

What We Talk About When We Talk About the Rule of Law

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This article considers the concept of the rule of law both as a commemoration of the past and as a frame of reference. In particular, it examines the rule of law at the intersection of law and politics, namely the point where politics becomes law-bound. The article presents case studies from Canada, the US and the UK to explore how legal and political rationalities intersect in the idea of the rule of law. The comparison reveals troubling questions as to the apparent normalization of significant and recent departures from the rule of law in all three jurisdictions.

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I. Introduction

This article considers the concept of the rule of law both as a remembrance of the past and as a frame of reference for the present. In particular, it examines the rule of law at the intersection of law and politics. A more complete understanding of the rule of law is important as the public looks to lawyers to explain when, why and how political actors are bound by formal legal limits. Being able to know what is meant when a particular jurisdiction is claimed to be in compliance with the rule of law has become especially important because of a growing public awareness of questions relating to the legality of government action, along with continued challenges in applying the rule of law's basic requirement: that political action taken by the executive must be consistent with established legal standards.

In exploring these questions, this article presents case studies from Canada, the United States and the United Kingdom as common law jurisdictions with significant overlap in legal language, legal culture and legal history. For each jurisdiction, the article will consider how the rule of law might be placed at risk by unchecked executive power. The article begins by introducing the rule of law as a conceptual device which emerges on the margins of law and politics before examining the case studies and concluding with a refined understanding of the current state of the rule of law that draws on insights from the case studies.

II. The Rule of Law: Between Law and Politics

Most scholarship on the rule of law begins by simply providing a definition of the concept that is suitable to the scholar. This article instead begins by noting the intellectual history of the concept. The phrase is commonly attributed to AV Dicey and other nineteenth century English thinkers of public law and jurisprudence. According to Costas Douzinas, “A.V. Dicey and Walter Bagehot distinguished between political and legal sovereignty” by saying that “the former [political sovereignty] belongs to the electorate and has only ideological significance” while “legal sovereignty by contrast is perpetual, indivisible and illimitable”.¹ It is fair to say that a similar relationship can exist between the concepts of the democracy in political sovereignty and the rule of law in legal sovereignty. This is the basic distinction which this paper seeks to tease out in the contemporary Anglo-American context.

Underlying this article is a rich body of scholarship on the rule of law that speaks to questions of human rights, liberalism and equality as substantive inheritances of an imagined universal (or at least western) political and legal culture. An analysis of this scholarship reveals an unresolved divide between those who understand the rule of law as infused with a ‘thick’ or substantive substrate of content on the one hand, and those who understand it as ‘thin’ or procedural without substantive content on the other hand. In the thick version, the rule of law means more than guarantees that the law applies equally to all. It also means that the law includes principles of equality of access and basic human rights.² By contrast, in the thin version, the concept tends to be neutral or devoid of substantive content and avoids intruding on the autonomy of the legislature

1 Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge-Cavendish, 2007) at 282.

2 See Jeremy Waldron, “Legislation and the Rule of Law” (2007) 1:1 *Legisprudence* 91. For an empirical analysis of the usage by scholars, see Jørgen Møller & Svend-Erik Skaaning, “Systematizing Thin and Thick Conceptions of the Rule of Law” (2013) 33:2 *Justice System Journal* 136.

to make policy decisions.³ Proponents of the thin view tend to resort to *laissez-faire* views to justify an ideologically neutral definition of the concept.⁴ This perspective reveals a critical divide between rules that govern political and legal rationality. Notably, both thin and thick conceptualizations of the rule of law contain a liberal ethos. The thin view sees the rule of law as “a technical construction limited to formal conditions without material content”.⁵ These conditions tend to focus on laws being clear, prospective and non-contradictory. The thick view insists on substantive equality of outcome and formal equality of opportunity. This perspective includes norms designed to provide respect for individual liberties and human rights among other commitments of liberalism.

In writing on the rule of law, Brian Tamanaha puts forward a series of assertions about the rule of law’s relationship with the normative universe of liberalism. These assertions provide a useful starting point for further analysis. Among them is the axiomatic rule on the relationship between the rule of law and liberal ideology and moral philosophy to the effect that although the rule of law can exist outside liberal systems, no liberal system can exist without the rule of law. In premodern times in the ancient, classical and medieval iteration of the rule of law was about collective self-rule rather than individual rights, *e.g.* citizen self-rule in Greece and the containment of the rule of the many by the one in medieval iterations. But, Tamanaha emphasizes, modern imaginings of the rule of law emerge from Renaissance and Reformation and reach a high point in the individuation of the Enlightenment and the US and French Revolutions in particular. The modern rule of law is individualist insofar as it is motivated by a

3 The late Justice Scalia is well-known for this view. For a critique thereof see Erwin Chemerinsky, “The Jurisprudence of Justice Scalia: A Critical Appraisal” (2000) 22:2 *University of Hawaii Law Review* 385 at 385–401. For a principled defence of judicial activism see Sonja C Grover, *Judicial Activism and the Democratic Rule of Law* (London: Springer, 2020) at 232–69.

4 See Grover, *ibid* at 232.

5 Jesús Fernández-Villaverde, “Magna Carta, the Rule of Law, and the Limits on Government” (2016) 47:1 *International Review of Law and Economics* 22 at 22–28, citing Brian Z Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004) at 33.

fear of imposition on personal liberty by the state (as is the social contractual model upon which liberal political theory is based).⁶

The late Lord Bingham laid out eight fundamental postulates of the rule of law in his popular title on the subject, as follows:

1. Law must be accessible and strive to be intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. Law of the land should apply equally to all, save and to the extent objective differences justify differentiation.
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly for the propose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. Law must afford adequate protection of fundamental human rights.
6. Means must be provided for resolving disputes without prohibitive cause or inordinate delay, bona fide civil disputes which the parties are unable to resolve.
7. Adjudicative processes provided by the state should be fair.
8. Compliance by the state with obligations in international law as in national law.⁷

It is clear that both Tamanaha and Bingham adopt a thick version of the rule of law. In other words, the basic characteristics attributed to the rule of law are not only procedural but also involve value judgments and normative commitments. A synthesis of the rule of law scholarship suggests that the concept is best seen as an ethical horizon toward which we might strive, alongside democracy but at times in tension with it. The tension arises from democracy privileging majoritarianism while a substantive view of the rule of law can override

6 See Tamanaha, *ibid.*

7 See Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

majorities on the basis of a higher social contract, often reflected in a culture of constitutionalism.

This article focuses on the rule of law as applied in two scenarios: (a) a crisis situation where the executive government is called upon to take urgent action in response to a crisis; and (b) the potential for a conflict of interest between the personal interests of political leaders and the public interest. In these contexts, the rule of law is understood as making politics law-bound when an executive act can be seen to conflict with legal requirements. While this article favours Tamanaha and Bingham's thick version of the rule of law, the case studies do not turn on this question. Instead, each presents a clear example of a departure from the thinnest possible view of the rule of law, even one merely focused on maintaining fidelity to existing legal standards. In terms of defining 'law', for the purpose of this article, once the threshold that makes a normative standard a legal rule has been crossed it is considered a valid legal standard.

III. Case Studies

A. Canada

Through legislation, the Parliament of Canada has attempted to make political actors, including the executive government, accountable to basic principles of the rule of law. The main source of rules is found in the *Conflict of Interest Act*.⁸ Applications of the legislation are contained in the reports of the Conflict of Interest and Ethics Commissioner. A number of these reports relate to Justin Trudeau's Liberal government, two of which are notable. First, the 2017 investigation into Trudeau's relationship with the Aga Khan Foundation found multiple violations of the legislation publicly reported upon by the Commissioner in *The Trudeau Report*.⁹ Second, the 2019 investigation of the SNC-Lavalin affair disclosed breaches of the legislation publicly reported upon

8 SC 2006, c 9, s 2.

9 Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Trudeau Report*, by Mary Dawson (Ottawa: CIEC, 20 December 2017).

by the Commissioner in the *Trudeau II Report*.¹⁰ At the time of writing, the Conflict of Interest and Ethics Commissioner has confirmed a new investigation into Trudeau in connection with a non-profit organization called WE Charities, which with Trudeau and his family were associated before and after the 2015 election.¹¹

1. The SNC-Lavalin Affair: The Problem of Conflict of Interest

The SNC-Lavalin affair is well known to Canadians and was reasonably widely reported on by English language media in the US and the UK.¹² The legal origins of the scandal lie in a 2015 RCMP investigation into the Canadian construction and engineering giant's business practices in Muammar Gaddafi's Libya. These events draw to a close in 2019 when the company pled guilty to fraud charges arising under the *Criminal Code*¹³ of Canada and to bribery charges arising under the *Corruption of Foreign Public Officials Act*.¹⁴ The case against the firm involved bribes to secure lucrative contracts with the Libyan government before Mr. Gaddafi was deposed. Ultimately, the company agreed

10 Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, by Mario Dion (Ottawa: CIEC, 14 August 2019).

11 See Peter Zimonjic, "Ethics watchdog investigating Trudeau over choice of WE Charity to run \$900M student grant program", *CBC News* (3 July 2020), online: <www.cbc.ca/news/politics/wecharity-trudeau-mario-dion-probe-1.5637195>.

12 See e.g. Ian Austin, "The Strange Story Behind the SNC-Lavalin Affair", *The New York Times* (15 February 2019), online: <www.nytimes.com/2019/02/15/world/canada/snc-lavalin-justin-trudeau.html>; Leyland Cecco, "Explained: the case that could bring down Canada's Justin Trudeau", *The Guardian* (1 March 2019), online: <www.theguardian.com/world/2019/mar/01/explained-the-case-that-could-bring-down-canadas-justin-trudeau>.

13 RSC 1985, c C-46.

14 SC 1998, c 34.

to pay a CAD \$280,000,000 fine.¹⁵ SNC-Lavalin's legal exposure to serious criminal charges overseas, triggered a political crisis for the governing Liberal Party which ended with the high profile exit of two senior ministers from cabinet, including the first Indigenous woman to hold the twin portfolios of Attorney General and Minister of Justice, Jody Wilson-Raybould, and Federal Treasury Board President, Jane Philpott. Beyond its impact on the careers of two top ministers in his government, the scandal also triggered the resignation of Trudeau's longest serving and close political advisor, Principal Secretary, Gerald Butts and that of Canada's most senior unelected civil servant, the Clerk of the Privy Council, Michael Wernick, both of whom were implicated by the Conflict of Interest Commissioner in a pressure campaign against then Attorney General and Minister of Justice, Wilson-Raybould to intervene in the criminal prosecution of SNC-Lavalin.

Matters came to a head when Wilson-Raybould alleged and the media widely reported that the Prime Minister and the Office of the Prime Minister as well as other high ranking government officials, including Butts and Wernick, pressured her to intervene in the independent Director of Public Prosecutions ("DPP") branch of the Department of Justice, to grant a Deferred Prosecution Agreement ("DPA"). The DPP is an independent and arm's length body which makes discretionary decisions about public prosecutions in the public interest and insulated from political considerations.¹⁶ A DPA is sometimes called a remediation agreement and similar provisions exist also exist in the US and the

15 See Gail J Cohen, "RCMP lays corruption charges against SNC-Lavalin", *Canadian Lawyer Magazine* (19 February 2015), online: <www.canadianlawyermag.com/news/general/rcmp-lays-corruption-charges-against-snc-lavalin/273054>; Nicolas Van Praet et al, "SNC-Lavalin unit pleads guilty to fraud charge, to pay \$280-million fine", *The Globe and Mail* (19 December 2019), online: <www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption/>.

16 DPAs which also exist in the US and the UK, became a part of the law of Canada with amendments to the *Criminal Code* of Canada given royal ascent on September 19, 2018 in the context of omnibus *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12, s 403.

UK.¹⁷ Such an agreement permits a prosecutor and a corporation charged with corporate malfeasance in the form of fraud or corruption to agree to a deferred prosecution triggered only if the corporation does not reform itself, make restitution and implement new self-regulation measures. In Canada, such an agreement, can now occur by way of Part XXII.1, section 715.3(1) of the *Criminal Code* provides that remediation agreements entered into “between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement”.¹⁸ This provision in the *Criminal Code* was added as a result of intensive lobbying of the Trudeau Government for it by SNC-Lavalin.¹⁹

17 For a jurisdictional comparison from an academic perspective see Paetrick Sakowski, “A Bargain with Justice? A Perspective of Canada’s New Remediation Agreement” (2019) 42:3 *Manitoba Law Journal* 365; Eleanor Dennis, “Using N/DPAs to Achieve Global Settlements: Lessons for Canada and its Nascent Regime” (2020) 29:1 *Dalhousie Journal of Legal Studies* 45. For a guide to corporate commercial or white collar clients from one of Canada’s leading commercial law firms see Lawrence E Ritchie & Malcolm Aboud, “Deferred Prosecution Agreements (DPAs) come into force in Canada” (19 September 2018), online (blog): *Osler* <www.osler.com/en/blogs/risk/september-2018/deferred-prosecution-agreements-dpas-come-into-force-in-canada>; Patrick FD McCann, “Remediation Agreements: A Rational Process that is in the Public Interest” (19 September 2019), online: *Fasken Newsletter*, <fasken.com/en/knowledge/2019/09/ott-newsletter-remediation-agreements-a-rational-process-that-is-in-the-public-interest>.

18 *Criminal Code*, *supra* note 13, s 715.3(1).

19 See David Cochrane, “Inside SNC-Lavalin’s long lobbying campaign to change the sentencing rules”, *CBC News* (14 February 2019), online: <www.cbc.ca/news/politics/snc-lavalin-trudeau-bribery-fraud-wilson-raybould-1.5020498>; Bill Curry & Tom Cardoso, “SNC-Lavalin Lobbied PMO 19 times since start of 2017 records show”, *The Globe and Mail* (2 October 2019), online: <www.theglobeandmail.com/politics/article-snc-lavalin-had-access-to-governments-top-decision-makers-lobbying/>; Robert Fife & Daniel Leblanc, “Liberals, Conservatives reimburse illegal SNC-Lavalin donations”, *The Globe and Mail* (8 September 2016), online: <www.theglobeandmail.com/news/politics/snc-lavalin-violated-elections-act-with-contributions-to-liberals-tories/article31762290/>.

It meant that a corporate accused, much like a regular person who is charged with a criminal offence, could be offered a deferred prosecution.²⁰ In a deferred prosecution, an accused agrees to plead guilty in exchange for the Crown's agreement to divert them from the criminal justice system into an alternative non-penal remedy. SNC-Lavalin, a major employer in Canada and a donor to the Liberal Party, had successfully lobbied the Government earlier in its mandate for an amendment to the *Criminal Code* which would permit corporations to "reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing". That language is now reflected in section 715.31(f) of the *Criminal Code* along with five other legislative objectives Parliament attributes to the amendment.²¹

SNC-Lavalin is not only Canada's largest construction company, it is a significant employer in Canada,²² it is also a significant donor to the Liberal

20 *Budget Implementation Act*, *supra* note 16.

21 *Criminal Code*, *supra* note 13, s 715.31(f) is the final of six objectives Parliament attributes to the revisions to provisions treating remediation agreements. Other legislative objectives include the denunciation of an organization's wrongdoing, proportionate accountability for wrongdoing, encouragement of respect for the law, encouragement of voluntary disclosure of wrongdoing and provision for reparations for harm caused.

22 In testimony before the House of Commons Justice Committee in 2019, Trudeau's former principal secretary, Gerald Butts, is reported to have testified that "9,000" Canadian workers employed by the firm in the country "could lose their jobs" in addition to more in the supply chain more broadly "if the company couldn't secure a DPA" as cited by Diana Swain, "An economic reality check on SNC-Lavalin: Are 9,000 jobs really at stake?", *CBC News* (8 March 2019), online: <www.cbc.ca/news/business/snc-lavalin-scandal-economics-jobs-risk-1.5047248>. These claims were uncertain and tough to verify. For a very critical view of the jobs-based argument for DPA see Ian Lee & Philip Cross, "Why Trudeau's excuse that he's protecting SNC-Lavalin 'jobs' is total baloney", *Financial Post* (15 March 2019), online: <financialpost.com/opinion/why-trudeaus-excuse-that-hes-protecting-snc-lavalin-jobs-is-total-baloney>.

Party.²³ Long before this scandal, it had a long established record of illegal donations and improper influence peddling with both of Canada's major political parties.²⁴ After Ms. Wilson-Raybould was sacked she was replaced by David Lametti; the decision by the DPP not to grant a DPA was not interfered with. However, the firm did strike a deal with prosecutors whereby a subsidiary pled guilty to fraud and agreed to pay a CAD \$280,000,000 fine over five years. Which, as Professor Errol Mendes puts it, "got [SNC-Lavalin] a DPA by another means".²⁵ For his part, Mr. Trudeau would go on a year later to secure another majority government. Ms. Wilson-Raybould now sits as an independent in Parliament, Ms. Philpott narrowly lost her re-election bid as an independent Member of Parliament and Mr. Wernick is retired. Mr. Butts, a long-time and close personal friend of the Prime Minister, was quietly moved back into the Prime Minister's inner circle after a short period in the wilderness. The scandal and its aftermath speaks to a culture of impunity and lawlessness at the highest levels of the Canadian Government.

The Conflict of Interest and Ethics Commissioner's report into the SNC-Lavalin affair speaks about the rule of law as it applies to the Prime Minister's control of the federal cabinet, particularly in relation to the dual role of the Minister of Justice and Attorney General. The findings of the report strongly criticized Trudeau:

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- 23 See Tim Naumetz, "Liberal raised nearly \$500,000 amid brewing SNC-Lavalin Affair", *iPolitics* (3 April 2019), online: <ipolitics.ca/2019/04/03/liberals-raise-nearly-1-million-amid-brewing-snc-lavalin-affair/>.
- 24 See Alex Boutilier, "SNC-Lavalin made illegal donations to Liberals, Conservatives from 2004 to 2011", *Toronto Star* (8 September 2016), online: <[iPolitics \(2 January 2020\), online: <\[ipolitics.ca/2020/01/02/was-the-public-interest-and-canadas-legal-and-moral-obligation-served-in-snc-lavalin-conviction/\]\(http://ipolitics.ca/2020/01/02/was-the-public-interest-and-canadas-legal-and-moral-obligation-served-in-snc-lavalin-conviction/\)>. Mendes further notes that the fine is comparatively low to what similar offenders are ordered to pay in the UK and the US.](http://www.thestar.com/news/canada/2016/09/08/snc-lavalin-broke-laws-in-donations-to-liberals-conservatives.html?rf=)

[t]he evidence showed that SNC-Lavalin had significant financial interests in deferring prosecution. These interests would likely have been furthered had Mr. Trudeau successfully influenced the Attorney General to intervene in the Director of Public Prosecutions' decision. The actions that sought to further these interests were improper since they were contrary to the Shawcross doctrine and the principles of prosecutorial independence and the rule of law. For these reasons, I found that Mr. Trudeau used his position of authority over Ms. Wilson-Raybould to seek to influence, both directly and indirectly, her decision on whether she should overrule the Director of Public Prosecutions' decision not to invite SNC-Lavalin to enter into negotiations towards a remediation agreement.²⁶

The Shawcross doctrine relates to the independence of the Attorney General from cabinet, politics and the decision-making apparatus of the executive, and by extension the administrative arm of the state.²⁷ The doctrine supports the impartial role of the Attorney General as the chief law enforcement officer. At the federal level in Canada, the potential for conflict is significant as the portfolios of Attorney General and Minister of Justice (the latter being a senior cabinet minister responsible for formulating policy) are held by the same individual. The doctrine, named after Sir Hartley Shawcross, was widely debated in the media at the time that the SNC-Lavalin affair unfolded.²⁸ In 1951 Shawcross described, in the British House of Commons, what he believed to be the proper relationship between the Attorney General and the cabinet as one in which he or she may consult with colleagues at their discretion.²⁹

26 *Trudeau II Report*, *supra* note 10 at 2.

27 For a basic definition of the doctrine see John Llewelyn Jones Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 360.

28 For a comprehensive and authoritative summary of the media coverage and the underlying legal issues see Richard Devlin & Sarah Frame, "Economic Corruption, Political Machinations and Legal Ethics: Correspondents' Report from Canada" (2019) 22:1/2 *Legal Ethics* 94.

29 See Kent Roach, "Prosecutors and National Security" (2019) [forthcoming in Ronald Wright, Kay Levine & Russell Gold, eds, *Oxford Handbook on Prosecutors and Prosecutions*] on the definition and historical origins of the

However, the eventual decision to prosecute or not prosecute in a particular criminal case rests with the Attorney General alone. No undue pressure should be placed on him or her by the prime minister or any other member of cabinet.³⁰ In Canada, the independence of the public prosecution function within the Department of Justice is itself institutionally reinforced by its separate administration in the Department of Public Prosecutions.³¹

Canadian courts have previously considered the Shawcross doctrine. The leading cases are *Miazga v Kvello Estate*³² and *Krieger v Law Society of Alberta*.³³ In its 2002 judgment in *Krieger*, the Supreme Court of Canada held that “[i]t is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions”.³⁴ The Court further held:

[t]he gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General’s role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. Unlike the

Shawcross Principle and of its particular iteration in Canada: “[t]he Shawcross Principle articulated in 1951 is a constitutional convention that while the Attorney General (AG) may consult Cabinet colleagues about the policy implications of prosecutorial decisions, he or she is not to be directed or pressured on such decisions by the Cabinet and that the decision should be made by the AG alone. ... The leading Canadian articulation of this principle remains federal Attorney General Ron Basford’s statement that prosecutorial decisions should not be made on the basis of ‘narrow, partisan views, or based upon the political consequences to me or to others; but that the AG is entitled ‘to seek information and advice from others’ while not being ‘directed by his colleagues in the government or by Parliament itself’” [citation omitted].

30 See *ibid.*

31 See *Director of Public Prosecutions Act*, RSC 2006, c 9, s 121.

32 2009 SCC 51 [*Miazga*].

33 2002 SCC 65 [*Krieger*].

34 *Ibid* at para 3.

U.K., cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of cabinet but also Minister of Justice, and in that the role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K. ... It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.³⁵

Several years later in *Miazga*, the court affirmed *Krieger* for the proposition that prosecutorial discretion was at the heart of Crown independence, which meant that “decisions taken by a Crown attorney pursuant to his or her prosecutorial discretion are generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process”.³⁶ It also observed that “[t]he independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from the government”.³⁷

It is important to contextualize these cases. Neither was about the dual role of Attorney General and Minister of Justice. *Miazga* was a civil case arising from a suit for malicious prosecution. *Krieger* involved questions relating to the role of a lawyer acting as a provincial Crown attorney, specifically as to the application of law society rules that required such lawyers to provide timely disclosure of evidence to the accused. The decision in *Krieger* turned on the question of whether the law society had interfered with prosecutorial discretion through its regulation of the legal profession. Despite their different contexts, these cases set the stage for prosecutorial independence and discretion in Canada.

35 *Ibid* at paras 29–30 [footnotes omitted].

36 *Miazga*, *supra* note 32 at para 6.

37 *Ibid* at para 46.

Aside from its role in supplying the Attorney General with independence to promote impartial decision-making, the Shawcross doctrine is also related to the interface of law and politics within the broader concept of the rule of law. The doctrine goes further than protecting prosecutorial independence at the level of Crown attorneys as it relates to the conduct of the Attorney General. While it permits an Attorney General to take the public interest into account in exercising prosecutorial discretion, it prohibits political interference in the exercise of this discretion.

In the SNC-Lavalin affair, the Conflict of Interest and Ethics Commissioner concluded that the Prime Minister's involvement in deferring the prosecution of SNC-Lavalin was contrary not only to the Shawcross doctrine, but also to the principles of prosecutorial independence and the rule of law.

Following this report, the government asked former Deputy Prime Minister and Minister of Justice Anne McLellan to review the roles of the Attorney General and Minister of Justice and Attorney General of Canada. Her review, released in June 2019, concluded that no separation of these roles were required or desirable from a rule of law perspective.³⁸ In her report, McLellan concluded that:

[t]he structure we have balances the independence of the Attorney General with political accountability. It safeguards against interference in prosecutorial decisions by placing prosecutions in the hands of an appointed, tenured public official. It requires that on the rare occasions when an Attorney General decides to exercise their authority to intervene, it will be transparent. ... As I heard repeatedly in our consultations and literature review, any structure can be vulnerable to improper interference and decision-making based on impermissible considerations. ... Upholding the rule of law cannot be the responsibility of only one person. It is the responsibility of the Prime Minister, Cabinet, all parliamentarians, appointed officials, the Clerk of the Privy Council, the public service, and the judiciary. No matter what structure is in place, a democracy can only thrive if there is a commitment on the part of all

38 Perhaps this conclusion is unsurprising coming from a former Liberal Attorney General and Minister of Justice rather than an independent outsider.

who govern it to the rule of law. It is my hope that the recommendations I have made will reflect and support that commitment.³⁹

McLellan's unwillingness to upset the status quo in the face of what appears to be a fairly obvious case for reform was poorly received in the media.⁴⁰

It is also worth considering the conflict of interest question in relation to the SNC-Lavalin matter. Section 9 of the *Conflict of Interest Act*⁴¹ provides:

9 [n]o public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests.⁴²

In this case, the relevant public office holder is Trudeau in relation to the furtherance of a private interest, namely that of SNC-Lavalin. SNC-Lavalin is a major employer in Trudeau's home province and city and was also a donor to the governing Liberal Party. In this sense, the conflict of interest is between the public interest in prosecutorial independence and the perceived political and electoral interests of the Prime Minister, his political party and the government.⁴³ The scandal threatened to undermine Trudeau's "sunny ways"

39 Canada, Office of the Prime Minister of Canada, *Review of the Roles of the Minister of Justice and Attorney General of Canada* by The Honourable A Anne McLellan (28 June 2019) at 44–45.

40 See Anne Kingston, "Anne McLellan's appointment: one more bumbling bid to bury the SNC-Lavalin affair", *MacLean's* (22 March 2019), online: <www.macleans.ca/politics/ottawa/anne-mccllans-appointment-one-more-bumbling-bid-to-bury-snc-lavalin/>.

41 *Conflict of Interest Act*, *supra* note 8, s 9.

42 *Ibid.*

43 See Charlie Smith, "Where does Trudeau's SNC-Lavalin scandal go from here?", *The Georgia Straight* (28 February 2019), online: <www.straight.com/news/1207256/where-does-trudeaus-snc-lavalin-scandal-go-here>; *contra*, Jonathan Malloy, "Is the SNC-Lavalin controversy truly a scandal?" (24 February 2019), online: *The Conversation* <theconversation.com/is-the-snc-lavalin-controversy-truly-a-scandal-112208>.

anti-corruption and transparency image that initially brought him to power in 2015.⁴⁴

What is clear in even the thinnest conception of the rule of law is that the political interests of the governing party and its leader are not to take priority over the public or national interest. Even where there is no direct personal enrichment, a political advantage has value and can suffice as an interest leading to a conflict. Insofar as Trudeau, as both party leader and head of government, sought to intervene in the exercise of prosecutorial discretion by the Department of Public Prosecution under the auspices of the Attorney General, the Conflict of Interest and Ethics Commissioner observed: “I find that Mr. Trudeau used his position of authority over Ms. Wilson-Raybould to seek to influence her decision on whether she should overrule the DPP decision not to invite SNC-Lavalin to enter into negotiations towards a remediation agreement”.⁴⁵ Arguably, a country that takes the rule of law seriously might have required Trudeau to resign in these circumstances. However, it appears that Canadians may not have appreciated the significance of the Conflict of Interest and Ethics Commissioner’s findings, at least not sufficiently to stop them from returning the Prime Minister and his Liberal Party to power in 2019, albeit in a chastened minority. Although the party went from a large majority of 184 seats in 2015

44 David Moscrop, “Trudeau’s ‘sunny ways’ were doomed to meet their SNC-Lavalin. Because this is Canada” (5 March 2019), online: *MacLean’s* <www.macleans.ca/politics/trudeaus-sunny-ways-were-doomed-to-meet-their-snc-lavalin-because-this-is-canada/>; Kai Nagata, “The Disturbing Double Meaning of Trudeau’s ‘Sunny Ways’” (29 November 2017), online: *The Narwhal* <www.thenarwhal.ca/disturbing-double-meaning-trudeau-s-sunny-ways/>.

45 Martin Patriquin, “SNC-Lavalin affair evokes ‘humiliation’ of sponsorship scandal in Quebec” (8 February 2019), online: *iPolitics* <www.ipolitics.ca/2019/02/08/snc-lavalin-affair-evokes-humiliation-of-sponsorship-scandal-in-quebec/>; Charlie Pinkerton, “Trudeau tried to influence Wilson-Raybould on SNC-Lavalin, broke conflict-of-interest code: Ethics Commissioner” (14 August 2019), online: *iPolitics* <www.ipolitics.ca/2019/02/08/snc-lavalin-affair-evokes-humiliation-of-sponsorship-scandal-in-quebec/>.

down to minority of 157 seats in 2019, it is truly not clear to what extent the SNC-Lavalin affair can be said to have motivated voters. However, popular political polling suggested the scandal was a factor during the campaign.⁴⁶

Although the narrative expressed in the media understood the situation as relating to a conflict of interest, it was not always clear how the conflict related to the rule of law. For Liberal Party supporters who were either employees of SNC-Lavalin or sympathetic to the jobs-first message communicated by Trudeau in his defence, the conduct at issue may have seemed acceptable and even correct. For others who prioritized the rule of law, Trudeau's actions were disconcerting as it suggested that the Prime Minister was willing to cross ethical lines repeatedly.

The question of a conflict of interest is an ethical problem as much as it is a rule of law one. Indeed, it is hard to understand the rule of law in the absence of a corresponding ethos of public life. In this case, the Prime Minister acted in his public capacity to pursue his own electoral interests over the professional advice of independent prosecutors. This action crossed a crucial ethical boundary between a political act and the apolitical and impartial act of proceeding with a criminal prosecution. Is this significantly different from when US President Donald Trump intervened with federal Department of Justice prosecutors in the sentencing recommendations of his convicted associate Roger Stone?⁴⁷ This comparison may not be welcome for centrist Canadians who

46 See David Colletto & Bruce Anderson, "Has the SNC-Lavalin/Wilson-Raybould Controversy Impacted Public Opinion?" (6 March 2019), online: *Abacus Data* <abacusdata.ca/has-the-snc-lavalin-wilson-raybould-controversy-impacted-public-opinion/>.

47 Article II, §2 of the US Constitution of course grants the President the legal power "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment". However that does not end the matter, US courts have not yet been tested in the face of claim taken against someone who received a Presidential pardon given for a corrupt intent or colourable purpose designed to undermine the rule of law. On the Stone pardon specifically, see Harold Hongju Koh et al, "Is the Pardon Power Unlimited?" (28 February 2020), online: *Just Security* <www.justsecurity.org/68900/is-the-pardon-power-unlimited/>. Koh et al argue that if Trump was re-elected an abuse of

support Trudeau's government and imagine Canada to be everything that Trump's America is not. However, the tendencies for the rule of law to be flouted in the context of conflict of interest are shared by both countries. The rule of law is violated in the same way in both situations through interference with the prosecutorial independence of the Attorney General and the Department of Justice. In the US, this kind of interference has become an acute and continuing problem during the course of the Trump administration.⁴⁸ However, its features are not foreign to the Canadian government. When the executive intervenes in the criminal justice system for political purposes in the absence of a sound legal basis, the rule of law will be undermined unless the violation is recognized and remedied. This is particularly problematic in a country like Canada, the US and the UK where the office of the Attorney General and the Department of Justice is overseen by a member of the cabinet bound by party loyalty to the government and its leader. Structurally speaking, and as a question of institutional design, federal prosecutors in the US or Crown prosecutors in Canada and the UK are not appointed by courts, but rather by federal departments of justice. Federal prosecutors are ultimately answerable to the Attorney General. It is therefore hardly surprising that prosecutorial discretion can give rise to rule of law challenges.

the pardon power could become the basis for renewed obstruction of justice articles of impeachment in a second term and after his defeat a potential basis for criminal charges of obstruction of justice in both state and federal courts. The authors cite Alexander Hamilton's *Federalist* 74 for the proposition that the exercise of the pardon power would be guided by "humanity and good policy", "scrupulousness and caution", even "dread of being accused of weakness or contrivance".

- 48 See Center for Ethics and the Rule of Law, University of Pennsylvania, Ad Hoc Working Group in Participation with Citizens for Responsibility and Ethics in Washington (CREW), "Report on the Department of Justice and the Rule of Law Under the Tenure of the Attorney General William Barr" (12 October 2020), online (pdf): <www.law.upenn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law>. See *e.g.* at 9–10 where the Working Group "concluded that there had been extensive political and politically-motivated interference in individual prosecutions by the White House and Attorney General – particularly in the cases of Michael Flynn and Roger Stone".

2. The Provincial Routinization of the Notwithstanding Clause

Canada's *Charter of Rights and Freedoms*⁴⁹ (the "*Charter*") includes a derogation provision. Section 33 stipulates: "[p]arliament or legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7–15 of the *Charter*".⁵⁰ This provision provides a mechanism by which Parliament can override some of the most foundational civil and political liberties guaranteed by the Constitution of Canada. This provision represents the greatest weakness in the Canadian imagining of the rule of law. Professor Robert Leckey describes it as the "the nuclear weapon" of legislative options.⁵¹

For most of the *Charter*'s history, governments tended to avoid invoking section 33 to take away rights.⁵² However, over the past two years populist premiers in Canada's two most populous provinces have sought to bring section 33 into play as a way of circumventing the *Charter* scrutiny of illiberal laws. This is an alarming development for routine politics in the provinces.

Quebec's controversial secularism law, championed by Premier François Legault, prohibits the wearing of religious symbols or outward signs of religious

49 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

50 *Ibid*, s 33.

51 Daniel Leblanc & Ingrid Peritz, "Quebec to invoke notwithstanding clause to prevent Charter challenges of religious-symbols ban", *The Globe and Mail* (28 March 2019), online: <www.theglobeandmail.com/canada/article-quebec-to-invoke-notwithstanding-clause-to-prevent-charter-challenges/>.

52 See Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 *Constitutional Forum* 9 discussing the end of the "notwithstanding taboo" and attributing the phrase to Richard McAdam at 13, n 41. Earlier, at 11, n 23, Mailey attributes the insight to Richard Albert along with McAdam that "the strength of the political convention that quickly developed against invocations of s. 33" were responsible for the growth of judicial review and increasingly powerful judiciary in post-*Charter* Canada.

observance by those working in public facing jobs for the provincial government.⁵³ The law has the effect of precluding police, lawyers, teachers and others working for the state from wearing the Muslim hijab, the Sikh turban, the Jewish kippah and other religious symbols. So brazen is the law's non-compliance with the *Charter* that the legislation invokes the notwithstanding clause to exempt it from compliance with the *Charter* protections of free expression, religious freedom and equality.

Quebec governments have invoked section 33 over the years, but the last time it created a storm of controversy was in 1988, when Premier Robert Bourassa used the measure to adopt a restrictive language law.⁵⁴ This was a part of Quebec's dissent from the process of constitutional patriation from the United Kingdom in 1982. The essence of Quebec's objection to patriation was that it did not have a veto in constitutional amendment and could not protect minority language education rights to its satisfaction.⁵⁵

In addition to Quebec, Ontario Premier Doug Ford threatened to use the notwithstanding clause following his election in 2018.⁵⁶ The threat was made in response to the Ontario Superior Court of Justice's ruling in the *City of Toronto v Ontario (Attorney General)*.⁵⁷ Ford's response triggered a political and

53 See Bill 21, *An Act Respecting the Laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12.

54 See *Attorney General of Quebec v Quebec Association Protestant School Boards et al*, (1984) 2 SCR 66 (province's restriction on admissions to English schools); *Ford v Quebec*, (1988) 2 SCR 712 (Bourassa Government's prohibition on English commercial signage).

55 See Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding*, revised ed (Toronto: Carswell, 2007) at 264 ("In the last hours of the November conference everyone acknowledged that no proposal on minority language education rights and an amending formula would be acceptable to both to Ottawa and Quebec City").

56 See Jeffrey B Meyers, "First Ontario, now Quebec: The notwithstanding threat" (10 October 2018), online: *The Conversation* <www.theconversation.com/first-ontario-now-quebec-the-notwithstanding-threat-104379>.

57 2018 ONSC 5151 [*City of Toronto*].

legal crisis. The case involved *Charter* scrutiny of a hastily enacted law, the *Better Local Government Act*, referred to as Bill 5.⁵⁸ The Court held the law to be unconstitutional. Bill 5 sought to redraw the Toronto City Council by “reducing the number of City wards and councillors from 47 to 25 and *de facto* doubling the ward populations from an average of 61,000 to 111,000”.⁵⁹ Justice Belobaba found that key provisions of Bill 5 ran afoul of *Charter* section 2(b) that guarantees the rights of municipal voters and candidates to “freedom of thought, belief, opinion and expression”.⁶⁰ The court also held that these violations could not be justified under section 1 of the *Charter* that guarantees rights “subject to ‘such reasonable limits ... as can be demonstrably justified in a free and democratic society’”.⁶¹

In refusing to accept the Court’s ruling, Ford threatened to invoke section 33 of the *Charter*.⁶² In rushing the new legislation through, the government did

58 Bill 5, *An Act to amend the City of Toronto Act, 2006, The Municipal Act, 2001 and the Municipal Elections Act, 1996*, 1st Sess, 42nd Leg, Ontario, 2018 (assented to 14 August 2018) SO 2018, c 11 [Bill 5].

59 *City of Toronto*, *supra* note 57 at para 4.

60 *Ibid* at para 22.

61 *Ibid* at para 62. The injury to section 2(b) rights would be to the capacity of council candidates to effectively get their message out and campaign a changed electorate and redrawn electoral map on eve of an election. Justice Belobaba expressed doubt on the likelihood of success of other constitutional grounds including section 2(d) freedom of association and section 15(1) equality rights but does not foreclose on the possibility at para 13. In my opinion, a strong case could be made, on the basic principle of the rule of law as articulated in the seminal pre-*Charter* case of *Roncarelli v Duplessis*, [1959] SCR 121, which contains certain factual parallels.

62 Although he failed to formally invoke the notwithstanding clause in the proposed legislation, his public comments suggest that was his next move. The backlash was swift. Professor Lorraine Weinrib argued that the notwithstanding clause is governed by basic principles of the rule of law and cannot be abused in this way, see Lorraine Weinrib “Doug Ford can’t apply the notwithstanding clause retroactively to impede democracy” (18 September 2018), online (blog): *The University of Toronto Faculty of Law*

not make clear its intent to override *Charter* rights in the text of the original legislation reviewed by Justice Belobaba. Although this error is not necessarily a fatal defect, it demonstrates the knee-jerk response of the government to the adverse ruling. Importantly, the purpose of Bill 5 was to change the boundaries of wards and effectively nullify the forthcoming municipal election.⁶³ This legislation was a far cry from the type of nationalist politics that characterized disputes between Quebec and the federal government around language rights and the constitutional division of power. By contrast, Ford's response appears to be a crude attempt at after-the-fact gerrymandering and payback for past political grievances.⁶⁴ Comparisons can again be made to the Trump administration in the US.

Perhaps the reason that section 33 has not been used in a routine way to undermine the *Charter* is related to the constitutional design. Section 1 of the *Charter* has provided an outlet for a nuanced balancing act between competing rights. The analysis is informed by the approach of the Supreme Court of Canada in *R v Oakes*.⁶⁵ Although reasonable people disagree on where to draw the line, including judges of the Supreme Court of Canada, the section 1 jurisprudence permits careful weighing of evidence and emphasizes proportionality of harms and benefits. Section 33, by contrast, circumvents this

<www.law.utoronto.ca/blog/faculty/doug-ford-can-t-apply-notwithstanding-clause-retroactively-impede-democracy>.

63 See Jeffrey B Meyers, "Ford's fight with Toronto shows legal vulnerability for cities" (21 September 2018), online: *The Conversation*

<theconversation.com/fords-fight-with-toronto-shows-legal-vulnerability-of-cities-103134>.

64 See Samuel E Trosow, "Fighting Doug Ford's threat to shrink Toronto city council" (30 July 2019), online: *The Conversation*

<theconversation.com/fighting-doug-fords-threat-to-shrink-toronto-city-council-100798> (citing the comments of Professor Roger Keil to the *Toronto Star* as "gerrymandering"); Edward Keenan, "Doug Ford's attack on Toronto's city council is a declaration of war" (27 July 2018), online: *Toronto Star* <www.thestar.com/opinion/star-columnists/2018/07/27/fords-move-to-slash-toronto-council-without-consultation-an-undemocratic-move.html>.

65 [1986] 1 SCR 103.

process. While the section was seen to be a form of preserving parliamentary sovereignty under a bill of rights, it offers legislatures a method to avoid judicial review and the rule of law in respect of some *Charter* rights.

Section 33 is a potentially fatal defect to many of the fundamental constitutional rights in Canada. With some notable exceptions, this defect has been latent.⁶⁶ But, recent events discussed above reveal that section 33 can become a quick, easy and unprincipled escape route for a provincial government (and conceivably a future federal government) that seeks to reject a court ruling before appealing the decision to a higher court.⁶⁷ Ford's message, not unlike President Trump's, is clear: the courts are not elected, I am. In this sense, the Ontario government shares parallels with the Trump administration.

The 2018 crisis in Ontario was ultimately averted when the Court of Appeal upheld the Ontario government's application for a stay of the original decision.⁶⁸ But this result should not provide us with false comfort. The fact remains that provincial premiers, including those in Canada's two largest provinces, have

66 See David Halton, "Constitutional shortcomings weaken the Charter" (5 November 1981), online (video): *CBC Archives* <www.cbc.ca/player/play/1811846060>.

67 Ford could have appealed the ruling to the Ontario Court of Appeal and Supreme Court of Canada, but he did not. He instead declared that the decision was illegitimate because he, unlike Justice Belobaba, is elected. The *Toronto Star*, which Ford is known to oppose quoted the Premier's reaction: "I was elected. The judge was appointed. He was appointed by one person, (former Liberal Premier) Dalton McGuinty". Jennifer Pagliaro & Robert Benzie, "Ford plans to invoke notwithstanding clause for first time in province's history and will call back the legislature on Bill 5", *Toronto Star* (12 September 2018), online: <www.thestar.com/news/toronto-election/2018/09/10/superior-court-judge-strikes-down-legislation-cutting-the-size-of-toronto-city-council.html>. As any first-year law student will know, this is impossible because superior court judges are federally appointed. In fact, as noted in the article, Justice Belobaba was appointed by former Prime Minister Paul Martin.

68 See Nick Westoll & David Shum, "Ontario's appeal court sides with Ford government, paves way for 25-ward Toronto election", *Global News* (19 September 2018), online: <www.globalnews.ca/news/4464728/appeal-court-stay-toronto-city-council/>.

shown a recent willingness to invoke the notwithstanding clause as a matter of routine politics. Similarly, Trudeau has been found to be in a conflict of interest on multiple occasions in which his own personal and political interests have influenced government decisions.

Ultimately, whether a provincial government backs down or follows through on threatened use of the notwithstanding clause, the effect on the political culture is to loosen the convention against its non-usage while threatening the substantive values associated with the rule of law. The same can be said of the federal government headed by a prime minister who repeatedly breaches the *Conflict of Interest Act* without lasting consequences.

The invocation of section 33 of the *Charter* cannot itself be interpreted as an attack on the rule of law as it is perfectly legal under the *Charter*. At the same time, however, its existence creates an invitation to go beyond the balancing and proportionality of section 1 to circumvent the rule of law: a deeply flawed structural aporia. Indeed, during the debate following Ford's threat to use the provision, former Prime Minister Stephen Harper's Director of Communications, Rachel Curran, stated on television: "[w]ho are we actually governed by? ... Are we governed by our elected representatives or a small cabal of largely left-leaning judges?".⁶⁹ This comment might as easily have been heard on Fox News in the US debate over the latest circuit court ruling on Obamacare. The tension between the idea of a democratic mandate and the rule of law is obvious in both countries. Unsurprisingly, Legault described section 33 as a "legitimate [legislative] tool" and one that was necessary for respecting "what the vast majority of Quebeckers want".⁷⁰ Of particular note is the way in which the democratic majoritarian ethos is presented in opposition to the rule of law. This

69 Brennan MacDonald & Vassy Kapelos, "He did the right thing': Former premiers back Doug Ford's use of the notwithstanding clause", *CBC News* (13 September 2018), online: <www.cbc.ca/news/politics/powerandpolitics/former-premiers-doug-ford-notwithstanding-clause-1.4823066>.

70 Morgan Lowrie, "Legault defends Quebec's religious-symbols bill, calls notwithstanding clause 'legitimate tool'", *The Globe and Mail* (31 March 2019), online: <www.theglobeandmail.com/canada/article-legault-defends-quebecs-religious-symbols-bill-calls-notwithstanding/>.

is a key theme in conflict of interest situations like the SNC-Lavalin affair and the high-profile usage of the notwithstanding clause in provincial politics.

In Canada, as in the US and the UK, positive law does not always ensure an appropriate sanction to a breach of the rule of law. Conventions are even less reliable. In Canada, by virtue of section 33, the exception to the rule of law is provided by the Constitution itself. That said, the problem of conflict of interest, particularly as it relates to the exercise of power by the executive is usually at the core of any crisis.

B. The United States

The US President's continued capacity to hold power is framed in terms of the rule of law. This point was not lost on Adam Schiff, Chairman of the House Permanent Select Committee on Intelligence. The Committee's *Trump-Ukraine Impeachment Inquiry Report* not only invoked the language of American exceptionalism but also the language of an imagined global striving toward the rule of law which America had, at least in an aspirational sense, come to represent. According to the report:

[f]rom their homes and their jail cells, from their public squares and their refugee camps, from their waking hours until their last breath, individuals fighting human rights abuses, journalists uncovering and exposing corruption, persecuted minorities struggling to survive and preserve their faith, and countless others around the globe just hoping for a better life look to America. What we do will determine what they see, and whether America remains a nation committed to the rule of law ... As Benjamin Franklin departed the Constitutional Convention, he was asked, 'what have we got? A Republic or a Monarchy?' He responded simply: 'A Republic, if you can keep it'.⁷¹

This quote attributed to Benjamin Franklin resonated in the moment of Schiff's address to the Senate, the American people and the world because it spoke to the idea that the rule of law lies in the hands of every generation to safeguard

71 US, House of Representatives Permanent Selection Committee on Intelligence, *The Trump-Ukraine Impeachment Inquiry Report* (HR 660) (December 2019).

anew and to the importance of the Trump impeachment trial in America's 240-year experiment with republican democracy. Although the Senate ultimately acquitted President Trump, the evidence was overwhelmingly against him and, much of it, free for the entire world to see. In a sense Schiff's opening statement can now be read as an epitaph to the rule of law in contemporary America.

Several months earlier, Robert Mueller had begun digging the grave.⁷² In its cryptic conclusion, the *Mueller Report* punted the decision on whether Trump obstructed justice to the congressional impeachment mechanism, and refused to weigh in decisively:

[b]ecause we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.⁷³

Mueller, a career prosecutor and consummate lawyer, painfully constrained his language, seeking to avoid falling afoul of Justice Department policy prohibiting the indictment of a sitting President.⁷⁴ At the same time, Mueller signalled to Congress that the President's conduct raised a fundamental question of the rule of law insofar as it related to the law-bound character of executive power.

When Schiff recounts the story of Benjamin Franklin at the opening of America's national mythology, however, he signals just how deep the crisis has

72 See US, Department of Justice, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (Washington, 2019) [*Mueller Report*].

73 *Ibid* at 182.

74 See US, Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution* (Department of Justice, 2000).

gone. Well before Trump fired James Comey, triggering the Mueller investigation, or requested what obviously appeared to be a quid pro quo from the President of the Ukraine, he was already flouting the rule of law. A series of lawsuits beginning early in his presidency by a group called Citizens for Responsibility and Ethics in Washington (“CREW”) identified the enormity of the new administration’s violation of the plain language of the Constitution on the very first day of Trump’s presidency. Trump had refused, unlike any modern President before him, to divest himself of his considerable business interests prior to taking the oath of office.

The CREW lawsuits made the novel argument that Trump was in violation of both the Foreign and Domestic Emoluments Clauses. Article 1, section 9, clause 8 of the *US Constitution*, the Foreign Emoluments Clause, prohibits a President taking payments, gifts or favors from a foreign power.⁷⁵ Article 2, section 1, clause 7, the Domestic Emoluments Clause of the *US Constitution*, stipulates the President’s remuneration while in office and states that it shall not be varied during his term. The President “shall not receive within that Period any other Emolument from the United States, or any of them”.⁷⁶ The understanding which CREW reasonably urged upon the courts was that the President could not receive any payments, gifts or favors, directly or indirectly, beyond the terms of compensation set by the *Constitution*. This would include his own government, a state government or their booking of accommodations or a convention at a Trump owned hotel rather than at another business. The Foreign Emoluments Clause is aimed at preventing foreign governments from influencing a sitting president with gifts, payments or bribes directly or indirectly. This would include a foreign government purchasing Trump owned products or services in lieu of a competitor for the purpose of ingratiating themselves to the President.

The Founding Fathers included the Foreign Emoluments Clause to guarantee that any “[p]erson holding any Office of Profit or Trust” could not be

75 US Const, art I, § 9, cl 8 [the Foreign Emoluments Clause].

76 *Ibid*, art II, § 1, cl 7 [the Domestic Emoluments Clause].

corrupted by accepting “any present, Emolument, Office or Title, of any kind whatever, from any King, Prince, or foreign State”.⁷⁷ This principle was implanted in US legal and constitutional culture from the time of the revolution. It constituted a sharp break with the still feudal practices that prevailed in England at the time. Frank Bowman contrasts what he describes as the “constitutional compensation” model for officials from a practice that was “long prevalent in Great Britain in which officials were paid, not with regular salaries, but by grants of land, commercial monopolies, or right to streams of revenue from taxes, fees, or the Church”.⁷⁸ Instead in the US:

the obvious point of the foreign emolument clause [w]as to insulate all American officeholders from the temptation to betray their country to another nation. The dual purpose of the special bar on domestic presidential emoluments was first, to prevent congressional factions or executive departments from buying the president’s special affection, and, second, to ensure that the president was not bribed by states into favoring one state or region over the interests of the nation.⁷⁹

The question of emoluments illustrates that a departure from the rule of law started on the first day of Trump’s presidency. Based on the established practice of all modern presidents, it was clear that President-elect Trump had an obligation to disclose his assets, tax returns and divest himself of his ongoing financial interests in a blind trust. When the litigation was advanced against Trump, Bowman described the emoluments clauses as having “been excavated from desuetude by the presidency of Donald Trump”.⁸⁰ The idea that the Foreign Emoluments Clause might have fallen into desuetude but for Trump’s presidency suggests that convention or established practice was not sufficient to safeguard the rule of law. It also highlights a tendency in American legal and

77 Foreign Emoluments Clause, *supra* note 75.

78 Frank O Bowman III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* (Cambridge: Cambridge University Press, 2019) at 279.

79 *Ibid.*

80 *Ibid* at 280.

constitutional culture to rely on terms like emoluments that are no longer in contemporary usage or relevance.

The Federalist Papers remain a key authority in American constitutional jurisprudence, especially at moments of constitutional crisis or a breakdown in the rule of law (which may overlap).⁸¹ They discuss several meanings for the term “emoluments”. It is clear that both Hamilton and Madison had a strong sense of what constituted a conflict of interest and self-dealing. They also expressed views on which emoluments properly flowed to a public office holder and which did not. In “Federalist No. 1”, Hamilton writes that the term is “among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men of every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold ...”.⁸² In this usage, an emolument is a benefit conferred on the basis of the public office held or an enrichment arrived at by virtue of holding that office. Similarly, in “Federalist No. 36”, Hamilton writes about the state power of taxation, which he fears will allow states to gain influence as against the federal government “by an accumulation of their [citizens] emoluments”.⁸³ Emoluments would therefore include payment, monies or salaries flowing from an office, and possibly tax revenues flowing to the government.

In “Federalist No. 51”, which focuses on checks and balances among the different branches of government, Madison writes that the “... member of each department should be as little dependent as possible on those of others for the

81 See *Reference re Secession of Quebec*, [1998] 2 SCR 217 in which the Supreme Court of Canada treats the rule of law and constitutionalism interchangeably alongside federalism, democracy and multiculturalism as unwritten norms which underpin the Canadian legal system and are inherent to the constitutionalism itself.

82 Alexander Hamilton, “Federalist No. 1” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 28.

83 Alexander Hamilton, “Federalist No. 36” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 218.

emoluments annexed to their offices”.⁸⁴ Similarly, in “Federalist No. 55” he writes: “[t]heir [Congressmen] emoluments of office, is to be presumed, will not, and without a previous corruption of the House of Representatives cannot, more than suffice for very different purposes; their private fortunes, as they must all be American citizens, cannot possibly be sources of danger”.⁸⁵ He further writes that “members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during the term of their election”.⁸⁶ Here again, Madison uses the term emolument to mean benefits arising from public office.

In “Federalist No. 59”, Hamilton writes how Congress might regulate the election of its own members: “[t]he scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal”.⁸⁷ The idea of an emolument flowing to a public official cuts against the grain of the preference for the common weal rather than the personal, political or economic gain of the officeholder. Enrichment need not be understood purely in terms of private financial or pecuniary interests as the emoluments of office might include indirect benefits relating to political status and influence.

In “Federalist No. 65”, Hamilton writes of a President who has been impeached by the House of Representatives and convicted by the Senate: “[a]fter having been sentenced to perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution

84 James Madison, “Federalist No. 51” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 318.

85 James Madison, “Federalist No. 55” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 342.

86 *Ibid* at 343.

87 Alexander Hamilton, “Federalist No. 59” in Clinton Rossiter, ed, *The Federalist Papers*, (New York: New American Library, 1961) at 364.

and punishment in the ordinary course of law”.⁸⁸ In other words, once convicted by the legislative branch of a political crime, it will be up to the judicial branch to determine guilt if the president is criminally charged. Hamilton speaks of “perpetual ostracism from the esteem and confidence and honors and emoluments of his country”.⁸⁹ Thus, it is understood that emoluments in this context are awards that come properly from holding a public office. The idea is that a president cannot receive foreign emoluments while he is president or cannot be similarly induced into real or apparent conflicts of interest. The link between a conflict of interest and emoluments is central to the Hamiltonian conception of American democracy.

“Federalist No. 72” speaks to the risk that would ensue if “every new President” were to “promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraces and ruinous mutability in the administration of the government”.⁹⁰ Speaking of the remuneration of the chief magistrate in “Federalist No. 73”, Hamilton warns against having his remuneration based on the partisan preferences of Congress: “[t]he legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him”.⁹¹ Again, the term emolument is used alongside salary to signal the conferral of benefits, honours and other forms of benefit which properly flow to the office rather than the specific person occupying it.

“Federalist No. 72” further speaks to the context of corruption by state officials including presidents and chief magistrates alike. The point for Hamilton is that prohibitions on the taking of emoluments are designed to prevent “an avaricious man, who might happen to fill the office, looking forward

88 Alexander Hamilton, “Federalist No. 65” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 397.

89 *Ibid.*

90 Alexander Hamilton, “Federalist No. 72” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 435.

91 Alexander Hamilton, “Federalist No. 73” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 439.

to a time when he must at all events yield up the emoluments he enjoyed”.⁹² Such a man, Hamilton opined, “would feel a propensity, not easy to be resisted ... to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have the recourse to the most corrupt expedients to make the harvest as abundant as it was transitory ...”.⁹³ Self-dealing is the essence of the conflict, in this context turning the public office into private gain which is antithetical to the rule of law. The form of good could be personal and pecuniary or perhaps also more generally political or factional in the language of Hamilton.

“Federalist No. 73” addresses the wide scope of executive power inclusive of the veto, and Hamilton makes the point that “power over a man’s support is a power over his will”.⁹⁴ This statement reiterates the requirement that the President should receive no salary, gift or other benefit outside of his annual remuneration as set out in the *Constitution*:

[i]t is not easy, therefore, to comment to highly the judicial attention which has been paid to this subject in the proposed Constitution. It is there provided that ‘[t]he President of the US shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them’.⁹⁵

Article 2, section 1 of the *US Constitution* reflects the language proposed by Hamilton, which also appears in the Presidential Oath of Office. The *US Constitution* requires the President to “solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States”.⁹⁶ This language, and the commitment to legal formalism to which it corresponds is so important that when Chief Justice Roberts stumbled over the

92 Hamilton, “Federalist No. 72”, *supra* note 90 at 436.

93 *Ibid.*

94 Hamilton, “Federalist No. 73”, *supra* note 91 at 440.

95 *Ibid.*

96 US Const, *supra* note 75, art II, § 1.

words administering President Obama's first oath of office, the Chief Justice re-issued the oath the next day in the Oval Office to make sure the President had stated the formula exactly as required by the Constitution.⁹⁷ It is clear that the constitutional text matters and is taken seriously.

In the case of Trump, there are two questions about emoluments. First, whether payments by foreign governments and dignitaries to Trump-related hotels and other businesses constitute prohibited foreign emoluments. Second, whether payments by state governments or the federal government itself to Trump-owned enterprises constitute prohibit domestic emoluments.

Federalists No. 76, 77 and 84 reinforce Hamilton's use of emoluments. "Federalist No. 76" prevents the executive from having undue influence over the legislature by prohibiting the appointment of members of Congress from appointment "to any civil office under the US which shall have been created, or the emoluments whereof shall have been increased, during such time".⁹⁸ Here again, the idea is that the creation of emoluments from sources other than the one to which one's public office is derived from creates a situation ripe for conflict of interest. In "Federalist No. 77", Hamilton's usage is again evident: "[t]he power which can original the disposition of honours and emoluments, is more likely to attract that be attracted by the power which can merely obstruct their course".⁹⁹ Finally, "Federalist No. 84" reflects the language of the Foreign Emoluments Clause itself.¹⁰⁰ Notably, because both the Foreign and Domestic

97 See Samuel P Jacobs, "After fumbled oath, Roberts and Obama leave little to chance", *Reuters* (18 January 2013), online: <www.reuters.com/article/us-usa-inauguration-roberts/after-fumbled-oath-roberts-and-obama-leave-little-to-chance-idUSBRE90H16L20130118>.

98 Alexander Hamilton, "Federalist No. 76" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 457.

99 Alexander Hamilton, "Federalist No. 77" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 459.

100 See Alexander Hamilton, "Federalist No. 84" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 510 citing to the following proposed Constitutional language for the proposed Article 1, Section 9 Clause 7: "No title of nobility shall be granted by the United States; and no

Emoluments Clauses had seemingly fallen into desuetude prior to the Trump administration, their contemporary meaning and application will only become ascertained through ongoing litigation.¹⁰¹

In addition to CREW, a private business sued President Trump on the basis that the restaurant at the Trump hotel in Washington DC benefited from unfair advantages as a result of its link to the President.¹⁰² A group of Democratic members of Congress also filed emoluments lawsuits on behalf of their constituents.¹⁰³ Such lawsuits face hurdles which are nevertheless by no means insurmountable on the question of standing.¹⁰⁴ There are conflicting rulings. Some courts found that CREW lacked standing to proceed,¹⁰⁵ while other courts found that CREW had the necessary standing to proceed.¹⁰⁶ The Democrats in Congress were also found to have standing.¹⁰⁷ In addition to standing, there are also questions about whether payments to the President's

person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from an king, prince, or foreign state". Compare to the actual Foreign Emoluments Clause at Article I, Section 9, Clause 8 *supra* note 75: "[n]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State".

101 Bowman, *supra* note 78 at 279–80.

102 Citizens for Responsibility and Ethics in Washington, "Legal Actions", (last visited 27 February 2021) online: *CREW* <www.citizensforethics.org/legal/lawsuits/>.

103 Heather Caygle, "Democrats to sue Trump over conflicts of interest", *Politico* (7 June 2017), online: <www.politico.com/story/2017/06/07/democrats-donald-trump-sue-conflict-of-interest-239262>.

104 See Bowman, *supra* note 78 at 440, n 25.

105 See *Citizens for Responsibility and Ethics in Washington v Trump*, 276 F Supp (3d) 174 at 174 (SD NY 2017).

106 See *District of Columbia v Trump*, 291 F Supp (3d) 725 at 725, 737 (D Md 2018).

107 See *Blumenthal v Trump*, 949 F Supp (3d) 14 (US App DC 2020).

businesses paid in the ordinary course of business would be considered emoluments or whether something else would be required to characterize them in this way. There is also a question of the appropriate remedy for a constitutional breach in such a case. As Bowman points out, the availability of remedies against a defendant president or other high office holder is through Congress' power to impeach. On the precipice of President Trump's impeachment, Bowman wrote, "[i]n sum, the very presidential attacks on the justice system and the press that form a part of the indictment against Mr. Trump raise exponentially the difficulty of convincing the public at large — but more particularly his increasingly tribalized electoral base — that there exists a body of verifiable truth upon which a fair impeachment judgment could be made".¹⁰⁸ Just as impeachment would be too much of a lift for the Grand Old Party Senate in the present political and media milieu, the post-Trump United States Supreme Court cannot be counted upon to recognize that a payment made by a foreign official, lobbyist, another branch of government or state government is an emolument simply because the President or other state official has an interest in the business.

Nevertheless, the political reality is clear. There is an apparent and likely real conflict of interest arising from the President's initial refusal to divest himself of his businesses or place them in a blind trust during his presidency. As noted, there is no legal requirement for the President to do so, only an established practice. The same is true about the disclosure of tax returns by presidential candidates. Democratic lawmakers are quite appropriately considering legislation to address both.¹⁰⁹

108 Bowman, *supra* note 78 at 314.

109 In the context of conflict of interest and divestiture from business interests see Jacob Pramuk, "Elizabeth Warren and Democrats introduce bill to push Trump to divest businesses", *CNBC* (9 January 2017), online: <www.cnn.com/2017/01/09/elizabeth-warren-and-democrats-introduce-bill-to-push-trump-to-divest-businesses.html>. In context of the disclosure of tax returns of some states, see Kayla Epstein, "Trump could be left off some states' ballots in 2020 if these bills become law", *Washington Post* (20 March 2019),

C. The United Kingdom

Martin Loughlin describes the rule of law as a part of a western legal cultural inheritance with both an ancient and a modern face.¹¹⁰ The ancient one can be traced back to Aristotle for whom the rule of law was conceptually distinct from democracy. The rule of law was seen by Aristotle, according to Loughlin as an elitist ethos, directed at the governing class and to the nascent class of jurists tasked with interpreting the laws rather than to the people generally who were as yet not imagined.¹¹¹ The ancient idea of the rule of law, according to Loughlin, insisted on the reason-based quality of legal thought and the need for those with power, influence or high office to be of high character and fair-minded, inclined towards benefiting the citizens and the republic rather than themselves.¹¹² The essence of the rule of law in this ancient iteration was a form of ‘practical wisdom’ or reason. Loughlin refers to this using the Greek term *phronesis*:

[t]he Aristotelian account suggests that the single most important condition on which the rule of law rests is that of the worthiness of character of those engaged in legislative and judicial decision-making. Although this worthiness is a

online: <www.washingtonpost.com/politics/2019/03/20/trump-could-be-left-off-some-states-ballots-if-these-bills-become-law/>.

110 See Martin Loughlin, *Swords and Scales* (Bloomsbury: Hart Publishing, 2000).

111 See *ibid* at 69 describing Aristotle as the quintessential example of the ancient idea of the rule of law which elevated reason above democratic or egalitarian impulses in the modern sense but instead addressed itself to a privileged governing class comprised of “a small group of human beings—the adult male heads of holds” of a particular caste etc.

112 *Ibid* at 71 speaking to the origins of the England’s ancient or unwritten constitution as descending from Aristotelian imaginings of the rule of law transmitted the English constitutional culture into the present as a preference for “aristocratic government” in which political experience is passed down “within the governing class from generation to generation”. Here again, the contrast with more modern or egalitarian liberal and republican impulses on continental and American constitutional history, is apparent.

precondition fall all within the governing class, it impinges most on the judges, since it is through their work that justice is activated into reality.¹¹³

This ancient Aristotelian understanding of the rule of law is absorbed in British constitutional culture. Britain, unlike the US which has a comparatively modern written constitution, is the inheritor of an unwritten and ancient constitution. Canada inherited the British Constitution but adopted a written constitutional framework and a bill of rights. These characteristics make Canada a hybrid of both its colonial history and its closest neighbour.

The War of Independence fought between republicans and loyalists in North America was partly a contestation of the need of a written constitution guaranteeing enumerated individual rights, particularly around the power to tax.¹¹⁴ The Federalist Papers reveal that its authors were sufficiently worried that the new republic would collapse into tyranny. They therefore could not rely on the ancient idea of the rule of law as prudence, wisdom and good governance. Instead, they designed a complex constitutional architecture to ensure that public officials acted in accordance with law or suffered the consequences, including removal from office. This led to a culture of judicial review over matters of high politics developing much earlier in the US than it would in the UK. In fact, it is specifically the culture of judicial review and constitutionalism in the modern sense which drives some of the partisan intensity around Brexit. Interestingly, those critical of Canada's adoption of the *Charter* frequently

113 *Ibid* at 70.

114 See Bruce Ackerman, "Constitutional Politics/Constitutional Law" (1989) 99:3 *The Yale Law Journal* 453 at 475 describing America's founding fathers as "children of the Enlightenment, eager to use the best political science of their time to prove to a doubting world that republic self-government was not utopian dream. ... Otherwise they would never have tried to write a Constitution whose few thousand words contained a host of untried ideas and institutions" [citation omitted]. See also Bruce Ackerman, *We The People: Foundations* (Cambridge Mass: Harvard Beknap Press, 1991) at 188, writing of Publius "Whatever modern America may think, *he* speaks for a People of white male merchants and planters, farmers and mechanics who fought a Revolution for life, liberty, and property – but not for the end of slavery or the triumph of the welfare state".

channeled parliamentary sovereignty to suggest that elected members of parliament, and not unelected judges, should make policy decisions of national importance.¹¹⁵

Speaking of the influence of the ancient idea of the rule of law on the historical emergence of the British constitutional culture, Loughlin writes:

[t]he unwritten British constitution is rooted in a set of traditional practices concerning the business of governing and reflects the deep-seated belief that government is a form of practical knowledge. These characteristics of the British constitution were consolidated during an era of aristocratic government in which political experience was passed down with the governing class from generation to generation ... This quite clearly reflects an idea of the rule of law which is rooted in character, the need for a balanced disposition and the maintenance of self-restraint.¹¹⁶

Loughlin explains how the ancient conception of the rule of law as prudential governance embedded itself in the jurisprudence of Sir Edward Coke who famously observed that “[r]eason is the life of the law”.¹¹⁷ This idea is not unique to the British understanding of the rule of law as it can also be found in the thought of Tocqueville.¹¹⁸ Loughlin writes that the ancient concept of the rule of law lived on in England into the twentieth century insofar as judicial review could always be understood as wise or prudential adjudication. This is now also the case in the UK where judges are increasingly understood, in the

115 See e.g. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Andrew Petter, “Twenty Years of *Charter* Justification: from Liberal Legalism to Dubious Dialogue” (2003) 52:1 *University of New Brunswick Law Journal* 187.

116 Loughlin, *supra* note 110 at 71.

117 John Marshall Gest, “The Writings of Sir Edward Coke” (1909) 18:7 *The Yale Law Journal* 504 at 524.

118 See Loughlin, *supra* note 110 at 74 attributing to Tocqueville the idea that “democratic institutions can only survive when combined with ‘lawyer-like sobriety’”.

words of Lord Evershed in a 1945 letter to then Lord Chancellor, Viscount Simon, at the core of the rule of law in modern England. The common law requires the figure of the judge and the act of judicial review. Loughlin explains that this as “largely bound up with the immense prestige and person position accorded to the judges” who derived their authority according to Lord Evershed, from still more ancient virtues corresponding to a “cloistered” and “aristocratic” profession in which the judge is “both the complete master of the trial” and subject to “solemn (if not Olympian)” requirements of “real impartiality”.¹¹⁹ In other words, judges who understand their role as neutrally applying laws enacted by the legislature. Loughlin notes that “[a]s a result of these developments, the rule of law has acquired a rather different meaning. Once the emphasis on judging changes from deliberation to rule-application, the ancient idea of the rule of law as the rule of reason is superseded by a modern idea of the rule of law as the rule of rules”.¹²⁰ That said, the ancient idea of the rule of law as *phronesis* remains but has been transplanted into the judiciary in its role as interpreter and applicator of the law. Loughlin refers to the rites and rituals of the judiciary as reflected in the icon of justitia as reflections of the ancient idea of the rule of law as a virtue: “[t]he public must have confidence in the virtuous character of the judiciary. The judiciary must be seen to be both independent of government and placed and some remove from the people”.¹²¹

Brexit provides an illustration of the crisis of the rule of law in Britain. Voters favouring Brexit framed their objective as escaping the imagined constraints of European Union law and EU sovereignty that competed with their own. However misleading and inaccurate this narrative may be, the palpably racist idea that Britain needed to regain control of its borders from Europe in order to keep out foreign workers, immigrants and refugees was a powerful nativist undercurrent for Brexit driven by lower-income voters, particularly those who

119 *Ibid.*

120 *Ibid* at 78.

121 *Ibid* at 75.

were older, whiter and living outside London.¹²² A comparison with these voters can be made with those who supported Trump in 2016.¹²³

Before Boris Johnson's government was re-elected in 2019 with a majority and given a mandate for Brexit, he was rebuked by the UK Supreme Court. The ruling addressed important questions of legal and constitutional culture. In *Miller v The Prime Minister*¹²⁴ and its companion case *Cherry v Advocate General for Scotland*,¹²⁵ the UK Supreme Court reviewed the legality of the government's advice tendered to the Queen to prorogue Parliament. The judgment considered the critical issue of the justiciability of political questions, the same question visited by the US Supreme Court in *Marbury*.¹²⁶ The UK Supreme Court found that the government's actions were unconstitutional. Part of what made the prorogation unconstitutional was that the government advised the Queen not in the best interests of the British people but in his and his government's electoral and political interests. Although the judgment was celebrated as a rebuke to Johnson's callous disregard for parliamentary rules, it did not trigger his resignation.¹²⁷ Like Trudeau and Trump, Johnson went on to survive, and even thrive, politically.

122 See Simon Winlow, Steve Hall & James Treadwell, *The Rise of the Right* (Bristol: Policy Press, 2017) at 199–208.

123 See Rachel Bitecofer, *The Unprecedented 2016 Presidential Election* (London: Palgrave Macmillan, 2018).

124 *R (on application of Miller) v The Prime Minister*, [2019] UKSC 41 [*Miller v The Prime Minister*].

125 *Cherry and others v Advocate General for Scotland*, [2019] UKSC 41 [*Cherry v Advocate General for Scotland*].

126 *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

127 On his blog Conor Gearty declared it is “the finest moment in in the annals of UK’s judicial history”: Conor Gearty, “Supreme Court judgment: in law, reason still matters, facts are relevant, and nonsense doesn’t work” (25 September 2019), online (blog): *London School of Economics British Politics and Policy* <www.blogs.lse.ac.uk/politicsandpolicy/supreme-court-judgment-prorogation/>.

The UK Supreme Court's decision points to the complex intersection of law and politics at the core of the rule of law. By the time of Brexit, there was pressure for the UK Supreme Court to stop the Prime Minister from abusing discretionary prerogative powers to advise the monarch to dissolve Parliament and call an election. To do so, the UK Supreme Court waded into foundational questions of the rule of law. The UK Supreme Court unanimously held that the government had violated the rule of law by using its powers for political purposes. The judgment curtailed the scope of executive power at a moment of major political significance. Delivering the ruling, Lady Hale spoke for the unanimous court on the question of justiciability of political issues and whether, how and to what extent a court can rule on matters of having to do with politics *qua* politics. The judgment demonstrates that the rule of law is about the meeting place of law and politics and the insistent autonomy of both. It is also about stopping the executive from exceeding the bounds of its power, particularly where there is a conflict between the political or self-interest of a politician and the proper functioning of the constitutional order.

In considering such a case, the court must ascertain what is a legal question as opposed to a political question. It must also impose legal oversight of the political, which requires decisive line-drawing:

[a]lthough the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. . . . almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.¹²⁸

This important passage reveals the limits of prerogative powers that operate at the margins of law and politics. When governments in parliamentary democracies rely on prerogative powers, it is usually a sign of the executive

128 *Miller v The Prime Minister*, *supra* note 124 at para 31.

attempting to act at the zenith of its power.¹²⁹ Crucially, for the UK Supreme Court, the exercise of prerogative powers by a Prime Minister, even in a matter as sensitive as providing advice to the Queen, can be subject to judicial review:

[r]eturning, then, to the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. *On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government*

129 In the UK, the exercise of prerogative powers gave legal cover to then UK Prime Minister Tony Blair's Government to short circuit Parliament in the decision to deploy the military alongside the US in the Iraq War. For an examination of the problem of having war powers exercised as prerogative powers by the executive in the absence of a written constitutional safeguard see Peter Hennessey, "From Blair to Brown: The Condition of British Government" (2007) 78:3 *The Political Quarterly* 344, see also Teemu Häkkinen, "Challenging the Royal Prerogative: The Decision on War against Iraq in Parliamentary Debates in 2002-3" (2016) 35:1 *Parliamentary History* 54. On the development of the prerogative power in subsequent conflicts and under subsequent governments see James Strong, "Why Parliament Now Decides on War: Tracing the Growth of Parliamentary Prerogative through Syria, Libya and Iraq" (2014) 17:4 *The British Journal of Politics and International Relations* 604. Canada did not enter into the Iraq War in a combat role, by way of comparison with the UK, in the Australian context of the commitment of combat troops to Iraq see Charles Sampford & Margaret Palmer, "The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq" 18:2 *Griffith Law Review* 350. In a domestic electoral context in Canada see e.g. former Prime Minister Harper's 2008 request to the Governor General to prorogue parliament "GG agrees to suspend Parliament until January", *CBC News* (4 December 2008), online: <www.cbc.ca/news/canada/story/2008/12/04/harper-jean.html>. For powerful critiques of Harper and his government see Lawrence Martin, *Harperland: The Politics of Control* (Toronto: Viking Canada, 2010); Christian Nadeau, *Rogue in Power* (Montreal: Lorimer Publishing, 2011).

on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.¹³⁰

In ruling that the government acted unlawfully in advising the Queen to prorogue Parliament, Lady Hale made clear that the rule of law will not permit Parliament to be prorogued for purposes that are purely political. In other words, the rule of law does not sanction a conflict between a prime minister's personal or political ambitions, wishes or agenda and the prime minister's law-bound and constitutionalized role:

[t]he Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies; he has a constitutional responsibility ... It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason – let alone a good reason – to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful ...¹³¹

The conclusion that “[i]t was outside the powers of the Prime Minister to give it [the advice to her Majesty]. This means that it was null and of no effect”, reasserted the rule of law.¹³² The government, however, transformed this historic rebuke into political success and secured a clear mandate in the following election to effectuate Brexit.

IV. Rule of Law Crises in Comparative Perspective

On both sides of the Atlantic, the Anglo-American political and legal inheritance is being tested. The televised judgment of the UK Supreme Court made clear that Johnson's government had acted unconstitutionally. The ruling had the trappings of a key moment for the evolution of the rule of law in the

130 *Miller v The Prime Minister*, *supra* note 124 at para 52 [emphasis added].

131 *Ibid* at paras 60–61.

132 *Ibid* at para 69.

UK. It appeared to have averted a constitutional crisis. However, it created a fresh political crisis related to the legitimacy of the prime minister's power. It is also created a rule of law problem relating to the legal control of a political question that lies at the heart of constitutional monarchy. It was followed by a general election in which Johnson consolidated his mandate and formed a majority government on the promise to deliver Brexit once and for all.

In the US, Congress is a co-equal branch of government under the Constitution. It has, however, abdicated robust executive oversight in recent decades. The ground that will need to be made up to restore the balance after the Trump administration is formidable. Congressional oversight of the executive also faces ongoing opposition from Republican lawmakers. It also appears that in the US and UK, political leadership characterized by celebrity egos and degradations of the office have become the norm.

In parliamentary democracies, the role of the prime minister has become increasingly presidential in its day-to-day operations.¹³³ This trend presents a rule of law problem as it means that the person of the leader and the government they lead can raise a conflict of interest. Notably, Johnson survived a political defeat after UK Supreme Court ruling and Trudeau remained as prime minister although with a government reduced to a minority. Both clashes with the rule of law were survivable for leaders in political terms. It thus appears that political accountability is wanting.

In the US, the Constitution permits a president to be tried by the Senate and removed from power if convicted of impeachment. The constitutional framers carefully crafted provisions around oversight and the removal of a president, reflecting that at its limit presidential power and oversight is more of a political than a legal question. Leading US constitutional scholars have written

133 On the concentration of power in the Office of the Prime Minister ("PMO") during the Harper years (2006-2015), and on the Americanization of Canadian legal, political and constitutional culture see David Schneiderman, *Red, White, and Kind of Blue?* (Toronto: University of Toronto Press, 2015), especially on the phenomena of 'presidentialization' of the PMO at 79-80, 90-92, and nn 85-87 describing similar phenomena in the UK context.

about the impeachment process, weighing in on what constitutes a high crime and misdemeanor that is needed for conviction by a two-thirds majority of the Senate. Bowman captures the present moment and the relevance of the rule of law to impeachment. Having compared the case against Trump with earlier impeachment trials against Johnson, Nixon and Clinton, he concludes:

[t]he list of Trump's offences against constitutional propriety and reasonable expectations of presidential behaviour is dishearteningly diverse and includes conduct in virtually the categories of conducts historically identified as 'high Crimes and Misdemeanors' [to White] obstruction of justice both narrowly and broadly defined; abusing (or at least thoughtlessly misusing) the pardon power; ceaseless prevarication; and using his office to enrich himself and his family while violating the emoluments clauses in the process. They run on to include varying forms of electoral misconduct; culpable maladministration of various kinds, most notably deconstruction of America's trade, diplomatic, and security architecture; persistent attack on the legitimacy of the other branches of government and the free press; regular abuse of the norms of civil discourse; and perhaps, bizarre though it seems even to consider it, being in thrall to a hostile foreign power.¹³⁴

This view can be compared with the *Mueller Report*, which stated:

[b]ecause we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.¹³⁵

134 Bowman, *supra* note 78 at 297.

135 *Mueller Report*, *supra* note 72 at 296–97.

The result of Trump's presidency, in the context of the internet age, is to introduce a form of politics characterized by the manipulation of effect, propaganda and chaos unlike any previous administration. The effects on the government and the institution of the presidency are yet to be fully understood. But it would seem that the US has a long way to go in rebuilding its international authority on the rule of law.

In Canada, things are not as they used to be. Violations of the rule of law and statements by officials that the rule of law has been infringed no longer have obvious political consequences, nor do political scandals that would have once shocked and upended the status quo. It would seem that Trudeau should have been ousted by his own party after the Conflict of Interest and Ethics Commissioner's report twice found him guilty of significant conflicts of interest. As noted earlier, even after being chastened by the electorate and reduced to a minority government, Trudeau is in the midst of a similar case related to a charity that he and his family were associated with and which received a large government contract.

It is clear that recent events of global importance demonstrate the seriousness of the current crisis of the rule of law in two of the world's leading countries: the UK and the US. Recent events in Canada, led by Trudeau, a more centrist and conventional leader than Trump or Johnson, prove that my home country is not immune to the crosscurrents and an erosion of the rule of law. What is taking place in political and legal cultures should be a warning sign against normalizing lapses of the rule of law. Wherever a head of government or head of state circumvents legal rules for political ends, great damage is inflicted upon the rule of law.

For the ancients, the rule of law depended on the prudence, wisdom and character of the law-maker. This approach could not be enforced by constitutional language or court jurisprudence. The rule of law now aims to constrain arbitrary power through a more permanent structural means that does not rely on the personality, training or 'aristocratic wisdom' of the decider. No longer is the law about the exercise of innate wisdom or what the Greeks called *phronesis*. While the more primordial idea of the rule of law still courses through

the ancient unwritten English Constitution, it appears anemic in the face of populist nationalism and majoritarian politics.

V. Conclusion

Despite including a bill of rights, the US Constitution reflects a deeper commitment to ancient political wisdom, judgement and ethics than what it makes explicit. Until recently, it has not been necessary for the US to consider legislating a requirement for presidential candidates to disclose their tax returns, or to divest themselves of business interests prior to taking office. In Canada, Trudeau is again at the centre of a conflict of interest investigation. Similarly, until Johnson, a British prime minister had not pushed the limits of existing constitutional conventions to merit a rebuke from the UK Supreme Court. Despite the unfortunate milestones, these governments have shown themselves to be largely impervious to conventional mores of right conduct in public office. Until addressed, the disconnect between violations of the rule of law and political accountability will continue to raise troubling new challenges.