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TRUMP STRIKES AT JUSTICE

After Attorney General Jeff Sessions was forced out, the president seems to want a lawman he can control.

Robert Mueller, the special counsel, always knew he was running the Russia investigation on borrowed time. That time may have just run out on Wednesday afternoon, when President Trump ousted his attorney general, Jeff Sessions, less than 24 hours after Republicans lost their eight-year lock on the House of Representatives.

So who's going to protect Mr. Mueller now?

Until Wednesday, the job was being performed ably by Rod Rosenstein, the deputy attorney general who assumed oversight of the Russia investigation when Mr. Sessions recused himself in March 2017.

Under Mr. Rosenstein's leadership, the investigation Mr. Mueller took over has resulted in the felony conviction of the president's former campaign chairman, guilty pleas from multiple other top Trump aides and associates and the indictments of dozens of Russian government operatives for interfering in the 2016 election. For more than a year, Mr. Rosenstein walked a political tightrope, guarding Mr. Mueller's independence on the one hand while trying to appease Mr. Trump's increasingly meddlesome demands on the other.

That task now falls to Mr. Sessions's chief of staff, Matthew Whitaker, who on Wednesday became acting attorney general and, far more alarmingly, the man Mr. Mueller now reports to.

The good news is that no one, including Mr. Whitaker, can stop the multiple prosecutions or litigation already in progress — including the cooperation of Paul Manafort; the sentencing of Michael Flynn; or the continuing investigation of Michael Cohen, Mr. Trump's former lawyer, and the Trump Organization by federal prosecutors in New York. The courts will have the final say on what happens in each of those cases.

Democrats will also soon be running the House, returning it to its place as a coequal branch of government and holding Mr. Trump to account for the first time since he took office. "We are immediately issuing multiple letters to key officials demanding that they preserve all relevant documents related to this action to make sure that the investigation and any evidence remains safe from improper interference or destruction," Representative Jerrold Nadler, the New York Democrat who is expected to soon head the House Judiciary Committee, said in a statement on Wednesday.

The bad news is, well, pretty much everything else. Mr. Whitaker — who has been called the "eyes and ears" of the White House inside the Justice Department by John Kelly, Mr. Trump's chief of staff — has expressed a Trumpian degree of hostility to the investigation he is now charged with overseeing. He has called it a "witch hunt" and, in its earliest months, wrote an opinion piece arguing that Mr. Mueller was coming "dangerously close" to crossing a "red line" by investigating the president's finances. He has suggested there was nothing wrong in Mr. Trump's 2017 firing of James Comey, the F.B.I. director, and he has supported the prosecution of Hillary Clinton. In an interview last year he described "a scenario where Jeff Sessions is replaced with a recess appointment, and that attorney general doesn't fire Bob Mueller, but he just reduces his budget to so low that his investigation grinds to almost a halt." In 2014, he headed the political campaign for Iowa state treasurer of Sam Clovis, who later became a Trump campaign aide and, more recently, a witness in the Russia investigation.

Mr. Whitaker could do a lot of damage, much of it behind closed doors. For example, he could tip off the White House to what the special counsel's office is up to, or he could block Mr. Mueller from taking significant investigatory steps, like bringing an indictment, without having to notify Congress or the public until the investigation is complete. And any report Mr. Mueller ultimately submits goes directly to the attorney general — who may decide whether or not to pass it along to Congress.

The president may believe that the Republican majority in the Senate — increased on Tuesday with likely Trump loyalists — is prepared to embrace such a corrupted standard for American justice. So it's a good moment to recall another figure from that era — Archibald Cox, the Watergate special prosecutor, who said in the aftermath of the Saturday Night Massacre in 1973, "Whether we shall continue to be a government of laws, and not of men, is now for Congress and ultimately the American people."

The president was not repudiated

Daniel McCarthy

If Donald Trump inaugurated a new era of conflict in American politics, Tuesday's midterm elections were just another skirmish, not a turning point in the war. Republicans lost fewer seats in the House of Representatives than Democrats lost in 1994 or 2010, when Bill Clinton and Barack Obama were in their first terms as president. Mr. Clinton and Mr. Obama both went on to win re-election two years after those midterm routs. And while Democrats also lost Senate seats in the first midterm elections under Presidents Clinton and Obama, Mr. Trump's Republicans defied the historical trend by adding to their Senate majority.

Democrats and other critics of President Trump argue that given the health of the economy, the failure of Republicans to do better than just keeping the Senate amounts to a damning verdict on this administration. Democrats and their supporters also boast about winning the "popular vote" for the House by a wide margin — by more than 8 percent, according to early estimates. Taken together, these claims are meant to show that Trumpism as a program and style of politics is unpopular, a drag on the Republican brand, and puts winning future elec-

tions into great doubt.

The trouble for those who say this is that neither congressional nor presidential elections are decided by a national popular vote, and if anything, the results in 2018 have confirmed that Trumpism, or at least a Trump-led Republican Party, can indeed continue to win crucial presidential battleground states such as Florida and Ohio. If Mr. Trump were the abject failure that

Mr. Trump made the midterms a battle. He is widely hated and feared, but he is also much loved as a champion of his voters.

well in the first place, some 22 months after Mr. Trump assumed office.

Republicans on Tuesday did lose the governorship of Michigan, and they failed to win races for governor and the United States Senate in Pennsylvania. Those states, too, were part of Mr. Trump's electoral map two years ago and are apt to be critical in 2020. Would the president be unable to win them

again? Lou Barletta, the Republican nominee for Senate in Pennsylvania (who lost to the incumbent Democrat Bob Casey), was a staunch immigration restrictionist, just as the president is. But Mr. Barletta ran what was almost universally deemed a poor campaign, and he had nothing of the president's star power or talent for exploiting an opponent's weaknesses through well-chosen insults. Democrats' successes in Pennsylvania suggest little about how a Democratic nominee will perform in the state against Mr. Trump in two years' time. The same can be said, with a little less confidence, about Democrats' midterm successes in other Upper Midwest contests.

In an ordinary midterm election, turnout is low and the opposition party has an advantage, as is reflected in the long chronicle of losses for whichever party holds the White House at the time. In recent decades, only the 1998 and 2002 midterm elections were exceptions in which the president's party gained seats. It's easy to see why the president's party is usually endangered: It has to defend the real record of a real leader, while the opposition party can criticize the president without having to offer an alternative. Strong criticism from one side and a necessarily weaker defense from the other is a formula for gains by the party out of power.

That was still the case this year. Yet

Mr. Trump did something unusual by increasing turnout among his defenders as well as his opponents. Republicans felt that Mr. Trump had an agenda still worth fighting for, and they were heartened that on several key issues — perhaps most important, judicial appointments — the president had delivered what he promised. That helped to make Tuesday a good night for political engagement overall, and it kept Republican losses below what they would have been if Mr. Trump had simply been an unpopular and polarizing figure.

Mr. Trump made the election a real battle instead of a running retreat. He is indeed widely hated and feared, but he is also much loved as a champion of his voters — not only by those who are nationalists as the president is but by those, too, who are conventional Republicans who want lower taxes, fewer regulations and more conservative judges. Far from bringing about Mr. Trump's repudiation, whether by a defeated and regretful right or by the country as a whole, the midterm election has only firmed up the lines of conflict for the future.

President Trump will be at the center of that conflict, not as an aberration or departure from the norms of politics but as an integral part of the Republican Party — its head as well as its right arm.

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Supporters at a Trump rally in Fort Wayne, Ind., on Monday. Republicans have been heartened that on several key issues, the president had delivered what he promised.

The threat against Mueller

Fred Wertheimer
Norman Eisen

Despite the extraordinary success of the special counsel, Robert Mueller — or more likely because of it — he faces his most serious threat yet: the forced resignation of Attorney General Jeff Sessions.

Early last year, Mr. Sessions, as a former Trump campaign official, recused himself from the Russia investigation, handing over its oversight to Deputy Attorney General Rod Rosenstein. As acting attorney general in that capacity, Mr. Rosenstein has overseen and vigorously defended the investigation, led by Mr. Mueller.

After requesting and receiving Mr. Sessions's resignation on Wednesday, President Trump wasted no time in naming Matthew Whitaker, Mr. Sessions's chief of staff, as acting attorney general, and shifted the oversight role from Mr. Rosenstein back to the attorney general's office and its new acting head.

As ethics experts, we believe Mr. Whitaker should recuse himself from the investigation. If we have ever seen an appearance of impropriety in our decades of experience, this is it: a criminal subject president appointing his own prosecutor — one who has evidently prejudged aspects of the investigation and mused about how it can be hampered.

No prosecutor — or indeed governmental official of any kind — should work on a matter under these circumstances. Mr. Whitaker must step aside. His conflicts are just as worrisome in their own way as Mr. Sessions's conflict was, maybe more so.

Whether or not Mr. Whitaker steps aside, Mr. Trump's audacity now demands additional safeguards. Congress must quickly put in place a plan to protect the Russia investigation before President Trump makes any further efforts to control the special counsel's office.

Our proposed solution is based upon one devised by, of all people, Robert Bork when he was the acting attorney general during Watergate. Mr. Whitaker or whoever becomes the next acting attorney general must provide the same protections against interference that Mr. Bork provided to the special Watergate prosecutor, Leon Jaworski, in a 1973 Justice Department order. Mr. Jaworski received the protections as part of agreeing to replace the previous prosecutor, Archibald Cox, who was fired in the infamous Saturday Night Massacre.

The Bork order contained much stronger provisions to protect the independence of the special prosecutor investigation than is now found in the Department of Justice guidelines that govern the Mueller inquiry. These enhanced protections should be demanded from any new person given responsibility to oversee the Mueller investigation: The attorney general, acting or permanent, will not remove the special counsel except for extraordinary improprieties.

The special counsel shall not be subject to the day-to-day supervision of any Justice Department official. The attorney general shall not countermand or interfere with the special counsel's decisions or actions.

The attorney general will not limit the jurisdiction of the special counsel without first consulting with the Republican and Democratic leaders of the House and the Senate.

The investigation by the special counsel shall continue until he determines that it and all prosecutions and other proceedings within his jurisdiction have been completed or, in his discretion, have been reassigned to the Justice Department.

The special counsel may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate people or entities of Congress and may make such a report public.

This is all common sense, but the problem is that it also runs counter to the president's stated reasons for getting rid of Mr. Sessions — namely, that Mr. Sessions wouldn't intervene in Mr. Mueller's inquiry. So why would anyone designated as acting attorney general by Mr. Trump, let alone the president himself, go along with such an order?

Congress has an important role to play in answering that question. Members of both chambers should demand, including in oversight or other hearings, a commitment, given under oath, from any new person overseeing the Mueller investigation to protect the investigation along the lines of the Bork protections.

Legislation also should be pursued to impose the Bork protections on the Mueller investigation. (Alternatively, existing bipartisan legislation to protect the investigation should be renewed.)

Senate Republicans might not follow through, but congressional Democrats, new to the majority come January, should make it clear now that any inter-

ference with the Mueller inquiry will be met with increasingly aggressive congressional investigations.

And the public has a role to play as well. Americans must make it clear that any attack on the special counsel's office is an attack on the fundamental principles of the rule of law. A number of Democratic and Republican members of Congress have spoken out about the importance of allowing Mr. Mueller to complete his work without interference, and the Bork solution is the logical means to that end. These members need to move into immediate action.

For example, in March, Senator Lindsey Graham made an unequivocal public commitment, stating, "I pledge to the American people, as a Republican, to make sure that Mr. Mueller can continue to do his job without any interference." Senator Graham is in line to lead the Senate Judiciary Committee next year, and this puts him in a powerful position to carry out his pledge to the nation.

This is not about partisanship. The strong protections against interference in the Watergate investigation were given by an acting attorney general, a Republican, to protect the independence of a special prosecutor investigating a Republican president. Nearly 50 years later, the American people should ask no less.

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