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The Rule of Law: More than Just a Law of Rules

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I. INTRODUCTION

I intend to talk today about something that everyone seems to be talking about these days: The rule of law, or more precisely, what the rule of law means to us and what it should mean to us. And I want to acknowledge at the outset that the discussion may be fraught. This week has been brutal for those of us who care deeply about, and want to believe deeply in, the integrity of our legal institutions. Emotions are running especially high, feelings are especially raw, and partisan fury is coursing through the body politic. For the last 24 hours, I've gone back and forth over it would be better to just ditch this topic entirely and talk about something else. But in the end I think what we are going through right now makes it more important than ever to talk about our commitment to "the rule of law," what it does and what it should mean. I have some strong views about this, and I am going to express those views. I will do my best to do so respectfully, and I hope constructively.

So let me start by summarizing what I intend to say. One can view the deep divisions in our legal culture, and one can view this confirmation battle, in partisan terms: Conservatives want one set of judicial outcomes, liberals want a different set of judicial outcomes and what we are witnessing is just a struggle about who is going to be in charge. All the rest is just posturing. But I think something deeper is going on.

Over the course of three decades or so, the idea of "the rule of law" has come to have a particularly focused meaning for judges, academics and practitioners who are jurisprudential conservatives. Due in large part to the influence of Justice Scalia, the rule of law has become synonymous with a formalist kind of textualism in statutory construction and with originalism in constitutional interpretation. The idea is that these interpretive methods ensure fidelity to the rule of law—they ensure that we remain a nation of laws and not men in the sense that judges apply law rather than make it; they follow the dictates of the People expressed in the Constitution and in statutes, rather than substituting their own moral or policy judgments. In Justice Scalia's memorable phrase, they have come to view the rule of law principally as a law of rules.

That set of ideas has a great deal of force and it has had a disciplining effect on the way all of us approach legal text that I think is positive. But I want to suggest that that the dominance of the "rule of law as a law of rules" idea in conservative jurisprudence has produced at least two unfortunate consequences, one that is troubling but manageable and one that, at this moment in our history, may prove to be disastrous. The first unfortunate consequence is that it promotes divisiveness in the legal culture. It defines other interpretive methods, and the outcomes they produce, as illegitimate and not merely the product of good faith disagreement. Second, and more pressingly, it induces myopia. In this very moment in our history, many "rule of law as a law of rules" adherents are acting in a manner that suggests that they value the confirmation of judges who share

their interpretive commitments as a higher value than protection of the integrity of our legal institutions, the legitimacy of which rests on a more fundamental understanding of what the rule of law means. And I say that this way of thinking may prove disastrous because the integrity of our interpretive methods ultimately will mean very little if the integrity of the institutions chiefly responsible for enforcing and adjudicating the law lies in ruins. I hope to suggest a way of thinking about a shared commitment to rule of law values that can address both of these harmful consequences.

II. THE RULE OF LAW AS A LAW OF RULES

Let me frame the discussion by saying just a few words to flesh out what I mean by the phrase “the rule of law as a law of rules.” In the late 1980s, Justice Scalia published several essays setting forth his defense of textualism and originalism as the only legitimate methods of interpretation. One of them was titled “The Rule of Law as a Law of Rules.” At the risk of oversimplifying, Justice Scalia sought to demonstrate that traditional common law methods of legal reasoning—in which judges shape the law incrementally by making judgments informed by precedent, case-specific factual nuances, and considerations of policy, and consequences should be eschewed when judges interpret legal texts—could not legitimately be applied to interpret statutes or to interpret the Constitution.

When a judge interprets a statute, the judge should give the words of the text their ordinary meaning, no more and no less. The judge should not seek a different meaning in the legislative history or refuse to give the words their ordinary meaning because doing so would produce consequences the judge considers ill-advised or untoward.

And when a judge interprets a provision of the Constitution, the judge should interpret that provision in accordance with the original public meaning of the constitutional text, again no more or no less. The judge should not seek to give the words new or different meaning based on the conditions or understandings of our own time, based on the evolution over time of our understanding of broad constitutional phrases such as “cruel and unusual punishment,” “the equal protection of the laws” or “the freedom of speech,” or based on the judge’s sense of the unpalatable consequences of sticking with the original public meaning.

Judges must approach statutory and constitutional provisions this way, Justice Scalia said, because that was the only way judges can reliably avoid substituting their own personal sense of what the law *should be* rather than faithfully following the instructions set forth by the People in the Constitution or by the People’s duly elected representatives in statutes. Unelected judges do not make law; they apply it. A formalist textualism in the interpretation of statutes and a rigorous originalism in the interpretation of the Constitution ensure that

judges respect the limits of their legitimate authority. Here's a quote from one of Justice Scalia's articles that captures this: "Of all the criticisms leveled against textualism, the most mindless is that it is formalistic. Of course it is formalistic. The rule of law is *about* form. . . . Long live formalism. It is what makes government a government of laws and not of men."

Justice Scalia was not the first to make these arguments, but he may well have been the most effective. His writings on and off the bench have inspired two generations of conservative lawyers, judges and academics. And he has moved the law. One way to see this is to look at the briefs the Solicitor General's office has filed in the Supreme Court in statutory construction cases over the years. If you go back to the 1970s, you will find that the briefs generally start with an elaborate analysis of the purposes of Congress, as found in the legislative history, and then eventually work their way around to arguing that the text can and therefore should be read in a way that accomplishes those purposes. But the briefs the Office has filed over the past two decades or so have more or less the opposite structure. They first argue the plain meaning of the text, then argue that the statutory structure shows the plain meaning is the correct one and then say that enforcing the statute's plain meaning will best advance its purpose, and then they will say that if you want to look at the legislative history you will find that it supports this result too.

Perhaps nothing captured this better than Justice Kagan's comment that "we're all textualists now," by which she meant to praise Justice Scalia for his profound influence on how courts interpret statutes.

III. GOOD FAITH DISAGREEMENT VERSUS ILLEGITIMACY

As Justice Kagan's praise illustrates, the interpretive approach championed by Justice Scalia has had enormous persuasive force. And there has been something very positive in that evolution. Text should be the anchor. It should constrain judges.

But you can have too much of a good thing. And we do. Statutory construction cases often pose hard questions of interpretation—questions that don't have an easily discernable "best" answer. Constitutional cases often pose hard questions of interpretation that don't have an easily discernable "best" answer, for reasons too numerous and challenging to address right now. The problem with "the rule of law as a law of rules" is that it tends to make every dispute over the meaning of a statute or a constitutional provision into a battle of first principles. In every case, or at least every case of consequence, the fight is not just over the meaning of the text. There is also a fight over whether the way you go about determining the meaning of the text is legitimate or illegitimate. If you are a "rule of law as a law of rules conservative," you tend to view a result you disagree with as not just an error but as an unprincipled transgression against the most basic norm of our system—the rule of law.

I experienced this over and over again during my time as Solicitor General. One great example is *King v. Burwell*, the 2015 case about the Affordable Care Act. The case posed a question of statutory construction: Did Congress provide for subsidies to help people afford the cost of mandatory health insurance for people in all states or only in states that set up their own exchanges for the purchase of insurance? My opponents in the case argued for the latter. In their view the operative words of the statute dictated that result. In defending the availability of subsidies in every state, we argued that the statutory text could reasonably be read to support that meaning, and that read in context it had to have that meaning both to make other operative provisions of the Act work and because the basic policy Congress put in place would collapse without the subsidies. But if you go back and read the briefs, you will see that they cast the issue not principally as a dispute over the meaning of a statute but as a dispute over the rule of law. For the challengers, a ruling against them would not just be an error. It would transgress the rule of law and call the court into disrepute. That kind of rhetoric suffused the challengers' briefs. And it suffused Justice Scalia's dissent—a dissent in a case that otherwise wasn't all that close. The Court rejected the challenge by a 6–3 vote in an opinion by the Chief Justice. And if you look at the briefing and argument in the other big cases of those years—the immigration cases, the gay rights cases—you will see exactly the same rhetorical stance. The opposition is not just wrong, it is illegitimate.

It doesn't have to be this way. If each side of this debate afforded the other a presumption of good faith, I think the tenor of our discourse would be quite different. The debate would go something like this. The textualists and originalists would acknowledge that their approach has its shortcomings, can't answer all questions and sometimes produces results that don't make a lot of sense, but they would argue that their approach beats the alternative because without its constraints there is just too much risk that judges will impose their own policy preferences and value judgments rather than respecting the will of the People reflected in the duly enacted text. Those with a different approach—let's call them purposivists—would acknowledge the risk of subjectivity and value imposition, and would acknowledge that it sometimes happens, but would argue that their approach produces outcomes that more sensibly reflect what Congress was trying to achieve in a statute or that most sensibly reflect what a basic constitutional commitment means in a world very different from that of the Framers, and that the constraining force of precedent and established process norms limit the risk of subjectivity and value imposition.

Now I want to be clear. Liberals, purposivists, are certainly guilty of this too. During the Bush Administration, every dispute over the scope of the President's national security power was cast as a fight about the rule of law, just as during the Obama Administration disputes over major domestic policies were. But if each side afforded the other a presumption of good faith, instead of seeking rhetorical and political advantage in a particular understanding of “the rule of

law,” it would be a lot easier for us to recognize how much common ground we share.

IV. RULE OF LAW MYOPIA

When we talk about the rule of law, what we mean above all is that, in the words of the Massachusetts Constitution written by John Adams, we are a government of laws and not men. That indispensable premise of our Constitution’s form of government.

Now I’d like to turn to what I see as the second unfortunate consequence of the “rule of law as a law of rules” movement. It is to me a bigger and more threatening problem. The basic point is this: The rule of law is not just a law of rules. When John Adams wrote in the Massachusetts Constitution that we are a government of laws and not men, he wasn’t prescribing an interpretive methodology. He was making a much more fundamental point. Under our ideas of constitutional governance, power must be exercised legitimately. It is an abuse to wield power for the benefit of those who hold it—be it executive or legislative power. We structure our governments and adopt bills of rights to guard against that kind of abuse. Everyone, from the President on down, is equal before the law and equally subject to the law. No one is above the law. At bottom, that is what it means to respect the rule of law.

The genius of the “rule of law as a law of rules” movement was to link the movement’s arguments about interpretive methods to these fundamental principles. But fidelity to these interpretive methods isn’t the sum total of the rule of law—far from it. But right now many people in positions of power are acting like it is, and that puts us at great risk. What I mean is this: Many of our leaders are remaining silent in the face of unprecedented assaults on the rule of law in the fundamental sense I just described, because they have decided it is more important to ensure that the Supreme Court and the lower federal courts are dominated by Justices and judges who share their commitment to “the rule of law as a law of rules.” I don’t think this is purely partisan in the sense that they are just seeking a court system that reliably produces conservative outcomes. I think they genuinely believe that they are acting on a commitment to the rule of law. But in my judgment it is a myopic commitment, and one that poses grave risks in our present moment.

You can see a vivid illustration of this in the confirmation hearings for Judge Kavanaugh and for Judge Gorsuch before him.

Conservative Senators are quite explicit in linking their support for these nominees to their commitment to the rule of law as a law of rules. Here is what Chairman Grassley said in his opening statement in the Kavanaugh hearing:

Chairman Grassley: “Our legal system is the envy of the world. It provides our people stability, predictability, protection of our rights and equal access to justice. But this is only possible when judges are committed to the rule of law.” Invoking Justice Scalia: “The role of the judge is to apply the law as written, even if the legal result is not one the judge personally likes.” Re the nominee:

[His] extensive record demonstrates a deep commitment to the rule of law. He has written eloquently that both judges and federal agencies are bound by the laws Congress enacts. And he has criticized those who substitute their own judgments about what a statute should say for what the statute actually says.

And here is what Senator Cruz said:

Senator Cruz: “Then candidate Trump said he was looking to appoint judges in the mold of Justice Scalia. He said he wanted to appoint judges who would interpret the Constitution based on its original meaning, who would interpret statutes according to the text, and who would uphold the rule of law.” (Versus Clinton who “wanted . . . a liberal progressive willing to rewrite the US Constitution, willing to impose liberal policy agendas that she could not get through the democratic process . . .”).

Yet at the very same moment that these Senators, and many others, are talking about the need to confirm a jurisprudential conservative in order to protect the rule of law, our commitment to the rule of law in the most basic and fundamental sense—the notion that we are a government of laws and not men—is under sustained assault by the President of the United States.

I can’t mince words about this. Virtually every day the President of the United States swings a sledgehammer at our most basic institutional commitments to the rule of law. I know that may sound partisan to some of you, maybe to many of you. But it shouldn’t and I hope it doesn’t. These are just facts, plain straightforward facts. And these are the facts:

- The President attacked career Justice Department prosecutors for bringing criminal fraud charges against two sitting Republican Congressman (one for insider trading and one for converting campaign funds to personal use) because, in his words, the indictments would make it more difficult for Republicans to hold on to those seats in the upcoming congressional elections. I’m not saying these congressmen are guilty. Like everyone else they deserve a presumption of innocence until their guilt has been established. But what the President said is that the Department of Justice should have declined to prosecute in order to avoid potentially adverse partisan consequences for the Republican Party.

- The President has repeatedly demanded that the Department of Justice bring criminal charges against his former adversary in the Presidential race, against the former Director of the FBI, against the former Deputy Director of the FBI, [and] against a career DOJ official who heads the Organized Crime Drug Enforcement Task Force.
- The President has repeatedly castigated the Attorney General for his decision to recuse from a DOJ investigation into activities in which the Attorney General played a part, notwithstanding unambiguous advice from DOJ's ethics office that the Attorney General must recuse. And the core of his criticism is that the recusal has prevented the Attorney General from protecting him against DOJ's investigations.
- The President repeatedly attacks the legitimacy of the Special Counsel's investigation into allegations of Russian interference in the 2016 election and related matters, and demands that it cease—despite the many convictions and guilty pleas it has produced.
- The President attacked the FBI earlier this month as a cancer.
- The President has declassified information in applications for FISA warrants against the advice of his national security advisors who are concerned about harm to intelligence sources and methods, and threatens to do so again—all to allow allies in Congress to use the disclosed information to attack the legitimacy of the Special Counsel's investigation into Russian interference with the 2016 election.
- The President attacks the integrity of the judiciary, describing those who rule against him as “so-called judges,” and, as a candidate, stating that a judge of Mexican descent could not judge a case against him fairly and impartially.

We have never experienced anything like this kind of sustained public assault on the integrity of our legal institutions by the President of the United States. It is not normal. And these are the facts. Every one of these things occurred. And the President continues to say and do these things. Now I think the purpose of these statements and these actions is clear enough. The President is trying to bend our nation's legal institutions—the Department of Justice, the FBI, the judiciary—to his personal will. He seeks to deploy the mighty power of law enforcement against his perceived political foes. And he seeks at the same time to ensure that this mighty power will not be deployed against him, his family, or his political allies. These acts are the very definition of a demagogue and the very antithesis of the rule of law in the most fundamental sense. Virtually every day, the President gets up and swings his sledgehammer. And with each blow, the foundations of our commitment of our institutions to the rule of law become less secure.

And what do we hear from our leaders in the President's party, both in and out of government? Well, with a few brave exceptions what we hear is crickets. I recognize that it sounds partisan to point a finger at "leaders in the President's party." But the problem is that unless and until the leaders of the President's own party take a stand, it remains too easy for the President and his supporters to brush off criticism of his attacks on our legal institutions as partisan posturing. And I'm pretty sure those silent leaders know that.

I don't fault the women and men of DOJ and the FBI for their silence. For the most part, they are keeping their heads down and doing their jobs as they should be done. On a substantive level, I don't like some of what they are doing—their immigration policies and their move back toward draconian criminal sentencing for example. But those are legitimate disputes about policy that do and should occur in our system. Thus far the Department has weathered the sledgehammer blows.

And there certainly have been courageous voices in the Republican Party. A number of conservative intellectuals and leading lawyers have spoken out publicly against the damage the President is doing to our faith in the rule of law. And what they have done takes real courage. They have paid and will pay a considerable personal and professional price. And some congressional leaders—perhaps chief among them this State's Senator Ben Sasse—have had the courage to do so as well. But they remain a distressingly small minority.

Now certainly some of this, especially for elected officeholders, may come down to simple fear of political retribution. But as I said, I think it is about something else. I don't know what is in the hearts and minds of these people. But I think it is a fair surmise that they have decided that they are willing to run the risks to the rule of law in the broader sense in order to secure a victory for their view of the rule of law as a law of rules in the courts. That is what the "but Gorsuch" and now "but Kavanaugh" memes are ultimately about. The *Washington Examiner* reported that at the 2017 Federalist Society Convention, attendees were given red stress reliever squeeze balls emblazoned with the phrase "but Gorsuch." That pretty much says it all.

But in response to "but Gorsuch" or "but Kavanaugh," I say what value is there in maintaining a commitment to the interpretive methods of textualism and originalism if the legal institutions that maintain our commitment to the rule of law in the more fundamental sense lie in ruins? It just doesn't much matter whether DOJ's enforcement of criminal statutes faithfully follow the statutory text if the targets of that enforcement are being chosen because they are the President's political or personal enemies. It doesn't matter much if DOJ or the FTC are advancing a principled interpretation when they enforce the antitrust laws if the reason they are enforcing those laws is to harm or intimidate companies the President perceives as critics or foes. And it doesn't matter much

that the enforcement actions the government brings are based on principled interpretations when the government is choosing not to bring enforcement actions based on those very same interpretations against persons or entities who are the President's friends and supporters.

Now I want to be clear: we are not there yet. But we are teetering on the precipice.

V. HOPE

And yet I have hope. I believe that what I have described as the more fundamental understanding of the rule of law is actually common ground even for judges, academics and lawyers otherwise deeply divided on questions of interpretation and results. I believe most of us in this profession agree that it is an abuse—a transgression of the rule of law—to wield the awesome power of law enforcement as a political weapon against your enemies. I believe that most of us agree that it is an abuse—a transgression of the rule of law—to refuse to enforce the law for partisan political reasons. I believe that most of us agree that it is an abuse to call our law enforcement institutions a cancer, or to declassify sensitive national security information to advance partisan political objectives.

And I believe that the leaders who have been silent so far know in their hearts that they cannot be silent forever. I believe that they know they are going to have to take a stand. It will take courage. But I believe it will happen. And when it does, it will be important for those of us on the progressive side to honor that courage and that commitment. Those of us who are out there now talking about the threat to the rule of law aren't really risking very much to do so. But those on the right are taking a real risk. And we on the other side will need to remember that, and be ready to do the same when the challenge falls to us.

I believe they will do this because I believe that at the end of day, for all the divisiveness and rancor we are experiencing right now, we do share common ground. And when that moment of truth arrives and they do take a stand, that may well be when we can begin to acknowledge again how much common ground there is between us. That would be something we should all welcome and something we can all build upon. At least I hope so.