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The Rule of Law
and the
Rise of Bureaucratic Government
in the United States

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Thank you, Mr. Chairman. I commend the committee for holding this series of hearings on the fifth anniversary of Dodd-Frank Wall Street Reform and Consumer Protection Act, and I am honored to testify to you today about the rule of law and the rise of bureaucratic government on the 228th anniversary of the signing of the United States Constitution.

The very meaning and structure of our Constitution embody the great foundational principle of the rule of law. It is fair to say that the rule of law may be the most significant and influential accomplishment of the long history of human liberty. And yet here we are today, covered by a vast web of rules and regulations, endless policies and programs, all emanating from government, mostly the work of vast agencies and bureaucracies that largely operate outside our rule of law structure.

It is no exaggeration to say that the greatest political revolution in the United States since the establishment of the Constitution has been the shift of power away from the institutions of republican government to an oligarchy of unelected experts who rule over virtually every aspect of our daily lives, ostensibly in the name of the American people but in actuality by the claimed authority of science, expertise, and administrative efficiency. In assuming more and more tasks in more and more areas for which it is less and less accountable, modern government has done great damage to American liberty and self-government.

A principle that is quite old and long predates the United States, the rule of law is the general concept that government as well as the governed are subject to the law as promulgated and that all are to be equally protected by the law. Its roots can be found in classical antiquity. The vast difference between the rule of law as opposed to that of individual rulers and tyrants is a central theme in the writings of political philosophers from the beginning. In the works of Plato and as developed in Aristotle's writings, it implies obedience to positive law as well as rudimentary checks on rulers and magistrates.

Throughout most of human history, the rules by which life was governed were usually determined by force or fraud: Those who had the power—whether military strength or political dominance—made the rules. The command of the absolute monarch or tyrannical despot *was* the rule, and had the *coercive* force of the law. Rulers made up false stories of inheritance and

rationalizations such as “divine right” to convince their subjects to accept their rule without question. This is still the case in many parts of the world, where the arbitrary rulings of government are wrongly associated with the rule of law.

One only need read Shakespeare to see that Anglo-American history of a thousand years is replete with the often violent back and forth between despotic rule and the slowly developing concept of the rule of law. Impatient English kings regularly sought to evade the rudimentary process of law by exercising the prerogative power and enforcing their commands through various institutions such as the King’s Council, the Star Chamber, or the High Commission.

It was Magna Carta in 1215 that first challenged this absolutism and forced the monarch to abide by the mechanisms of law. In its famous thirty-ninth clause, King John of England promised to his barons that “[n]o free man shall be taken, imprisoned, disseized, outlawed, or banished, or in any way destroyed, nor will he proceed against or prosecute him, except by the lawful judgment of his peers and the Law of the Land.” The idea that the law is superior to human rulers is the cornerstone of English constitutional thought as it developed over centuries and directly informed the American Constitution.

The Glorious Revolution of 1688 established parliamentary supremacy over the monarch, a crucial step in the development of political liberty. But when that supremacy came to mean complete parliamentary sovereignty and acts of parliament came to be synonymous with the rule of law itself there was no longer any higher, fundamental law to which that legislature was subject and against which its legislation could be judged and held accountable. This became more and more apparent in the decades leading up to the American Revolution. In the Declaratory Act of 1766, Parliament declared it “had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, *in all cases whatsoever*.” That marked another break with the older principle that the rule of law was above government and provided an overall restraint on government, legislatures just as much as monarchs.

The idea of the rule of law was transferred to the American colonies through numerous writers and jurists, and can be seen expressed throughout colonial pamphlets and political writings. Thomas Paine reflected this dramatically in *Common Sense*:

> But where says some is the king of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

The classic American expression of the idea comes from the pen of John Adams when he wrote the Massachusetts Constitution in 1780, in which the powers of the commonwealth are divided in the document "to the end it may be a government of laws, not of men."

Over time, the rule of law has come to be associated with four key components.

First, the rule of law means a formal, regular process of law enforcement and adjudication. What we really mean by "a government of laws, not of men" is the rule of men bound by law, not subject to the arbitrary will of others. The rule of law means general rules of law that bind all people and are promulgated and enforced by a system of courts and law enforcement, not by mere discretionary authority. In order to secure equal rights to all citizens, government must apply law fairly and equally through this legal process. Notice, hearings, indictment, trial by jury, legal counsel, the right against self-incrimination—these are all part of a fair and equitable "due process of law" that provides regular procedural protections and safeguards against abuse by government authority. Among the complaints lodged against the king in the Declaration of Independence was that he had "obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers," and was "depriving us in many cases, of the benefits of trial by jury."

Second, the rule of law means that these rules are binding on rulers and the ruled alike. If the American people, Madison wrote in *Federalist* 57, "shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty." As all are subject to the law, so all—government and citizens, indeed all persons—are equal before the law, and equally subject to the legal system and its decisions. No one is above the law in respect to enforcement; no one is privileged to ignore the law, just as no one is outside the law in terms of its protection. As the phrase goes, all are presumed innocent until *proven* guilty. We see this equal application of equal laws reflected in the Constitution's references to "citizens" and "persons" rather than race, class, or some other group distinction, as in the Fifth Amendment's language that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." It appears again in the Fourteenth Amendment's guarantee that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The rights of all are dependent on the rights of each being defended and protected. In this sense, the rule of law is an expression of—indeed, is a requirement of—the idea of each person possessing equal rights.

Third, the rule of law implies that there are certain unwritten rules or generally understood standards to which specific laws and lawmaking must conform. There are some things that no government legitimately based on the rule of law can do. Many of these particulars were developed over the course of the history of British constitutionalism, but they may be said to stem from a certain logic of the law. Several examples can be seen in the clauses of the U.S. Constitution. There can be no "ex post facto" laws—that is, laws that classify an act as a crime leading to punishment after the act occurs. Nor can there be "bills of attainder," which are laws that punish individuals or groups without a judicial trial. We have already mentioned the requirement of "due process," but consider also the great writ of "habeas corpus" (no person may be imprisoned without legal cause) and the rule against "double jeopardy" (no person can be tried or punished twice for the same crime.) Strictly speaking, none of these rules are formal laws but follow from the nature of the rule of law. "Bills of attainder, ex-post facto laws and laws impairing the obligation of contracts," Madison wrote in *Federalist* 44, "are contrary to the first principles of the social compact, and to every principle of sound legislation."

Lastly, even though much of its operation is the work of courts and judges, the rule of law ultimately is based on, and emphasizes the centrality of, lawmaking. This is why, although we have three coequal branches of government, the legislature is the first. But as those who make law are themselves subject to some law above them, this gives rise to the idea that there are different types of laws, some of which are more significant and thus more authoritative than others. The rule of law—especially in terms of key procedural and constitutional concepts—stands above government. By definition and by enforcement it is a formal restraint on government. It judges government in light of a higher standard associated with those ideas. The more authoritative or fundamental laws have an enduring nature. They do not change day to day or by the whim of the moment, and cannot be altered by ordinary acts of government.

This sense is captured in Magna Carta's reference to "the Law of the Land," a phrase written into all eight of the early American state constitutions, as well as the Northwest Ordinance of 1787. It is reflected in the supremacy clause of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The deep importance of this supremacy is seen in the fact that the oaths taken by those holding office in the United States—the president, members of Congress, federal judges—are oaths not to a king or ruler, or even to an executive or to Congress, but to the United States Constitution and the laws.

The full implications of the constitutional development of the rule of law first appear in the principles and institutions of the American Founding. The key turn in constitutional thinking came with the recognition, initially by John Locke and others but most famously expressed in the Declaration of Independence, of inalienable rights that belong to each person by nature and that legitimate governments are organized and structured to protect according to the consent of the governed. And so the Founders' created a strong, energetic government of limited authority, its powers enumerated in a written constitution and separated into functions and responsibilities, further divided between national and state governments in a system of federalism, all designed to leave ample room for republican self-government.

Liberty is assured not by the anarchy of no government, on the one hand, or the arbitrary rule of unlimited government, on the other, but through a carefully designed and maintained structure of government to secure rights and prevent tyranny through the rule of law. The very form of the Constitution separates the branches in accordance with distinct powers, duties, and responsibilities stemming from the primary functions of governing: to make laws, to execute and enforce the laws, and to uphold (judge or adjudicate) the rule of those laws by applying them to particular individuals or cases. No branch is higher or lower than any other, and no branch controls the others; each is vested with independent authority and unique powers that cannot be given away or delegated to others. The legislative branch is the first among equals, not only because it is the branch most directly representative of popular opinion (being the closest to the people, it best reflects their consent) but also because the very essence of governing according to the rule of law is centered on the legitimate authority to make laws.

The Constitution further supports the rule of law by dividing and checking power. "The accumulation of all powers," Madison explains in *Federalist* 47, "legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Because it was not enough to divide power and hope that it remained nicely confined within the written barriers of the Constitution, there needed to be an internal check to further limit the powers of government. But rather than create another coercive authority for that purpose (a dubious proposition to say the least), the Founders divided power and then set it against itself. This separation of powers, along with the further provisions for checks and balances, creates a dynamism within the workings of government that uses the interests and incentives of those in government to enforce constitutional limits beyond their mere statement.

For sure, the Founders understood the need for the good administration of government — an important aspect of their "improved science of politics." But the administration of things was subordinate to the president and more importantly the laws of Congress, and thus responsible to the people through election. As Alexander Hamilton points out in Federalist 68, it is a "heresy" to suggest that of all forms of government "that which is best administered is best." Their objective was to break free of the old despotisms, characterized by the arbitrary will of

the stronger, and to establish the rule of law, of limited constitutional government based on consent, and secure the unalienable rights with which man is endowed by "the Laws of Nature and Nature's God."

We can trace the concept of the modern state and its "new science of politics" to the likes of the French philosophes and continental utopians who were deeply enamored with the endless promises of reason and modern science to solve all aspects of the human condition. Just as science brought technological changes and new methods of study to the physical world, so it would bring great change and continuous improvement to society and man. The late-19th-century Progressives took this argument, combined it with ideas from German idealism and historicism, and Americanized it to reshape the old constitutional rule of law model—which was seen as obsolete, inefficient, and designed to stifle change—into a new, more efficient form of democratic government which they called the "administrative state."

While the Founders went to great lengths to preserve consent and limit government through republican institutions and the separation of powers, the progressives held that the Founders' barriers had to be removed or circumvented and government strengthened and expanded through a combination of powers which would concentrate its authority and direct its actions toward achieving progress. And while seeming to advocate more democracy, the first progressives — under a Republican president, Theodore Roosevelt, and then a Democratic one, Woodrow Wilson — pursued the opposite when it came to government action. "All that progressives ask or desire," Wilson wrote in 1912, "is permission — in an era when 'development,' 'evolution,' is the scientific word — to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine." To encourage democratic change while directing and controlling it, progressives posited a sharp distinction between politics and what they called "administration." Politics would remain the realm of expressing opinions, but the real decisions and details of governing would be handled by administrators, separate and immune from the influence of politics.

The particulars of accomplishing the broad objectives of reform—the details of regulation and many rule-making functions previously left to legislatures—were to be given over to a new class of professionals who would reside in the recesses of agencies like the FCC (Federal Communications Commission), the SEC (Securities and Exchange Commission), the CPSC (Consumer Product Safety Commission), or OSHA (Occupational Safety and Health Administration). As "objective" and "neutral" experts, so the theory went, these administrators would act above petty partisanship and faction, making decisions mostly unseen and beyond public scrutiny to accomplish the broad objectives of policy reform.

The United States has been moving down the path of administrative government in fits and starts for some time, from the initial Progressive Era reforms through the New Deal's interventions in the economy. But the most significant shift and expansion occurred more recently, under the Great Society and its progeny. Whereas initial regulations dealt with targeted commercial activity – railroads, trucking, aviation, banking – there was a turn in the 1970s to broader "social regulation" concerning areas such as the environment, employment, civil rights, and healthcare. The expansion of regulatory activities on a society-wide scale in the 1960s and 1970s led to vast new centralizing authority in the federal government. This new approach, what Daniel Patrick Moynihan called "the policy approach" to governing, now dominates. In its current phase everything — from financial restructuring to environmental regulation to immigration reform — must be dealt with comprehensively, meaning centrally, uniformly, and systemically by an administrative apparatus that is more complicated and expansive than ever.

The Affordable Care Act is a perfect example. Massive regulatory authority over one-sixth of the American economy, not to mention over most health-care decisionmaking, is transferred to a collection of more than 100 federal agencies, bureaus, and commissions, along with new federal programs and an unprecedented delegation of power to the Secretary of Health and Human Services. Little or nothing will be allowed outside the new regulatory scheme — no alternative state programs, no individuals or businesses that choose not to participate, no truly private market alternatives.

Likewise, the Dodd-Frank Wall Street Reform and Consumer Protection Act. Its 2,300 pages require administrative rule-makings reaching not only to every financial institution but well in to every corner of the American economy. Its new bureaucracies, like the Consumer Financial Protection Bureau and the Financial Stability Oversight Council, operate outside of the public eye and are subject to virtually none of the traditional checks. The CFPB is literally outside the rule of law: it has an independent source of revenue, insulation from legislative or executive oversight, and the broad latitude and discretion to determine and enforce its own rulings—as so define the limits of its own authority—based on vague terms left undefined.

The primary function of modern government is to regulate. When Congress writes legislation, it uses very broad language that turns extensive power over to agencies, which are also given the authority of executing and usually adjudicating violations of their regulations in particular cases. The result is that most of the actual decisions of lawmaking and public policy—decisions previously the constitutional responsibility of elected legislators—are delegated to bureaucrats whose "rules" there is no doubt have the full force and effect of laws passed by Congress. In 2014, Congress passed and the President signed about 220 pieces of legislation in to law, amounting to a little over 3,000 pages of law, while federal departments and agencies issued 79,066 pages of new and updated regulations. The modern Congress is almost exclusively a supervisory body exercising limited oversight over administrative policymakers. The rise of the new imperial presidency—acting by discretion, creative interpretation, and executive orders more than legislative direction—should not be surprising given the overwhelming and tempting amount of authority that has been delegated to decision-making actors and bodies ostensibly under executive control.

Modern administrative forms of governing consolidate the powers of government by exercising the lawmaking power, executing their own rules and then judging their application in administrative courts, binding individuals not through legislative law or judicial decision but through case-by-case rulemaking based on increasingly broad and undefined mandates, with more and more authority over an ever wider range of subjects, all the while less and less apparent and accountable to the political process and popular consent.

This idea of enlightened administration is not merely an aspect of modern political life — an extension of the Founders' recognition of the need for good administration, or a necessary adaptation of the existing structure to unanticipated conditions of modern life. It is a new and all-encompassing form of political organization. It represents, as Max Weber and others have argued, the final rationalization of politics. As such, administrative government is not a symptom of modern government. It is the problem.

Nevertheless, in the end, this is not an altogether new form of rule as much as it is the modern equivalent of a very old form that the American Revolution was meant to overthrow. Indeed, 800 years after England's barons forced King John to sign Magna Carta, we are seeing, as Philip Hamburger of Columbia Law school has powerfully argued, the institutionalization of the very forms of prerogative power once practiced by feudal monarchs against which the whole development of the rule of law was directed. The problem with such arbitrary, comprehensive, unchecked power is that it is not administration at all but rule outside of the law, outside of the Constitution and its checks and balances, and outside of and thus not responsive to our democratic institutions of government. We should all – Republicans and Democrats alike – recognize and fear this new state of things, whether it takes the particular form of Dodd-Frank Act or any other policy matter coming from the Left or the Right. If the administrative rule now threatening to overwhelm American society becomes the undisputed norm — accepted not only among the academic and political elites, but also by the American people, as the defining characteristic of the modern state — it could well mark the end of our great experiment in self-government.

Thank you.

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