

# How the Rule of Law Has Shaped and Continues to Shape America

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Every year since 1958, on May 1, the United States, led by the American Bar Association and Presidential Proclamation, recognizes Law Day, to commemorate the role of law in our society. The 2021 Law Day theme is “Advancing the Rule of Law Now,” and that theme is meant to provide opportunities to examine how the rule of law has not only provided order in everyday life, but also sustained our nation in times of civil unrest or tremendous civil distress.

I believe that one of the greatest strengths of the United States is that the overwhelming majority of our citizens support the concept and process of being a nation that adheres to the *Rule of Law* and to rules of law. According to the Stanford Encyclopedia of Philosophy, the phrase “the Rule of Law” has to be distinguished from the phrase “a rule of law.”

The latter phrase is used to designate some particular legal rule like ... a rule that says we have to file our taxes by a certain date. [B]ut, *the Rule of Law* is one of the ideals of our political morality and it refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance.

I had long thought this on a subconscious level, but I really started to reflect on it as ground truth when I was first assigned to the Pentagon a few months after the attacks of September 11, 2001. As I walked the Pentagon’s corridors, I would sometimes pass a plaque with

words President George W. Bush spoke on the evening of September 11th. The plaque stated: “*Terrorist attacks can shake the foundations of our biggest buildings but they cannot touch the foundation of America.*” While some may disagree, it occurred to me that the Rule of Law, as one of this nation’s greatest ideals and aspirations, is the foundation of America.

As we approach Law Day 2021, questions loom as to where the United States stands today with respect to the *Rule of Law*. As I write, America faces legal restrictions brought on by a global pandemic; racial justice protests and demands for police and criminal justice reform sparked by the killings of George Floyd, Breonna Taylor, and many others; and the unanswered questions in the wake of the January 6, 2021, violent insurrection at the U.S. Capitol which was promoted by conspiracy theories and doubts about the integrity of the 2020 presidential election. As a result, this is a good time to consider the extent to which the Rule of Law in America has been shaken and how the nation is being shaped by these challenges. It’s

also a good time to consider how we can advance the Rule of Law in this environment.

## Defining and Recognizing the Rule of Law

The World Justice Project describes the Rule of Law as a “*durable system of laws, institutions, norms, and community commitment that delivers: accountability (for government and for individuals), just laws ... open government ... and accessible justice.*” In 1776, in his pamphlet *Common Sense*, Thomas Paine boldly proclaimed that in America “law is king.” In making this statement, Paine was drawing a contrast on the one hand between systems in which a single individual can rule according to their whims, with, on the other hand, Paine’s vision for America wherein we would have a constitutionally based government with checks and balances and in which everyone is subject to legal protections and safeguards.

The *Rule of Law* permeates all aspects of American life. For example, we have traffic laws that let us know who has the right of way and we have environmental laws and regulations that tell us what we are allowed to put into the ground, air, and water. In addition, in the midst of the Covid-19 pandemic, most of us have been impacted by public health restrictions on where and how we can congregate with others. America’s adherence to

the Rule of Law does not mean that our legal system is free from errors as no system influenced and controlled by human beings is ever free from mistakes. A glaring example is that the U.S. Constitution, permitted slavery in parts of the country until the 13th Amendment was ratified in December 1865, and it denied women the right to vote in federal elections until August 1920 when the 19th Amendment was ratified.

### By No Means a Perfect System

Even when the actual words of the Constitution didn't pose a problem, there have been several instances in which the Constitution, and other laws and policies have been interpreted in ways that later brought shame on the country. For example, in 1856, the U.S. Supreme Court ruled in a case called *Dred Scott v. Sandford* that people of African descent were never intended to be and could never be U.S. citizens. The nation's highest court also said

that people of African descent had “no rights which the white man was bound to respect.” Also, in 1896, more than 30 years after the Civil War had been fought and 28 years after the 14th Amendment had overruled the *Dred Scott* decision by granting citizenship to African Americans, the Supreme Court ruled in *Plessy v. Ferguson* that states could segregate Black people from White people for no reason other than the color of their skin. That decision created a doctrine called “separate but equal” that, while sounding neutral, was actually a practical and moral farce. However, *separate but equal* would remain U.S. law and the basis for segregating school children in parts of the country for more than 50 years until it was overruled in *Brown v. Board of Education* and it would be the practice in public accommodations such as restaurants, hotels, and public transportation until the Civil Rights Act of 1964 was passed.

### Rule of Law in Wartime

Despite our being a nation rooted in and based on the Rule of Law, there have been other instances in which our legal system endorsed practices that discriminated against people based on ancestry or in which our government engaged in practices that did not align with our nation's stated core values. For example, in February 1942, a couple of months after Japan's attack on Pearl Harbor, President Franklin Roosevelt issued an Executive Order which allowed all persons of Japanese ancestry, regardless of citizenship or immigration status, to be relocated to internment camps. In *Korematsu v. United States*, the Supreme Court ruled that the forced detention of Japanese Americans did not violate our Constitution. However, years later, Chief Justice John Roberts acknowledged that *Korematsu v. United States* was “gravely wrong the day it was decided.” Also, the late Supreme Court Justice

## 2021 Law Day: Advancing the Rule of Law Now

4 Ways to Get Involved at [www.lawday.org](http://www.lawday.org)



LAW ★ DAY 2021  
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### 1. Invite a lawyer or judge to your classroom.

Many state and local bar associations have lawyer-in-the-classroom programs, and many state court systems have judge-in-the-classroom programs, and they may be equipped to join a class virtually to talk about specific topics.

The federal court system also offers connections between classrooms and federal judges, who are experienced in the distance-learning environment, to engage students in virtual classrooms. Contact Rebecca Fanning, at [Rebecca\\_Fanning@ao.uscourts.gov](mailto:Rebecca_Fanning@ao.uscourts.gov), at the Administrative Office of U.S. Courts for more information.

### 2. Record a statement or conversation about what the rule of law means to you.

Join a national conversation around the 2021 Law Day

theme, Advancing the Rule of Law Now. How-tos, for student and adults, and prompts are available.

### 3. Hold a classroom discussion about the rule of law.

There are lesson plans for older students, and resources to read and watch for younger students. Everything is scalable, depending on classroom needs, and may also be conducted virtually or in person.

### 4. Attend a virtual event.

Find national, state, and local events, and register for or click into one that looks interesting to you or your students. Be sure to check with your state bar or court administrator to learn about any virtual programs they might be planning.

Antonin Scalia said that the decision in *Korematsu* “upholding the internment of Japanese Americans was wrong” but Scalia added that “it could happen again in wartime.”

Fear and times of national distress—including wartime—place immense pressure on our adherence to national values and to the Rule of Law. For example, after the 9/11 attacks, President Bush authorized so called “*enhanced interrogation techniques*” for questioning detainees who were thought to be terrorists. Many people describe these enhanced interrogation techniques as torture. One may wonder how a nation that prides itself on a system of laws promoting individual dignity and freedom from self-incrimination, could ever allow other human beings to be tortured. Yet we did so less than 20 years ago.

### **Rule of Law, Black Lives Matter, and January 6**

The events of the past several months have generated fresh inquiries into where America stands with respect to our commitment to the Rule of Law. The Black Lives Matter Movement sparked an unparalleled examination in this country and across the globe of the American legal system’s commitment and willingness to protect Black lives. How is it that the “land of the free and home of the brave” leads the world in imprisoning people? And how is it that African Americans are vastly overrepresented in the prison population? Also, mandates and restrictions brought on by the COVID-19 pandemic have generated debate about the lawfulness and reasonableness of these restrictions. For example, former U.S. Attorney General Bill Barr stated in September 2020 that “other than slavery, which was a different kind of restraint, this is the greatest intrusion on civil liberties in American history.” While I vehemently disagree with Attorney General Barr’s comparison, he was undoubtedly speaking for some people when he implied that such restrictions were contrary to

America’s ideals and acceptable legal norms. Finally, in the aftermath of the January 6, 2021, assault on the Capitol, which was designed to disrupt congressional counting of electoral votes in the 2020 presidential election, Senate Republican Leader Mitch McConnell addressed issues related to the Rule of Law when he stated, “... the mob was fed lies ... they were provoked by the president and other powerful people, and they tried to use fear and violence to stop a specific proceeding of the first branch of the federal government, which they did not like.”

Can the Rule of Law sustain the challenges presented by mob violence and by citizens who cast doubt on fundamental legal processes? How about when such doubts are fueled by propaganda sown by presidents and others with prominent platforms and positions? Events of the past year have demonstrated that America is still being shaped by the Rule of Law. While people, including myself, may still see the

Rule of Law as one of America’s greatest strengths, we can’t afford to take it for granted. Now is the time for fresh examination and for us to seek ways to advance the Rule of Law in the midst of unparalleled challenges. 🌐



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