

# The Department of Justice is being destroyed before our eyes



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The piñata has broken and the result isn't one of candy and sweets for everyone. The Department of Justice (DOJ) has ruptured. It's been a hundred hits, and the tear is now wide open and the wound potentially mortal.

The issues spewing forth include case quotas, grand jury manipulation, public pronouncements in violation of court orders and ethics rules, court dismissals, high rates of acquittals, summary firings of career agents and prosecutors, abrupt changes in mid-level DOJ leadership, and an administration using explicit arrest threats to intimidate officials safeguarding the nations' elections.

The American criminal justice system has invested enormous authority and discretion in the executive branch's enforcement of the laws. Over time, however, that has resulted in the appropriation of what should be external constraints and boundaries. The cost and consequences have become untenable.

The explicit and repeated actions by the administration (from the president on down) targeting its enemies or abusing the law to hide its own flaws have mauled the piñata beyond recognition.

The use of the federal authority to prosecute a cyclist in Washington, D.C., for allegedly damaging federal property — the almost certainly misapplied lining seen floating in the Reflecting Pool — would be comical if it weren't a real felony case.

The corruption hasn't grown in the dark of secrecy; it has metastasized in the open. By labeling previous law enforcement as political, the DOJ now targets political opponents with investigations and prosecutions. The perverse justification is that because the prior authorities did it (because we say they did), we can too.

Among the underacknowledged victims of DOJ's desecration are the many individual federal prosecutors who otherwise would thrive in a stable, ethical environment. Their challenge now is to navigate a chain-of-command that is overtly politicized and compromised. That's a career-risking daily endeavor.

Another price is that the already fragile criminal justice system has, or will, lose the presumption of regularity. For decades, the working assumption (not always the reality) was that DOJ's actions were made in good faith and with appropriate self-imposed due diligence. That is, when the federal prosecutor spoke, it was, in general, credible (if not necessarily correct). Judges and juries must now view the government as partisan players, not higher purpose advocates.

The executive's law enforcement powers are at their apex when negating prior enforcement activity. The clearest example is the mass commutations and pardons of hundreds of Jan. 6 riot defendants. Despite the objective, abundant evidence of the defendants' illegal actions and purpose, the current administration wiped away the legal consequences. Under the constitutional power of pardon, the president has the sole ability to do so. Another example of an unreviewable decision by the executive branch is the DOJ's ability to close a criminal investigation of a supporter.

It's not law enforcement independence from executive branch leadership that's required, it's the much more robust use of existing constraints to corral those enforcement activities. In theory, safeguards exist when the executive branch pursues criminal investigations and prosecutions based on improper motives or uses improper means.

Judges must vet warrants with neutrality instead of deference; they must evaluate prosecutors' charges during trials against a new backdrop of possibly illicit motives; grand jurors must exercise caution when hearing summary evidence in secret, and they must realize the U.S. Attorney doesn't charge, grand juries do through indictments issued in their names; trial juries must evaluate the evidence by witnesses and argument of the prosecutors with true detachment; and the public must not accept the validity of DOJ's personal attacks.

Even more, Congress must draft criminal statutes with more particularity to reign in the discretionary use of laws for silencing critics. One discrete reform is to limit the times a prosecutor can re-submit a proposed indictment to a federal grand jury after a rejection. That might be accomplished through a judicial rule (by the U.S. Judicial Conference), or by legislation (by Congress).

It's time to remind ourselves, prosecutors don't convict; juries do. Prosecutors don't sentence; judges do. And all prosecutors are officers of the court in addition to enforcement officials.

The underused and underappreciated constraints we previously relied on need to mature and take on heightened significance. Ethical prosecutors won't be hampered in their core mission; in fact, they will rely on such external measures to avoid the worst of what's cascading from on high within the DOJ.

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