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A January Massacre Averted and the Lawyers Who Helped

Bruce A. Green

Rebecca Roiphe

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Commentary

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Amid the events surrounding President's Trump efforts to use the Justice Department and the courts to overturn the election of Joe Biden, there were some standout lawyers and judges who held up under pressure and put the law and their professional obligation first.

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In the waning days of his administration, President Donald Trump sought to abuse the Justice Department and the courts to overturn the election of Joe Biden and remain in the presidency. Perhaps, we should not be surprised by the former president's unscrupulous use of power, his reckless disregard for the institutions of democracy. But our democracy endured, thanks in part to lawyers in public life who valued the rule of law over ideology. We should pause to acknowledge how well the profession held up under pressure.

As law professors who teach legal ethics, we study the history, traditions, values, norms, rules and regulation of the legal profession. Although the legal profession has its share of "lawyer-statesmen" and "wise counselors," we often teach our students about rogue lawyers. As John Dean, President Richard Nixon's White House counsel, likes to recall, legal ethics became a serious subject thanks to the Watergate scandal, during which many government lawyers, who are supposed to uphold the law, broke it.

In this most recent scandal, there were good and bad lawyers, but it's remarkable how well the profession as a whole stood up under pressure. Lawyers in the Department of Justice resisted Trump's plot to oust acting Attorney General Jeffrey Rosen and use DOJ to pressure Georgia to overturn its election results. After the Texas attorney general failed in his Hail Mary effort to recruit the Supreme Court's help in changing the election result, Justice Department lawyers refused Trump's entreaty to do the same.

When the president threatened to fire Rosen and install a loyalist in his place, top department officials agreed that they would resign in protest. It's not entirely clear who was involved, but what we do know is that the decision was unanimous. When pressured to go to court to serve Trump's private interests, and with no evidence to justify overturning the election results, Rosen and others in the DOJ leadership all refused to comply. They were supported by White House Counsel Pat Cipollone and his deputy Patrick Philbin, as well as former Attorney General Bill Barr.

Some have compared this to the Saturday Night Massacre, where President Nixon fired two successive attorneys general because they refused to get rid of the special counsel investigating Nixon and his administration. This recent episode was, in fact, far worse.

Trump was not seeking to get DOJ to hold off on an investigation in order to avoid accountability. He was trying to use the power of the government to nullify a valid election.

But the comparison is useful. Just as the attorneys general stood up to Nixon, so too did a parade of government lawyers refuse to allow Trump to proceed. Despite their political and personal allegiance to the president and the president's then seemingly ironclad grip on the Republican party, they followed the ethics standards of the profession.

Maybe they saw the writing on the wall. Maybe they wanted to distance themselves from the president. But whatever the motive, these lawyers did the right thing. And this is precisely the way lawyer regulation is supposed to work. It trades on lawyers' interest in their own reputations. It uses that, in part, to ensure that lawyers will not cut corners to make a buck or get ahead at the expense of the system, and it seems to have worked here.

Judges, too, followed the rules. Trump appointees joined their colleagues on the bench in overwhelmingly rejecting Trump's claims of election fraud in court. Trump may have expected his appointees to feel beholden to him or to their common ideological preferences. But it turns out that life tenure combined with a professional devotion to impartiality and the rule of law won out.

Likewise, unsung lawyers in the swing states where election results were challenged evidently put the law and professional obligation first. We can infer that, regardless of their political leanings, they advised public officials to do their jobs, and to resist efforts in and out of court to overturn the legitimate election results.

Of course, this effort to subvert democracy had its rogue lawyers, and they will probably get most of the attention in our classes. But ultimately, good lawyers and judges carried the day. It would be an exaggeration to call them heroes, but they were professionals, carrying out the law and professional norms. In doing so, they helped prevent what could have been a far worse assault on our democracy. And that's worth celebrating.

REBECCA ROIPHE is the Trustee Professor of Law at New York Law School, where she chairs the Institute for Professional Ethics and is co-director of the Criminal Justice Institute. BRUCE A. GREEN is the Louis Stein Chair at Fordham Law School, where he directs the Louis Stein Center for Professional Ethics.