

The Rule of Law: No One is Above It

By David G. Jones and Samantha Jones



THE TOPIC OF THE RULE OF LAW AND ITS relationship to presidential power has inserted itself into our national debate over the last 50 years, and it remains more relevant and compelling as each year passes.¹

While each presidency stretches the limits of authority reserved to the executive branch, the presidencies of Richard Nixon, Bill Clinton, and Donald Trump have demonstrated that presidents will test the bounds of their power as it relates to their constitutional responsibility to “take care that the laws be faithfully executed.”²

In many ways, it displays an apolitical concept of law; one that truly seeks to constrain all in an equal manner and avoid the exercise of power outside the law.

As James Madison so aptly explained: “[i]f men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and, in the next place, oblige it to control itself.”³

Madison and the framers of the Constitution understood at an almost prescient level that powerful

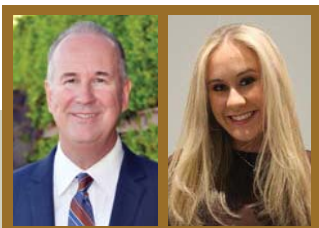
leaders, even those with good intentions, would exert as much power and control over the legal system as they were allowed by the people and other branches of government.

And while presidents regularly seek to assert their authority beyond the constraints set forth by the Constitution and our laws, a unique scenario allowing for rampant abuse arises when the president or those close to him become subject to legal jeopardy.

In these situations, we see the typically structured and normalized decisions as to criminal and civil liability matters subject to manipulation by the nation’s chief executive.

A recent article in *The Hill* succinctly summarized the concept, explaining that...

“[a]t heart, the Rule of law ensures accountability under law for everyone, regardless of power or privilege, in or out of government. The idea, traceable to ancient scholars, resonates in most major legal traditions. America’s founders spoke of “an empire of laws not men,” and they institutionalized the idea in a constitutional framework that provides checks and balances on government authority...[i]t can be understood as a system that delivers accountability, just laws, open government and fair and impartial dispute resolution.”⁴



David G. Jones is a partner at the Encino firm of Lewitt Hackman. He specializes in all aspects of employment law and employment litigation and can be reached at djones@lewitthackman.com. **Samantha Jones** is his daughter and an aspiring politics-focused writer.

During the period encompassing the Constitutional Convention, Benjamin Franklin was asked, “What have we got[,] a republic or a monarchy[?]” Franklin responded, “A republic if you can keep it.”⁵

According to Judge Edward W. Najam, Jr., preservation of the Rule of law,

*“has been our nation’s response to Benjamin Franklin’s challenge. The Rule of Law has been the glue, the common denominator, the foundation—whichever metaphor you prefer—which has enabled us in Benjamin Franklin’s words to “keep the Republic” and preserve our representative democracy... The Constitution was designed to compensate for human nature and contain political factions as threats to the Rule of Law.”*⁶

As these sources indicate, the Rule of Law was historically a foundation for an ordered society that allowed for accountability for all. This article explores both sides of the coin.

On the one side, acknowledging the need for executive discretion and that of presidents to sometimes test specific laws in the best interests of our society.

On the other, reinforcing a firm but flexible Rule of Law to govern the conduct of presidents seeking to exert their authority outside the bounds of the law.

The Risk of Abuse

Recent events relating to President Donald Trump’s term have reminded us of the risks of presidential involvement in the legal process regarding alleged illegal conduct prior to or during a president’s time in office.

The ability to influence investigations, charging, and sentencing decisions as to presidential misconduct is real.

Again, the same concerns rang true for President William J. Clinton during his presidency as, clearly, the matter does not hinge on or is limited by political party affiliation.

Every president has faced calls for the Rule of Law to be applied to them like any other citizen. Each has resisted using executive power and aggressive legal challenges to core concepts within our laws.

Both Presidents Trump and Clinton faced civil suits and criminal challenges, which allegedly they used their influence and authority in office to minimize, all at significant risk to the integrity of the Rule of Law.

President Trump faced a myriad of both impeachment allegations, as well as more traditional personal and corporate civil and criminal investigations during his time in office, including allegations of self-dealing, tax evasion, and corporate fraud, to name a few.

As to the concept of delaying civil actions during presidential terms, scholars have argued both sides.

Some argued that the Court correctly denied President Clinton’s request to defer the Paula Jones litigation to vindicate the principle that no person is above the law.

Like all other government officials, they said, the president is subject to the same laws that apply to all other members of our society.⁷

Others have contended that there will be no actual prejudice to civil litigants seeking to pursue civil actions against a president, as a mere delay will not deny them ultimate recourse.

In the other striking example of the courts supporting the Rule of Law in a dispute over executive misconduct, in *United States v. Nixon*, the Court rejected “an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances” due to “our historic commitment to the Rule of Law.”⁸

The concern raised was that the president would have the ability to influence and minimize his exposure to criminal and civil liability unless the system resisted in the name of the Rule of Law.

In each of these cases, “[n]o proper inquiry would occur if the president risked criminal investigation only by Department of Justice officials subject to his control. The president would, in effect, prosecute his cause, a violation of a basic idea of the Rule of Law that no one can be the judge of his own cause.”⁹

Running counter to these arguments and legal precedents is the concept that every criminal or civil claim pursued against a president is inherently political.

In that regard, a president must have discretion to guard against the reverse—that the law would be more aggressively applied to him due to political or societal pressure.

Such pressures are constantly applied through the media and the political process to weaken presidential authority whenever an opportunity presents itself.

The Rule of Law Prevailing

Every president has advanced justifications for why the Rule of Law does not apply to them.

Many of the men elected to lead our country have genuinely believed that their office carries the type of unquestioned authority or superiority for basic laws not to apply to them.

While the Rule of Law is not a black-and-white notion, it presents and reinforces a set of concepts that every American citizen should abide by, despite their societal status.

As recent events have shown, there is a significant risk in abdicating the responsibility of adhering to the Rule of Law for those in a higher power.

Furthermore, when all branches of government are dominated by one political party, it creates even more potential risk as no person or entity is in a position of authority to oversee executive actions or step in when the president disregards the law.

Over the past several centuries, there are reasons why legal scholars have emphasized the significance of the Rule of Law.

Politicians of all stripes often reference the Rule of Law as “one of the great achievements of our civilization, for the alternative is the rule of raw power.”¹⁰

It is, they have said, “what stands between all of us and the arbitrary exercise of power by the state.”

Despite consistent efforts by presidents to overstep their bounds, it is essentially universally accepted that “no man or woman, no matter how highly placed...can be above the law in a democracy. [T]hat is a rock-bottom, irreducible principle of our public life.”¹¹

According to Richard H. Fallon, Jr., in *The Rule of Law as a Concept in Constitutional Discourse*, “Although the concept is somewhat amorphous, by most accounts it includes core tenets that have influenced many discussions of the presidency during the past quarter-century.”

This is the reason why the Rule of Law is such a hotly debated political topic during each new presidency.¹²

The New York Times editorialized that the “Rule of Law is too vital to the future to be sacrificed as a concession to the president’s whims, delusion or legal jeopardy.”¹³

As can be seen with troubled presidencies of the past, presidents are willing to engage in questionable conduct to achieve their goals or satisfy their sometimes twisted desires.

Without a consistent application and enforcement of the Rule of Law to presidents, the risk for a Pandora’s Box of problems is real.

The power of the presidency is immense and can corrupt the intentions of even well-intentioned men and women who will, in the future, occupy the office.

While many argue that their party’s president should be freed from the burdens of the Rule of Law, there is no doubt that the Rule should be equally applied to presidents as we move into the future.

Striking a Balance

Astute commentators have recognized the push and pull between the Rule of Law and the presidency.

Joel Goldstein likely captured the sentiment best in his piece, *The Presidency and the Rule Of Law: Some Preliminary Explorations*:

“The fear of a lawless Chief Executive is not a frivolous concern...His supervision of law enforcement agencies presents formidable opportunity to harass and abuse. The urge to assert his subjection to the Rule of Law is therefore not surprising. This obsession with subjecting the president to law should not cause us to overlook the extent to which it is the president, not the courts, that the Constitution charges with the responsibility to vindicate the Rule of Law. Moreover, we should recognize, as did the framers and our greatest presidents, that the Rule of Law knows limits which occasionally must be exceeded in crisis time. This is not to say that the president is always, or even often, above the law. Absolving the Executive of all judicial accountability would pose an insult to the Rule of Law. Rather in extraordinary times the president must be free to ignore a particular law to protect the constitutional system.”¹⁴

The rub lies with many arguing that a president is subject to the Rule of Law in all contexts and scenarios.

The framers and the courts have recognized numerous situations where a President can and should work outside the bounds of existing law.

Further, blind reliance on the Rule of Law as a cure-all for all presidential power grabs is true folly. In this regard, Goldstein argues that...


“[t]here is also a tendency to put too much weight on the Rule of Law,...but rules alone cannot solve the most difficult problems of restraining government power...Elections, campaigns, free press and discussion were crucial aspects of the strategy. But the Constitution does not rely simply on electoral accountability to control government...A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions,

observed Madison... Thus, the various institutional devices the Constitution provides and those our culture has added, help restrain presidential activity."¹⁵

Goldstein makes the critical point that the Rule of Law is primary, but electoral and media accountability are other powerful tools to provide real and perceived restraints on recalcitrant Presidents.

This holistic view of the mechanisms for control of presidential authority helps provide hope into the future for those who may have been frustrated by thwarted attempts to apply the Rule of Law to past presidential misconduct.

In the end, the people in government and the courts will determine whether the Rule of Law is applied equally and fairly to presidents. Without their commitment, it cannot be an effective tool for controlling such misdeeds.

*"Ultimately, the ability of our system to travel safely through the most treacherous times depends not just on any rules we can fashion but in the good faith and wisdom of leaders and the people they serve in operating our political and governmental institutions."*¹⁶ 

¹ The Rule of Law is defined in the Oxford English Dictionary as "[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes." Oxford English Dictionary online (accessed September 13, 2018; spelling Americanized).

² U.S. Constitution, Article II, Section 3.

³ James Madison, Federalist Paper No. 51 (1788). The Rule of law is, as John Adams wrote in the Massachusetts Constitution, a government of laws and not of men. *The Constitution, Factions, and The Rule Of Law*, 64-APR Res Gestae 10, 12, April, 2021 Judge Edward W. Najam, Jr. Mass. Const. art. XXX. (citing MASS. CONST. art. XXX.)

⁴ Andersen, Elizabeth, "To Defend Rule Of Law, We Must Agree On Its Meaning," January 22, 2021. <https://thehill.com/opinion/criminal-justice/535366-to-defend-rule-of-law-we-must-agree-on-its-meaning>.

⁵ Papers of Dr. James McHenry on the Federal Convention of 1787, 11 AM. HIST. REV. 595, 618 (1906).

⁶ *The Constitution, Factions, And The Rule Of Law*, 64-APR Res Gestae 10, 11, April, 2021 Judge Edward W. Najam, Jr.

⁷ *Jones v. Clinton*, 72 F.3d 1354, 1358 (8th Cir. 1996).

⁸ *United States v. Nixon*, 418 U.S. 683, 706-08 (1974).

⁹ *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding appointment of independent counsel).

¹⁰ 144 Cong. Rec. H11, 11776-77 (daily ed. Dec. 18, 1998) (statement of Rep. Hyde).

¹¹ *Id.* at B-2.

¹² Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 10 (1997); ("Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity." Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 3 (1997). Surely it is one of the Constitution's defining structural principles.") *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); ("the oldest principle of democracy" is that "the law must deal fairly with every man.") Debate on Articles of Impeachment, Hearing of the Committee on the Judiciary House of Representatives, 93d Cong. 1 (1974); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Take care duty is president's most important constitutional duty).

¹³ *The Shrinking Power of Lies*, N.Y. Times, Sept. 22, 1998, at A30.

¹⁴ Goldstein, Joel, *The Presidency and the Rule Of Law: Some Preliminary Explorations* 43 St. Louis U. L.J. 791, 817 (citing Michael Rosenfeld, Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers, 15 Cardozo L. Rev. 137, 139 (1993).)

¹⁵ *Id.* at 851, 852 (citing The Federalist No. 51, at 322 (Madison) (Clinton Rossiter ed., 1961).)

¹⁶ *Id.* at 852.

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Angela M. Berry



Law School: Loyola Law School

Area(s) of Practice:
Criminal Law, trials, writs and appeals

Years in Practice: 30

Firm and Location:
Angeles Berry, PLC, Encino

What's your favorite vacation spot? "Any vacation."

What was your favorite childhood television program?
"Twilight Zone and Perry Mason."

Your favorite Valley restaurant? "Firefly."

Angela M. Berry is a criminal defense attorney who practices in both trial courtrooms and before the appellate courts. Her practice involves a wide range of cases, including the defense of the accused in simple misdemeanor misconduct and those accused of capital murder.

Berry received her undergraduate degree in Political Science from UCLA in 1987, graduated from Loyola Law School in 1991 and was licensed to practice law later that same year.

She credits her precise and persuasive motion and appellate writing to her clerkship with the California Attorney General's Office, Criminal Appeals Section while attending law school. Her experience in the trial courts is a culmination of 30 years of trying cases, more than 50 of which have been jury trials.

Berry is actively engaged in, and currently sits on the Board of, the Criminal Courts Bar Association. She has also served as an executive board member of the Indigent Criminal Defense Appointments Program, and as a member of the organization's Billing and Discipline Committee.

She currently sits on the Bar's Attorney Referral Service Committee and was honored by the Constitutional Rights Foundation as its 2007 Lawyer of the Year.

The mother of two and the step-mother of two, Berry loves running marathons and has climbed Mt. Kilimanjaro.