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Deputy Attorney General Rod Rosenstein flanking Attorney General Jeff Sessions, recused from the Russia investigation, and then acting Director of the FBI Andrew McCabe, subsequently fired, at a Department of Justice news conference, Washington, D.C., July 20, 2017

In the latest in a long line of attacks on the Department of Justice (DOJ), President Trump demanded last week that Deputy Attorney General Rod Rosenstein investigate the FBI after recent reports that an informant had met with officials from his campaign in 2016 in the early stages of the Russia investigation. This assault was a severe one—aimed, as it was, at two of the core functions of prosecutors, the choice to initiate an investigation and the obligation to maintain the integrity of a source. Rather than recoiling in horror at the inappropriate request, Rosenstein ordered an internal investigation into the FBI’s conduct. Many condemned Rosenstein for what they saw as cowardice, and some wondered if this would be a fatal blow to democratic principles.

Though accused of deflection or accommodation, Rosenstein did, in fact, stand up to Trump. By initiating an internal investigation rather than a traditional investigation, there is no possibility of a grand jury. No potential for indictment. Rosenstein just barely protected the idea that criminal investigations and prosecutions must be conducted by trained professionals without political interference. He summoned an impartial party, the inspector general of the DOJ, to confirm what he already knows: that the FBI did not use the informant for political ends. The investigation, including the use of the informant, was a result of a justified suspicion that Russians were attempting to infiltrate the campaign. There have been times in the past when the FBI has become a tool for political vendettas, including spying on Martin Luther King Jr. and the Black Panthers, or gathering information on civilians who joined lawful protest movements. So an internal investigation is an appropriate way to reassure the public in these starkly divided times that such rogue action is not, now, the case.

As some of us breathe a sigh of relief that prosecutorial independence is still alive, it's hard not to wonder how long this can last. Rosenstein may be making concessions, avoiding a confrontation with the president about the limits of his powers, but at some point, President Trump may force Rosenstein's hand, ordering him to do something that violates the norms of his office and his ethical obligations as a prosecutor. What then? Will Rosenstein quit in protest? Will he be dismissed for his refusal to do what he believes to be improper, the way then acting Attorney General Sally Yates was? Or will he be fired for failing to prove his loyalty, as former FBI Director James Comey was? If so, will President Trump appoint someone who will fire Special Counsel Robert Mueller, finalizing his apparent strategy of controlling prosecutorial decision-making and using it for political ends?

When the then-candidate Donald Trump campaigned to the cheers of "lock her up," promising to prosecute his political opponent Hillary Clinton, he ignored the traditional independence of the DOJ and, by sheer force of populist rhetoric, began to undermine public faith in the rule of law. When, later, President Trump urged the Justice Department to reopen a closed investigation into Hillary Clinton's private email server, he did damage to the idea that prosecutorial decisions ought to be made based on law and fact, rather than spite or political advantage. The independence of the DOJ is suffering as Trump repeatedly dismisses the Russia investigation as a "witch hunt," and undermines informants, a key law enforcement tool, by labeling them spies.

Part of the reason the president has been so successful in undermining prosecutorial independence is that, over the last century, politicians and policy leaders on the left have failed to develop a language to defend these essential but informal aspects of government. It was progressive legal scholars, beginning in the early twentieth century who first argued that the law is an imperfect, even flawed instrument, inevitably affected by personal views and political bias. In the 1970s, another group of liberal philosophers and legal scholars at Harvard Law School, known as the Critical Legal Studies movement, drew on the New Left critique of institutions and the state to push this argument even further. In an odd alliance, these radical law professors voiced the view—now shared, in a malign way, by President Trump—that law is merely another tool of the powerful.

Some liberal legal scholars and philosophers, known as the Legal Process School, tried to restore the legitimacy of the law to justify the role of courts and legal institutions in democracy. They developed theories about the importance of institutions and norms in constitutional understanding, and argued that while the law itself may be indeterminate, the process of reasoned decision-making and the allocation of key tasks to the right institutional players gives the law and the courts a vital role in our democratic system. Unfortunately, liberal politicians and pundits failed in the 1970s and 1980s to articulate a popularized version of this theory that could compete with the right's vision of the law, and its enforcement, as an embodiment of the social order.

In 1985, President Ronald Reagan's attorney general, Edwin Meese, declared a "jurisprudence of original intention." He and others very effectively proselytized on behalf of textualism and originalism—theories that the law is what it was intended to be at the country's founding and need not adjust to evolving social realities two centuries later. This vision of law has lasted for decades and it has consistently supported a conservative ideological agenda. Liberals missed an opportunity to offer the public a competing and compelling view of the law as a set of evolving rules, institutions, and practices for resolving disputes. Had they done so, they might have ensured that a greater part of the public would share the shock and dismay over President Trump's threat to the rule of law.

We all understand now just how fragile the legal framework of democracy actually is. The law itself, the Constitution, and the Supreme Court can only uphold a small portion of our democracy. The rest is supported by individuals who operate within the traditions of their jobs. They follow training manuals, absorb office cultures, and—like Rosenstein, Comey, and Yates—adhere to the

ethical rules of their profession. The offices each have their history, lore, and practices that create their own internal consistency and hopefully a level of uniformity and fairness. These norms are under attack. In President Trump's worldview, there is only power and no restraint. He has set out to destroy the traditions that comprise an important constraint on his power.

In so many ways, President Trump's subversion of norms is eerily reminiscent of President Nixon's—but at least Richard Nixon recognized the existence of professional ethics before he sought to plow through them. Nixon wrote about his attorney general, John Mitchell, in a private memorandum to his chief of staff, Bob Haldeman: "John is just too damn good a lawyer. He's a good strong lawyer. It repels him to do these horrible things, but they've got to be done." Trump may have his mentor Roy Cohn in mind as he defines all lawyers as merely a means to a political end.

Of all the rule-of-law norms that Trump has set his sights on, the notion of prosecutorial independence—a tradition that dates back to before the founding—may be the most vulnerable at the moment. Early presidents did, on occasion, attempt to interfere in individual criminal prosecutions, but the vast majority of cases were tried by private individuals or local district attorneys who lay beyond presidential control. The idea that prosecutors should be insulated from politics grew in importance as the scope of federal criminal law expanded. When Congress created the Department of Justice in 1870, it envisioned a professional agency protected from corrupt political influence. The principle was tested in 1973 when President Nixon forced the resignations of two attorneys general who would not comply with his demand to dismiss the special prosecutor in the Watergate investigation.

When considering possible statutes to preserve the independence of the DOJ after Watergate, Congress determined that the best protection lay in the integrity and traditions of prosecutors and the DOJ itself. During congressional hearings, Ted Sorensen, a former adviser to President Kennedy, explained:

An Attorney General of the caliber of Francis Biddle or Elliot Richardson who recognizes that he is an officer of the court as well as a member of the Cabinet, and that his client is the Nation as well as the President, will have sufficient fidelity to both his professional and his public obligations to resist improper White House intrusion without any change in the existing statutory or institutional arrangement.

Sam Ervin, who chaired the Senate committee on Watergate, responded, “So in the last analysis, in your judgment, the thing comes down to the man.”

Insulating prosecutors from presidential control is not only a deeply engrained aspect of American democracy, it is also vital to preserve the criminal justice system and the rule of law. If the chief executive arrogates control over prosecutorial decisions, there are at least three potential consequences. First, an innocent person might go to jail and lose his liberty, not because he committed a crime but because it was politically expedient to send him there. Second, top White House officials and others could avoid consequences for their actions simply because they have power. Third, the law could be used to threaten, weaken, or dismantle political opposition, which would undermine the entire democratic process. Of course, prosecutors left to their own devices can be dangerous. Ken Starr’s investigation into President Bill Clinton proves the point. As critics have rightly argued, prosecutors at all levels commit egregious abuses. There are important checks on prosecutorial power, as well there should be. But balancing these checks with a respect for independence is critical.

If President Trump has Rod Rosenstein fired, will he ultimately win his battle against the vital norms that uphold our democracy?

I think not. While norms may seem fragile, more malleable and weaker than the law itself, they are, in fact, far stronger than they seem. During the Army-McCarthy hearings, in which a Senate subcommittee was investigating allegations of corruption against McCarthy staffer Roy Cohn, as well as communist infiltration in the military, chief counsel to the Army Joseph Nye Welch famously asked Senator Joe McCarthy, “At long last, have you left no sense of decency?” This one statement, which many see as a turning point for public opinion against McCarthy, did not refer to broken laws or constitutional violations. It was the integrity of those charged with protecting the law that Welch invoked so effectively. It is not surprising that Cohn, who embodied the ruthless pursuit of power without regard for ethical limits, later became Donald Trump’s acolyte—and Trump’s attack-dog model of how lawyers should serve their clients.

While Rosenstein and Mueller are currently the most visible guardians of prosecutorial independence, there are layers and layers of career prosecutors who can also take up the mantle. Even a president dead-set on gutting “the administrative state” (as his former adviser Steve Bannon called it) cannot clear

all the ranks of trained professionals without hobbling his own government. Both within the DOJ and in other agencies, there are civil servants who are doing their jobs with respect for the norms and practices that define them. While President Trump may be able to control their funding and objectives, at least for now, he has not figured out a way to replace them all with people who will, unquestioning, do his bidding. By referring the investigation into President Trump's personal attorney and long-time fixer Michael Cohen to the US Attorney's Office for the Southern District of New York, Mueller has reminded us of all the individual prosecutors out there. These are men and women devoted not to a boss who directs them but to a professional mission defined by centuries of tradition.

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