



Is the Rule of Law in Danger?

■ American Republic ■ Politics ■ Donald Trump ■ Friedrich Hayek ■ History ■ Rule of Law by

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Having flouted and subverted the rule of law for decades, the radical elements of the progressive left in the United States now face the inevitable consequence of their concerted activity...

“Donald Trump Could Threaten U.S. Rule of Law, Scholars Say.” So declared an ominous headline in the *New York Times* during the Republican primary campaign of 2016. MSNBC likewise ran a suggestive interview at the time of President Trump’s inauguration, entitled, “Will the ‘rule of law’ survive under Trump?”

Such alarming commentary presupposes the existence of the rule of law in the United States and appears designed to portray Donald Trump as a threat to that rule. In March, however, *Reason* republished and retitled a curious essay that first appeared in *The Week*: “The Immoral ‘Rule of Law’ Behind Trump’s Deportation Regime.” The implication of this revised title (the original read, “How today’s pro-immigrant activists are adopting the tactics of abolitionists”) is that President Trump is staunchly committed, rather than antagonistic, to the rule of law.

So which is it? Does President Trump jeopardize or safeguard the rule of law?

The answer, if we assume the rule of law is in full force and effect in the United States, is probably situational: In some cases, President Trump undermines the rule of law, while in others he reinforces it. But to know for sure, and to appreciate the difference, one must first understand what the rule of law is.

The rule of law encompasses multiple legal principles, chief among them is that the rules that govern society apply equally to all individuals within the prescribed jurisdiction. No person, not even the king or the president, is above the law. Law, not the arbitrary commands or categorical dictates of human rulers, is supreme.

Thus, the opposite of the “rule of law” is the “rule of man,” or the idea that the formal, discretionary imperatives of a powerful sovereign necessarily bind his subjects and subordinates.

The rule of law is a philosophical concept and a liberal ideal that gained ascendancy during the Enlightenment (think Locke and Montesquieu) but that can be traced to antiquity (think Aristotle). The British jurist, Albert Venn Dicey listed as its prime characteristics:

1. “The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power”;
2. “Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts”; and
3. “A formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts.”

These suggest that the rule of law is a bottom-up rather than a top-down system of governmental ordering based on already enunciated and widely accepted precepts. The operative rules that regulate the normative order of human activity in a free society under the law are rooted in custom and tradition. A ruler or judge is, in such a happy jurisdiction, responsive to the controlling principles that are antecedent to his or her political election, appointment, or empowerment.

F.A. Hayek identified the rule of law as a defining attribute of the common-law system, which, in his view, stood in contradistinction to the civil-law system that instituted vast codes and complex administrative agencies to superintend the unvigilant populace. Legislatures, of course, are accountable to the people through elections; thus, their enactments must reflect extant social practices and beliefs to satisfy voters. Administrative agencies, with their extensive rulemaking powers, are not so accountable. They are by design removed from legislative procedures and thus isolated from voters.

Hayek saw the common law as a decentralized form of social organization, and civil law as centralized planning and design. The rule of law, he thought, inhered in the former system but not in the latter. “The possession of even the most perfectly drawn-up legal code does not, of course,



insure that certainty which the rule of law demands,” he warned, “and it therefore provides no substitute for a deeply rooted tradition,” which the common law embodied.

The rule of law encapsulates other seminal concepts as well: the predictability, consistency, reliability, neutrality, and clarity of working rules, for instance. These, however, are in some way derived from the principal teaching that, in Hayek’s words, “all rules apply equally to all, including those who govern.” By any appreciable standard, the United States has not lived up to this high ideal in light of the growth of sovereign immunity and qualified immunity for government officials, the disparate treatment of individuals based on their political power and connections, and, among others, the rapid rise of the administrative state.

Lately, the rule of law has become associated with a law-and-order mentality that emphasizes punishment, severity, and rigidity as touchstones of the legal system. The rule of law, on this view, is the instantiation of brute force or the execution of raw power, or perhaps an ideological construct meant to condition the populace into servile submission to government authority.

This understanding of the rule of law has some merit: John Hasnas’s essay “The Myth of the Rule of Law” explains how rule-of-law rhetoric indoctrinates people into casual acceptance of the harmful government monopoly on the institutions of law. He decries the gradual acquiescence of ordinary people to, in his words, “the steady erosion of their fundamental freedoms” in the name of the rule of law.

But the rule of law as an ideal, rather than a felt reality, aims to preserve rather than imperil fundamental freedoms. Perhaps there are those with ulterior motives who champion the rule of law to achieve concealed goals; perhaps government in its current form cannot actualize rule-of-law ideals. When rule-of-law discourse *does* serve the repressive function that Hasnas describes, it is unduly coercive and abusive. In its proper form, and as it was originally understood, however, the rule of law aspired to restrain government power.

In the minds of yesteryear patriots like Thomas Paine, the United States epitomized the rule of law. He averred that “in America *the law is king*,” whereas “in absolute governments the king is law.” He said, as well, that “in free countries the law *ought* to be king; and there ought to be no other.”

If the law is no longer king in America, it’s not because of President Trump. That he enjoys immense and immeasurable power is evidence of the extent of the decline of the rule of law in this country.

Having flouted and subverted the rule of law for decades, the radical elements of the progressive left in the United States now face the inevitable consequence of their concerted activity—namely, that their coercive methods and institutions may be turned against them, and the authoritarian structures they created may service policies at odds with their own.

We can all learn a lesson from this revealing irony.

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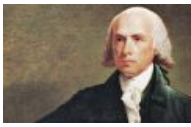
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