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## THE SHORT HISTORY OF THE RULE OF LAW IN THE UNITED STATES (1954-2016)

### 1. INTRODUCTION

Many Americans and outside observers assume that the United States of America was founded upon a cluster of principles known as the “Rule of Law”. Indeed, Articles I, II, and III of the United States Constitution of 1789, purportedly established the rights and authorities of three co-equal branches of government: the legislative, executive, and judicial branches.

Adherence to the Rule of Law in the United States, however, has a much shorter history. The ability of the judicial branch of the United States to interpret and declare “what the law is,” and then to have its decisions respected and enforced by the leader of the executive branch has only recently gained broad general acceptance<sup>1</sup>. For the majority of its 242-year history, the United States has been creeping towards the Rule of Law.

### 2. LEGAL INHERITANCE OF THE UNITED STATES OF AMERICA

The Rule of Law has many definitions and explanations. One of the oldest of these in the Anglo-American legal tradition is that law (*lex*) is supposed to bridle or mollify an overmighty ruler – the king – who simultaneously wielded executive and sacral authority. Since the 10<sup>th</sup> century, Anglo-Saxon kings had sworn a threefold oath to “preserve peace and protect the church, to maintain good laws

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<sup>1</sup> Chief Justice John Marshall in his landmark decision of *Marbury v. Madison* 5 U.S. 137 (1803) stated “It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each”. This case is often cited as the establishment of what has come to be known as the principle of Judicial Review.

and abolish bad, [and] to dispense justice to all”<sup>2</sup>. This practice was later followed by many Norman kings, with the coronation oath of King Henry I of England (1100-1135) also including a list of “bad customs” practiced by previous monarchs that Henry agreed to eradicate<sup>3</sup>. Nearly a century later, a peace treaty originally called the Charter of Runnymede (1215) – known today as *Magna Carta* – reiterated that King John (1199-1216) was subject to the law<sup>4</sup>. Many of *Magna Carta*’s Rule of Law principles became firmly embedded in the medieval English consciousness, in large part because it was reissued three more times in rapid succession (1217, 1225, and 1297) by subsequent monarchs<sup>5</sup>.

Medieval legal treatises also trumpeted the principle that a king must act within the limitations of the law. The great legal treatise of the medieval period was *Bracton: De Legibus et Consuetudinibus Angliae* [Bracton: On the Laws and Customs of England], authored by a series of royal judges in the middle of the 13<sup>th</sup> century<sup>6</sup>. Commenting on the relationship between the king and the law, *Bracton* states “the king has a superior, namely, God. Also the law by which he was made king. Also his curia, namely the earls and barons, because if he is without a bridle, that is without law, they ought to put the bridle on him”<sup>7</sup>. In this medieval analogy, then, we are to imagine the king as a horse – the great horse of state. And the king is running wild because he is without a bridle. What bridles, or restrains, the king? The law. Without law the king is a wild, untamed horse and therefore dangerous. *Bracton* also noted that: “The king must not be under man but under God and under the law, because the law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power. For there is no *rex* where will rules rather than *lex*”<sup>8</sup>. Essentially, *Bracton* contends that the will of the king must be bridled by the law or else that person cannot properly rule – that is, without law a king is not a king.

Law’s necessary preeminence over the unrestrained will of the king also finds a clarion voice in influential early modern English legal treatises. Sir John Fortescue’s grand 15<sup>th</sup> century treatise, *De Laudibus Legum Angliae* [Commendation

<sup>2</sup> H.G. Richardson, *The English Coronation Oath*, ”Transactions of the Royal Historical Society” 1941, Vol. 23, p. 129.

<sup>3</sup> See *Henry I’s Coronation Charter, Early English Laws*, <http://www.earlyenglishlaws.ac.uk/laws/texts/hn-cor/view/#edition/translation> (visited February 25, 2019).

<sup>4</sup> Historical background to the Magna Carta as well as the text of the document itself can be found at: <https://www.bl.uk/magna-carta> (visited February 25, 2019).

<sup>5</sup> For some background into the reissuance of Magna Carta and why it is called Magna Carta, see R. Rowberry, *Forest Eyre Justices in the Reign of Henry III (1216-1272)*, “William & Mary Bill of Rights Journal” 2016 Vol. 25, p. 513.

<sup>6</sup> An online version of *Bracton* is available at: <http://amesfoundation.law.harvard.edu/Bracton/> (visited February 25, 2019).

<sup>7</sup> S. E. Thorne, G.E. Woodbine (eds.), *Bracton: On the Laws and Customs of England*, Vol. II, 1968, p. 110; For some possible historical context to this section of *Bracton* se: D.A. Carpenter, *The Reign of Henry III*, 1996, p. 41.

<sup>8</sup> *Bracton*, Vol. II, p. 33.

of the Laws of England] (1468-1471)<sup>9</sup>, Chief Justice Coke's *Institutes of the Laws of England* (1628-1644)<sup>10</sup>, John Locke's *Second Treatise of Government* (1690)<sup>11</sup>, and William Blackstone's four-volume *Commentaries on the Laws of England* (1765-1769)<sup>12</sup> all speak of the monarch's necessary self-subjugation to the law. And many of the lawyers involved in the founding of the United States of America, such as Thomas Jefferson and John Adams, were steeped in *Bracton*, Coke, and Blackstone – all of which championed the Rule of Law<sup>13</sup>.

### 3. LACK OF RESPECT FOR RULE OF LAW IN THE EARLY UNITED STATES (1776-1953)

This is not to say, however, that law's betimes prickly bridle has always been worn willingly or well by monarchs of England or Presidents of the United States. In fact, executive respect for the Rule of Law has only a short history in the United States. Prior to the middle of the 20<sup>th</sup> century, it is difficult to assert that the judicial branch operated as a co-equal branch of the United States government. Rather, for the first approximately 175 years of the United States, the Rule of Law and the judiciary tasked with sustaining it was often subject to the whims

<sup>9</sup> Fortescue's *De Laudibus Legum Anglia* was published posthumously in 1616.

<sup>10</sup> Sir Edward Coke's *Institutes of the Laws of England* were published in four parts between 1628-1644.

<sup>11</sup> One of Locke's most famous statements about the Rule of Law is: "The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it. Freedom then is not what Sir Robert Filmer tells us, *Observations*, A. 55, a liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws: but freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is, to be under no other restraint but the law of nature". John Locke, *Second Treatise on Government*, 1690, Ch. IV, sec. 22.

<sup>12</sup> W. Blackstone, *Commentaries on the Laws of England*, 1765-1769.

<sup>13</sup> See generally: Howard L. Hubert, *Sovereignty and Liberty in William Blackstone's Commentaries on the Laws of England*, "The Review of Politics" 2010, Vol. 72. For Jefferson's knowledge of these and other English legal treatises, see *The Writings of Thomas Jefferson*, H. A. Washington (ed.), 1861, vol. VI, pp. 225-230. For Adams' knowledge of these and other English legal treatises, see John Adams, *The Works of John Adams, Second President of the United States: with a Life of the Author, Notes and Illustrations, by His Grandson Charles Francis Adams*, 1856, Vol. IX, *Letter to Jonathan Mason*, 21 August 1776. The papers of John Adams may be searched online at: <https://oll.libertyfund.org/titles/adams-the-works-of-john-adams-vol-9-letters-and-state-papers-1799-1811> (visited February 25, 2019).

of the executive branch, or simply ignored. Such lack of respect for the Rule of Law in the early United States is evident from the lack of monumental architecture for the judicial branch; from contemporary perceptions on the strength of the judicial branch relative to the executive branch; and from analyzing several instances in which various Presidents of the United States exhibited contempt for enforcing laws that conflicted with their aims.

#### 4. MISSING MONUMENTAL ARCHITECTURE FOR THE NASCENT JUDICIAL BRANCH

Monumental architecture is designed to make a statement of importance. Cultures, kingdoms, and nations typically house their most venerable governmental institutions in monumental buildings that are calculated to impress visitors and confer dignity upon the institution itself. Monumental buildings attached to different branches of government also signal that institution's relative importance and standing within the nation. The United States is no exception. A visitor to Washington, D.C. in 1920, for instance, would have noticed dramatic differences in the monumental architecture associated with each of the three branches of government in the United States.

The bicameral legislative branch of the United States (House of Representatives and Senate) resides in the beautiful United States Capitol, which, in its present form, dates from about 1850.

The leader of the executive branch, the President of the United States, is located in a beautiful neoclassical building known as the White House, which largely dates to 1829.

The Justices of the U.S. Supreme Court, on the other hand, did not have their own building until nearly one hundred years later – 1935<sup>14</sup>. From about 1800, when the national capital moved to Washington D.C., the U.S. Supreme Court occupied one of the empty rooms in the U.S. Capitol. And from roughly 1860-1935, the United States Supreme Court met in the basement of the U.S. Capitol building.

Thus, while the U.S. Constitution envisioned three co-equal branches of government, the architecture, and therefore status and dignity, associated with each of these branches was decidedly unequal. For over 100 years, the judiciary was

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<sup>14</sup> For a picture of the current United States Supreme Court building, which is built upon grounds formerly occupied by the original national zoo, see [https://www.google.com/search?q=U.S.+Supreme+Court&rlz=1C1CHBF\\_enUS794US794&source=lnms&tbm=isch&sa=X&ved=0ahUKEwi29PXh75XfAhVTLX0KHVQeA18Q\\_AUIDygC&biw=1280&bih=689#imgrc=mZVD6lffD4uDMM](https://www.google.com/search?q=U.S.+Supreme+Court&rlz=1C1CHBF_enUS794US794&source=lnms&tbm=isch&sa=X&ved=0ahUKEwi29PXh75XfAhVTLX0KHVQeA18Q_AUIDygC&biw=1280&bih=689#imgrc=mZVD6lffD4uDMM): (visited February 25, 2019).

shunted into spare rooms and eventually the basement of the legislature's building – a fitting home for the least valued branch of government in the early United States.

## 5. CONTEMPORARY PERCEPTIONS OF THE EARLY JUDICIAL BRANCH

Justices of the early U.S. Supreme Court also realized that the judiciary was the weakest of the three branches of government. John Jay became the first Chief Justice of the United States Supreme Court when he was appointed by the nation's first President, George Washington, in 1789. Jay served in this capacity until 1795<sup>15</sup>. Unlike George Washington, however, who is honored with the appellation "Father of the Nation," John Jay is not revered as the "Father" of the judicial branch. That honor is reserved for John Marshall, the fourth Chief Justice of the U.S. Supreme Court<sup>16</sup>. Why does the United States revere its fourth Chief Justice over its first? The answer is that after John Jay became Chief Justice, he realized that the U.S. Supreme Court did not have any real power to administer government in the United States. Unlike the executive branch that controlled the military, or the legislative branch that held the power of taxation and lawmaking, the judiciary did not have any means whereby to enforce its decisions. So, in 1795 John Jay resigned his post as Chief Justice of the U. S. Supreme Court in order to become the Governor of the state of New York, an executive branch office. In 1801, when President John Adams wanted to re-nominate Jay to serve on the U.S. Supreme Court following his term as Governor of New York, Jay declined, stating that the U.S. Supreme Court lacked "the energy, weight and dignity which are essential to its affording due support to the national government"<sup>17</sup>. It is sobering and illuminating to realize that the Rule of Law was so feeble in the early United States that the U.S. Supreme Court's first Chief Justice felt that his post was insignificant.

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<sup>15</sup> The Judiciary Act of 1789 (Ch. 20, 1 Stat. 73) created the position of Chief Justice of the United States Supreme Court.

<sup>16</sup> John Marshall, who served as Chief Justice of the U.S. Supreme Court between 1801-1835, is often called "The Great Chief Justice" and is widely acknowledged as the Father of the Judicial Branch.

<sup>17</sup> D. L. Faigman, *Laboratory of Justice: The Supreme Court's 200-Year Struggle to Integrate Science and the Law*, 2004, p. 34.

## 6. PRESIDENTIAL DISREGARD FOR THE RULE OF LAW

The lack of respect for the Rule of Law in the early United States is also evident in numerous instances in which Presidents of the United States chose not to enforce or acquiesce to the law when it contradicted their ambitions. The U.S. Supreme Court case of *Worcester v. Georgia* (1832) is an excellent example<sup>18</sup>. Here, a missionary named Samuel Worcester wanted to preach to the Native Americans in the northern part of the state of Georgia, but Georgia law prohibited all white men from living on Native American land without a state license<sup>19</sup>. The matter was appealed to the U.S. Supreme Court which annulled the state law, claiming that any power to grant licenses related to Native Americans was a federal power, not a state power<sup>20</sup>. In essence, the Supreme Court was trying to protect the property of Native Americans from illegal state intrusion. However, the President of the United States, Andrew Jackson, a strong proponent of Indian removal from United States' lands, refused to enforce this decision of the Supreme Court citing legal technicalities. Speaking of the inability of the U.S. Supreme Court to enforce its own decisions, Jackson stated, "the decision of the supreme court has fell still born, and they find they cannot coerce Georgia to yield to its mandate"<sup>21</sup>. Moreover, in contravention to *Worcester v. Georgia*, President Jackson encouraged Georgians to forcefully relocate Native Americans in Georgia to lands west of the Mississippi River, leading to the racially motivated mass forced migration known as the "Trail of Tears"<sup>22</sup>.

Another example of the President of the United States flouting the Rule of Law occurred just a few years after *Worcester v. Georgia*. In 1838, members of The Church of Jesus Christ of Latter-day Saints (commonly called Mormons) established several settlements in the state of Missouri. Concerned about the Mormons' growing economic, political, and military influence (as well as their unconventional views on Christianity) the Governor of Missouri, Lilburn Boggs, signed Executive Order Number 44, making it legal to kill Mormons within state boundaries<sup>23</sup>. In response, state militias forced the Mormons from their homes and destroyed their property, killing many.

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<sup>18</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>19</sup> See R. A. Berrutti, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, "American Indian Law Review" 1992, issue 17 (1), pp. 291-308.

<sup>20</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>21</sup> See R. N. Satz, *American Indian Policy in the Jacksonian Era*, Lincoln 2002, p. 49.

<sup>22</sup> Today the Trail of Tears has been commemorated as a National Historic Trail of the United States, see <https://www.nps.gov/trte/index.htm> (visited February 25, 2019).

<sup>23</sup> Missouri Executive Order Number 44, 27 October 1838. A digital copy of this Executive Order can be found here: <https://www.sos.mo.gov/archives/resources/findingaids/miscMormonRecords/eo> (visited February 25, 2019).

Many Mormons eventually relocated about forty miles northeast in the neighboring state of Illinois in 1839. Once the Mormons were firmly settled in Illinois, Joseph Smith, the leader of the Mormons, petitioned President Martin Van Buren in 1839 and 1840 for redress for their property losses and for religious protection under the U.S. Constitution<sup>24</sup>. As reported in a contemporary Illinois newspaper, President Van Buren cut short his interview with Joseph Smith and his companions, stating: “I can do nothing for you, gentleman. If I were [with] you, I should go against the whole state of Missouri, and that state would go against me in the next election”<sup>25</sup>. Smith and his companions left Washington, D.C. frustrated. Within a few years, the Mormons decided to leave the United States because the executive branch refused to protect their religious rights under the U.S. Constitution from persecutions by illegal mobs. These Mormon pioneers, under the leadership of Brigham Young, blazed a trail westward into the mountain valleys of what was at that time Mexican Territory<sup>26</sup>.

Another poignant example of executive disregard for the Rule of Law occurs after the Stock Market crash of 1929 ushered in the Great Depression. During the 1930s, President Franklin D. Roosevelt sponsored a raft of radical economic legislation designed, in his mind, to spur the stagnated United States’ economy from its deep malaise. Collectively, historians refer to this package of economic legislation as the “New Deal”. Contrary to President Roosevelt’s wishes, however, the U.S. Supreme Court invalidated many key provisions of his New Deal legislation, leaving him frustrated. To overcome what he thought was an outmoded and recalcitrant U.S. Supreme Court, President Roosevelt sponsored the Judicial Procedures Reform Bill of 1937, which was designed to allow the President to add more Justices to the nine-member U.S. Supreme Court<sup>27</sup>. The Bill’s central provision was that when a sitting Justice of the Supreme Court reached 70 years of age and did not retire, then the President could appoint an additional Justice to the Supreme Court, up to a maximum of six additional Justices<sup>28</sup>. In essence, over time President Roosevelt wanted to “pack” the U.S. Supreme Court with Justices that he felt would be favorably disposed to his New Deal legislation.

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<sup>24</sup> See R. O. Barney, *Joseph Smith Goes to Washington*, (in:) R. N. Holzapfel, K. P. Jackson (eds.), *Joseph Smith, the Prophet and Seer*, 2010, pp. 391-420; The First Amendment of the U.S. Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”.

<sup>25</sup> *The Mormons for Harrison*, “Peoria Register and North-Western Gazetteer” 17 April 1840.

<sup>26</sup> In 1894 the Mormon settlements on the western side of the Rocky Mountains became the state of Utah.

<sup>27</sup> For an excellent background into the broader economic and cultural context for the clashes between President Roosevelt and the U.S. Supreme Court, see M. E. Parrish, *The Hughes Court: Justices, Rulings, and Legacy*, Santa Barbara, CA, 2002.

<sup>28</sup> See, e.g., B. Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*, New York 1998.

Fortunately, both political parties as well as the Vice-President of the United States were vehemently opposed to the Bill, and after a bitter political struggle Roosevelt's Bill failed to pass Congress<sup>29</sup>. One commentator wryly noted, when "the dust settled, Franklin D. Roosevelt had suffered a humiliating political defeat at the hands of Chief Justice Hughes and the administration's Congressional opponents"<sup>30</sup>. Instead of being bridled and guided by the decisions of the U.S. Supreme Court and sponsoring legislation that met constitutional standards, President Roosevelt's disastrous court-packing plan in 1937 is but one more instance of the executive branch seeking to impose its will on the judiciary.

## 7. BROAD PRESIDENTIAL RESPECT FOR THE RULE OF LAW (1954-2016)

Pinpointing the exact moment of transition when the executive branch in the United States developed a broad, general respect for the Rule of Law is a fruitless endeavor. Most likely, general presidential respect for the Rule of Law solidified from some admixture of time, integrity, happenstance, political advantage, and deep-seated social and cultural changes as a result of the ravages of World War II<sup>31</sup>. Thus starting in the 1950s, Presidents of the United States submitted to the bridle of the Rule of Law.

One of the watershed moments with respect to the Rule of Law in the United States was the U.S. Supreme Court decision in *Brown v. Board of Education* (1954). In *Brown*, the Supreme Court declared that state laws establishing separate public schools for black and white students were unconstitutional<sup>32</sup>. In other words, *Brown* abolished racial segregation in public schools throughout the country. Nevertheless, many states, particularly in the southern United States where public school segregation was the norm, defied this ruling. In 1957, nine black students attempted to attend all-white Little Rock Central High School in Lit-

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<sup>29</sup> See, e.g., W. E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*, New York, Oxford 1995.

<sup>30</sup> M. E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, "Washington Law Review" 1984, Vol. 59, p. 737.

<sup>31</sup> War is incredibly destructive, but it is also a powerful social change agent. Following World War I, which devastated the lower social classes in the United Kingdom, compulsory education for all in the United Kingdom developed. Following World War II we find the rise of the United Nations, the beginnings of what is currently called 'Human Rights Law,' and increased pressure on egalitarianism between races and cultures.

<sup>32</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).



tle Rock, Arkansas, the capital of the state<sup>33</sup>. Declaring a state of emergency, Orval Faubus, the Governor of Arkansas, called on the Arkansas National Guard to block these nine black students from entering the high school<sup>34</sup>.

In response to the Faubus' actions, President Dwight D. Eisenhower issued Proclamation 3204, commanding anyone involved in obstructing justice to disperse<sup>35</sup>. When this did not immediately occur, President Eisenhower, using his role as Commander-in-Chief of the military, federalized the Arkansas National Guard and directed these soldiers along with soldiers from the 101<sup>st</sup> Airborne Division to support the integration of the school rather than block it<sup>36</sup>. The newly federalized Arkansas National Guard soldiers and the 101<sup>st</sup> Airborne Division were instructed to "enforce the orders of the federal courts with respect to the attendance at public schools of Little Rock of all those who are properly enrolled, and to maintain law and order while doing so. (...) Our individual feelings towards those court orders should have no influence on our execution of the mission"<sup>37</sup>. To the credit of these soldiers, they put aside their biases and prejudices and followed orders. Little Rock Central High was desegregated, and President Eisenhower enforced *Brown* under very difficult circumstances.

Move forward about one decade, and we find another instance of the President of the United States complying with the Rule of Law. On 6 February 1974, the United States House of Representatives started the constitutional impeachment process against President Richard Nixon, a Republican, for ordering a break-in at the Democratic National Committee headquarters in the Watergate Hotel in 1972<sup>38</sup>. Nixon partially complied with Senate investigators' wishes to turn over

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<sup>33</sup> The names of these nine brave students are: Melba Beals, Minnijean Brown, Elizabeth Eckford, Ernest Green, Gloria Karlmark, Carlotta LaNier, Thelma Mothershed, Terrence Roberts, and Jefferson Thomas.

<sup>34</sup> Gubernatorial Proclamation, Declaring a State of Emergency in Little Rock and Mobilizing the Arkansas National Guard, 2 September 1957.

<sup>35</sup> Presidential Proclamation 3204, Obstruction of Justice in the State of Arkansas, 23 September 1957.

<sup>36</sup> Executive Order 10730, Providing Assistance for the Removal of an Obstruction of Justice within the State of Arkansas, 24 September 1957; A wonderful picture from Time Magazine in 1957 shows members of the 101<sup>st</sup> Airborne Division standing outside Little Rock Central High School where they would escort black children to and from the school. See [https://www.google.com/search?q=101st+airborne+division+little+rock+high+time+magazine&rlz=1C1CHBF\\_enUS794US794&source=lnms&tbnm=isch&sa=X&ved=0ahUKEwjkcXnmJjfAhUUHDQIH-Y-UwCI4Q\\_AUIDygC&biw=1280&bih=689#imgsrc=E\\_COA8En8WmsvM](https://www.google.com/search?q=101st+airborne+division+little+rock+high+time+magazine&rlz=1C1CHBF_enUS794US794&source=lnms&tbnm=isch&sa=X&ved=0ahUKEwjkcXnmJjfAhUUHDQIH-Y-UwCI4Q_AUIDygC&biw=1280&bih=689#imgsrc=E_COA8En8WmsvM): (visited February 25, 2019).

<sup>37</sup> Annex C to Operations Order 1, Headquarters Arkansas National Guard, 28 October 1957.

<sup>38</sup> House Resolution 803, Resolution Providing Appropriate Power to the Committee on the Judiciary to Conduct and Investigation of whether Sufficient Grounds Exist to Impeach Richard M. Nixon, President of the United States, 6 February 1974; The provision in the U.S. Constitution regarding impeachment of U.S. Presidents reads, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors". U.S. Constitution, Article II, Section 4.

audio tapes related to Watergate, but the U.S. Supreme Court ordered him to fully comply<sup>39</sup>. Under political and legal pressure, Nixon released more audio tapes and documents which clearly demonstrated his culpability in ordering the break-in and trying to cover it up. He subsequently peacefully resigned from office<sup>40</sup>. In many countries when the President or leader(s) of the executive branch are being forced from power there is often riot and violence. Here, Nixon stepped away peacefully, and the country moved forward<sup>41</sup>.

The celebrated case of *Bush v. Gore* (2000) provides another powerful instance of broad executive respect for the Rule of Law. In *Bush v. Gore*, the U.S. Supreme Court settled a dispute surrounding recounted votes in the state of Florida for the 2000 presidential election<sup>42</sup>. Originally, the Florida Secretary of State certified that George W. Bush was the winner of the state of Florida, giving Bush enough votes to win the tightly contested 2000 presidential election. Voting officials in Florida soon realized, however, that there were irregularities with how the automated voting machines were counting votes, prompting a recount. The U.S. Supreme Court ultimately decided that the use of different standards of recounting votes in different counties of Florida violated the Equal Protection Clause of the U.S. Constitution, and that no alternative recounting method could be established within the time limit for this presidential election. This decision left Bush as the winner of Florida and consequently the U.S. Presidency<sup>43</sup>. Rather than foment discord at the decision of the U.S. Supreme Court which effectively cost him the Presidency, Al Gore respected the Rule of Law and honored their decision by conceding the 2000 presidential election to George W. Bush.

## 8. DEMISE OF THE RULE OF LAW IN THE UNITED STATES (2016-?)

Under President Trump, however, executive respect for the Rule of Law in the United States is rapidly waning. Responding to fears of terrorism, President Trump attempted to ban Muslims of certain nations from immigrating

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<sup>39</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>40</sup> C. Kilpatrick, *Nixon Resigns*, "The Washington Post" 9 August 1974.

<sup>41</sup> Richard Nixon is the only U.S. President to have resigned from office. President Andrew Johnson and President Bill Clinton were impeached while in office, but neither of them was convicted and removed from office.

<sup>42</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>43</sup> *Bush v. Gore*, 531 U.S. 98 (2000); The Equal Protection Clause is part of the 14 amendment of the U.S. Constitution. It reads, "(...) nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

to the United States through Executive Order 13796<sup>44</sup>. When U.S. federal courts determined that several provisions in this Executive Order were unconstitutional because they unfairly targeted only Muslims from certain countries, Acting U.S. Attorney General Sally Yates ordered the U.S. Justice Department not to enforce the ban. Yates' stated that the Executive Order's effects were contrary to "this institution's [the U.S. Department of Justice] solemn obligation to always seek justice and stand for what is right"<sup>45</sup>. Almost immediately, Trump callously relieved Yates from her post, calling her statement a "betrayal" to the U.S. Department of Justice, and appointing a new Acting Attorney General who would do his bidding<sup>46</sup>.

Trump has also argued that illegal immigrants in the United States may be denied due-process rights explicitly guaranteed under the U.S. Constitution. The Fifth Amendment to the U.S. Constitution states, "No person shall (...) be deprived of life, liberty, or property without due process of law"<sup>47</sup>. Nevertheless, in June 2018 President Trump "explicitly advocated depriving undocumented immigrants of their due-process rights, arguing that people who cross the border into the United States illegally were invaders and must immediately be deported without trial or an appearance before a judge"<sup>48</sup>. Following Trump's wishes would violate fundamental tenets of the U.S. Constitution, as due-process rights apply to everyone on U.S. soil, regardless of whether or not they are citizens<sup>49</sup>. Widespread immigration reform, while desperately needed, is a matter for the legislative branch. It cannot, and should not, be resolved through unilateral, impulsive action from the executive branch.

It may even be the case that President Trump violated the law in order to become President of the United States. Since taking office, President Trump has been dogged by allegations that he colluded with Russia to influence the 2016 presidential election in his favor. The U.S. Department of Justice appointed Robert Mueller, former Director of the Federal Bureau of Investigation (FBI), as special

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<sup>44</sup> See Executive Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 27 January 2017.

<sup>45</sup> *State of Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); Devlin Barrett, *Acting Attorney General Orders Justice Dept. Not to Defend Trump's Immigration Ban*, "The Wall Street Journal" 30 January 2017.

<sup>46</sup> J. Roy, *Why People are Calling the Acting Attorney General's Firing the 'Monday Night Massacre'*, "Los Angeles Times" 30 January 2017; *Trump's 'Monday Night Massacre': What the Legal Community is Saying*, "Fortune" 31 January 2017.

<sup>47</sup> U.S. Constitution, Amendment V (1791).

<sup>48</sup> P. Rucker, D. Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights*, "Chicago Tribune" 24 June 2018; L. Nelson, *Trump Amplifies Push to End Due Process for Illegal Immigrants*, "Politico" 25 June 2018.

<sup>49</sup> G. Frazee, *What Constitutional Rights do Undocumented Immigrants Have?*, "PBS News-hour" 25 June 2018.

counsel in May 2017 to investigate these claims<sup>50</sup>. Although Trump has repeatedly called this investigation a “witch hunt,” Mueller and his investigative team have indicted Paul Manafort (Trump’s political consultant) for illegal business dealings involving Russia and the Ukraine<sup>51</sup>, and Michael Cohen (Trump’s lawyer) has plead guilty to several counts of illegal dealings directly related to Trump’s 2016 presidential campaign<sup>52</sup>. Mueller has also collected several findings on how President Trump himself has obstructed justice during this Russia investigation<sup>53</sup>.

With Mueller’s Russia investigation winding down, it is probably only a matter of time before President Trump is charged with criminal violations related to his 2016 presidential campaign. This, in turn, will likely spur the U.S. House of Representatives to begin impeachment proceedings against Trump, like they did against President Nixon. To prepare their colleagues and the nation for this difficult chapter in the United States’ struggle for the Rule of Law – for Trump will not go quietly – 44 former U.S. Senators (both Republican and Democrat) recently wrote to current U.S. Senators. They urged their current counterparts to uphold “the rule of law and the ability of our institutions to function freely and independently”<sup>54</sup>. For without the Rule of Law the rights and promises espoused by the United States are hollow.

## 9. CONCLUSION

One of the founding ideals of the United States of America outlined in the Declaration of Independence in 1776 was the Rule of Law<sup>55</sup>. But it is only since the 1950s (nearly 200 years after the Declaration of Independence) that the United

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<sup>50</sup> R. Ruiz, M. Landler, *Robert Mueller, Former F.B.I. Director, is Named Special Counsel for Russia Investigation*, “The New York Times” 17 May 2017.

<sup>51</sup> The full text of Paul Manafort’s indictment can be found here: <https://www.justice.gov/file/1038391/download> (visited March 12, 2019).

<sup>52</sup> A. Feuer, “6 Takeaways From Michael Cohen’s Guilty Plea,” “The New York Times” 21 August 2018.

<sup>53</sup> These findings are: (1) Trump’s intent to fire former FBI Director James Comey; (2) Trump’s role in crafting a misleading public statement on the nature of a June 2016 Trump Tower meeting between his son and the Russians; (3) Trump’s dangling of pardons before grand jury witnesses who might testify against him; (4) Trump’s pressuring of Attorney General Jeff Sessions not to recuse himself from the Russia investigation. See N. LeTourneau, *Mueller’s Four Findings on Trump’s Obstruction of Justice*, “Washington Monthly” 13 April 2018.

<sup>54</sup> 44 Former U.S. Senators, *We Are Former Senators. The Senate Has Long Stood in Defense of Democracy—and Must Again*, “The Washington Post” 10 December 2018.

<sup>55</sup> The Unanimous Declaration of the Thirteen United States of America, 4 July 1776. A full transcription of The Declaration of Independence may be viewed at: <https://www.archives.gov/founding-docs/declaration-transcript> (visited March 12, 2019).

States executive branch has generally recognized and respected the judiciary and the Rule of Law. With President Trump at the helm, however, this period may soon be over – the tenuous bridle of the Rule of Law is stretched taut and may soon fray. To prevent this calamity, the Rule of Law in the United States (and elsewhere) must be vigorously protected and nurtured. For at the end of the day, the Rule of Law is merely an idea, a belief that must be acted upon to be realized. When not constantly protected and cultivated, the Rule of Law can and will wither.

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## Summary

Many Americans and outside observers assume that the United States of America was founded upon a cluster of principles known as the "Rule of Law". Indeed, Articles I, II, and III of the United States Constitution of 1789, purportedly establish the rights and authorities of three co-equal branches of government: the legislative, executive, and judicial branches. Adherence to the Rule of Law in the United States, however, has a much shorter history.

During the 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> centuries, the President of the United States – leader of the executive branch—often ignored or contradicted decisions by the judiciary when it served their ambitions. Monumental architecture and actions by early Justices on the U.S. Supreme Court also testify that the judiciary was the least respected branch in the U.S. government. Not until 1954 with the landmark U.S. Supreme Court decision of *Brown v. Board of Education* and its vigorous enforcement by the President of the United States – nearly 200 years after America's founding – can the United States accurately be described as a nation that consistently follows the Rule of Law. With the repeated questionable and unconstitutional tactics deployed by the Trump administration, however, this period of the Rule of Law in the United States is waning. To prevent its continued decline, the Rule of Law in the United States (and elsewhere) must be vigorously protected and nurtured. For in the end, the Rule of Law is merely an idea, a belief that must be acted upon to be realized. When not constantly protected and cultivated, the Rule of Law can and will wither.

## KEYWORDS

Rule of Law, executive, judiciary, United States, U.S. Constitution

## Streszczenie

Wielu Amerykanów i obserwatorów zewnętrznych zakłada, że Stany Zjednoczone Ameryki Północnej powstały w oparciu o grupę zasad znanych pod pojęciem „praworządności”. Rzeczywiście, artykuły I, II i III Konstytucji Stanów Zjednoczonych z 1789 roku, ustanawiają zakres uprawnień władzy w ramach trzech jej równorzędnych obszarów: władzy ustawodawczej, wykonawczej i sądowniczej. Jednak przestrzeganie rządów prawa w Stanach Zjednoczonych ma znacznie krótszą historię.

W ciągu XVIII, XIX i na początku XX wieku prezydenci Stanów Zjednoczonych – będący głównymi przedstawicielami władzy wykonawczej – często ignorowali lub sprzeciwiali się decyzjom władzy sądowniczej, kiedy służyło to zaspokajaniu ich ambicji czy interesów. Decyzje Sądu Najwyższego również świadczą o tym, że sądownictwo było najmniej szanowaną gałęzią władzy w Stanach Zjednoczonych. Dopiero od 1954 roku, czyli od czasu decyzji Sądu Najwyższego w sprawie *Brown v. Board of Education*, a zatem prawie 200 lat od powstania Stanów Zjednoczonych Ameryki, mogą one być uznane za kraj konsekwentnie realizujący zasady państwa prawa. W związku jednak z powtarzającymi się wątpliwymi i niekonstytucyjnymi taktykami stosowanymi przez administrację Donalda Trumpa okres rządów prawa w Stanach Zjednoczonych słabnie. Aby zapobiec całkowitemu upadkowi praworządności w Stanach Zjednoczonych (i w innych miejscach na świecie), zasady państwa prawa muszą być chronione i pielęgnowane. Praworządność jest bowiem tylko pewną ideą, którą należy chronić. Jeśli nie jest ciągle chroniona i kultywowana, może zamierać.

## SŁOWA KLUCZOWE

praworządność, władza wykonawcza/egzekutywa, sądownictwo, Stany Zjednoczone Ameryki Północnej, Konstytucja Stanów Zjednoczonych Ameryki Północnej