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The Rule of Law: A Reassessment for the Twenty-First Century

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ABSTRACT:

This brief radio address attempts to explain the origins of American liberty and to assess its health at the beginning of the 21st century. The notion of rule of law and the emerging science of constitutionalism enabled America's founding generation to establish a system of political liberty that continues to stand as a model for all human societies to pursue.

KEY WORDS:

Rule of law, constitutionalism, tyranny, liberty, consent, natural law, American liberty

Tyranny and Liberty: Preface

Tyranny and liberty are words, which came easily to the lips of the American founders. Their writings team with appeals and polemics based on these twin concepts. Furthermore, these arguments extended far beyond the pages of newspapers and the halls of the Philadelphia convention. In hamlets and villages, up and down the Atlantic coast, citizens designated liberty trees around which they could gather for meetings and rallies. Tyrants such as George the Third's Chief Minister, Lord North, were often burned in effigy, but what did these early Americans mean by "liberty" and by "tyranny"?

These powerful words can be illustrated with a simple example from that same period. Atop a beautiful mountain in western Virginia sits Monticello, the home of Thomas Jefferson. Just below the brow of the hill once stood the shacks where Jefferson's slaves lived. The kinds of lives that were lived in these two houses exemplified what Americans meant by liberty and tyranny. Jefferson's life at Monticello was the life of liberty. He had designed this magnificent house and gardens to fulfill his personal aims, his vision of the good life. His beautiful library accommodated his love of books and learning. Its halls were filled with the objects amassed by his curiosity. Its dining rooms, guest rooms, and kitchens accommodated Jefferson's love of good food and good society, preferably enjoyed together. In short, at Monticello Jefferson lived a life in free pursuit of his own goals and tastes, and that is the essence of liberty.

In stark contrast to Jefferson's life, stood that of his slaves. Their condition exemplified life under tyranny. Everything in the slaves' lives was organized to satisfy the ends of someone else, Thomas Jefferson. They worked in fields to produce crops which enriched and supported Jefferson's life. They worked in kitchens to produce food for Jefferson's table. They cared for horses and carriage which existed for Jefferson's use to the extent that they produced food and goods for their own consumption, this ensured that they would remain alive, healthy, and available, to work for ends defined by their master. The difference between liberty and tyranny doesn't lie in the material status of Jefferson and his slaves. Beneath the apparent opulence of Jefferson's lifestyle were debts and financial demands he could never satisfy. The slaves almost certainly enjoyed a higher standard of living than many of the white settlers in the frontier beyond Monticello. The fundamental difference lies in the ends pursued by either side. Jefferson, like the frontier settlers, pursued ends of his own choosing. The slaves pursued ends largely defined by someone else. And they did not have the option of changing that. In that difference lies the distinction between liberty and tyranny.

The American founders believed that all government posed a profound risk of tyranny. If a person or faction wants to control and organize the lives of others for some personal end, government is the perfect tool. In 1975 communists under the leadership of Pol Pot came to power in Cambodia. They proceeded to use the power of the state to reorganize society according to their ideology. Private property was abolished. Educated people were persecuted or executed. And the cities were emptied in an attempt to make Cambodia into a self-sufficient agrarian society. In the end, millions of Cambodians died at the hands of their own government, yet ultimately the tyranny of this communist regime lay not in its deplorable violence but in the fact that it kept Cambodians from pursuing their own personal ends, demanding instead that they pursued ends defined by the state.

The Rule of Law: Introduction

For the American founders, preventing tyranny was one of the chief aims of government. Their solution to this problem, this danger posed by governments, was the concept of rule of law. In 1776 John Adams reaffirmed the ancient insight that "good government is an empire of laws." Over 2000 years earlier Plato had declared, "Let not Sicily nor any city anywhere be subject to human masters, such is my doctrine, but to laws." Even earlier Heraclitus taught that it was more critical for a city to defend its laws than the city walls. Under the rule of law the government cannot act on the whim

of the rulers. In short, the government cannot be arbitrary. It can only act in accordance with law.

To understand the rule of law better, we should first understand what the rule of law is not. The rule of law is not simply rule by official edicts. An empire of laws demands more than simply putting rules and regulations on the books. On September 15, 1935 the German Reichstag or parliament passed what became known as the Nuremberg laws. Although these “laws,” so called, took the form of regular statutes, they violently ruptured the underlying agreement that gives laws their authority. The agreement of any law state is that valid laws will treat all citizens equally. The Nuremberg laws laid the foundation for the mass murder of six million people in the holocaust which followed. They stripped all Jews of legal citizenship, deprived them of full legal protection by making them “subjects” of the German state, and imposed a host of professional and personal restrictions. Nazi laws excluded Jews from public office, the civil service, journalism, radio, farming, teaching, theater, and film. Marriage between Aryans and Jews became a crime. The Nazis violated all the social agreements that made rule of law possible, and established the most blatant and ominous forms of discrimination through what appeared to be formally valid laws. In so doing, the Nazi party thoroughly subverted the emerging tradition of German law.

The American founders also had first-hand experience with a government that excused itself in gross lapses of attention to the requirements of the law and the protections it provides to citizens. In the decades leading up to the Revolution, the British Parliament passed a series of acts relating to the American colonies. In form they looked like any other laws, but in substance they amounted to what Jefferson called, “a history of repeated injuries and usurpations, all having [as their] indirect object the establishment of an absolute tyranny over these states.” For example, in 1774, Parliament passed a series of laws designed to punish the people of Massachusetts for the Boston Tea Party. They closed the port of Boston, which meant financial ruin of the colony and stripped the town and provincial governments of much of their traditional powers. All of this was done nominally by legal means, but to the colonists it smacked of tyranny and arbitrariness. The Intolerable Acts, as they were called by the colonists, sparked resentment throughout the colonies and ultimately led directly to the Revolutionary War. Thus the rule of law demands more than the appearance of law. Put another way, not just any act of the government can be law in the full sense. To achieve its purpose of extensive social cooperation while protecting the people from tyranny, law must conform to certain principles that have been recognized in all regimes that have achieved liberty under law. It is these principles of the rule of law which distinguish a society in which government is limited and liberty protected.

Law of Consent. For the founders, the first principle of law was consent. Jefferson wrote about the “consent of the governed,” and for decades leading up to the Revolution, American patriots struggled under the motto of “taxation without representation is tyranny!” Both of these statements point to a central tenet of the rule of law—people can only be bound by laws made and enforced according to procedures and authorities that they accept. There are several ways in which people give their consent to the legal system itself and give consent to particular laws.

For the American Founders, all governments were based on an original contract where men in the state of nature agreed to form civil society. This basic social contract is the underlying agreement between the people to give the authority to make and administer laws to a shared government. These moments of original, voluntary agreement are unanimous and occur only rarely. Thus there are other, more periodic, ways in which people signal their consent to particular laws. When immigrants become citizens they take an oath to uphold the laws. When we travel to foreign countries we voluntarily submit ourselves to the laws, or lack thereof that obtain in those places. And when we choose to live in a country that would allow us to freely leave with all our assets, we signal to all other citizens that we accept the authority of law in that country. Periodic elections ensure that laws to which the majority of the people do not agree cannot last for long.

Right to Revolution. Finally the Founders believed in a right to revolution, which ensured that if a regime ignored the laws and lost the voluntary support of the people, it could be overturned. Thus the Declaration of Independence asserts “that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute a new government.” Although it isn’t practical to insist on unanimous agreement for every law through these various kinds of consent, the law—or at least the law making institutions—will always rest on a foundation of significant agreement. Because equal citizens should not be favored or discriminated against by the law, the rule of law requires that the law must take the form of general rules rather than specific commands, directed to particular people at particular points in time—or particular benefits or punishments aimed at specific individuals or groups. This requirement makes it difficult for public officials to persecute or discriminate against some and to favor others.

Perhaps an example can illustrate this concept. For many years the English Parliament could pass a kind of “law” called a bill of attainder. A bill of attainder is an act of the legislature which declares a specific person guilty of a crime and then assigns a punishment. One of the most famous cases of bill of attainder involved the Earl of Strafford. During the 1630s King Charles I and Parliament fought an increasingly bitter

battle for political supremacy. Eventually this conflict would end in the English Civil War and the execution of the king. In its early years, the Earl of Strafford was one of the king's closest advisors and one of Parliaments most hated enemies. After repeatedly failing to get Strafford, Parliament hit on the idea of a bill of attainder. In a 1641 statute they declared Strafford guilty of treason and had him executed. One hundred and forty years later, the American founders were still discussing this case as if it had just happened, and they provided for such potential cases by explicitly forbidding bills of attainder when they wrote the constitution.

Thus, the idea of generality means that laws should be written so that they are directed at certain kinds of acts, rather than specific individuals. The provisions in many state constitutions forbidding "special, local, or private laws," embody this principle. Because all citizens are equal before the law, none is above it. Law is supreme, even over the rulers themselves. Much of the world takes this much less seriously than do Americans, and they shook their collective heads in disbelief when Richard M. Nixon, the president of the strongest nation in the world, was forced to resign because he had sponsored an illegal break-in to spy on his political opponents. Consider two other examples, one ancient and one modern.

After the fall of Rome in 455, the eastern half of the Roman Empire, called Byzantium, continued for another thousand years. A Byzantine Emperor named Justinian authored a legal code which became one of the standard legal models of the next thousand years. Under Justinian's Code the sovereign or emperor occupies a special place. Unlike regular citizens, the emperor is completely above and outside of the laws. They simply don't apply to him. In modern times, under the laws of the Soviet Union, the Communist Party occupied a similar position. All other organizations in the USSR were strictly controlled by the laws of that union. However, none of these laws applied to the Communist Party. Like the emperor in Justinian's Code, the Party occupied a special place outside the law.

If the rule of law meant anything to the American founders, it meant that special exceptions in the law were unacceptable. When John Adams spoke of the "empire of laws," he had in mind a society in which everyone, even the king and his officers, were subjected to the same rules. In order for citizens to obey the law, they must first know what the law is. For this reason, vague and unknowable laws are incompatible with the rule of law. For example, during the last half of the fifteenth century, England was engulfed in the War of the Roses between competing claimants to the throne. Eventually, the Tudors won and Henry the Seventh crowned himself king of England in 1485. Yet Henry and his Tudor descendants were never easy on the throne and they frequently used the charge of treason to eliminate potential rivals. They could do this

because what actually constituted treason was conveniently vague. Despite a long line of statutes stretching back to 1352 “defining” treason, friendly judges could always find new meanings for the law, allowing the crown to “legally” eliminate its enemies. In a twist of irony, the same vagueness about what was meant by the word treason also allowed Parliament to execute King Charles I on the same charge a century later.

Ex Post Facto Law. Given this history it is hardly surprising that the Founders carefully defined treason in the Constitution. Vagueness is not the only way the law can be made unknowable, opening the door to tyrannical actions. The Constitution includes a provision forbidding congress from making an “*ex post facto* law.” *Ex post facto* is a Latin phrase meaning “after the fact.” The founders wanted to ensure that all law would be prospective or forward looking. Government should not be able to make an action, which was legal at the time it was carried out, suddenly illegal. Citizens shouldn’t be punished tomorrow for actions committed yesterday when they were only today made illegal. For example, in the wake of the Russian Revolution a civil war broke out among the various factions which had overthrown the czar. By the 1920s the communists had won and taken control of the entire country. Lenin decided to stage a show trial to punish the Socialist Revolutionaries, one of the parties which had opposed the communists. Despite the fact that there had been no law against the Socialist Revolutionaries’ activities when they were carried out, as well as the fact that the communist themselves granted a general amnesty in 1919, the Soviets passed Articles of Law criminalizing the Socialist Revolutionaries’ past activities. In 1922 a trial was held in which the leaders of the party were found guilty of breaking a law several years before it was passed.

Laws Made Public. Finally the law must be made public. People have to have some set of rules to which they can refer. For example after World War II the Soviet Army occupied much of Eastern Europe. Local communists immediately began cooperating with the Red Army to suppress political opponents and take control of the state. By 1949 Hungary was a single-party country. The new regime turned its attention immediately to the courts. New judges loyal to the communists began referring to the “revolutionary legal awareness of the working people” as the authority for their actions. Thus the necessity of deriving legal decisions from any body of formal written law was abolished. As a result, over the next four years the Hungarian government issued some 280,000 judgments on the basis of “political considerations.” There was no way people could know enough to avoid violating these laws. The government was free to prosecute and punish anyone it wanted to intimidate or eliminate.

Ability to Obey Laws. The final principle of the rule of law seems a bit strange. It is the simple idea that citizens should be capable of obeying the laws their government

makes. In the summer of 1965 as a BYU student I had the opportunity to work as an intern in the United States Department of State, and through a bizarre series of events there found myself almost immediately assigned to the position of acting desk officer for the Ecuadorian desk. As I studied the files on current issues in Ecuador, I learned that the United States had recently advised the military junta in the solution of its tax problems. Because it was so difficult to collect taxes, the Ecuadorian government had simply multiplied taxes to the point that about 125% of everyone's income was owed in taxes! But collections only reached five percent! Obviously no one was able to obey the laws, and everyone was vulnerable to being punished if the government wanted to get them for whatever reason. The solution that was recommended was to dramatically reduce the number of tax laws, the number of separate taxes, and to try to increase collections. This made compliance possible and tax collections in fact did rise dramatically. If governments make laws which citizens cannot obey, then there is no way in which the people can avoid committing "crimes." When everyone is "guilty," it is possible for government to act arbitrarily in punishing those they wish while maintaining the appearance of legality.

Due Process of Law. The principles of rule of law I have discussed to this point are all characteristics that we expect in good laws. But rule of law also requires that the processes of the legal system be insulated from potential manipulation by the powerful or by public officials. The American legal system is the beneficiary of a long history of inventions in English law designed to accomplish this. We have come to refer to these procedural standards as the "due process of law." Due process requires an independent judiciary or judges whose own positions are protected from reprisals should they rule against the government or powerful citizens. The right of habeas corpus prevents the government from keeping people in jail without making specific charges of illegal action against them and making those charges before a judge, which precipitates the process leading to a trial and resolution of the case. The right to a public and speedy trial protects citizens from languishing in jail or from being tried before secret tribunals outside the critical gaze of the public. Further the authority to determine the facts of the case is reserved to a jury of peers and not to public officials or even judges.

Right to Legal Counsel. Finally, any accused citizen has a right to legal counsel to help him defend himself in the strongest way possible, including the right to confront witnesses and to compel friendly witnesses who may know something that would save him to come forth. The case of the Boston Massacre illustrates the importance of many of these procedural protections. In this case, four British soldiers were charged with shooting into a crowd and killing a man. This so-called massacre occurred when the four soldiers showed up to relieve the guard at the state house. As they marched down the street, a prepared mob began to threaten them and pelt them with refuse and other

objects. Running to the shelter of their guardhouse the soldiers turned to defend themselves. I imagine these young men, probably in their late teens, were frightened to death, and one did fire into the crowd. and someone was killed. Whether they thought of it themselves or whether it was suggested to them by someone older and wiser, the four young soldiers sent a messenger to John Adams, lawyer and famous patriot, asking that he and his partner James Otis take their case. They could very well have asked for the free services of the very capable Crown lawyer, but they chose Adams. Adams knew the newspapers were inflaming the public over the incident and that a proper defense would be extraordinarily difficult. But after only fifteen minutes of deliberation he accepted the case and went to work. There was no doubt that the soldiers had fired their muskets and killed one of the Boston Rowdies. The question was whether or not they could be executed for their action. Ultimately, their defense turned on distinctions in the law between manslaughter, homicide justifiable, homicide excusable, and homicide felonious. These distinctions in turn rested on a maze of ancient statutes and legal precedents. Without a lawyer they couldn't have understood the law, let alone invoked it for their protection.

During the trial, John Adams—by all accounts the most skilled and learned lawyer in Massachusetts—carefully explained and relentlessly hammered home the legal distinctions to a Boston jury. As a result. the soldiers enjoyed the full protection of the law. It was to ensure that citizens could thus invoke the law to protect themselves that the founders included the right to legal counsel in the Bill of Rights. Well, in this case, ninety-six Bostonians had sworn statements to the effect that the accused redcoats had fired on the Boston crowd without the least provocation. Against such a mass of evidence and enraged public opinion, the case of the soldiers appeared hopeless. Ninety-six Bostonians may have signed affidavits but for their evidence to mean anything it had to be presented in open court where, according to due process, the soldiers could confront it through their counsel—and their counsel knew his business.

Under the relentless cross-examination of Otis and Adams, the inconsistencies, exaggerations, and falsehoods of the ninety-six statements emerged. The evidence against the soldiers crumbled. Many other people had seen what really happened on March 3, 1770. However much they may have feared the Boston mob or hated the British soldiers. they had no choice but to appear and testify on behalf of the accused. Failure to do so would have resulted in prison terms for them; thus, because of due process of law, the soldiers, were able to mount a defense in court, regardless of outside circumstances. Their lives were spared and they were released after a punishment for much lesser offenses.

For much of the world, the legal process is routinely undermined by threats of violence, of torture, and practices that require people to incriminate themselves. When Henry VIII wanted to get rid of his second wife, Anne Boleyn, he had her accused of infidelity which, in the case of the queen, amounted to treason. There was one problem: Henry had no evidence that his wife had actually been unfaithful. Henry's prosecutors got around this inconvenience by torturing several likely suspects until they implicated the queen, repeating what the prosecutors told them to say. Then, both they and the queen were executed. This is not the kind of trial the Founders liked. Concentration camps and gulags have become our symbols of tyranny in the twentieth century. For the Founders, this kind of royal manipulation of trials and the law was synonymous with tyranny. For them, due process of law meant that evidence could not be manufactured, especially with torture. Nor would they allow the government to put one of its citizens on the stand and make him or her testify against himself or herself. If the government was to prove its case, it had to do it without the forced cooperation of its intended victim.

The rule of law is much more than a system of principles or a list of procedural protections. It is certainly more than an abstract philosophy of government. During the French Revolution, politicians, drawing on the ideas of pre-revolutionary intellectuals known as the *philosophes*, sought to completely break their ties with the past and rebuild French society from the ground up. Ultimately their attempt ended in what English critic and observer Edmund Burke called, "a cartload of headless corpses and a tyrant."

In contrast, the rule of law is a way of thinking and a set of attitudes which were deeply embedded in the traditions of the Founders. Far from being an abstract philosophy culled from the works of theorists, the principles of rule of law rest on a long history of legal experiment, development, and tradition. Its success in America—in contrast to its failure in other parts of the world—can be traced at least in part to the presence or absence of such tradition. Wherever human societies have developed traditions of individual liberty, we find versions of the rule of law. Ancient societies developed some of the basic elements of rule of law in Mesopotamia, Greece, Rome, and in Ancient Israel, where the Law of Moses was central to their culture and society. "Whoso keepeth the law is a wise son," declares the author of Proverbs. King Mosiah concluded his instructions on the new system of judges for the Nephites, reflecting on the evil effects of unrighteous kings, and his hopes that under the new system "this might be a land of liberty and every man may enjoy his rights and privileges alike." The rich history of the idea and institutions of law from ancient times to the present, with all its ups and downs is too long and complex for us to review here. Suffice it to say, the American colonies were blessed to inherit from England the strongest and clearest rule

of law tradition known to men at that time. The American Founders—possibly because of their struggles to win the full protection of those very laws—learned to articulate the ideals of rule of law more effectively than any previous generation. Perhaps most importantly, they grasped clearly the necessity of building legal and governmental institutions and designing constitutions that would provide government officials with more incentive to protect the law than to corrupt it.

Their grand experiment still stands today as clearly the most successful rule of law experiment in the history of the world. The success of American freedom and its Revolution captured the imagination of Latin America and Europe in the next few decades as a score or more of democratic revolutions followed quickly after, but with much less success. The English tradition of law, the American genius for constitutional design, and the enlightened commitment of the American people themselves to the concept of liberty under law proved a difficult combination to duplicate. With the rise of the socialist idea in the nineteenth century, the American Revolution lost some of its luster for newly emerging states and the Marxist model took center stage by the early twentieth century. The amazing collapse of European communism and socialism in the closing decades of the twentieth century and the clear emergence of America as the premier success story for liberty have thrust the American Constitution back into the limelight. Hundreds of seminars have been conducted in Eastern Europe and other parts of the world on American Constitutionalism. The phrase “rule of law” which was long derided by Marxist theorists, is eagerly studied and defended by peoples eager in these nations to live the kinds of lives that are enjoyed by Americans.

The rule of law has another history that is not so well known and may not be of as much interest to so many people. For more than three decades I have been engaged professionally with legal philosophers and theorists around the world, who have been trying to develop a successful theory of law. In those early years I marveled at how unimportant the concept of rule of law seemed to most of my fellow academics in this exercise. What has been exciting for me to see is the same revolution in their thinking that has taken place in the world at large in recent years. The major academic press for philosophical and legal literature, the Oxford University Press, has published one or more books on the rule of law for each of the last five years. And even more recently I received an invitation from the American Philosophical Association to contribute an essay to a special publication that will come out this spring dedicated to the philosophical analysis of the idea of rule or law. This would have been unthinkable just a few years ago

Review. First, to review, the rule of law removes the fear of arbitrary government action. Under the rule of law, the government can only move against a citizen when he

or she breaks the law. Furthermore, the law must be prospective, known, and possible of being obeyed. All of this means that citizens can avoid government coercion. This being the case, they can pursue their goals without fear of government interference, provided they obey the law. It also means that government cannot force citizens to pursue some end defined by the state.

Second, rule of law provides the context for what the founders called “the enjoyment of property.” This means more than simply the protection of property rights. It refers to the arrangements which allow markets to occur. Rule of law stabilizes expectations about the behavior of others. Without law, people wishing to come to an agreement and sign a contract must constantly renegotiate the form of a valid agreement. Furthermore once the bargain is struck they have no way of knowing whether or not the other party will honor the contract. In such a situation the uncertainty of everything greatly slows the flow of commerce. Law however largely removes these problems. If the forms of agreement are governed by a stable set of rules, parties need not negotiate the form of each new contract. Furthermore, by guaranteeing that contracts will be enforced, the rule of law creates a certainty which allows people to proceed with their business. And I think we can see from these examples the extent to which the law exists principally to facilitate the interaction between the citizens.

A Reassessment for the Twenty-First Century: Conclusion

The rule of law also diminishes uncertainty about the future. It diminishes the chance that people will fall victim to the tyranny of either the government or their neighbors. As a result they will save and invest because they believe they will be able to enjoy the fruits of such efforts in the future. Rule of law creates the framework which allows markets to generate wealth and prosperity, but it does more than simply allow for the accumulation of money. By removing the fear of arbitrary government action and providing a basis for material prosperity, the rule of law allows for what Jefferson called the “pursuit of happiness.” What is meant by the pursuit of happiness? The answer to that would seem to be liberty. The rule of law won’t make people happy, but it will provide a context in which they can pursue happiness for themselves. It frees them from the fear of becoming means to someone else’s ends. They can have a faith in the future, which allows them to improve themselves. Education and self-improvement make much more sense in the context of a stable future. Rule of law provides such a future. Under it, people can determine for themselves what will bring them happiness. Then they are ensured the freedom to pursue it.

The rule of law creates a kind of society in which everyone, government and governed, agrees to abide by the same set of rules in pursuit of their individual ends.

The founders were acutely aware that such a society will not spring into being from nothing. It requires a commitment to law, born of history, practice, and civic virtue. They also realized that it wouldn't maintain itself without careful precautions. Government had to be carefully structured and limited to ensure that it followed the rule of law. For the founders, this would be accomplished by creating a constitution, a document that established frequent elections, a government institution with separation of powers, a bicameral legislature, a complex system of checks and balances, and basic legal procedures. These constitutional devices are procedures and distributions of authority that make it difficult for the government to ignore principles of rule of law. They make it unlikely that all the powers of government can be controlled by one group of people. This strategy of dividing and limiting authority is called constitutionalism. The American founders were the great geniuses of constitutionalism and understood better than any preceding generation that it was an imaginative and creative activity—one that needed to result in a balanced government in protection of the rule of law. The delegates who converged on Philadelphia in the muggy summer of 1787 had a free society, a society under the rule of law, as their goal. The document they produced, despite crisis, change, and different challenges that it has faced over the succeeding centuries, has emerged as one of the most successful political experiments in the history of the world.