

Rule of Law Is Not a Given.
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What distinguishes liberal democracies from dictatorships and absolute monarchies is "rule of law." Laws, unlike the orders or whims of single absolute powers, involve a system of participatory governance (the people vote), separation of powers (Executive, Legislative, and Judiciary), and an independent press that serves as a check on abuse of power by any of these other institutions.

"Norms," agreed upon behaviors beyond force, are the habitual behavior of most citizens and most officials in our culture. If the public does not honor these norms, Rule of Law cannot work.

One norm, for example, is that our presidents do two things to meet concerns of the citizens: release their tax forms for at least five years, and release medical reports annually. The financial information assures us that our president will not be subject to blackmail or be in the thrall of a foreign power. Our millionaire presidents have normally (a norm) put their holdings in a genuinely blind trust so that nothing that they do is of knowing benefit to their own wealth.

These norms come out of historic experience. George Washington set the example that a president serves no more than two terms. Because this was a norm, not a law, President Franklin Delano Roosevelt was able to be elected to four terms during a time of great danger. After his death, Congress made two terms not just a norm, but a law.

The norm of annual medical reports began after Roosevelt and his successor, Dwight Eisenhower, had medical problems not revealed to the public. Roosevelt's last term in office was dogged by heart failure that was kept from the public. Eisenhower also had a heart condition. The norms that followed them was open information on the health of the president.

The issue of a president's mental health, however, is still a problem. Nobody medical explores the mental health of a president. If a president becomes unable to carry out his duties (or incapacitated), the 25th amendment allows the vice president, together with a "majority of either the principal officers of the executive departments or of such other body as Congress may by law provide," to declare the president "unable to discharge the powers and duties of his office" in a written declaration.

This same amendment provides for orderly succession in the event of a president being incapacitated or dead, or removed by impeachment, a situation that arose after assassinations or, in the case of Nixon, who stepped down, avoiding prosecution. Nixon's Vice President had already been removed for criminal activity.

Over time, we learn by trial and error how to codify protections from misbehaving officials, assassinations, and temporary incapacity. Norms have not been enough. Laws were needed.

Presidential pardons are mostly governed by norms, which do not protect the country from ill-advised pardons. Our current president has been toying with the idea that he might pardon himself, which he cannot do.

A self-pardon by the president is incompatible with the provision of Article II, Section 3 that "he shall take Care that the Laws be faithfully executed" and the provision of Article II, Section 1 that "executive power shall be vested in a President." (Professors Jed Shugarman and Ethan Leib have presented a different argument regarding self-pardons and the "Take Care Clause," available here.)

"When a president pardons another person for a federal crime, he is in fact executing the law\227the law of the Constitution\222s pardon power\227despite the fact that he is relieving that person from the execution of the federal penal code. But when the president pardons himself, he assumes a power that is incompatible with, rather than a supplement to, the application of the federal criminal law. That is because as chief law enforcement officer, he could put himself beyond the applicable law simply by withholding his consent to his prosecution by the department he controls while he is president\227and then assure himself that he could not be convicted after his term ended\227or after impeachment\227because he could pardon himself prospectively." (Jed Shugarman and Ethan Leib: the Take Care Clause.)

Thank goodness for that law.

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