



Threats to Rule of Law in America

By Walter E. Williams

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Institutions - established law, custom, and practices - matter and should not be ignored. How is it that western Europe and the U.S. managed to amass unprecedented wealth while countries of the former USSR, China, Africa, South America and the Middle East haven't? The answer has little to do with the people of those countries. After all people who migrate to western Europe or the U.S. often wind up doing quite well.

The reason why the West has been able to amass great wealth is that rule of law is embedded in Western values. Where there's rule of law, human initiative flourishes. Rule of law refers to: freedom of contract and enforcement of contracts, protection of private property, stability of laws, a requirement that all persons, private individuals and government officials are subject to the same laws and, most importantly, limitation of the authority of government. For more than a half century various elements of the rule of law have been under ruthless attack in America. Private property means the person deemed as the owner makes decisions on its uses and that applies to the most valuable property we own - ourselves. Sanctions are taken against persons who use their property in ways that violate the property rights of others. However, when the U.S. Fish and Wildlife Service bans an owner from using part of his property because some animal has chosen it for a habitat, that's a private property rights violation, resulting in losses to the owner.

Government attacks on private property have become routine in today's America. John Adams warned, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and there is not a force of law and public justice to protect it, anarchy and tyranny commence."

Freedom of contract has come to be viewed with contempt. Suppose you offer to pay me for \$3 an hour and I agree; suppose I live in Virginia and want to purchase liquor in Washington, D.C., suppose in rent controlled New York and San Francisco a landlord and tenant mutually agree to pay a higher rent, suppose I'm a California navel orange grower who wants to sell his entire crop, and suppose you want to provide taxi services in New York but don't have \$170,000 for a license. There are literally thousands of restrictions like these on freedom of contract. You might say, "Williams, there are good reasons for restricting the freedoms of others." You're right and every tyrant who has ever existed has had what he considered a good reason.

Another part of rule of law is simply the stability of laws. For most of our nation's history people could make plans. For the most part they could expect today's laws to be tomorrow's laws; hence, they could plan for the future. Today, that's not true. A businessman making investment decisions doesn't know what Congress is going to do a year or two down the line making today's investment decisions worthless. As such it produces the quick buck mentality - get in and get out.

Another increasingly prevalent violation of the rule of law is seen in companies using government to overturn lost competitive advantages in the market. The Microsoft case is an example where its competitors, not customers, employed the heavy hand of government to accomplish what they couldn't accomplish in the market. It's increasingly paying companies to invest more resources currying favor with government officials rather than investing those resources in real productivity.

We're such a rich nation that immediate effects of attacks on rule of law aren't readily apparent. But

enough pin pricks, even into an elephant, will eventually kill.

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Some Basic Tenets of the “Rule of Law”

The concept of the rule of law was clearly understood by the American founders. Even before the colonies formally declared their independence, Thomas Paine, in a widely circulated tract entitled “Common Sense,” wrote “so far as we approve of monarchy, that in America THE LAW IS KING.

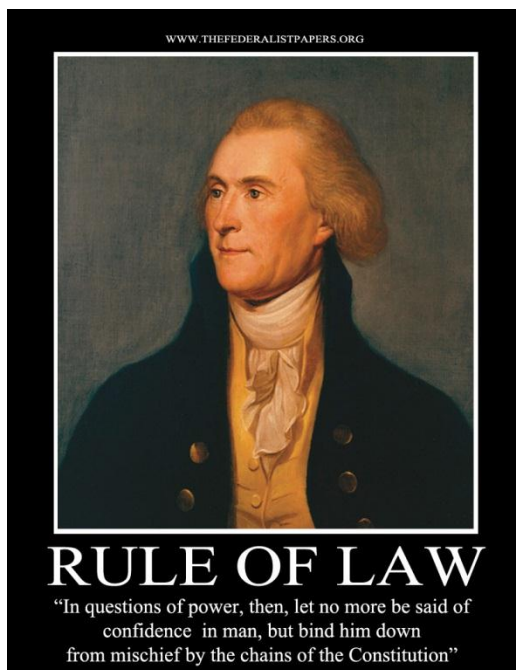
For as in absolute governments the King is Law, so in free Countries the Law ought to be King; and there ought to be no other.”

The founding fathers embedded these ideas in our remarkable Constitution and incorporated in it the important values of separation of powers, an independent judiciary, a government under law, and equality of all before the law.

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.
4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.
5. The law is Constitutional, and strict adherence to the Constitution is followed by all branches of government.
6. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.

This definition should not appear revolutionary; it is based upon the words and ideas of jurists at the highest level of our nation, our founding fathers, and the philosophers and writers that helped lay the ideological foundation for western democracy. Together these “rule of law” values ensure that individuals are offered their best chance of fulfilling their maximum potential.

The rule of law, in the purist sense, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved. Its presence or absence should be judged in relative terms; what is possible in an advanced western society may not be possible in a developing nation. No country may rightfully claim perfect adherence to these ideals. The rule of law should be viewed as a lodestar to which counties can turn for guidance now and in the future. It is our most fundamental value.



Rule of Law versus Unlimited Rule

by James Bovard, February 2003

President Bush is fond of reminding Americans of his devotion to the rule of law. On May 3, 2002, he told an audience that he “always” lectures foreign leaders “about the need for there to be rule of law ... and our country is a shining example of that.”

Unfortunately, the current U.S. “rule of law” is a parody of what the Founding Fathers understood by that term.

Early Americans venerated the law and saw it as the key to safeguarding their freedom. Thomas Paine wrote in 1776 that “in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.”

In 1780, the Massachusetts Bill of Rights stated as its goal the establishment of a “government of laws and not of men.” John Phillip Reid, in his unrecognized classic 1986 study, noted, “It is sometimes assumed by legal scholars that law was command during the era of the American Revolution, but that is an error. To a remarkable extent law even in the eighteenth century was still thought of as it had been in medieval times, as the sovereign and not as the command emanating from the sovereign.”

Americans of the Revolutionary era glorified the law because it was seen as a means to restrain government and to secure the rights of the citizens. Nobel Laureate Friedrich Hayek defined the rule of law in 1944: “Government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers.” Hayek later observed, “Because the rule of law means that government must never coerce an individual except in the enforcement of a known rule, it constitutes a limitation on the powers of all government.” The rule of law aims to minimize discretionary power.

The rule of law is a recognition of the government’s obligation to the citizenry. Political theorist Joseph Towers wrote in 1774, “In arbitrary governments, all are equally slaves. . . . A vague and indefinite obedience, to the fluctuating and arbitrary will of any superior, is the most abject and complete slavery.” Arbitrary power means personal subjugation to the bureaucratic and political rulers who can exercise their personal will over the subjects.

Unfortunately, the modern interpretation of the term “law” is an invitation to the abuse of power. The English

jurist Sir William Blackstone declared in 1765 that “law is not a transient order from a superior to or concerning a particular person or thing, but something permanent, uniform, and universal.” The U.S. Supreme Court declared in 1907, “‘Law’ is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.”

But nowadays laws increasingly exist to bind citizens in arbitrary ways. Laws are often carved in political expediency. A law is simply a reflection of the momentary perception of self-interest by a majority of a legislative body. It is binding only until enough congressmen find it in their self-interest to repeal or revise it. Law is increasingly something that government does to private citizens — until further notice.

The flood of laws and revisions of laws amounts to perpetually changing the rules of society to the point at which the United States degenerates into a Third World condition. Laws are always on the eve of the next sweeping revision, creating an atmosphere of legal instability. Neither the legislators nor the bureaucrats now have any sense of the sanctity of law — of the idea that law should not be changed simply for momentary political convenience.

The more often the law is revised, the more that law becomes simply a series of arbitrary political commands that must be obeyed, a grant of unlimited power to government officials. The more often government officials change the rules by which individuals will be judged, the more those individuals will be left to the government’s mercy, since most citizens do not know and cannot possibly understand the law and regulations they must obey.

Loss of respect for the rule of law

In recent decades, support for the classical concept of the rule of law has evaporated; instead, competing bands of intellectuals champion the executive branch or Congress or judicial activism or some other fad. Rather than focus on the actual operations of government agencies, political thinking is often characterized by a “Do it now!” philosophy. Discretionary power has been granted to bureaucrats by many laws because

congressmen don't have the courage to say openly what they want the bureaucracy to do, leading to government by stealth.

Arbitrary power is the mirror image of the rule of law. Benjamin Constant beautifully expressed the danger of arbitrary power in his 1815 book, *Principles of Politics*:

Arbitrary power destroys morality, for there can be no morality without security. Arbitrariness is incompatible with the existence of any government considered as a set of institutions. For political institutions are simply contracts; and it is in the nature of contracts to establish fixed limits. Hence arbitrariness, being precisely opposed to what constitutes a contract, undermines the foundation of all political institutions. The essence of arbitrary power is government's refusal to issue clear rules limiting its prerogative to punish private citizens.

At some point, the sheer accumulation of penalties and threats in the statute book fundamentally changes the citizen's relation to the government. Rather than a government of laws, it becomes a government of threats, intimidation, and browbeating. When the law books reach a certain length, there is little or no difference between laws and arbitrary commands, because few people know what the laws or regulations actually are.

Because there can be no level playing field between the citizen and the state, every expansion of the state means increased subjugation of the citizen. Every increase in the cost of achieving justice from the state is a de facto subsidy for government oppression. The higher the cost of legal self-defense, the more likely that government agencies will abuse their power. Government employees who carry out vendettas against citizens almost never have to pay either the government's or the citizen's legal bills; their incentive is to stretch their power as far as possible.

Every increase in the cost of traversing government administrative processes increases the arbitrary power of government employees over every citizen who cannot afford hefty legal bills. Sen. John Taylor wrote in 1822, "There are no rights where there are no remedies,

or where the remedies depend upon the will of the aggressor." And with the constantly expanding power and prerogatives of federal agencies, those remedies depend more than ever before on the bureaucratic aggressors.

While Bush and his attorney general, John Ashcroft, perennially invoke the rule of law, the Bush administration has consistently swollen the power of the federal government over American citizens. The USA PATRIOT Act created a bevy of new standards to allow federal agents to trounce Americans' privacy, to secretly read their email, and to arrest and perpetually hold aliens who have not been convicted of any crime. The recently passed act creating the Homeland Security Department also vested new discretionary and intrusive power in federal agencies.

In his April 30 proclamation of Law Day 2002, Bush declared,

Our Founding Fathers believed that a strong and independent judiciary was a cornerstone of democracy.... In criminal matters, judges help to ensure that the innocent remain free and the guilty are appropriately punished. This Law Day, I encourage all Americans to reflect on the vital work performed by our federal judiciary in upholding the rule of law and on the importance of a robust and independent judiciary in our system of government.

But the USA PATRIOT Act and various Bush administration "emergency regulations" have hamstrung the ability of judges to challenge or oversee the actions of federal agencies.

It will take more than Bush's invocations of the rule of law to protect Americans from newly empowered federal agents. In his day-to-day actions, he has shown far more enthusiasm for placing the federal government on a pedestal than for submitting to the Constitution — perhaps the ultimate expression of the Founders' vision of the rule of law.

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