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Rule of Law in the United States. Stability is one of the World's Most Valued Commodities

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Summary: "The rule of law is like the notion of 'the good'. Everyone is for the good, although we hold different ideas about what the good is." [1] Two primary ways of viewing the Rule of Law have developed over the years: the "thick" theory of the Rule of Law advocates that, in addition to laws that are publicly promulgated, equally enforced, and independently adjudicated, participation in government decisions (democracy) and consistency with international human rights law are essential for the Rule of Law in a society; the "thin" theory of the Rule of Law asserts that democracy and consistency with human rights law, while nice, are not essential for the Rule of Law. While the Rule of Law is often talked about in the context of developing countries that are coming out of conflict, there is little talk about the Rule of Law and its application to countries such as the United States. The past two years have seen the Rule of Law in the United States threatened as it has never been before, with Senators refusing to do their constitutional duty, a President that threatens to disregard the rulings of the judiciary, and judges both politicizing and abdicating their role as the interpreters of the law. Using a definition of the "thin" theory of the Rule of Law formulated by Brian Tamanahan, I ultimately argue that it not only is, but should be the case that a product of the Rule of Law, stability, a combination of security and predictability, is one of the world's most valued commodities; and that Rule of Law, rather than the Rule of Man, is and should always be the bedrock of the United States of America.

Keywords: United States, Rule of Law, Stability, Tamanaha, Thin Theory, Thick Theory

1 Introduction

The first substantive section of this paper will introduce the concept of the Rule of Law. This will include discussion of how the Rule of Law is thought to be a measure of "good" or "legitimacy" for countries throughout the world, and will briefly examine the question of why that is the case. This section will also define the two primary theories of the Rule of law, the "thin" and "thick" theories, and explain why, for purposes of analysis, the "thin" definition was chosen.

1 TAMANAHA, Brian. The History and Elements of the Rule of Law, *2012 SING. J. LEGAL STUD. 232 (2012).*

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The second section will focus on applying Brian Tamanaha's "thin" definition of the Rule of Law set out in his article, *The History and Elements of the Rule of Law*[2], to the United States. This portion of the paper will be split into three subsections that mirror Tamanaha's analysis of the Rule of Law, focusing on the definition of the Rule of Law and the natural requirements that follow, an analysis of the three themes that are essential to the Rule of Law, and the essential social component that needs to be present in a society for the Rule of Law to take root.

The third section of this paper, referencing the "thick" definition of the Rule of Law from the first section of the paper, as well as looking at the *Rule of Law Handbook: A Practitioner's Guide of Judge Advocates*[3], will highlight how many Western powers and institutions, including the United States, hold other countries to standards they themselves may not be able to meet. This section will then go through the intrinsic issues that arise when a country tries to remake another in their image, identifying how Rule of Law operations seemingly ignore some fundamental components of the Rule of Law itself.

The last substantive section of this paper will focus on the weaknesses and threats to the Rule of Law in the United States. While no nation can truly live up to the ideal that is the Rule of Law, this section will highlight a host of current and recent events, such as the Senate's refusal to hold confirmation hearings for former President Obama's Supreme Court nominee, Merrick Garland, and how such situations reveal "gaps" in the Rule of Law in the United States. This section will also focus on the judiciary and its importance in the Rule of Law scheme, highlighting how, at the end of the day, the Rule of Law relies on society's ability to select "good" judges and judge's ability to remain so.

2 The Rule of Law

Having the Rule of Law is something that countries all over the world try to claim, as it not only has domestic advantages, but gives them legitimacy and respect in the international community.[4] At the root of the Rule of Law are the elements of predictability and security. Even if one country does not like the laws of another country, the fact that the Rule of Law exists in the second country means that those in the first know what to expect with some level of consistency when dealing with that country.

There are two primary theories of the Rule of Law, the "thin" and thick" theories. The definition of the "thin" theory of the Rule of Law, as the name implies, seeks to include only those elements that are essential for the Rule of Law in society. The definition of the "thick" theory of the Rule of Law tends to include

2 *Id*.

3 *Center for Law and Military Operations*, Rule of Law Handbook: A Practitioner's Guide of Judge Advocates, [Online] Available at <https://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf> Accessed 01.04.2011.

4 TAMANAHA, *supra* at 232.

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elements found in the "thin" definition, but then tends to add certain requirements such as a commitment to democracy or international human rights law, thus adding moral and substantive obligations that the "thin" theory does not require. For purposes of this paper, the "thin" definition of the Rule of Law will be presented as that put forward by Brian Tamanaha in his work, *The History and Elements of the Rule of Law*. For the "thick" definition of the Rule of Law, the definition used by the Secretary-General of the United Nations will be the one utilized.

The definition of the "thin" theory of the Rule of Law as set out by Tamanaha is as follows: "Rule of law means that government officials and citizens are bound by and abide by the law."[5] While there are requirements, themes, and elements that are a part of this definition, this will be covered in the next section of the paper.

The definition of the "thick" theory of the Rule of law as set out by the Secretary-General of the United Nations is as follows:

> [The Rule of Law is] a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[6]

While the definition of the "thick" theory of the Rule of Law will come up again in discussing how the West tends to execute Rule of Law operations, for purposes of answering the question of whether the United States has the Rule of Law, the "thin" theory definition will be applied. This definition was chosen because it is better than the "thick" definition so far as embodying the sentiment that "the purpose of law is to provide a government of security, predictability, and reason". [7]Since the "thick" theory of the Rule of Law requires "participation in decision-making" and laws that are "consistent with international human rights norms and standards",[8] this tends to have the effect of stating "that only

5 *Id*. at 233.

6 United Nations and the Rule of Law, *What is the Rule of Law?*, United Nations, [Online] Available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> Accessed 20.04. 2017.

7 *Center for Law and Military Operations*, *supra* at 2.

8 United Nations and the Rule of Law, *supra*.

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liberal democracies have the rule of law",[9] which may be a popular sentiment, but one that is ultimately false.

The "thick" theory of the Rule of Law is thus more "substantive" but less "holistic", disqualifying a large number of nations that do not follow the approach of governance common in the United States and many Western-European nations. By using the "thin" theory of the Rule of Law we ensure our definition does not suffer from being under-inclusive, focusing not on what the substance of the law is or should be in a society, but focusing merely on the structure of government and the form of how the laws operate. To use a metaphor, the "thin" theory of the Rule of Law is all the things you need to build a house, where the "thick" theory of the Rule of Law says there are some appliances you need in the structure for it to be called a house. While we all may agree that Smart LED 72" TVs would be nice, this paper takes the view that our first priority should be making sure we have the materials to build the structure itself before worrying about what to put inside it.

3 Applying the Definition of the "Thin Theory" of the Rule of Law to the United States

3.1 Tamanaha's Definition of Rule of Law

Again, according to Tamanaha, the "rule of law means that government officials and citizens are bound by and abide by the law."[10] This is a concept that is deeply embedded in the American experience, with our political leaders and government officials swearing first and foremost not a duty to the American people, but to the United States Constitution.

> This definition requires that there must be a system of laws—and law by its nature involves rules *set forth in advance* that are *stated in general terms*. A particular decision or an order made for an occasion is not a rule. The law must be *generally known and understood*. The requirements imposed by the law *cannot be impossible* for people to meet. The laws must be *applied equally to everyone according to their terms*. There must be *mechanisms* or *institutions* that *enforce the legal rules* when they are breached.[11]

The United States sets rules in advance that are stated in general terms through the bills that Congress passes, ultimately recorded in the United States Code after they become law with the signature of the President. While it is recognized that a Judge's order may carry the force of law, this is differentiated from

9 TAMANAHA, *supra* at 234.
10 *Id.* at 233.
11 *Id.*

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a rule of general applicability, which not only binds the parties in a dispute like a court order or ruling, but all individuals in the nation.

Whether laws in the United States are generally known and understood is debatable, however, since the laws are public and thus "accessible" to those they are meant to bind, this requirement for the Rule of Law can be understood with the old Roman maxim, "*Ignorantia juris non excusat*",[12] or roughly translated, "Ignorance of the law excuses not." Thus, it is the case that some level of knowledge may be imputed to all those to whom a rule of law will apply. So far as rules of law being generally understood, while it is the case that much of the legislation that Congress passes may seem like it was written in a foreign language, there are methods used to combat unclear language that may threaten the liberty of citizens, such as interpreting a criminal statute that one cannot understand as being unconstitutionally vague or overbroad.

The requirement that the rules imposed by law are not impossible for those bound by the law to meet is one grounded in common sense. If the laws that Congress passes are impossible to meet there is no Rule of Law because no one could, thus would be, bound by it. In the United States such issues would be likely addressed with a Due Process challenge, or a challenge that the government used a rule of general applicability when it was inappropriate to do so, and, since an individual did not have a real opportunity to stay within the bounds of the law, it violated Due Process under the Fifth Amendment of the United States Constitution.[13]

There is some argument to be had as to whether the requirement that laws be applied to everyone equally has been present throughout the entire history of the United States, or even whether it is present today. While it has always been the case in the United States that bills passed by Congress that later turn into law apply to the whole nation, the Equal Protection Clause of the Fourteenth Amendment was not part of the United States Constitution until the Reconstruction era following the Civil War in 1868,[14] with the provision not being explicitly applied to the Federal Government through "reverse incorporation" until the 1954 case of *Bolling v. Sharpe*.[15] That said, there is a difference between laws that do not apply to everyone equally and those that have a disproportionate impact on a sector of society (Black Codes, or laws used by various Southern states during the Reconstruction era of the Civil War to discriminate against Blacks, are an example of laws that did not apply to everyone equally, whereas a statute that punishes crack cocaine possession more than powder cocaine possession, which may disproportionally affect the Black community, still techni-

12 Black's Law Dictionary, Fifth Edition, pp. 672.
13 *See* U.S. Const. amend. V*; see also Mathews v. Eldridge*, 424 U.S. 319 (1976).
14 *See* U.S. Const. amend. XIV.
15 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

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cally applies to everyone).[16] Additionally, Bills of Attainder, legislative acts that declare and punish a group of individuals without a trial, are prohibited by the United States Constitution,[17] reinforcing the view that legislative acts cannot be passed to apply or target only a small group of people. For purposes of analyzing the United States under this Rule of Law definition, it is important to point out that a requirement that the law be applied to *everyone equally according to their own terms* is not the same as saying the law needs to *treat* everyone equally.

The last requirement for this definition of Rule of Law, that there must be mechanisms or institutions that enforce the legal rules when they are breached, is covered by the Executive Branch in the United States. The President is charged to "take care that the laws be faithfully executed"[18] under the Constitution, meaning that through agencies, law enforcement, and prosecutors the Executive has the coercive force and resources to enforce the laws of the United States. While this is one area the United States usually has no trouble satisfying in terms of requirements for Rule of Law, as we will see a bit later on there are some scenarios where there seems a "gap" in enforcement capabilities when laws are not being followed.

3.2 Themes of the Rule of Law

After defining the Rule of Law, Tamanaha identifies three basic themes that are at the center of the Rule of Law; (1) the notion that the government is limited by law, (2) the notion of formal legality, and (3) the idea embodied by the expression, "The rule of law, not man".[19]

3.2.1 Government is Limited by Law

The notion that the sovereign is limited by law is perhaps the most fundamental and enduring theme of the Rule of Law. The definition of a sovereign, a thing possessing supreme or ultimate power[20], does not easily lend itself to the idea that the sovereign can be limited. In *The Leviathan,* Hobbes' stated, "He that is bound to himself only, is not bound"[21], a commentary to illustrate that the creator of laws cannot be bound by the laws that the creator itself created. The United States' solution to Hobbes' dilemma? Separation of Powers.

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16 KURTZLEBEN, Danielle, *Data Shows Racial Disparity in Crack Sentencing*, U.S. News, [Online] Available at <https://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing>.

17 *See* U.S. Const. art. I, §9.

18 *See id.* at art. 2, §3, cl. 5.

19 TAMANAHA, *supra* at 236.

20 *Sovereign*, Merriam-Webster, [Online] Available at <https://www.merriam-webster.com/dictionary/sovereign> Accessed 20.04.2017.

21 HOBBES, Thomas. *Leviathan,* New York: Oxford University Press, 1996, pp. 176–177.

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Tamanaha specifies that, no matter how the sovereign's power is divided up for purposes of creating a government, important for the Rule of Law in society is an independent prosecutorial body, and an independent judicial body, with the judicial body being empowered to hold the other parts of the sovereign accountable.[22] This is consistent with the United States' system where the sovereign, the Federal Government, is split into three parts, the Legislative, Executive, and Judiciary. The Legislative branch's duty is to create law, the Executive's is to enforce the law, the Judiciary's is to interpret the law and solve disputes. The separate branches, particularly the Executive and Legislative, often clash, vying for power. This is not the result of a "mistake", it was done by design: "Ambition must be made to counteract ambition".[23] Since it is impossible to actually subject a sovereign who creates the law to the law it creates, you split the sovereign into components that, given their different duties and obligations, act as a check and balance on each other's power.

While there are issues that arise when the individual that a prosecutorial body is supposed to be investigating is the Executive that has power over them, such as with President Nixon and the Watergate affair,[24] it remained the case that the Judicial branch was able to step in and say that President Nixon's firing (albeit indirect) of the special prosecutor was inappropriate, and a new prosecutor was appointed to continue the prosecutorial role.[25] Thus, the Rule of Law, so far as the notion that government is limited by law, was upheld. Also in line with Tamanaha's assertion that an independent Judiciary must be able to hold the other components of the sovereign accountable, the Supreme Court of the United States is the final interpreter of the laws passed by Congress and of the United States Constitution, meaning the Court's interpretation of the law is the law of the land.

The independence of components or branches of the sovereign that is essential to having a government that is limited by law is preserved by way of how the branches' officials are chosen. Article III of the United States Constitution prohibits decreasing the salaries of federal judges and specifies that they are to hold their position for life absent a violation of "good behavior".[26] This means that, once a federal judge is sworn into office, they can act independently without fear of retributive action by the Legislature or Executive as the only way they can be removed will be by impeachment, which would require a majority of the House of Representatives and a two-thirds majority for conviction in the Sen-

22 TAMANAHA, *supra* at 240.

23 MADISON, James. *The Federalist Papers No. 51,* Congress.gov, [Online] Available at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51> (1788). Accessed 20.04.2017.

24 TAMANAHA, *supra* at 239.

25 *Id*.

26 *See* U.S. Const. art. III, §1.

ate. No Justice of the Supreme Court has ever been successfully impeached and convicted.

Independence for Congressmen and women in the United States is preserved through the electoral process. While each chamber of Congress has Constitutional authority to expel their own members,[27] and Congress can impeach a Congressman as they would a President, they are insulated from interference by the other branches of government. Even if a Congress-member were convicted of a crime, he/she could technically not be removed from Office without expulsion or impeachment proceedings.[28] Also, Congress-members are elected by the people, which means that legislators have independence from the Executive and Judicial branches because the only people they have to convince of their own worthiness for office is those constituents that live in the Congress-members' district.

Similar to Congress-members, the independence of the President and Vice President is preserved through, primarily, the electoral process. However, since it is the electoral college and not an actual majority of the popular vote that determines who is President, it is arguably the case that, given how the electoral college works today (party lackeys voting for who they are told to vote for instead of leaders of communities coming together for legitimate debate as was the original intent as referenced in Federalist No. 68),[29] Congress, through the nature of political parties, has ways of influencing who will be President. This concept can also be found reflected in the Democratic Party's primary system, where elected Democratic officials, including Congress-members, have a "superdelegate" vote to give to the candidate of their choosing.[30] However, once a President and Vice President are elected, it is nearly impossible to remove them. A President and Vice President can be impeached or, due to a little known part of the Twenty-Fifth Amendment, the President can be ousted by the Vice President and a majority of the principal officers of the Cabinet with the aid of Congress.[31] In the event of a crime not covered under by Presidential immunity, the President would still have to be impeached and convicted by the Senate before being officially removed.[32]

27 *See* id. at art. I, §5.

28 MASKELL, Jack. *Status of a Member of the House Who has been Indicted for or Convicted of Felony*, Congressional Research Service, [Online] Available at <https://fas.org/sgp/crs/misc/RL33229.pdf> (2014).

29 HAMILTON, Alexander. *The Federalist Papers No. 68,* Yale Law School, The Avalon Project, (1788).

30 JACOBS, Ben. *Who are the Democratic superdelegates and where did they come from?,* The Guardian, [Online} Available at https://www.theguardian.com/us-news/2016/apr/19/democratic-party-superdelegates-history-rules-changes (2016).

31 *See* U.S. Const. amend. XXV.

32 *See id.* at art. II.

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3.2.2 Formal Legality

The notion of formal legality is based closely upon the requirements that follow from the "thin" definition of Rule of Law set out above (laws must be set forth in advance, they must be general, they must be publicly stated, they must be applied to everyone according to their terms, and they cannot demand the impossible), but can simply be understood as providing consistency and predictability through law.

> … formal legality enhances liberty of action or individual autonomy because people are advised of their permissible range of free action. There can be no criminal punishment without a pre-existing law that specifies a given action as prohibited. Thus, citizens are free to do whatever they like as long as the stated rules are not violated.[33]

In the United States this concept of formal legality is embraced, with retroactive criminal statutes deemed unconstitutional as a violation of Due Process and the assumption that a thing not prohibited is a thing permitted.

This view of formal legality fits well within the scope of liberalism and capitalism, as the ability of an individual to predict what a government's reaction will be to a certain scenario offers them security in the planning of their activities and lives.[34] Without formal legality people would be left in a perpetual state of insecurity where government action would be subject to individualized determinations resulting in an arbitrary exercise of a sovereigns' power. In the United States this is again managed with Congress passing rules of general applicability that apply to all, and courts being bound by higher courts and an adherence to precedent.

Ultimately, formal legality offers the benefits of predictability to a society with the trade-off being occasional bad results, a consequence of over or under-inclusiveness. "By over-inclusive, I mean that rules will sometimes produce results that are *not consistent* with the aim of the rule; by under-inclusive, I mean that sometimes, rules will fail to extend to situations that *would* advance the purpose of the rule."[35] While it is the case that in the United States, as in many other countries, over-inclusiveness issues are managed by allowing courts to consider equitable remedies, under-inclusiveness cannot be solved the same way[36] and thus some bad results are simply unavoidable as a matter of having a rule-based system. Also, overreliance on equitable remedies will erode the rule-based system and thus the very predictability that formal legality put in place.[37]

33 TAMANAHA, *supra* at 240.
34 *Id.*
35 *Id.* at 241.
36 *Id.*
37 *Id.*

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Another limitation that Tamanaha says formal legality has is that it is consistent with "a regime of laws with inequitable or evil content".[38] In the United States this can be reflected in again, the reference to Black Codes, other forms of segregation, and criminal statutes that seem to disproportionally target minorities. Since formal legality, as the same implies, is about formal process instead of substantive morality, it is possible that a number of troubling actions can be carried out consistent with its tenets.

> An unjust set of laws is not made just by adherence to formal requirements. On the contrary, when the laws are unjust, formal legality can actually bring about greater evil because the system is dedicated to carrying out these unjust laws. An effective system of the rule of law may strengthen the grip of an authoritarian regime by enhancing its efficiency and by providing it with the appearance of legitimacy.[39]

The last limitation on formal legality that Tamanaha mentions is the fact that there exist many circumstances where formal legality is "not appropriate or socially beneficial".[40] In the context of the United States, whether formal legality is not socially beneficial is not so much an issue because we do not fall into the classification of a small-scale community with a communitarian orientation.[41] Where adherence to strict rules in those kinds of communities could lead to unrest because long-term relationships and compromises everyone can live with are the priority over adherence to rules,[42] the United States is a large and complex society in which the compromises we make are done only because of the legal rules that we can resort to if we know compromise fails.

A rather large area in the United States where formal legality may not be appropriate is in the context of the modern administrative state.[43] Rather than establishing clear legal rules that guide government action ahead of time, Congress now passes organic and supplementary statutes to establish and guide an agency as to its purpose, but leaves the actual formulation of policies and rules to the agencies themselves. Agencies often find themselves in the exact kind of situation where formal legality does not work, considering complex issues where particularized judgment is required.[44] Agency officials, in order to respond fluidly to ongoing issues, "gather information, apply expertise, exercise discretion, and make judgments"[45] absent predetermined clear legal rules by Congress. In this way the predictability that formal legality offers is traded for flexibility or "efficiency" in the administrative setting.

38 *Id.*
39 *Id.* at 242.
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*

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3.2.3 Rule of Law, not Man

Similar to the idea of formal legality where predictability and security is key, the proposition of "Rule of Law, not Man" seeks to shield the law from the vagrancies and prejudice that are intrinsic to man.[46]

> And the rule of law, it is argued, is preferable to that of any individual... Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[47]

While the Rule of Law is meant to be shielded from human weaknesses, the fact remains that "the operation of law cannot be sequestered from human participation".[48] In the United States law is created by Congress, which is made up of hundreds of individuals, law is interpreted by hundreds of judges, and the law is enforced by the President and thousands of executive branch employees.

The solution to this paradox that Tamanaha highlights is to make the legal experts-the judiciary, the "special guardians of the law".[49] In the ideal we see judges as simply the mouthpiece of the law, unbiased, educated in the nuances of law, transformed from "subjective man into objective judges".[50] Tamanaha points to three conditions must be met for judges to accomplish this transformation:

> (1) There must be a well-developed legal tradition, a rich body of legal knowledge and a robust legal profession that embodies and advocates the value of legality; (2) the judiciary must enjoy independence, with institutional arrangements that protect the judiciary from interference by others; (3) they must be supported by attitudes external to the judiciary, among government officials and the public at large, in particular the attitude that it is improper to interfere with the judiciary as it fulfills its role of interpreting and applying the law, even when its decisions are unpopular.[51]

The United States had the privilege of a well-developed legal tradition at its beginnings given its colonial masters, the British. While the exact structure of the early American courts was indeed different than the common law courts in England, we see the evidence of a robust legal profession exemplified even before the nation was born by, then solicitor, later President, John Adams' defense of the British soldiers in what has become known as the "Boston Massacre". Even

46 *Id*. at 243.
47 *Id.*
48 *Id*. at 244.
49 *Id*. at 243.
50 *Id*. at 244.
51 *Id*. at 244–45.

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though Adams was a colonist and later became known for his involvement in the American Revolution and establishment of the United States, he defended men that were hated in his community, arguing that "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."[52] Adams' also reaffirmed the idea that protecting innocence is more important than punishing guilt, a concept that underpins our justice system to this day with the colloquialism of "innocent until proven guilty".

The independence of the judiciary we have already spoken to above, with the different procedural hurdles in place that make it almost impossible to remove a federal judge from his or her post. Lastly, while some may not be happy about the decisions that judges make in the United States, it is still seen, by government officials and the public at large, to be improper to interfere or otherwise attempt to delegitimize the judiciary as it carries out this role. A recent example of this can be seen by looking at February 4th, 2017, when, early in the days of the new Donald Trump Presidency, Trump referred to a federal judge who put a stay on the implementation of one of the Administration's executive orders as a "so-called judge".[53] The President's questioning of a federal judge's legitimacy because he received an unfavorable decision was not met well across the political spectrum, with members of his own party stating that the United States does not have so-called judges, but real judges,[54] and Representative Adam Schiff retorting, "This 'so-called' judge was nominated by a 'so-called' President & was confirmed by the 'so-called' Senate. Read the 'so-called' Constitution."[55]

3.3 The Essential Component Behind A Rule of Law Society

Tamanaha states that, at its most base, the essential component behind the Rule of Law is a nation's shared belief that it is a "necessary and proper aspect of their society".[56]

> A widely shared cultural belief that the law *should* rule is *the* essential element of the rule of law—and that is the hardest to achieve. Above all else, for this cultural belief to be viable, people must identify with the law and perceive it to be worthy of ruling. The populace must believe that the law reflects their values and serves their interests. General

52 ADAMS, John. *Argument in Defense of the Soldiers in the Boston Massacre Trials,* (December 1770).

53 WANG, Amy. *Trump lashes out at 'so-called judge' who temporarily blocked travel ban*, The Washington Post [Online]. Available at <https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.8dd496eef1c3> Accessed 04.02.2017.

54 *Id.*

55 SCHIFF, Adam. Twitter, [Online] Available at https://twitter.com/repadamschiff/status/827904939997405186?lang=en. Accessed 15.04.2017.

56 TAMANAHA, *supra* at 246.

> trust in law must be earned for each generation, again and again, by legal actors living up their legal obligations.[57]

This sentiment highlights what every Rule of Law advocate and student of history should have long realized: all the rules, procedures, and mechanisms of coercion in the world will not establish the Rule of Law in a society that fundamentally rejects the premise that law is "good".

Similar to the condition that society must internalize the judiciary's role in society as one of independence, respect, and not subject to interference, Americans deeply hold the belief that Rule of Law is a "necessary and proper aspect of their society."[58] Law is where Americans turn to assert their rights, where they go to figure out how to start and operate a business, and how they know how fast they can drive on their way to work. Again, this is a tradition that developed over hundreds of years in common law England, taking on its own intricacies with the creation of a written Constitution, then the addition of a Bill of Rights, the primary purpose of which was to protect the individual from the power of the state.

When Americans are told not to do something they want to do, the assertion is not that they should be able to do it because they want to, the assertion, true or not, is that it is their "right" to do it. Again, where in other countries compromise may be preferable to resorting to law because collegial relations are valued more than strict rules, the compromises Americans make are done only because of the legal system that they can resort to if we know compromise fails. Threatening to sue someone, a legal action, is a bargaining technique for a settlement in the United States. Even when law is not exercised, such as through a lawsuit, it is used to achieve a purpose.

4 Remaking other Nations in Our Image

The United States and other Western powers have arguably been committed to Rule of Law operations since the end of World War II. Rule of Law operations often take place in underdeveloped or developing countries that may or may not be coming out of a period of conflict. While the first major Rule of Law operations undertaken in the modern era are widely considered a success, Germany and Japan, it is rare to see that sentiment echoed in today's times with country's such as Iraq and Afghanistan. While there are many reasons for this, not the least of which is that it may be too early to determine whether these were successes or failures, it is humbly suggested that one possible reason is that we, the powers engaged in Rule of Law operations, have been applying the wrong theory.

57 *Id.* at 247.
58 *Id.* at 246.

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4.1 The Double Standard

Along with the UN definition of the Rule of Law set out in section two, another definition of the Rule of Law that is utilized in Rule of Law operations is that found in the *Rule of Law Handbook: A Practitioner's Guide of Judge Advocate ("Handbook"),* which states, "[The] Rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles."[59]

While this definition does not include democracy as a requisite for the Rule of Law in a society, it still contains the requirement that laws be "consistent with international human rights principles".[60] While it is somewhat helpful that the *Handbook* clarifies that this phrase means that countries must meet the minimum under the Universal Declaration of Human Rights (UDHR),[61] it openly acknowledges that there is still lively debate over which international human rights are required to make a society one governed by Rule of Law. The UN and *Handbook* definitions of the Rule of Law represent versions of the "thick" theory of the Rule of Law that we apply to other nations, again, seemingly requiring that they remake themselves in our image, as liberal democracies. There is a problem however: While we require other nations to satisfy the UN and *Handbook* definitions of the Rule of Law to be called Rule of Law societies, the United States and many Western European nations, subjected to similar standards, may themselves fail that test.

Does a country satisfy the UN's definition of the Rule of Law if participation in the decision-making process has been severely hindered for certain portions of a society? If that participation is facially there but as applied heavily diminished? Does the *Handbook's* requirements that a country's laws be consistent with international human rights law apply even in matters of national security? Which international human rights laws must be followed? Does not signing a human rights treaty violate this requirement? The West better hope the answers to these questions are "Yes, yes, no, only the UDHR most of the time, and no" otherwise they may not be nation's that have the Rule of Law.

In this way the UN and *Handbook* definitions of the Rule of Law are not only Ameri and Eurocentric, they are hypocritical. Thus, adopting the definition of the "thin" theory of the Rule of Law may not only be less arrogant and self-righteous, but has the benefit of also being more consistent. This is not a matter of lowering standards for those countries we apply the UN and *Handbook* definitions to, it is a matter of applying a Rule of Law definition equitably.

59 Center for Law and Military Operations, *supra* at 3.
60 *Id.*
61 *Id.* at 7.

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4.2 The Essential Element of the Rule of Law that Rule of Law Operations Ignore

The essential element of the Rule of Law was, again, the fundamental shared cultural belief that the Rule of Law is a "necessary and proper aspect of… society".[62] This belief took shape over hundreds of years in England before being exported to North America for the United States to then latch onto. This belief that Americans hold was the result of a very distinct history, a distinct culture, and a distinct tradition. To think we can, in a handful of years, imbue this belief and the values that underpin it, in a society with a very different history, culture, and tradition, is ludicrous.

> In many societies the government is distrusted and recourse to the law is feared or avoided. Negative views towards the law are common where the law has a history of enforcing colonial or authoritarian rule, where legal officials are perceived to be corrupt or inept, where legal professionals are distrusted, or where the content or application of the law is seen to be unfair or identified with particular interests or groups within society or with the elite.[63]

We have had some success in Rule of Law operations, coming to the realization that, if it is our intention to do a Rule of Law operation properly, these must be ongoing efforts that not only bolster security, but civil society. However, if it is our intention to do a Rule of Law operation properly, we must realize we are not talking about years, but at the very least, decades. Iraqis can now vote, but a culture of democracy? That will take generations. Iraqis are used to those in power being the law or applying it to everyone unequally on their own terms, this will take generations to erode. Iraqis are used to the government perhaps not even being the sovereign, as militant groups act as law and so dictate the rules based on ethnicity or allegiance. This too will take generations to fade.

Taking a look at a portion of the world not often in the news today for Rule of Law operations, Eastern Europe, you see the post-Soviet states' history shape how Rule of Law operates in their societies. While a part of the Soviet Union, these states did not vote, so voter turnout is low today. While part of the Soviet Union, law enforcement was not to be trusted, hence why they are viewed as crooks today. In Romania, corruption is rampant, with the people holding marches to protest what they see as a government more interested in lining their own pockets than they are with the welfare of its people.[64]

These countries are not the United States and do not yet have the essential element of the Rule of Law to further development of it in their societies. Chang-

62 TAMANAHA, *supra* at 246.

63 *Id*. at 247.

64 KARASZ, Palko. *In Romania, Corruption's Tentacles Grip Daily Life,* The New York Times, [Online] Available at <https://www.nytimes.com/2017/02/09/world/europe/romania-corruption-coruptie-guvern-justitie.html> (2017). Accessed 10.04.2017

ing hearts and minds will always be more difficult than writing a code of law, building a courthouse, and establishing a police force.

5 Threats to the Rule of Law in the United States

Just as a country may take time to develop the Rule of Law, the Rule of Law already established in a country can be eroded. Injecting a requirement, or at least clarifying, Tamanaha's definition of the Rule of Law, having the Rule of Law in society means having a legal solution or mechanism to deal with every significant issue of operation in regards to the government. Over the course of the 2016 Presidential campaign, and into the Trump Presidency, the threats to the United States' Rule of Law have been shown a spotlight.

5.1 Constitutional Crisis

There are times where, due to a branch of the Federal Government's action or inaction, there is a violation of the law with no legal remedy, spurring constitutional crisis. One of these times was in 2016 when a Republican-controlled Senate refused to consider then President Obama's appointed Judge for a seat on the Supreme Court. Despite a clause of the United States Constitution [65] and a provision of the Judiciary Act of 1869 [66] requiring that the Supreme Court have nine Justices and that the Senate shall provide "Advice and Consent", the Senate refused for political reasons. Now, while the people of the United States could have been put pressure on their Senators to consider the President's nominee as was their legal duty, even if such an idea worked it would have been a political, not a legal, remedy. The United States Senate had just flaunted the Rule of Law in the United States and the United States lacked a legal remedy to correct it.

As was mentioned before, a federal judge put a stay on one of President Trump's executive orders, Trump responding, called that judge a "so-called judge". Before that time in June of 2016, Trump had reacted to another unfavorable decision in court by saying the Judge was being unfair to him and could not be trusted because the Judge was of "Mexican heritage" and Trump, as a candidate, indicated he wanted to build a wall across the Southern border the United States shares with Mexico.[67] This is to say that, before a federal judge ruled against Trump in his capacity as President, Trump had shown an ability to consistently attack the legitimacy of judges who ruled in a way he did not like, contrary to the third condition Tamanaha says is essential to a working judiciary. The concern at the time the federal judge ruled against the Trump Administra-

65 U.S. Const. Art. II § 2, cl. 2.

66 *Circuit Judges Act*, 16 Stat. 44 (1869) (Relevant provisions currently codified in 28 U.S.C. §1).

67 SULLIVAN, Sean, JOHNSON, Jenna. *Trump calls American-born judge 'a Mexican', points out 'My African' at a rally*, The Washington Post, [Online] Available at <https://www.washingtonpost.com/news/post-politics/wp/2016/06/03/trump-calls-american-born-judge-a-mexican-points-out-my-african-american-at-a-rally/?utm_term=.65c8414bc5f3> (2016).

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tion was what would happen if the Administration said "no". The United States relies on the Judiciary to interpret the law and the Executive to enforce it. The Judiciary has no army, no military or law enforcement force of mention to carry out its orders, again which is why the respect of the people and government of a nation is so important. If the Trump Administration had refused to follow the orders of a federal judge the United States would be in another constitutional crisis, this time with the President of the United States undermining the Rule of Law. Again, one could argue that the President could then be impeached by Congress, but impeachment relies on the political will of Congress, meaning that the only remedy would be, once again, not legal but political.

5.2 The Role of the Judiciary

The United States' largest threat to the Rule of Law arguably comes from the same people to whom we entrust it, the Judiciary. After stating that the ultimate responsibility for maintaining a Rule of Law system rests with the judiciary, Tamanaha goes on to say that, "[t]he danger of this strain of the rule of law is that the *rule of law* might become *rule by judges*.[68] Whenever judges have final say over the interpretation and application of law, they will determine the implications of law in concrete situations." The danger Tamanaha speaks to is, of course, judicial activism. When judges substitute their own biases and opinions for the law, they have the ability to turn "the judge speaks the law" into "the law is what the judge says it is".[69] While Tamanaha stresses that this is the reason we must be so careful about selecting our judges, picking them not only for commitment to the law and willingness to defer to proper authority, but for honesty and integrity,[70] judgeships, especially when it comes to the Supreme Court, are treated as a political game by Senators and the Executive, with less attention given to integrity and skill than to how they feel a judge would vote on an issue of interest to them. Also worth noting, once a federal judge is sworn into office in the United States, there is a thin chance of being able to address a judge who goes rouge. The same obstacles to federal judges' removal that give them their independence also allow for their activist behavior.

The greatest danger that judges present to the Rule of Law in the United States is not through the judicial activism that Tamanaha mentions however, it is through judicial abdication. While there may indeed be times where the structural nature of our government and Separation of Powers requires an issue truly be a "political question", meant to be left to the political branches of government, the Judiciary cannot use this as an excuse to dodge tough or uncomfortable issues of law. "It is emphatically the province and *duty of the judicial department to say what the law is*."[71] It is not the privilege of the Judiciary to say what the law

68 TAMANAHA, *supra* at 245.
69 *Id.*
70 *Id.*
71 *See Marbury v. Madison*, 1 U.S. 137 (1803).

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is, it is not the discretion of the Judiciary, it is the duty of the Judiciary. When the Judiciary abdicates this role, the Rule of Law devolves into the Rule of Man. Thus, it is of paramount importance for the Rule of Law in the United States that judges, whether they are in possession of the judicial virtues at the time they are given their seat or not, find and keep them during their tenure, and ultimately have the courage to say what the law is.

6 Conclusion

It goes without saying that no nation perfectly lives up to the ideals of the rule of law. A number of systems fall so short of these ideals that they must be denied the label, regardless of their claims otherwise. All rule of law systems, even those that are admirable in many respects, have their failings and exceptions and flaws. But any nation that hopes to meet the core demand of the rule of law must insure that when the government exercises coercion against citizens, it does so in accordance with standing laws and it must ensure that the government is answerable in court for its actions. Everything else aside, this lies at the heart of the rule of law.[72]

While it is far from perfect and cannot claim to fully pass every definition based on the "thick" theory of the Rule of Law that exists, the United States has the Rule of Law under the "thin" theory. Let us pray we keep it.

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72 TAMANAHA, *supra* at 246.

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