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**Subject:** VANITY FAIR; "IT WOULD BE RIDICULOUSLY NAÏVE NOT TO BE CONCERNED": TRUMP HAS POLITICIZED THE DOJ. HOW LONG CAN THE SDNY HOLD OUT?

**Date:** Tue, 09 Jul 2019 15:45:56 +0000

**Importance:** Normal

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LINK TO ARTICLE: <https://www.vanityfair.com/news/2019/07/trump-has-politicized-the-doj-how-long-can-the-sdny-hold-out>

# "IT WOULD BE RIDICULOUSLY NAÏVE NOT TO BE CONCERNED": TRUMP HAS POLITICIZED THE DOJ. HOW LONG CAN THE SDNY HOLD OUT?

The battles over the border and the census show that the West Wing is fully in control of Justice. "The fear is that Trump doesn't even need to say it out loud anymore."

BY

[CHRIS SMITH](#)

**Sally Yates** tried to warn us. Way back in January 2017, at the end of the very first week of the Trump administration, the new president signed an executive order banning refugees and immigrants from seven majority-Muslim countries from entering the United States. It was a blatantly political act, following months of **Trump** campaign promises, and it immediately provoked lawsuits challenging the order as religious discrimination. Yates, the acting attorney general, refused to defend the legally indefensible and was summarily fired. "The president is attempting to dismantle the rule of law, destroy the time-honored independence of the Justice Department, and undermine the career men and women who are devoted to seeking justice day in and day out," Yates wrote in a *New York Times* op-ed published in July 2017.

Two Julys later, Trump's politicization of the DOJ is gaining new momentum and depth. The president's choice of **William Barr** as attorney general, and Barr's entirely predictable attempts to undercut the Mueller report, has been the highest-profile, highest-stakes move to weaponize the department for partisan purposes. But two fresh episodes demonstrate Trump's relentless push to subvert the DOJ, and how far-reaching the damage will be to the rule of law. First came **Sarah Fabian**, the senior attorney in the DOJ's Office of Immigration Litigation, telling a California appeals

court that it is “safe and sanitary” for jailed immigrant children to go without soap or toothbrushes and to sleep on concrete floors under bright lights. “I actually felt somewhat sorry for her,” a former federal prosecutor says. “You could hear how half-hearted she was in making the point. But there is no way she would have been making that argument at all without it being approved at the highest levels of DOJ. And then when it became controversial, **Mike Pence** threw her completely under the bus!”

The second, ongoing case echoes the events that got Yates fired. Last week, the Supreme Court ruled against adding a citizenship question to the 2020 census, after documents from a now deceased Republican consultant’s hard drives were exposed. The census citizenship question, Thomas Hofeller wrote in an analysis, “would clearly be a disadvantage to the Democrats” and “advantageous to Republicans and non-Hispanic whites.” The DOJ announced it would not be fighting the Supreme Court ruling; the Commerce Department announced it would begin printing the census forms without the question in question.

Trump didn’t care. “We are absolutely moving forward,” he declared on Twitter. Which was news to DOJ lawyers, who found themselves fumbling during an emergency conference call with a Maryland district court judge. “I’ve been with the United States Department of Justice for 16 years, through multiple administrations, and I’ve always endeavored to be as candid as possible with the Court,” a clearly flummoxed **Joshua Gardner** said. “The tweet this morning was the first I had heard of the president’s position on this issue.”

After a few more days of confusion, the DOJ said on Friday it would demur from pursuing the case, at least until the Commerce Department “adopts a new rationale for including the citizenship question.” That new spin should arrive very soon. Over the weekend Trump and Barr replaced the DOJ legal team handling the case. Whether the prior group of career lawyers balked at returning to the Supreme Court with a new, possibly untenable argument or whether Barr simply wants fresh minds on the case, the shift was all but unprecedented, and is yet another indication that Trump sees the DOJ as a political tool. “Look, every administration makes different decisions about policies. That’s the consequence of an election,” says **Emily Pierce**, a senior adviser in the Justice Department under **Barack Obama**. “What’s different here is Trump threatening to prosecute political opponents, and not deferring to the judgment of law enforcement or of the courts.”

Career DOJ attorneys were troubled early on when Trump pardoned former Arizona sheriff **Joe Arpaio**, who had been convicted of criminal contempt of court. “With that pardon Trump said there were no consequences for defying a court order,” Pierce says. “That’s a significant message. Now, with a tweet basically overruling the judgment of the DOJ on the citizenship question, it’s not just a perversion of the department’s authority. It’s about using the civil division for political purposes.”

Yet as much as Trump seems to care about the citizenship question, he cares far more about protecting himself. “For two years Trump has been battering DOJ and completely politicizing its work. Sometimes he got what he wanted out of them and sometimes he didn’t,” says **Matthew Miller**, a Justice Department spokesman under President Obama. “Now he’s got an A.G. who will talk publicly about the Democrats ‘spying’ and spin the Mueller report to help the president. One big question that flows from that is, What does it mean for the Southern District of New York’s investigation into the Trump Organization?”

And the SDNY’s investigation into Trump’s role in paying off **Stormy Daniels**. And the office’s probe of Deutsche Bank, which loaned Trump more than \$2 billion over the course of 20 years. And its attempts to track the \$107 million raised by Trump’s inaugural committee. “The SDNY presents the greatest ongoing legal threat to Trump and his people,” says **Mimi Rocah**, a former chief of the office’s organized crime unit. In February the *Times* reported that Trump had asked Barr’s predecessor, **Matthew Whitaker**, whether a perceived loyalist could be put in charge of the SDNY’s

work; Whitaker subsequently denied, under oath, having had any such conversation. But it's hard to imagine Trump won't try to intercede if the famously independent SDNY—currently back in the headlines for charging billionaire **Jeffrey Epstein** with sex trafficking—moves to indict one or more of the president's high-ranking associates. (Epstein has pleaded not guilty.) “The fear is that Trump doesn't even need to say it out loud anymore, because Barr is so protective of him,” Rocah says. “It would be ridiculously naïve not to be concerned.”

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