



The Trump Administration, the Rule of Law, and the Future of Business

FACULTY PANEL REPORT

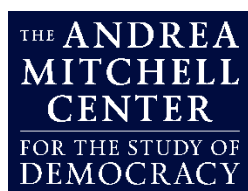
April 22, 2025



Wharton
UNIVERSITY of PENNSYLVANIA



Center for Ethics
and the Rule of Law
UNIVERSITY of PENNSYLVANIA



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**PENN PROGRAM
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THE TRUMP ADMINISTRATION, THE RULE OF LAW, AND THE FUTURE OF BUSINESS

On April 14, 2025, a standing-room-only audience at the Wharton School heard presentations from an interdisciplinary panel of Penn faculty members on the topic of whether and how the Trump administration is violating a foundational understanding of the rule of law in the United States and, if so, what this may mean for the future of business.

The faculty panel was co-sponsored by the Wharton School's Legal Studies & Business Ethics Department, the Center for Ethics and the Rule of Law (CERL), the Andrea Mitchell Center for the Study of Democracy, the Penn Initiative for the Study of Markets (PISM), and the Penn Program on Regulation.

Eric W. Orts, Guardsmark Professor of Legal Studies & Business Ethics at Wharton, kicked off the conference by making a fundamental distinction between governments based on the rule *of* law and those following a rule *by* law. He said the Trump administration only within its first 100 days has taken actions that threaten to undermine the long-standing position of the United States as a rule-of-law jurisdiction. In one view, the Trump administration's disruptive actions might be justified as politically legitimate given Trump's election in 2024. These actions, including President Trump's slew of executive orders, accord with the principle of the rule of law until they are struck down or modified by the federal courts. An opposing view points out that the Trump administration is already violating some federal court orders with respect to the Supreme Court's Tik Tok decision and in the immigration context. If this trend continues, and if the Trump administration continues to flout or ignore federal court orders, then the fears of those who believe the rule of law in the United States is in danger will have been realized. The business implications are grave. The global economic order ultimately depends on rule-of-law assumptions.

Jesús Fernández-Villaverde, Howard Marks Presidential Professor of Economics, could not attend the panel in person but provided a few comments to share. His main concern relates to research that he and others have done on "uncertainty shocks" in government policy. President Trump's recent tariff policies, which have been set only by the White House without congressional approval, fall into this category. A primary takeaway is that the rule of law through orderly processes is important for the reliability of markets. Empirical evidence from many econometric studies points out that the worst type of regulation is an uncertain regulation. A bad yet certain regulation is often better than a well-intended but uncertain regulation. Even if Trump's tariffs aim at a legitimate goal, the significant uncertainty that they have introduced into global trading markets has been damaging.

Jules H. van Binsbergen, Nippon Life Professor in Finance, indicated that Trump's tariffs were exercised under federal legislation. Still, the decisions were causing uncertainty based on a multi-equilibrium problem in financial and trading markets. The volatility has presented options traders with significant opportunities. There were also serious concerns about whether insider trading has been occurring. He pointed out that Trump's high tariffs seemed, in fact, to be a traditionally left-wing policy, and that this was an indication that the traditional right-left distinction may be breaking down. President Trump represents a general, widespread populism reacting against internal disruptions and an unequal sharing of the economic benefits of globalization. The new tariff policies are not likely to provide a solution to this problem, but what will? Complaining about bad policies does not help much. Democrats and Republicans alike should focus on new solutions.

In answer to questions from the audience, Professor van Binsbergen also suggested that although Trump's tariffs presented economic problems, worries that long-term U.S. Treasuries were unstable or that the U.S. debt was too high relative to historical benchmarks could be overblown.

Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy and Faculty Director of the Center for Ethics and the Rule of Law, discussed the difference between a regime under the rule of law and a kleptocracy. A kleptocracy is a form of government in which the rulers use the power of their political positions to extract financial benefits. She warned that President Trump's recent actions risk converting the United States into a kleptocracy. Vladimir Putin's Russia is the leading contemporary example of this kind of regime in which business monopolies owned by a small number of oligarchs are closely tied to the government and where government leaders use their official positions to enrich themselves in conjunction with the private sector. This is not, by definition, a fully free economy, as kleptocracies tend to concentrate wealth at the top. It is also an economy riddled with inefficiencies, as supply and demand do not set pricing. Professor Finkelstein pointed to three developments in the United States that indicate a trend in this direction. *First*, post-Watergate ethical and legal rules designed to protect against conflicts of interests in government are being eroded. The first and second Trump administrations are the only administrations since the 1960's to ignore ethics rules completely and the Office of Government Ethics, which usually ensures that government employees divest themselves from their personal holdings, is not able to do its job under the current administration. In addition, allowing Elon Musk to make significant policy decisions under his "special government employee" designation, rather than having a Senate-confirmed member of the administration undertake such initiatives contributes to the ability of the administration to evade conflict of interest rules. *Second*, President Trump is blatantly violating the Emoluments Clause in the Constitution. This provision prohibits the receipt of gifts, both foreign and domestic. The failure to adhere to the prohibition on emoluments fosters a climate in which benefitting the president is perceived as a means to achieving results in Washington.

Third, the Supreme Court's opinion in *Trump v. United States*, which granted immunity to the president against criminal charges relating to "official capacity actions," has removed the remaining protections against self-profit by the President and his closest advisors in our system, since it green lights presidential bribery and other illegal action, provided that these actions are part of the president's official duties. The implications of a kleptocracy for businesses that are not allied with the regime are, of course, grim.

Mitchell A. Orenstein, Professor of Russian and East European Studies, explained that the Trump administration is following an "authoritarian playbook" antithetical to the rule of law and is taking Viktor Orbán's Hungary as a model. Project 2025 translates Orbán's style into the U.S. context. Key tactics include: (1) dismantling constitutional checks on executive power, (2) attacking the media and academic institutions, and (3) changing the legal system to entrench authoritarian power. A constraint on Hungary is its membership in the European Union which requires, at least ostensibly, some adherence to democratic norms. Orbán's solution when he won a supermajority in 2010 was to rewrite the Hungarian Constitution. In the United States, we can expect a similar assault on constitutional norms, and it remains to be seen whether the U.S. Supreme Court will provide strong resistance to this assault or not. Trump is following the Hungarian playbook by attacking the judiciary, attacking the media, and attacking academia. In Poland, a similar authoritarian takeover was reversed politically in a national election, but reform has proven difficult. Once institutional integrity is lost, it is not easy to recover. Professor Orenstein also agreed that the current political divide may be better understood as nationalist versus internationalist rather than left versus right.

Amanda Shanor, Assistant Professor of Legal Studies & Business Ethics, focused on historical developments led by business interests to influence U.S. law and policy. In a famous memo, Lewis Powell, who later became a Supreme Court Justice, urged the U.S. Chamber of Commerce to build a movement similar to the civil rights movement to advance business interests and free markets, including rolling back the New Deal administrative state. Over the last 40+ years, that movement has limited redistributive policies, leading in part to the sharp rise in inequality that has contributed to the current populist backlash. The Chamber of Commerce has also become one of the most successful litigants in cases before the Supreme Court. Business interests have largely successfully advocated for a shift in First Amendment jurisprudence from a protection for political dissent to one advancing economic liberty, for example by checking the power of labor unions and increasing the voice of business interests in politics. Recent Court decisions have also paired down the power of administrative agencies. Yet the business community now finds itself in a precarious position. The center of gravity of the conservative legal movement is shifting from a decades-long commitment to libertarianism towards polarized identitarianism—from a focus on free markets to a focus on the preservation of identity, which it claims is under existential threat from multiculturalism, immigration, and globalization. The goal is to ensure 'our' side wins and 'yours' loses, as evidenced by attacks on

‘woke’ business actions on equality issues or climate change. In this context, businesses face a collective action problem. Joint action is needed to defend the rule of law so that the business community will not be subject to the whims of political leaders.

Rogers M. Smith, Christopher H. Browne Distinguished Emeritus Professor of Political Science, provided a summary of the political and legal argument favoring the Trump administration’s positions. President Trump was elected in a campaign emphasizing that the status quo of the current government was deeply corrupt and unconstitutional. The Reagan-era attacks on regulation and the administrative state have been escalated and augmented by a populist attack on DEI and “woke capitalism,” which is also supported by traditional religious groups who have felt spurned by Democratic administrations. A powerful unitary executive is needed to subvert the power of the administrative bureaucracy, which is also seen as corrupt. The majority of the current Supreme Court seems broadly sympathetic to this view. The Court’s recent precedents are trimming the power of administrative agencies, and its criminal immunity decision in *Trump v. United States* emboldens the president. The “flood the zone” strategy of the many procedurally questionable executive orders has led, however, to a corresponding “flood of litigation.” This leads to greater legal uncertainty, which is characteristic of a lack of rule of law. Many business firms are uncomfortable with the legal and economic uncertainty, but so far, they are not sure how to respond.

Cary Coglianese, Edward B. Shils Professor of Law and Professor of Political Science, characterized the sweep of actions in the first few months of the second Trump administration as an “abandonment of regular order” that threatens the rule of law in the United States. These actions, he said, fall into six categories: (1) the unilateral canceling of federal contracts and effective impounding of spending authorized by Congress exercising its constitutional power to tax and spend (i.e., the power of the purse), (2) the firing of government employees, elimination of legal protections for civil servants, and the unilateral constructive closing of administrative agencies, (3) the broad assault on major law firms, which now raise professional ethics and conflicts of interests questions for these firms if they were ever to represent clients challenging the administration, (4) immigration policy changes causing significant fear in vulnerable populations and changing the United States’ longstanding reputation around the world as a land of opportunity and a beacon of freedom and justice, (5) unilateral and ever-changing tariffs which undermine, as a matter of international trade, the United States’ commitment to free markets and, as a matter of domestic law, principles of non-arbitrary decisions, and (6) the rhetorical and, in some cases, real abandonment of traditional geopolitical alliances with other democratic governments around the world. Professor Coglianese said that these actions collectively reflect a dramatic retreat from core principles underlying government under the rule of law, including those that demand reason-giving and transparency and decision-making that honors promises and avoids favoritism. For business interests and economic stability, these actions do not bode well. We are already seeing the weakening of the dollar. Over the

longer term, violations of due process with respect to people only raise the threat of legitimizing violations also of business property rights. Professor Coglianesi asked whether, if persons living in the United States can be summarily whisked away to foreign prisons without hearings, there can be any meaningful legal assurance against the government seizing property or deploying tax authorities for vindictive or self-interested reasons. He explained that the extensive research of Nobel Prize-winning economists Daron Acemoglu and Simon Johnson from the Massachusetts Institute of Technology and James Robinson from the University of Chicago has demonstrated a clear positive relationship between economic wealth and legal institutions that encourage inclusive participation in business organizations, the consistent protection of property rights, and a strong commitment to the rule of law.

The faculty panel concluded by taking questions from the audience. One from an MBA student provides a fitting conclusion: Although there are many differences of opinion and perspective, it seems that the Trump administration is indeed taking actions that threaten the rule of law not only in the United States but globally. Many business interests likely supported Trump's candidacy for reasons including a continuation of low-tax policies and greater deregulation. However, some actions within the first 100 days give reason for pause. In particular, the volatility introduced by erratic tariffs and the uncertainty raised about basic protections of due process in the United States legal systems are problematic for the future of business—or at least for free enterprise organizations that remain independent of a potentially emerging kleptocracy or some version of “crony capitalism.” What is to be done next, asked this student. Professor Orts replied that faculty should remain “brave enough” to hold academic panels like this one to engage the issues. Professor van Binsbergen added that discussions in academia should focus on objective research questions and avoid taking “political” stands. Both approaches will be adopted in future events on this topic.

[Compiled by Eric W. Orts and fact-checked with individual panelists]



A large audience at the Wharton School heard presentations from an interdisciplinary Penn faculty panel.



Professor Eric W. Orts introducing the panelists.



The Panelists from left to right: Professors Eric W. Orts, Rogers M. Smith, Mitchell A. Orenstein, Jules H. van Binsbergen, Cary Coglianese, Claire Finkelstein, and Amanda Shanor.

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THE TRUMP ADMINISTRATION THE RULE OF LAW AND THE FUTURE OF BUSINESS

Monday, April 14, 2025

Location: Jon M. Huntsman Hall, Room 240
3730 Walnut St, Philadelphia, PA | **Time: 12:00 - 1:30 p.m.**

Penn Faculty Panel Discussion, The Wharton School, University of Pennsylvania

This panel will bring together an interdisciplinary group of Penn faculty to discuss current events related to the rule of law in the United States and the potential impact on business. The aim is to provide a forum for open debate and discussion about this topic, with Penn students from across the university as the primary intended audience. Presentations will therefore be kept brief to preserve time for questions and comments.

Panelists will include:

- **Cary Coglianese**, Edward B. Shils Professor of Law and Professor of Political Science
- **Jesús Fernández-Villaverde**, Howard Marks Presidential Professor of Economics
- **Claire Finkelstein**, Algernon Biddle Professor of Law and Professor of Philosophy
- **Mitchell A. Orenstein**, Professor of Russian and East European Studies
- **Eric W. Orts**, Guardsmark Professor of Legal Studies & Business Ethics, The Wharton School
- **Amanda Shanor**, Assistant Professor of Legal Studies & Business Ethics, The Wharton School
- **Rogers M. Smith**, Christopher H. Browne Distinguished Emeritus Professor of Political Science
- **Jules H. van Binsbergen**, Nippon Life Professor in Finance

All members of the Penn community invited – especially students!
Lunch will be provided first come, first served