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De-Weaponizing the Federal Government

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By **Bruce A. Green & Rebecca Roiphe**

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In January 2023, the U.S. House of Representatives established a subcommittee on the Weaponization of the Federal Government to “investigate matters related to the collection, analysis, dissemination, and use of information on U.S. citizens by executive branch agencies, including whether such efforts are illegal, unconstitutional, or otherwise unethical.” Republican-party members compared it to the Church Committee, which, almost a half-century ago, investigated wrongdoing by the FBI and the CIA, including surveillance of anti-war activists and President Nixon’s political opponents. Democratic-party members were skeptical, worrying that the subcommittee will intrude into ongoing federal investigations. Time will tell whether the new House subcommittee will undertake a legitimate inquiry or will merely engage in its own “weaponization” by using Congress’s investigatory power to achieve partisan objectives.



Commentary



Rebecca Roiphe is the Joseph Solomon Distinguished Professor of Law at New York Law School (“NYLS”). At NYLS, Professor Roiphe teaches courses on criminal procedure, ethics in criminal practice, and American legal history. Previously, Professor Roiphe taught at Fordham University School of Law, worked as an Assistant District Attorney at the Manhattan District Attorney’s Office, and served as a law clerk for The Honorable Bruce Selya, U.S. Court of Appeals for the First Circuit.

Professor Roiphe’s scholarship emphasizes the

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questions: What is Congress's role in holding federal investigators and prosecutors accountable for partisan abuses of power—and preventing such abuses? If Congress is not up to the task, who would do better?

Concerns that federal investigators and prosecutors may abuse their power toward partisan ends are nothing new. In a 1940 [speech to federal prosecutors](#), U.S. Attorney General (and future Supreme Court Justice) Robert Jackson acknowledged this risk. He observed that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.” He declared that a prosecutor is “most dangerous” when “the prosecutor selects some group of unpopular persons and then looks for an offense. . . . It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.”

Following abuses of prosecutorial power in the Nixon Administration, the U.S. Department of Justice (“DOJ”) adopted internal guidelines to reduce the risk that investigations or prosecutions will be pursued for partisan reasons. Senators began routinely seeking assurances from nominees for Attorney General that they would respect prosecutorial independence rather than pursuing the president’s partisan objectives. Congress established a process for the appointment of Independent Counsel to investigate and prosecute cases involving federal executive-branch officials. That process was later superseded by the current Special Counsel regulations: Under them, [Attorney General Garland recently appointed Jack Smith](#) to investigate former President Trump’s handling of classified documents and interference in the 2020 election, and [then appointed Robert Hur](#) to investigate President Biden’s handling of classified documents.

Despite these sorts of measures, federal prosecutors may still abuse their power to serve either higher-ups’ political interests or their own political agenda. Geoffrey Berman, the U.S. Attorney for the Southern District of New York in the Trump Administration, recently published a book, *Holding the Line*, highlighting this danger. He [accused](#) the administration of pressuring him to make prosecutorial decisions to serve the president’s partisan interests. The possibility that federal power will be misused in this way raises a host of questions that we previously addressed, including: [whether presidents should be allowed](#) to direct federal prosecutors, [whether federal prosecutors should resist](#) pressure from the White House, and most importantly, for present purposes, [who should investigate](#) allegations that federal prosecutorial authority has been politicized.

A Republican-led committee of the House of Representatives is not the only congressional body investigating possible partisan abuses of federal prosecutorial

democracy and examines the country’s tradition of prosecutorial independence, particularly with regard to the president’s power to control the Department of Justice. In 2022, Professor Roiphe co-authored journal articles that appeared in the *Hofstra Law Review*, the *Washington University Journal of Law and Policy*, and the *Florida State University Law Review*.

Professor Roiphe’s opinion pieces have appeared in several noteworthy publications, including *Slate*, the *New York Review of Books*, and *Politico*. She is frequently quoted as an expert on legal ethics and criminal justice in the media, including in *The New York Times*, *The Washington Post*, *Bloomberg News*, *Vice News*, and the *New York Law Journal*. Professor Roiphe also appears regularly on MSNBC and CNN, and is a legal contributor at CBS News, where she appears regularly to discuss national legal issues.



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Administration.

Among our prior observations is that Congress is not well-situated to oversee the DOJ on an ongoing basis or to respond to every accusation that an investigation or prosecution with political implications was mishandled. After all, Congress itself is a political body with strong partisan interests of its own that could inappropriately affect its investigation. Indeed, this has happened **on at least one occasion** when members of Congress interfered with the investigation and prosecution of Nazi extremists. Given Congress's partisanship and that its inquiries may interfere with ongoing criminal investigations and prosecutions, we have urged reliance on DOJ's Inspector General to assume the principal responsibility for examining allegations that prosecutors abused their power. There have been calls to strengthen the Inspector Generals' independence and expand their jurisdiction so that they can do this job more effectively.

But Congress has some role to play, including a responsibility to consider how federal law might better prevent prosecutorial abuses without undermining federal prosecutors' effectiveness. Congress did this in 2007, for example, when it found that the Bush Administration was replacing U.S. Attorneys with interim appointees who were more likely to promote its political objectives. In response, Congress enacted the Preserving United States Attorney Independence Act¹ to restrain this practice. Congress can certainly do more. In a **forthcoming article**, we suggest several steps to both protect subordinate prosecutors' decisions from political influence and prevent their misuse of power to promote their own political ends. Among other measures, we propose that in order to protect individuals from abuses of prosecutorial charging power in sensitive cases, prosecutions should require the approval of both the Attorney General and the U.S. Attorney, who would thereby serve as a check on each other.

It is unclear what will come out of the Weaponization subcommittee's inquiry. Will it discover evidence that executive branch agencies are systematically violating citizens' constitutional rights by collecting and analyzing their personal information? We tend to doubt it. But even if there have not been systemic abuses to date, Congress should worry about protecting citizens' privacy in the current era, when so much information about citizens is easily accessible to investigators. And especially, Congress should worry about preventing the federal government from targeting politically disfavored individuals and groups, including those who have simply been exercising their freedom of speech and other civil rights. But the Weaponization subcommittee's inquiry raises the concern that rather than address these real problems, various institutions and actors will so frequently accuse different presidential administrations of using prosecutorial and regulatory power with improper political or partisan motivations that the public will cease to believe any one of them.

and Ethics. At Fordham, Professor Green teaches and writes primarily in the areas of legal ethics and criminal law, and is involved in various professional activities. Professor Green chairs the Multistate Professional Responsibility Examination drafting committee, is a liaison to the ABA Standing Committee on Ethics and Professional Responsibility, and previously chaired and is a member of the New York State Bar Association's Committee on Professional Ethics. In addition, Professor Green previously chaired the New York City Bar Association's Committee on Professional Ethics, the ABA Criminal Justice Section, and the ABA Criminal Justice Standards Committee. He has served as the civilian member of the Handschu Authority and as a member of the New York City Conflicts of Interest Board.

Prior to joining the Fordham faculty in 1987, Professor Green was a federal prosecutor in the Southern District of New York, where he served as Chief Appellate Attorney, and served as a judicial law clerk to Justice Thurgood Marshall and Judge James L. Oakes, U.S. Court of Appeals for the Second Circuit. In May 2018, Professor Green received the Michael Franck Professional Responsibility Award, given by the ABA Center for Professional Responsibility.

should consider what legal measures it can adopt to provide comfort to Americans that federal prosecutors and regulators will do their jobs effectively and in a politically nonpartisan manner.

One possibility that has not been adequately explored is for Congress to establish a nonpartisan approval process for certain politically-charged investigations and prosecutions. The DOJ currently has an internal gatekeeping process for some politically sensitive investigative measures and prosecutions, requiring approval at the highest level. But perhaps this kind of self-policing is not good enough in some cases. Before pursuing investigations that are especially at risk of being, or appearing to be, politically motivated, perhaps a confidential gatekeeping process should be instituted in which investigators or prosecutors present justifications for the proposed investigation or prosecution, and neutral individuals participate in deciding whether to approve. The very process of having to justify prosecution decisions to such a body will help discourage abuses of power for political ends.

There is currently one federal model: Before conducting electronic surveillance to obtain foreign intelligence, the DOJ must secure approval from the Foreign Intelligence Surveillance Court ("FISA" court), comprised of federal judges appointed by the Chief Justice. A judicial review process, modeled on the FISA court, would pose separation-of-powers problems and add to the courts' burdens. But one could envision a review process embedded in the executive branch that still provides more objective, nonpartisan oversight. There is also a model of a review process on the local level: the [Handschu Authority](#), a three-member body established by court order that is responsible for approving politically-charged New York City police investigations. That model is also imperfect, since two of the members come from the police department leadership and can outvote the one civilian. But a better institutional review process surely can be constructed.

Even if the idea is ultimately rejected, the debate will reinforce Congress's expectations that when prosecutors and regulators make decisions about whom to charge with wrongdoing, they must act independently of political actors. Perhaps the DOJ and federal regulatory agencies can persuade Congress that they are unlikely to make decisions based on their own decision-makers' political preferences or to be subject to improper partisan capture by the White House. But if the federal executive branch cannot provide adequate assurance that its investigative and prosecutorial powers will not be abused for political gain, some type of confidential before-the-fact review process, embedded in the executive branch—but with the kind of independence and nonpartisanship expected of inspector generals—may be a useful addition. Prior screening would be preferable to efforts by Congress, an Inspector General, or others, to hold prosecutors, investigators, and regulators accountable for abuses after they occur.

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