Thoughts on the Threat to the Rule of Law

By Michael A. Brady

Although my high school days are long since passed, some books that we were assigned to read and discuss left a lasting impression on me. One of them is “Lord of the Flies” by the British Nobel prize winning author William Golding that was published in the early ‘50s. I understand it is still taught in many high schools today.

It tells the story of a group of British preadolescent boys who are the only survivors of a plane crash on a remote and deserted island. Golding described their disastrous and failed attempts to establish a fair system of government. Although the novel examines the baser inclinations of young people who have not yet matured, it is at the same time an examination of the necessary qualities of a fair governing system in an adult world – one that must be based on the even-handed application of the rule of law.

I thought about “Lord of the Flies” in October when, as a former Assistant U.S. Attorney, I signed a statement - along with almost 1200 other Department of Justice alumni - condemning the efforts of President Trump to direct the Department of Justice to prosecute the former FBI Director James Comey after career prosecutors, including the U.S. Attorney for the Eastern District of Virginia, had concluded there was insufficient evidence to warrant prosecution of Comey. In that statement, the former DOJ employees, who had served under both Democratic and Republican administrations, stated ‘‘Each of us proudly took an oath to defend the Constitution and to faithfully discharge the duties of our office, which included pursuing the evenhanded administration of justice free from partisan consideration.”

In my experience as an A.U.S.A., we were taught to always act within the Rule of Law. Outside influences were not to control or influence our actions. As the Department of Justice states on its website to this day "the Justice Department's mission is to uphold the rule of law."

If an agent from a government agency came to us with what he or she thought was a case of criminal behavior, it was up to us to make the decision, based on the evidence - not outside influences - whether it was, in fact, a case of apparent criminal behavior that merited prosecution.

If the A.U.S.A., in his or her review of the evidence, determined that there was not sufficient evidence to demonstrate that a crime had been committed, then the A.U.S.A. would so advise the agent and decline to present the case to a grand jury. At no time in my experience as an A.U.S.A. did I encounter or learn of an A.U.S.A. ever presenting a case to the grand jury that he or she believed did not merit prosecution.

In its Principles of Federal Prosecution, the Justice Department sets forth firm guidelines for all federal prosecutors, warning that "failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution." The document goes even further on this issue, referring to the "long-standing threshold requirement . . . that a prosecutor may commence or recommend federal prosecution only if he/she believes that the person will more likely than not be found guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal."

If we concluded that a case did merit prosecution, there were rules to follow in presenting the case to a grand jury for indictment. Grand juries meet in secret and the

Government attorney's job is to present sworn testimony and evidence in support of a proposed indictment. Only the grand jury can make the determination whether there is probable cause that a serious crime was committed. The prosecutor cannot insist that the grand jury return an indictment. The prosecutor is not even allowed to be present when the grand jury deliberates. The grand jury's authority to put an end to a government prosecution by returning a no bill, refusing to vote for an indictment, actually predates the Constitution and goes all the way back to colonial times under British rule.

Indeed, this is recounted in the Government's current "Handbook for Federal Grand Jurors" which tells about a case before the American Revolution that is familiar to many today from civics classes: "In 1735, . . .the Colonial Governor of New York demanded that a grand jury indict for libel John Zenger, editor of a newspaper [actually he was the newspaper's printer]. . .because he had held up to scorn certain acts of the Royal Governor. The grand jury flatly refused." Although the Handbook for Federal Grand Jurors does not mention it, the case was actually presented to two separate grand juries and both declined to charge Zenger.

Unable to persuade the grand jury to charge Zenger, the Attorney General on behalf of the British government charged him by way of Information and the case of Crown v. John Peter Zenger went to trial. He was found not guilty by the jury after about 10 minutes of deliberation. The indictment of Comey likely will become as infamous as the Zenger case.

Governments, like all human endeavors, are fragile. As far back as 1838, Abraham Lincoln, then just 28 years old and a lawyer for less than two years, gave his famous Lyceum speech. In it, he warned that the major danger to American democracy is internal, not

external threats. The recent actions of President Trump in encouraging and even directing the Department of Justice to charge specific people like Mr. Comey, often published on social media, constitute real threats to the Rule of Law and our nation.

Compounding the impropriety of directing his Attorney General to indict Comey and others, is the impact on U.S. prosecutors and other career federal employees. There are recent reports that hundreds of career prosecutors have been fired and thousands have resigned. Even FBI agents have been fired or resigned because they were involved in investigations or prosecutions of which the President did not approve.

President Trump has gone so far as to admit on social media, in a message directed to his Attorney General urging her to prosecute Comey, that he fired the U.S. Attorney in Virginia who determined that there was not sufficient evidence to prosecute Comey, describing the U.S. Attorney as a "Woke RINO," and labelling Comey "guilty as hell" even though the Constitution provides that anyone charged with a crime is presumed innocent until proven guilty.

In another instance, Mr. Trump fired the Acting U.S. Attorney in Sacramento who had advised ICE officials heading into her district of an existing order by a federal judge that potentially could impact their actions. Just hours after alerting ICE to what was the governing law in the district, i.e., the outstanding judge's order, she was terminated.

One of the hallmarks of authoritarian regimes is that the ruler exerts power in every sphere of government. In the worst cases, that ruler has the power to select and cause people to have their property confiscated, and to be jailed and even executed. Authoritarian

rulers also typically have the power to control and direct those who are judges in name only. Lincoln warned about the danger of authoritarian rule.

Our nation is in very perilous times. Americans have always prided themselves on our system of government based on the Rule of Law which is now seriously threatened. Consider the observation of Wall Street Journal columnist Gerard Baker, a staunch conservative for a staunchly conservative newspaper, who wrote recently "We seem to be moving rapidly toward a justice system in which the president essentially gets to decide who should be in prison. If you're a political enemy, we'll come up with a crime to fit your punishment. If you're a friend, we will annul your crimes."

This observation is not just one columnist's random and unjustified musing. In early November, Judge Mark Wolf of the Federal District Court in Boston, a judge for 40 years who had been a federal prosecutor for 10 years before President Reagan named him to the bench, resigned to avoid the ethical restrictions on what judges can address publicly and to be able to freely comment on the actions of the Trump administration. In his announcement, he stated "President Trump is using the law for partisan purposes, targeting his adversaries while sparing his friends and donors from investigation, prosecution, and possible punishment. This is contrary to everything that I have stood for in my more than 50 years in the Department of Justice and on the bench."

On the same day, President Trump's Deputy Attorney General Todd Blanche, in a presentation to the Federalist Society, is reported to have urged lawyers to join what he called the Administration's "war" against "rogue activist judges." Taking his cue directly from President Trump, Mr. Blanche is inciting attorneys against judges who have rendered

decisions that the Administration does not like. This is absolutely anathema to long-standing DOJ policy, which was to not comment publicly on actions or decisions of judges with whom they disagreed.

Using the Government's law enforcement powers to punish political enemies and publicly castigating sitting judges are existential threats to the Rule of Law which is central to our system of Government. The American people need to heed Lincoln's cautionary words of almost 90 years ago, employ "general intelligence, sound morality and, in particular, a reverence for the constitution and laws" and defend against these internal assaults on American democracy to avoid descending into the chaos of "Lord of the Flies."