

Whose Rules? Whose Law?

by Jesse Walker

The virtue of the rule of law is that it requires the government, like the rest of us, to follow rules. The trouble with the rule of law is that it's the government that ends up enforcing those rules. Often as not, it ends up doing whatever it wants, defining its own power with little regard for the Constitution, the common law, or the other institutions that are supposed to constrain it. One recent example: the American Heritage Rivers Initiative.

President Clinton will soon designate ten waterways as Heritage Rivers. Each will then be assigned a "river navigator," an official who'll assist local governments in finding federal programs to help them "restore and revitalize their river communities." In other words, he will be a pork facilitator. (Originally, he was to be called a "caseworker." I believe that says something about the way this administration thinks.)

The Constitution is explicit about who has the power to pass laws and spend money: Congress does. The President is not and should not be a lawmaker—the Founders feared excessive executive power, recognizing that it would draw us closer to dictatorship. Yet the Heritage Rivers program was created by presidential fiat. Congress never approved it; indeed, it never voted on it at all. The President simply announced it in his State of the Union address last year.

Therefore, one might conclude, the initiative is unconstitutional. Right?

Well, yes. But that hasn't stopped the government from moving forward with it, rule of law be damned. A few congressfolk have complained, but to little effect: they have forced the feds to defend their actions, but not to produce any arguments that actually make sense. Thus, the government and its lawyers argued that the program introduces no new regulations and dispenses no new funds, and therefore does not amount to new legislation or new spending. But Washington has already spent several hundred thousand dollars producing brochures, operating a website, flying federal employees to meetings, and otherwise preparing to put the initiative into effect. With time, those expenses will increase and new costs will emerge. The biggest of those will be the river navigators themselves, ten men and women who will be paid anywhere from \$70,000 to \$100,000 a year apiece, for at least five years. That's as much as \$5 million right there, without even taking into account what will happen if more waterways are added to the program.

That sure *looks* like new spending.

In theory, the initiative simply diverts cash from already existing programs. Therefore, argue the Clintonites, it merely reorganizes existing funds, and hence requires no congressional approval. "What we are talking about here is not the creation of a new bureaucracy or the creation of new statutory authority," explains Representative Paul McHale.

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"We are talking about the more efficient administration and delivery of existing federal programs."

That is a shell game. The initiative is a new program; the navigatorship is a new post. The very fact that communities must compete to be designated Heritage Rivers indicates that this is more than a mere continuation of existing programs. Otherwise, what new benefits would they be competing for? And if the plan draws its money from existing agencies, that is *more* cause for concern. When Congress funds the Environmental Protection Agency, the Department of the Interior, the Army Corps of Engineers, and the rest, it is funding *those* departments. It is not authorizing the President to carve from them a new bureaucracy of his own.

At times, even the initiative's advocates seem to recognize this. After President Clinton announced the program, an array of property-rights activists, western legislators, and concerned citizens protested it, worried that it might evolve into a federal land grab. When Congress responded with an oversight hearing a year ago, Representative McHale was among those testifying for the initiative. "The American Heritage Rivers Initiative," he told his colleagues, "is in the conservation tradition of Teddy Roosevelt, Gifford Pinchot, and Rachel Carson. It deserves the support and the funding of Congress."

Maybe, maybe not—but this was an oversight hearing, not a legislative debate. Congress's support and funding were not at issue. The President had already seized that prerogative for himself, Constitution or no Constitution.

Not that McHale cared much about that once his colleagues brought it up. "We heard references earlier . . . about a president taking unilateral action," he testified. "The president of the United States acting without the consent of Congress, and in fact deliberately attempting to circumvent the will of some members of Congress, took executive action to protect the natural resources of the United States. I am not referring to Bill Clinton. I am referring to Teddy Roosevelt. Read his autobiography. What is objected to today is

precisely what Roosevelt did nearly a century ago, and with the wisdom of hindsight and history, we now recognize that Roosevelt fortunately protected the natural resources of our nation so that we of this generation might be able to enjoy them."

Think about this. Behind the fashionable Teddymania, McHale is baldly arguing that the ends justify the means and that the Constitution isn't worth anything. Whither the rule of law now? (Asked about this later, the congressman clarified his position. He wasn't saying that the president had the right to circumvent Congress, he explained. He was simply pointing out that Roosevelt did it, and Roosevelt was right to do it, and Clinton is right to do it now. On second thought, "clarified" might not be the word I'm looking for.)

The oversight hearing came and went; the program stayed in place. But the resistance wasn't over yet. When one branch of the government oversteps its bounds, we are supposed to have a weapon of last resort: the courts. And so earlier this year, Representative Helen Chenoweth and three colleagues filed a lawsuit to stop the program, arguing not only that it was passed unconstitutionally but that it violates the Tenth Amendment and private-property rights as well.

In March, Judge Henry Kennedy dismissed the case without even considering the plaintiffs' arguments, declaring that Chenoweth and company simply did not have standing to present the suit.

All this may seem unimportant. But it's part of a pattern. Look at the long list of laws enacted by executive order. Look at all the powers executive agencies have arrogated to themselves at the expense of the judiciary as well as Congress. Look at all the military adventures presidents have ordered without any congressional declarations of war. The Heritage Rivers Initiative is another precedent, another blow—as the band sang, another brick in the wall. Above all, it is another reminder of how our government actually does business behind the pretty words that decorate the National Archive.

The rule of law is a great idea. But can it withstand the rules and the lawyers? ☐

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THE FREEMAN



Milton Friedman, Ex-Keynesian

“I had completely forgotten how thoroughly Keynesian I then was.”

—MILTON FRIEDMAN¹

What?! The world’s most famous free-market economist a former Keynesian?

Yes, it’s true. One of the more remarkable revelations in Milton and Rose Friedman’s new autobiography, *Two Lucky People*, is Milton Friedman’s flirtation with Keynesian economics in the early 1940s. During his stint with the Treasury Department, Friedman was asked to give testimony on ways to fight inflation during World War II. His reply, couched in Keynesian ideology, mentioned several options: cutting government spending, raising taxes, and imposing price controls. Amazingly, nowhere did he mention monetary policy or controlling the money supply, the things Friedman is famous for today.

During the 1930s, Friedman had also favored Keynesian-style deficit spending as a way out of the Great Depression. His mentor was not Keynes himself but Friedman’s teachers at the University of Chicago. Friedman recounts, “Keynes had nothing to offer those of us who had sat at the feet of [Henry] Simons, [Lloyd W.] Mints, [Frank] Knight, and [Jacob] Viner.”² In short, Chicago econo-

mists were Keynesian before Keynes.

In his autobiography, Friedman says he was “cured” of Keynesian thinking “shortly after the end of the war,” but doesn’t elaborate. In a recent letter, he denies ever being a thorough Keynesian. “I was never a Keynesian in the sense of being persuaded of the virtues of government intervention as opposed to free markets.” It should also be pointed out that Friedman’s teachers at Chicago blamed the Great Depression on “misguided government policy.” Friedman indicates he was “hostile” to the Keynesian idea that the Depression was a market phenomenon.³

Despite these statements, many free-market economists have long accused Friedman of being a quasi-Keynesian.

On December 31, 1965, *Time* magazine put John Maynard Keynes on the cover and quoted Friedman as saying, “We are all Keynesians now.” Later, Friedman said he was quoted out of context. “In one sense, we are all Keynesians now; in another, no one is a Keynesian any longer. We all use the Keynesian language and apparatus; none of us any longer accepts the initial Keynesian conclusions.”⁴

In an article published in 1986, Friedman glorified Keynes as a “brilliant scholar” and “one of the great economists of all time.” He described *The General Theory* as a “great book,” although he considers his *Tract on Monetary Reform* as his best work. More-

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