no weighing of personal, moral, and legal costs and benefits when it comes to achieving the overarching objective of ruining one man. Even the so-called “Justice Manual”—otherwise known as the prosecutor’s “Bible”—and its clear statement that “federal prosecutors and agents may never make a decision regarding an

¹⁹ Brief of U.S. Senator Roger Marshall & 26 Other Members of Congress as Amici Curiae in Support of Petitioner, *Donald J. Trump v. United States*, No. 23-939 (2024), (available at <https://bit.ly/3QL0rhM>).

investigation or prosecution ... for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party,”²⁰ has been shunted aside to advance politically expedient actions for the Administration.

Despite the unabashed weaponization of many institutions, this Subcommittee and portions of the federal judiciary deserve credit for critically highlighting and confronting these unprecedented abuses of power. But more must be done to prevent a potentially irreversible descent into total lawlessness and societal destruction. The Biden Administration must not be allowed to indict and potentially imprison its political opposition with impunity.

While there are certainly more examples that could be cited, the three issues described below are representative of the need for swift and robust corrective action to prevent these modern-day marauding bands of barbarians who seek to destroy anything that stands in their way of victory.

I. The Biden White House Illegally Facilitated Access to Former President Trump’s Records.

The Biden White House brazenly violated the Presidential Records Act when it granted a “special access request” to President Trump’s records to facilitate a prosecutorial inquisition by the Department of Justice and the Federal Bureau of Investigation.²¹

²⁰ U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-27.260 (available at <https://bit.ly/44NwFyY>).

²¹ *The President of the United States Has Absolute Authority Over His Presidential Papers: Undermining an Essential Element of the Biden DOJ’s Mar-a-Lago Prosecution*, AMERICA FIRST LEGAL FOUND. (Oct. 10, 2023), <https://bit.ly/3WELgdJ>.

The law is clear. Prefaced with the critical caveat that any access to Presidential records otherwise restricted is “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke,” the Presidential Records Act only makes records available in three situations: (1) “pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;” (2) through the request of an incumbent President for information “that is needed for the conduct of current business of the incumbent President’s office,” or (3) “to either House of Congress.”²²

Here, the President’s documents were not requested by Congress, so the question is whether the Department of Justice can rely on the remaining two exceptions to obtain these documents. Although publicly available documents suggest the White House initially requested these documents, it allegedly did so “on behalf of the Department of Justice (DOJ) ... so that the FBI and others in the Intelligence Community could examine them.”²³ The National Archives and Records Administration (NARA) revealed that the White House did not request the records for information “needed for the conduct of current business of the incumbent President’s office.”²⁴ Rather, agencies requested these documents—albeit through the White House—for agency use. Nothing in the record shows that these documents

²² 44 U.S.C. § 2205(2).

²³ Letter from Debra Steidel Wall, Acting Archivist of the United States, to all Employees 236-37 (Aug. 24, 2022, 03:25:22 PM), (available at <https://bit.ly/4ameVDJ>).

²⁴ 44 U.S.C. § 2205(2)(B).

were “needed for the conduct of current business of the incumbent President’s office.”²⁵

The Department of Justice is not the President’s office, nor a part of it. To hold that the documents were “needed for the conduct of current business of the incumbent President’s office” simply because the request came from the White House would allow agencies to make an end run around the restrictions in section 2205(2) by routing requests through the White House Counsel’s Office. The text’s plain meaning precludes such an interpretation: it limits the need only for the “current business of the incumbent President’s office.” The documents under this exception are made available to “an incumbent President”—not any agency head—thus further suggesting that the exception excludes requests from executive agencies.²⁶

Not only would this interpretation of the PRA authorize indirect criminal investigations through the White House out of accord with the plain meaning of the statute, but it would also dangerously expand the ability of an incumbent President to harass a former President by seizing documents based on the request of any agency for nearly any reason. Indeed, if the justification here is accepted—“so that the FBI and others in the Intelligence Community could examine [the documents]”—²⁷it is hard to imagine what sort of reason would not allow an incumbent President to

²⁵ *Id.*

²⁶ *Id.*

²⁷ Letter from Debra Steidel Wall, Acting Archivist of the United States, to all Employees 236-37 (Aug. 24, 2022, 03:25:22 PM), (available at <https://bit.ly/4ameVDJ>).

request documents under the justification that they are “needed for the conduct of current business of the incumbent President’s office.”²⁸

The Department of Justice should have been precluded from using this exception to justify obtaining the President’s documents, leaving it to rely solely on the exception granted for documents “pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding.”²⁹ That didn’t happen, either.

The Department of Justice ultimately indicted former President Trump based on a criminal referral from NARA.³⁰ This referral violated Administrative Procedure Act (APA) sections 706 (2)(A) (prohibiting agency actions not in accordance with law) and 706 (2)(B) (prohibiting agency actions in excess of statutory jurisdiction or authority).³¹ Relevant precedent holds that an indictment based upon rules or adjudications in violation of the APA’s formal requirements should be dismissed.³² The prosecution of President Trump should receive similar treatment.

Consider also the differential treatment of current President Joe Biden in the Administration’s persecution of President Trump—which further highlights the need to terminate the prosecution against President Trump.

According to Special Counsel Robert Hur, in May 2022, White House Counsel Dana Remus undertook an effort to retrieve Mr. Biden’s files from the Penn Biden

²⁸ 44 U.S.C. § 2205(2)(B).

²⁹ 44 U.S.C. § 2205(2)(A).

³⁰ Superseding Indictment at ¶ 50, *United States v. Trump*, No. 9:23-cr-80101 (S.D. Fla. July 27, 2023).

³¹ 5 U.S.C. §§ 706(2)(A)–(B).

³² See *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989); see also *United States v. Ross*, 848 F.3d 1129, 1131 (D.C. Cir. 2017); *United States v. Johnson*, 632 F.3d 912, 930 (5th Cir. 2011); *United States v. Cain*, 583 F.3d 408, 422 (6th Cir. 2009).

Center.³³ Remus described the original purpose of that effort as gathering materials to prepare for potential congressional inquiries about the Biden family’s activities from 2017 through 2019 when Biden was actively engaged with the Center.³⁴

Remus eventually learned that the Penn Biden Center’s offices contained official government records.³⁵ Remus decided this material could be relevant to future congressional inquiries and sent the material to Patrick Moore, one of Mr. Biden’s personal lawyers in Boston, Massachusetts, for further review by Moore and former White House Counsel Bob Bauer.³⁶

So, to summarize, Dana Remus had treated Trump’s Presidential records as something that must be referred to the Federal Bureau of Investigation, but when it came to Joe Biden, his classified records could be sorted out by his personal lawyers.

This Committee should also be clear about something else. According to the Hur Report, “[t]he FBI recovered additional marked classified documents at the Penn Biden Center, elsewhere in Mr. Biden’s Delaware home, and in collections of his Senate papers at the University of Delaware.”³⁷ The report further states, “Between January and June 2023, FBI agents searched over 300 boxes containing Mr. Biden’s Senate papers, which were stored in two locations at the University of Delaware.

³³ REPORT ON THE INVESTIGATION INTO UNAUTHORIZED REMOVAL, RETENTION, AND DISCLOSURE OF CLASSIFIED DOCUMENTS DISCOVERED AT LOCATIONS INCLUDING THE PENN BIDEN CENTER AND THE DELAWARE PRIVATE RESIDENCE OF PRESIDENT JOSEPH R. BIDEN, JR., SPECIAL COUNSEL ROBERT K. HUR, U.S. DEPT OF JUSTICE 257 (Feb. 5, 2024) (hereinafter “Hur Report”), <https://bit.ly/3wCB2A7>.

³⁴ *Id.* at 257–58.

³⁵ *Id.* at 258.

³⁶ *Id.*

³⁷ *Id.* at 12.

Within those boxes, agents found documents with potential classification markings, dating from 1977 to 1991, during Mr. Biden’s service in the Senate.”³⁸

44 U.S.C. § 2118 says in relevant part, “[t]he Secretary of the Senate and the Clerk of the House of Representatives, acting jointly, shall obtain at the close of each Congress all the noncurrent records of the Congress and of each congressional committee and transfer them to the National Archives and Records Administration for preservation[.]” Senator Biden clearly had records of the United States in his possession that should have been transferred to the Archives no later than January 15, 2009, when he resigned from the Senate.³⁹ They went to the University of Delaware, where they sat for over a decade. Never once did the Archives use law enforcement to retrieve those records. If that doesn’t look like a Washington-style mix of bureaucratic negligence and bias, I don’t know what is.

If President Donald Trump ordered NARA or the Federal Bureau of Investigation to recover Senator or Vice President Biden’s classified records, he would’ve been impeached. And you can be sure that Biden’s representatives would’ve fought any request to return records. But now that Biden controls the executive, he, of course, returned records knowing he supervised the very law enforcement organs that would decide whether to charge him. Shocking nobody, they declined to do so.

The Biden White House said it had no involvement with the Mar-a-Lago raid.⁴⁰ Now we know that was a lie, because the White House made a special access request

³⁸ *Id.* at 28.

³⁹ *Id.*

⁴⁰ *Watch: White House Says They Were Not Given a ‘Heads Up’ About the FBI’s Mar-A-Lago Search*, PBS NEWS HOUR (Aug. 9, 2022), <https://bit.ly/4bFx2Oh>.

for Trump’s records before the raid. In contrast to the regime’s persecution of its political opposition, it extends its grace beyond Biden’s political administration to its bureaucratic allies.

II. The Presidential Records Act Provides All Presidents with Absolute Authority to Determine What Is and Is Not a Presidential Record—Yet the Biden Administration is Prosecuting President Trump Based on an Erroneous Interpretation of the Act and Simultaneously Empowers Individual Bureaucrats With Greater Authority Over Their Records.

The Department of Justice has charged Donald Trump with violating 18 U.S.C. § 793(e), which provides:

(e) Whoever *having unauthorized possession of, access to, or control over* any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(emphasis added).⁴¹ In obtaining the search warrant to raid Mar-a-Lago in 2022, the Biden DOJ relied upon the definition of a “Presidential Record” in 42 U.S.C. § 2201 to support its position that Donald Trump retained documents he did not have the authority to retain at the conclusion of his presidency, and that, somehow, NARA possessed the authority to require them to be returned.⁴²

⁴¹ 18 U.S.C. § 793(e).

⁴² *Affidavit in Support of an Application Under Rule 41 for a Warrant to Search and Seize*, No. 9:22-mj-08332-BER, ECF No. 156-1 at 7 (S.D. Fla. filed July 5, 2023) (available at <https://bit.ly/3wxobzg>).

The fatal flaw in Jack Smith’s political prosecution under section 793(e) is that Donald Trump—as a matter of law—had *authorized* possession of, access to, and control over his Presidential records. My organization published a whitepaper explaining how and why this prosecution is constitutionally flawed. As the whitepaper explains:

Text, precedent, and executive practice reinforce the historical tradition. The records a President creates or receives while performing the duties of his office are his presidential records. That test does not depend on the content of the records, or whether the records are classified. The test does not change when a President leaves office. If, for example, a former President acquires new records after leaving office, those new records would not enjoy the same constitutional status as his presidential records acquired while in office. But the Presidential records a President takes with him upon vacating the presidency are his, to do with as he pleases. The President can keep them, sell them, destroy them, or donate them, as all Presidents have done.⁴³

In short, the documents that a president prepares or receives during his term in office belong to him. A reading of the Presidential Records Act that fails to account for a former president’s right to possess and control his records is inconsistent with the text, history, and precedent of presidential records.

Yet, juxtaposed against the Biden Administration’s twisted interpretation of the Presidential Records Act is its empowerment of bureaucrats within the Administration to determine which records are and which are not governmental records that require preservation under the Federal Records Act.

⁴³ *The President of the United States Has Absolute Authority Over His Presidential Papers: Undermining an Essential Element of the Biden DOJ’s Mar-a-Lago Prosecution*, AMERICA FIRST LEGAL FOUND. at 16–17 (Oct. 10, 2023), <https://bit.ly/3WELgdJ>.

Federal law requires that each agency “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”⁴⁴

Yet, in a routine email regarding the disclosure of these records, the CDC told my organization, America First Legal, that the CDC routinely deletes the emails of nearly all of its employees thirty days after they leave the agency.⁴⁵ Worse, in response to America First Legal’s probing, NARA investigated the allegations but closed the matter in deference to the CDC’s compliance with its own policies!⁴⁶

Quite simply, NARA entrusts *individual CDC employees* to decide which emails can be automatically deleted.

To give you a sense of how egregious NARA’s slap-on-the-wrist mentality is, consider a case involving former FBI agent Scott Payne.⁴⁷ Payne intentionally removed official records from the FBI’s custody. According to press reports cited by NARA, “Sitting in the crates [Mr. Payne] brought home when he retired are the field notes and transcripts of every case he’s worked.”⁴⁸ NARA did not refer Mr. Payne to the Department of Justice for investigation. Instead, it permitted the FBI to

⁴⁴ 44 U.S.C. § 3101.

⁴⁵ *America First Legal Demands that the HHS OIG Investigate the CDC’s Deletion of Employee Emails*, AMERICA FIRST LEGAL FOUND. (Mar. 29, 2023), (available at <https://bit.ly/3ytLgTO>).

⁴⁶ Letter from Lawrence Brewer, Chief Recs. Officer for U.S. Gov’t, NARA, to Mary Wilson, CDC (Feb. 23, 2024) (available at <https://bit.ly/3K0zB1q>).

⁴⁷ Letter from Lawrence Brewer, Chief Recs. Officer for U.S. Gov’t, NARA, to Teresa Fitzgerald, FBI (Feb. 10, 2022) (available at <https://bit.ly/3UhoBme>).

⁴⁸ *Id.* at 1.

“retriev[e] 99 discs from the former employee’s residence, documented that the former employee affirmed that he does not possess any hard copy documents and that the discs are the ‘totality of government records and information in his possession.’”⁴⁹

While NARA gives a slap on the wrist to an FBI agent who removed a career’s worth of documents from government custody and declines to prosecute President Biden for his own decades-long improper handling of Federal Records bearing classification markings, it has also made the first-ever referral of a former President for prosecution.

III. The Biden Administration Has Weaponized a Paperwork Statute Enacted in the Wake of the Enron Scandal to Attack President Trump and His Supporters.

The Biden Administration is prosecuting former President Trump, and individuals alleged to have participated in events around the entrance of the U.S. Capitol building on January 6, 2021, based upon a statute enacted in the wake of the Enron scandal—18 U.S.C. § 1512(c)(2)—that has no actual relevance to the conduct that was alleged to have occurred. Put differently, the Biden Administration is twisting a statute beyond recognition in its zealous attempt to punish the President and his supporters.

Section 1512(c)(2) is buried in a statute prohibiting the destruction or interference with documents and court records. Section 1512(c)(2) criminalizes obstruction of official proceedings. It carries a maximum 20-year prison sentence, making it a desirable statute for the Biden Administration to use to target its

⁴⁹ *Id.* at 3.

perceived political opponents. It has *never been* used outside the white-collar criminal context. Yet the Department of Justice has used the threat of significant prison time imposed by this statute as a cudgel to compel January 6 defendants to plead guilty. The Department of Justice has even indicted President Trump himself using Section 1512(c)(2), even though he was never at the Capitol on January 6, 2021.

Currently on review before the Supreme Court is the charging of one such individual under 18 U.S.C. § 1512(c)(2). My organization joined with 23 Members of Congress in an amicus brief to argue against this weaponized, targeted use of a criminal statute for conduct related to January 6th.⁵⁰ We made several key points:

- First, applying Section 1512(c)(2) beyond its document-based scope renders at least fifteen other statutory provisions completely meaningless.
- Second, the government’s broad view of Section 1512(c)(2) turns it into a weapon for political prosecution that the Department of Justice could selectively enforce against those whose political views oppose the current administration’s.⁵¹
- Third, the government’s interpretation would criminalize political conduct under which the government could then claim that anyone standing in its way—from protestors to lobbyists—has interfered with official proceedings.

The Biden Administration’s weaponization of a white-collar crime statute—passed in the aftermath of the Enron accounting scandal—to pursue politically

⁵⁰ Brief of Sen. Tom Cotton, Rep. Jim Jordan & 21 Other Members of Congress as Amici Curiae in Support of Petitioner, *Joseph W. Fischer v. United States*, No. 23-5572 (2024), (available at <https://bit.ly/3wH9idx>).

⁵¹ *Id.* at 3–4.

charged prosecutions against American citizens is the perfect example of what happens when radicals motivated by a political vendetta occupy the Department of Justice. There is no justification for this unprecedented power grab being used to destroy the lives of Americans across the country.

These are but a few examples of the degree to which the Biden Administration has weaponized the federal government against its political opponents to achieve its ideological and political goals. And I have not even begun to describe the numerous other ways in which the Biden Administration's allies have sought to bring personal destruction on President Trump, such as the nonsensical criminal case in New York,⁵² the egregious civil fraud case in New York,⁵³ the outrageous criminal case in Fulton County,⁵⁴ and other matters.

To the average American citizen residing outside the beltway, away from the isolated, elitist bubble where ends justifying the means seems to be a mantra for many, the situation is clear: the Biden Administration has embarked on a campaign of political persecution targeting everyone with whom it disagrees, particularly, President Trump. Americans are tired of watching institutions they once trusted

⁵² Daniel Epstein, *Bragg's Administrative Law Problem* (Apr. 30, 2024), <http://dx.doi.org/10.2139/ssrn.4811803>.

⁵³ Alex Oliveira, *Trump Files to Overturn Egregious \$454M Civil Fraud Judgment that Found He Inflated Wealth to Fool Banks*, N.Y. POST (Feb. 26, 2024), <https://bit.ly/3WAYrMY> (last visited May 13, 2024).

⁵⁴ Kyle Cheney, *Trump, Allies Charged with Racketeering Scheme Over Bid to Subvert Election in Georgia*, POLITICO (Aug. 14, 2023), <https://politi.co/3K0E4kF> (last visited May 13, 2024); *State of Georgia v. Donald John Trump*, No. 23SC188947 (Fulton County Super. Ct. Aug. 14, 2023).

violate the law and undermine the critical components of the constitutional and social constructs that made ours the greatest country in recorded human history.

The remaining issue, then, is what must be done? As Madison described in Federalist 51, “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁵⁵ Our government has an obligation to control itself, but it needs help to effectively do so. The time is now for institutional ambition to counteract institutional ambition, for Americans to stand up unafraid and unapologetic for the values they hold dear, and for our Republic to reject the radical weaponization of the executive branch.

⁵⁵ THE FEDERALIST NO. 51 (James Madison).