New York Times Bestselling Author of
How Would a Patriot Act? and *A Tragic Legacy*

GLENN GREENWALD

WITH LIBERTY AND JUSTICE FOR SOME

How the Law Is Used to Destroy Equality and Protect the Powerful

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In the course of this book, I hold certain government officials and corporations responsible for committing crimes. These assertions constitute my opinions based on the facts that I set forth in the text.

ALSO BY GLENN GREENWALD

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INTRODUCTION

As a litigator who practiced for more than a decade in federal and state courts across the country, I've long been aware of the inequities that pervade the American justice system. The rich enjoy superior legal representation and therefore much better prospects for success in court than the poor. The powerful are treated with far more deference by judges than the powerless. The same cultural, socioeconomic, and demographic biases that plague society generally also infect the legal process. Few people who have had any interaction with the justice system would dispute this.

Still, only when I began regularly writing about politics did I realize that the problem extends well beyond such inequities. The issue isn't just that those with political influence and financial power have some advantages in our judicial system. It is much worse than that. Those with political and financial clout are routinely allowed to break the law with no legal repercussions whatsoever. Often they need not even exploit their access to superior lawyers because they don't see the inside of a courtroom in the first place—not even when they get caught in the most egregious criminality. The criminal justice system is now

almost exclusively reserved for ordinary Americans, who are routinely subjected to harsh punishments even for the pettiest of offenses.

The wiretapping scandal of 2005 provides a perfect illustration. In December of that year, the *New York Times* revealed that officials in George W. Bush's administration were eavesdropping on Americans' telephone calls and e-mails without warrants or judicial oversight: a felony punishable by up to five years in prison and a ten-thousand-dollar fine for each offense. The lawbreaking could not have been clearer, yet virtually nobody in the political and media class was willing to call those acts "criminal," much less to demand legal investigations or prosecutions.

This was a depressingly familiar pattern for several decades and became particularly pronounced over the last one. America's political and business establishment presided over a series of extraordinary crimes that brought the United States political disgrace and financial ruin: the creation of a global torture regime; the systematic plundering by Wall Street, leading to the 2008 economic crisis; the serial obstruction of justice by high-ranking political officials; the fraudulent home foreclosures by the nation's largest banks. Yet in almost every instance, the perpetrators were shielded from any legal consequences. As these events clearly demonstrate, America's political culture not only provides strategic advantages in the legal system to political and financial elites, but now actually grants them *immunity* when they knowingly break the law. This license—awarded by the same political class that created the world's largest and most merciless prison state for its poorest and most powerless citizens—represents not just a departure from the rule of law but a fundamental repudiation of it.

The central principle of America's founding was that the rule of law would be the prime equalizing force, the ultimate guardian of justice. The founders considered vast inequality in every other realm to be inevitable and even desirable. Some would be rich, and many would be poor. Some would acquire great power, and many would live their entire lives virtually powerless. A small number of individuals would be naturally endowed with unique and extraordinary talents, while most people, by definition, would be ordinary. Due to those unavoidable circumstances, the American conception of liberty was not only consistent with, but premised on, the inevitability of outcome inequality—the success of some people, the failure of others.

The one exception was the rule of law. When it came to the law, no inequality was tolerable. Law was understood to be the sine qua non ensuring fairness, a level playing field, and a universal set of rules. It was the nonnegotiable prerequisite that made all other forms of inequality acceptable. Only if everyone was bound to the same rules would outcome inequality be justifiable.

So central is this founding principle that most Americans absorb it by osmosis via numerous clichés: All are equal before the law. Justice is blind. No man is above the law. We are, in the words of John Adams, "a nation of laws, not men." For Adams, either the law is supreme in all cases, or the arbitrary will of rulers is. Adams and the other founders viewed the preeminence of law over individuals—all individuals—as the only protection against the tyranny that American colonists had launched a revolution to abolish. For that reason, American political liberty was always inextricably bound to the notion that law reigns supreme.

It would be difficult to overstate the essential place of the

rule of law in the American political tradition. A principal grievance against King George III was his unilateral power to vest in himself and those he favored the right to act outside of the law. The goal of the American Revolution was to replace this arbitrary will of the monarch with unbending equal application of law to everyone. "Where, say some, is the King of America?" Thomas Paine, the great American revolutionary, asked in his 1776 pamphlet *Common Sense*. His answer:

> Let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the Law is King. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.

Alexander Hamilton did not often see eye to eye with Paine, but on this he heartily agreed. "The instruments by which [government] must act are either the AUTHORITY of the laws or FORCE," he wrote in 1794. "If the first be destroyed, the last must be substituted; and where this becomes the ordinary instrument of government there is an end to liberty!" Like Paine and Hamilton, Adams, in his 1776 *Thoughts on Government,* put the rule of law at the top of his list of core principles for a free and legitimate government: "The very definition of a republic is 'an empire of laws, and not of men.' . . . Good government is an empire of laws."

That last line may at first glance appear simple and even trite, but it contains a critical insight. The supremacy of law is not just one among many instruments of good government; it *is* good government itself. The converse is equally true: in the absence of the rule of law, good government cannot be said to exist.

To be sure, there may be exceptional situations where the rule of men might produce better outcomes than the rule of law. A truly magnanimous tyrant, a benevolent dictator, might conceivably lead to more positive results than a regime of unjust laws rigidly applied. Historians can point to emperors who exercised absolute power while advancing the interests of their subjects and the territories they ruled. Nevertheless, such societies should not be confused with "good government," dependent as they are on the fortuitous emergence of an unrestrained leader who is both well-intentioned and relatively immune from the corrupting effects of power (and, even less plausibly, immune from the absolutely corrupting effects of absolute power). A country that prospers by vesting absolute power in a leader who happens to be benevolent could just as easily come under the control of a malevolent leader the next time around. And when that happens, as at some point it surely will, a society without the rule of law will have no means of redress short of violent revolution.

What's more, even the most well-intentioned leader will eventually abuse his power if he is not constrained by law. Indeed, and somewhat paradoxically, a ruler's belief in his own virtue actually renders abuses of power more likely, since he can rationalize all manner of arbitrary and capricious measures: *I am good and doing this for good ends, and it is therefore justifiable.* Power exercised corruptly inevitably degrades and destroys even genuinely benevolent intent.

The founders understood that magnanimity is very rarely an enduring safeguard against the corrupting influences of power, and because they understood this, they insisted on the rule of law as the only effective weapon against such temptations. "Why has government been instituted at all?" Hamilton asked in

Federalist 15. "Because the passions of men will not conform to the dictates of reason and justice without constraint." Thomas Jefferson wrote in 1798: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." Adams, in 1772, put it this way: "There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty." Four years later, his wife, Abigail, memorably echoed the same sentiment in a letter to him: "Remember, all men would be tyrants if they could."

The rule of law does not guarantee good government: an empire of unjust laws can be as tyrannical as an empire of men, perhaps even more so. But though the rule of law is not *sufficient* by itself to ensure a just and free society, it's absolutely *necessary* for it. For that reason, a nation that renounces the rule of law has rendered tyranny not only likely but inevitable.

The fundamental requirement of the rule of law is equality: the uniform application of a set of preexisting rules to everyone, including the rulers. But like the term *rule of law, equality under the law* has become merely a platitude, a phrase recited without much appreciation of its significance. Everyone claims to believe in it, but hardly anyone remembers what it means. And yet the demand that all be treated equally under the law was no secondary concept to the founding of the United States, but its crux, and it is not difficult to understand why.

What the founders feared most was that a centralized federal government would unwittingly replicate the abuses they had suffered under the king. Unless aggressively constrained, a federal government could erode every precept of liberty that they were attempting to enshrine. It could forcibly override local rule, obliterate self-governance, and, through its sheer weight, trans-

gress every limit. Preventing the government from succumbing to the temptations inherent in its power was the founders' central concern when they were creating the Constitution.

Of course, the law itself also wields tremendous power. The legal system's reach is unparalleled: it can deprive a person of property, liberty, even life. It may compel people to transfer their material goods to others, block them from engaging in planned actions, destroy their reputations, consign them to cages, or even inject lethal chemicals into their veins. Unequal application of the law is thus not merely unjust in theory but devastating in practice. When the law is wielded only against the powerless, it ceases to be a safeguard against injustice and becomes the primary tool of oppression. Unjust acts perpetrated in defiance of the law are relatively easy to fight against, but unjust acts perpetrated under cover of law are much harder to challenge. Thus, not only does unequal application of law result in the loss of something good and necessary; it becomes a potent means for entrenching and protecting exactly that which law is designed to prevent.

In his 1795 essay *Dissertations on First Principles of Government,* Paine thus insisted that "the true and only true basis of representative government" is equal application of law to all citizens: rich and poor, strong and weak, powerful and powerless, landowner and tenant. Without equal application of the laws, Benjamin Franklin warned in his 1774 *Emblematical Representations,* society would fracture into two tiers: the "favored" and the "oppressed." The result, he said, would be "great and violent jealousies and animosities" between these classes, and a "total separation of affections, interests, political obligations, and all manner of connections, by which the whole state is weakened."

Revealingly, the central function of the Constitution as

law—the supreme law—was to impose limitations not on the behavior of ordinary citizens but on the federal government itself. The government, and those who ran it, were not placed outside the law, but expressly targeted by it. Indeed, the Bill of Rights is little more than a description of the lines that the most powerful political officials are barred from crossing, even if they have the power to do so and even when the majority of citizens might wish them to do so.

The vital aim of law, then, was to ensure that the powerful were subjected to its dictates on equal terms with the powerless. As Jefferson put it in an April 16, 1784, letter to George Washington, the foundation on which any constitution must rest is "the denial of every preeminence." In his 1786 *Answers to Monsieur de Meusnier's Questions*, Jefferson argued that the essence of America was that "the poorest laborer stood on equal ground with the wealthiest millionaire, and generally on a more favored one whenever their rights seem to jar." Even Hamilton, who made no attempt to conceal his belief in a strong executive, argued in *Federalist 71* that the president had to be "subordinate to the laws." The notion of *law* simply makes no sense, and has no good purpose, unless all are bound by its dictates.

The dangers of abandoning this principle were well recognized. In *Federalist 57*, James Madison emphasized that equal application of the law to political elites was a prerequisite for a free and cohesive society ("one of the strongest bonds by which human policy can connect the rulers and the people together"), and warned that in its absence "every government degenerates into tyranny." Perhaps most tellingly of all, the founder who was the least philosophically inclined but the most practiced in the exigencies of governance—George Washington—vowed, in a letter written in December 1795, that there would never be

immunity for wrongdoing by high government officials on his watch: "The executive branch of this government never has, nor will suffer, while I preside, any improper conduct of its officers to escape with impunity."

What the founders recognized was that unless the law were applied equally, subjecting all citizens to its mandates, the Constitution would simply consist of a set of guidelines or suggestions, compliance being optional. In view of that danger, equal enforcement was embedded in formal American jurisprudence from early on as the linchpin of the rule of law. The seminal 1803 Supreme Court case *Marbury v. Madison* is widely remembered for having established the foundation for how the U.S. government functions: Congress enacts laws, the president executes them, and the courts "say what the law is." But the Supreme Court's ruling was just as meaningful for what it signaled about how the principle of equality under the law would work in practice. The central dispute in *Marbury* was whether the courts had the authority to subject officials in the executive branch to their rulings—that is, whether officials who violated the law could be compelled to submit to judicial decrees. The court's unanimous decision announced that the judicial branch had not only the right but the duty to enforce the law on all citizens, including high-level officials in the executive branch. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," the chief justice wrote.

What makes the founders' insistence on equality under the law all the more striking is that none believed in equality as a general proposition. Indeed, the opposite is true: they considered inequality on every level, other than in law, to be the natural, inevitable, and just state of affairs. Even Jefferson, one of the most egalitarian of the founders, held that there was "a natural

aristocracy" among men, based on "virtue and talents." And he saw its existence as not only inevitable but desirable: "The natural aristocracy I consider as the most precious gift of nature for the instruction, the trusts, and government of society." Similarly, for Adams, inequality was both inevitable and natural, even divinely ordained: "It already appears, that there must be in every society of men superiors and inferiors, because God has laid in the constitution and course of nature the foundations of the distinction." Yet the founders concurred that nothing constituted a greater threat to the Republic than to allow this inequality of wealth or political power to determine the treatment of citizens before the law. In particular, they disdained superior and inferior positions imposed by the state rather than determined by merit. Paine, for instance, loathed inherited titles on the ground that they doled out rewards based on assigned status rather unrelated to entitlement. He declared:

> Nature is often giving to the world some extraordinary men who arrive at fame by merit and universal consent, such as Aristotle, Socrates, Plato, etc. They were truly great or noble. But when government sets up a manufactory of nobles, it is as absurd as if she undertook to manufacture wise men. Her nobles are all counterfeits.

To Paine, a system of legally enforced inequality would enable the elite to exploit the law to entrench unearned prerogatives or shield ill-gotten gains. And those counterfeit nobles would turn the law into a tool to promote and protect injustice rather than to correct it. Though Paine's liveliest polemics were devoted to scorning the accumulation of wealth, he had no quarrel with income inequality *provided* that there was no such inequality

under law. The rich could buy what they desired, dress and eat as they wished, and wallow in the most effete comforts and luxuries. But the law was the one realm where their money and property would count for nothing.

One point is vital to acknowledge: like all of the other principles espoused by the founders, equality under the law was not always observed in practice. Indeed, it was often violently breached from the very beginning of the Republic. Slavery, the dispossession of Native Americans, the denial of voting rights to women, and the granting of superior legal rights to property owners are a few of the most glaring deviations.

But even when the principle of equal treatment was betrayed, American leaders in every era have emphatically affirmed it, not so much out of hypocrisy as out of aspiration. Indeed, for those who were devoted to justice, the persistence of inequality was precisely what made equality before the law so imperative. Over time, this principle would provide the road map for eradicating injustice. It was the impetus for the abolition of slavery; the enactment of the Fourteenth Amendment, with its overarching guarantee of "equal protection of the laws"; the enfranchisement and empowerment of women; the civil rights movement; enhanced protections for the poor in the criminal justice process; and numerous other legal and social reforms of the last two centuries.

Today, equal application of the law remains a sacrosanct principle among virtually all legal theorists. Contemporary scholars routinely emphasize that the rule of law cannot exist without legal equality. As the constitutional legal scholar Michel Rosenfeld argues, the rule of law is not merely weakened if "the ruler