

America risks confusing the Rule of Law with Rule by Law

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Last weekend Donald Trump [proclaimed himself America's president of "law and order"](#), going on to demand the protection of the "crown jewel of American democracy: the rule of law and our independent system of justice".

Calls for the rule of law are a common refrain among Republican presidents, yet current events in the US present a vivid reminder of the need to strictly differentiate between rule of law, and rule by law.

The preposition is key: "rule of law" requires equality before the law and that the power of political leaders be constrained by laws and regulations. The rule of law requires equality before the law, that everyone is [subject to the same laws, no matter who they are](#) ; a principle embodied in [Article 7 of the Universal Declaration of Human Rights](#) : "All are equal before the law and are entitled without any discrimination to the equal protection of the law". This covers equal protection by, and in this case from law enforcement, and renders [racial profiling illegal](#) . The rule of law, characterised by fairness and predictable application, is different from rule by law, in which the state controls its citizens using law, but is not necessarily subject to these laws itself.

The problem with a state of rule by law, evident in the attitude of Police Officer Chauvin in the George Floyd homicide, is that it debases the concept of legality. Floyd's heart and lungs stopped functioning ["while being restrained"](#) by law enforcement officers previously reviewed for [use of force](#) . For the protesters out on the streets, Trump's tweet ["when the looting starts, the shooting starts"](#) , demonstrated his contempt for legal norms for all - by proposing an extrajudicial response to the initial protests in Minneapolis over Floyd's death at the hands of a white officer. Trump's threat, earlier this week, to [deploy federal troops](#) using the ["unlimited power of our Military"](#) under the [Insurrection Act 1807](#) , last used to quell the [1992 Los Angeles Riots](#) . Invocation of the Act would effectively suppress peaceful protest, and there is significant debate about whether Trump actually has this power, given requirements in some sections of the Act to a [request for help from State governors and legislature](#) and one Supreme Court opinion noting that this power resides with ["Congress, not the Executive"](#) .

When federal troops use munitions (["flash bangs, rubber bullets and tear gas"](#)) on peaceful protesters just yards from where the President is doing a bible photo-op suggesting law enforcement should be stepped up to prevent the violence, all point to a rule by law system, where lethal force is used against the people. This rule by law is further evidenced by the [the personal order of Attorney General William P. Barr](#) to the authorities to clear protesters away ahead of the President's televised address.

[The Attorney General's Statement on the Death of George Floyd and Riots](#) opens with the following phrase "the greatness of our nation comes from our commitment to the rule of law." Yet, it goes on to denounce "far left extremists" for using Antifa (short for Anti-Fascist) tactics. This torquing of the use of the rule of law is a cause for grave concern, as it shows an official in the highest legal office, using the rule of law in an instrumental sense, while simultaneously using that office to accuse "radicals and agitators" of "exploiting the situation" and undermining "peaceful protest".

This is not a new pattern. As pointed out by the [Washington Post](#) and [Slate](#), from the branding of the Mueller investigation "illegal" and the investigation team "dirty cops", to ["Obamagate"](#) Trump has consistently placed himself and his supporters above

the law, with violations only ever taking place by opponents. This approach significantly undermines the Rule of Law by losing what Fuller describes as the "[bonds of reciprocity](#)" between the citizen and lawmaker, the notion that the promulgated rules are the ones used to evaluate the lawgiver's own actions.

A lack of reciprocity erodes trust in the architecture of the law, the credibility of government, and confidence in law enforcement. As one police officer on Reddit expressed it, in response to the question [what are you thinking when you see cases like George Floyd?](#) , "[police officers like Chauvin] make my job that much harder and damage the trust I work so hard for".

Without the expectation that everyone is subject to the law, presidents, (or in the UK, [special advisers to the Prime Minister](#)), as well as police officers, acceptance of government authority will crumble; and with that we are likely to see further escalation of the current tragic cycle of protest, violence, rioting and police curfews.

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