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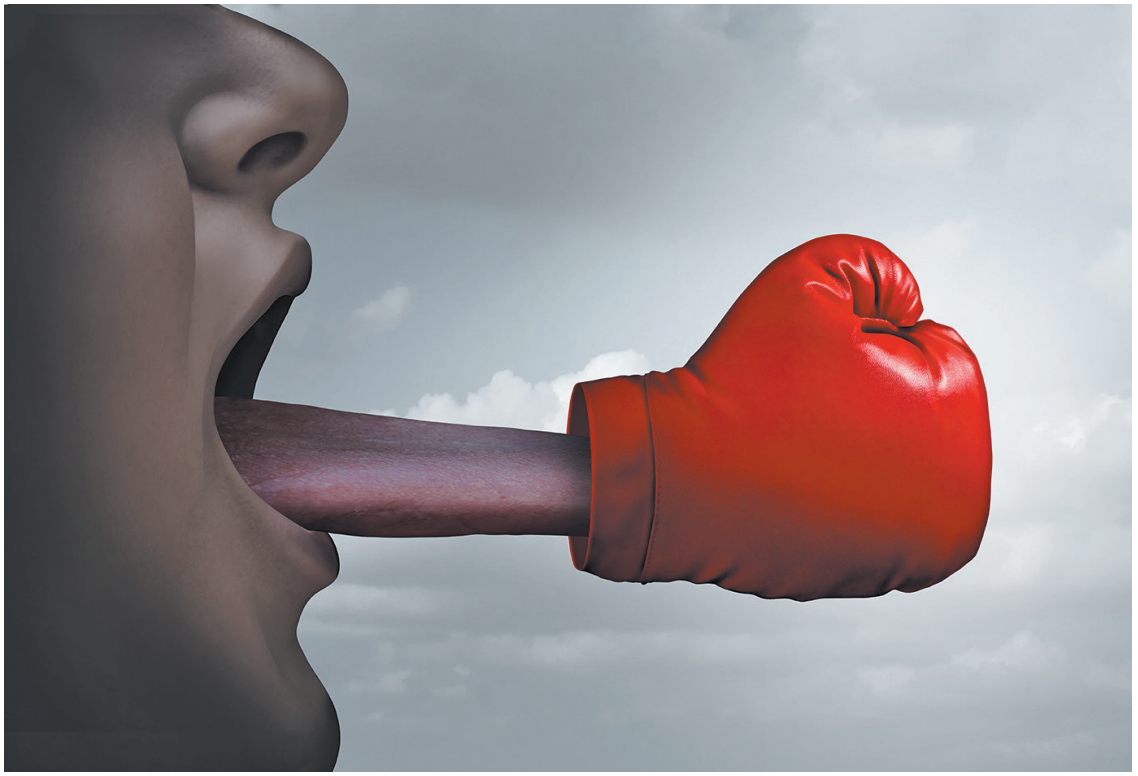
Minding the ramparts in an age of fear and favor

By Joshua M. Robbins



"Revenge is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out."
Francis Bacon, On Revenge, 1625

"I am your warrior. I am your justice. And for those who have been wronged and betrayed, I am your retribution."
Donald Trump, March 4, 2023

Over the past nine years, and particularly the past several months, there has been much talk about the use of federal law enforcement powers for political purposes. In 2016, there was "lock her up" and Hillary's emails. Then the Mueller investigation. And later, the state and federal prosecutions of Trump for attempted election overthrow, withholding classified documents, and false statements about hush-money payments. Within the past year, Republicans in both houses of Congress have introduced versions of a "No More Political Prosecutions Act."

Even more recently, President-elect Trump has explicitly stated his intention to pursue investigations and prosecutions of political opponents, including President Biden, Vice-President Harris, Special Counsel Jack Smith, and various others, largely as payback for the cases against him. More broadly, Trump and his advisors have disavowed the traditional notion that Department of Justice criminal investigations should be independent of White House influence, and Trump has nominated for Attorney General and FBI Director several supporters who have publicly echoed his calls for vengeance.

COMPANIES AT RISK

Politicians and government officials are not alone in the crosshairs: companies on the wrong side of certain political issues may also be at risk. Trump has previously threatened government action against such players as Amazon, Google, and Mark Zuckerberg. Florida Gov. Ron DeSantis took action against Disney for criticizing Florida "Don't Say Gay" law, and threatened litigation against Anheuser-Busch for its TV ad featuring a transgender actor. New York's Attorney General and its Department of Financial Services have targeted the NRA through criminal prosecution and other enforcement actions.

Other officials have threatened state action against financial companies offering ESG-focused investments, businesses pursuing diversity initiatives, and organizations implementing other forms of corporate social responsibility, as well as those opposing the expected immigration crackdown. Potential measures range from criminal investigations to tax enforcement to derivative lawsuits by state pension funds.

Faced with this new environment, some companies have opted to withdraw from political discourse entirely. Several major newspapers–including the Washington Post–notably declined to make presidential endorsements

for the first time in their histories. But there may be a limit to such strategic neutrality. Companies have their own constituents: their target customers, many of whom now expect companies to express values other than maximizing shareholder wealth. And some business owners or leaders may simply not want to remain silent.

DEPARTMENT OF JUSTICE POLICIES

The Department of Justice maintains clear policies against political considerations influencing enforcement decisions. Section 1-8.000 of the agency's Justice Manual governs DOJ's relationship with the White House and Congress, and 1-8.100 provides thatthe legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration. It is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department's legal endeavors.

This position is expressed further in separate DOJ guidance, while other federal enforcement agencies, such as the SEC, have similar policies. See 17 CFR § 200.58.

These policies, however, can be revised by any Attorney General or other agency head. And they are not legally binding in court; their enforcement ultimately depends on officials–such as line prosecutors and attorneys in DOJ's Office of Professional Respon-sibility or inspector general offices–who report to political appointees. Reliance on the agencies to self-police is not an obvious solution.

SELECTIVE PROSECUTION DOCTRINE

The selective prosecution doctrine, grounded in the Equal Protection Clause of the Fourteenth Amendment, theoretically prohibits enforcement actions based on impermissible factors, such as the exercise of First Amendment rights. But the standard for prevailing on a selective prosecution claim is exceedingly high. To prevail, a defendant must demonstrate that both (1) it was "singled out for prosecution among others similarly situated," and (2) the prosecution was motivated by a discriminatory purpose, such as to punish the defendant for "the exercise of protected statutory and constitutional rights." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). To do so is no small feat; there are numerous ways to show that someone else not prosecuted was not "similarly situated," and proving improper motive requires meaningful independent evidence that even Trump's social media accounts may not provide.

Defendants in various recent politically-charged cases–including Trump himself, as well as Hunter Biden, Michael Avenatti, Roger Stone, and various others–have alleged selective prosecution in seeking to have their cases dismissed, or else in seeking discovery of internal government communications regarding the bases for their prosecutions. They have uniformly failed.

Companies have not fared much better. For example, when DOJ sued to block AT&T's planned merger with Time Warner in 2017, the companies claimed that it was in retaliation for Time Warner subsidiary CNN's negative coverage of then-President Trump. The court rejected the claim and denied discovery into DOJ's decision-making and communications with the White House. A New York state court rejected a similar argument by the Trump Corporation in the criminal tax case brought against it in 2021.

While a truly egregious case may lead a court to grant a selective prosecution claim, the current state of the doctrine does not offer much promise as a defense.

THE FIRST AMENDMENT

In some cases, the target of government retaliation might be able to invoke the First Amendment through affirmative litigation. For example, in *NRA v. Vullo*, 602 U.S. 175 (2024), New York's lead financial regulator used the threat of investigations to pressure insurers to stop doing business with the NRA and other pro-gun groups. The NRA sued, and the Supreme Court unanimously held that the actions violated the NRA's free speech rights, because even though they facially addressed "nonexpressive" business relationships, they could be reasonably understood as aimed at punishing or suppressing certain speech.

Vullo appears to be in some tension with Armstrong and the general bias against selective prosecution claims. In Vullo, the Court observed that while the government could pursue violations of state law, it could not do so "in order to punish or suppress the [defendant's] protected expression." In rejecting the regulator's argument that she was only pursuing "conceded violations of the law," the Court examined the details of the alleged conduct and determined that (if true) it plausibly indicated that the regulator's real purpose was to punish and suppress certain advocacy. Even if the NRA and insurers had, in fact, broken the law, such retaliatory enforcement would be a First Amendment violation. "The critical takeaway," the Court said, is that "the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech[.]"

Whether this language–and particularly, the word "selectively"–foretells reconsideration of the Armstrong test may be tested in future litigation. In the meantime, those who have been identified as targets of retaliatory investigations may consider pursuing affirmative civil actions for constitutional violations, citing Vullo, rather than waiting for charges to be filed.

JUDGES AND JURIES

Ultimately, the most basic protection for individuals and companies targeted for political retaliation lies in the courts and their main decision-makers: grand juries, trial juries, and judges. The judicial process, governed by extensive rules of procedure, evidence, and Constitutional requirements, is designed to filter out patently meritless allegations. In 2019, a Washington, DC grand jury refused to return an indictment of former FBI Deputy Director–and prominent Trump target--Andrew McCabe. Several years later, a trial jury acquitted Democratic lawyer Michael Sussman in a case linked to a 2016 investigation of Trump.

Even if the government were able to obtain a guilty verdict, a trial judge can nix a case through a judgment of acquittal (in criminal cases) or judgment as a matter of law (in civil cases). If not, an appellate court provides a further line of defense; witness the decision by three Republican-appointed judges (two of them chosen by Trump) on the Eleventh Circuit to reverse Judge Eileen Cannon's pro-Trump decision in the classified documents prosecution.

Even this backstop, however, is not without its gaps. Not every jury pool will be as blue as the District of Columbia's, and not every judge will scrutinize the government's motives as carefully. It is not hard to imagine DOJ seeking bases to file charges in a district with a more conservative bench and a population friendlier to the administration. And it is not only the outcome of a government investigation or prosecution that matters; the very fact of an investigation, or the filing of charges, can inflict massive cost and harm on a target. This is particularly true of companies that contract with or receive money from the government, as the mere filing of an indictment can trigger debarment or suspension from federal programs–a death sentence for some businesses.

PROFESSIONAL RESPONSIBILITY RULES AND JUDICIAL OVERSIGHT

There is still one more constraint on politically motivated enforcement: the personal integrity and

career interests of the lawyers tasked with carrying it out. ABA Model Rule 3.1, and its state-level equivalents prohibit lawyers from pursuing knowingly frivolous cases. Model Rule 3.8 specifically requires that prosecutors ensure they have at least probable cause before filing charges. In civil enforcement cases, Federal Rule 11 and 28 U.S.C. § 1927 enable courts to sanction attorneys for meritless actions, and federal courts always maintain the inherent authority to penalize attorneys for abusing the judicial process. A government enforcement lawyer asked to knowingly pursue a meritless case or investigation could well find himself or herself in violation of these rules.

The aftermath of the 2020 election challenges shows that these measures can have real teeth. A number of attorneys representing the Trump campaign–including former Assistant Attorney General Jeffrey Clark–faced professional consequences, including disbarment, for pursuing legally unsupportable positions. The White House has no sway over the decisions of state bar authorities, and these precedents may weigh heavily in the minds of any government counsel faced with orders to pursue baseless cases for improper ends.

CONCLUSION

In closing *Trump v. United States*, its landmark decision on presidential immunity from criminal prosecution, the Supreme Court quoted George Washington's Farewell Address, observing that "a government too feeble to withstand the enterprises of faction" could lead to the "frightful despotism" of "alternate domination of one faction over another, sharpened by the spirit of revenge." "The way to avoid that cycle," it advised, was to "ensure that government powers remained properly distributed and adjusted." But that is only part of the story.

As Shakespeare's Cassius observed before another act of political payback, the fault–and the remedy–lie in ourselves. Revenge is a timelessly human impulse, and tribalism stalks not far behind. While the architects of our legal institutions well anticipated the threats that partisans on both sides have decried, and erected bulwarks against the misuse of power, the strength of those defenses rests, as always, with the system's principal actors: the lawyers. Their daily choices between expedience and principle, between partisan advantage and professional duty, will determine whether our courts remain temples of justice–or become theaters of vengeance.

Joshua M. Robbins *is a shareholder and chair of the White Collar and Investigations Practice at Buchalter.*