THE RULER OF LAW

By Andrew C. McCarthy

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"Be careful how you make those statements, gentlemen." Barack Hussein Obama had been president of the United States for all of two months. He was lecturing the titans of American finance who were struggling to explain—to a man with no meaningful business experience—how high salaries are necessary if American companies are to compete for talent in a global market.

"The public isn't buying that," scoffed the president. He wasn't talking about *the* public, though. "My administration," he warned, "is the only thing between you and the pitchforks." The pitchforks: that's *his* public.

Obama's formative background is the left-wing fever swamp of Chicago "community-organizing," a gussied-up term for systematic rabble-rousing—one it's now even acceptable to put on a resumé. The quest for raw power is the gospel according to the seminal organizer, Saul Alinsky—if we may use "gospel" in connection with an atheist whose most famous book, *Rules for Radicals*, opens with an ode to Lucifer for winning his own kingdom by rebelling against the establishment.

In Obama terminology, "hope" is the possibility that power may be

wrested from society's "haves" by infiltrating their political system. Just as Willie Sutton robbed banks because that's where the money is, organizers must target the very system they reject to acquire power—making themselves attractive to the great mass of society despite having "contemptuously rejected the values and the way of life of the middle class," as Alinsky put it. This is the formula for transformational "change": the exploitation of power, once acquired, to redistribute wealth and elevate the left's professionally aggrieved vanguard.

Though this quest for "social justice" must tread through regular politics, it cannot be achieved by regular politics. That's where the pitchforks come in. "Direct action"—as Mr. Obama's longtime confederates at ACORN (the Association of Community Organizers for Reform Now) euphemistically put it—is the organizer's signal tactic. *Action*, Alinsky taught, is the very point of organizing. "Direct action" is barely disguised code for the occasional use, and the omnipresent threat, of mob mischief, unleashed against the law-abiding bourgeoisie. The organizer prospers by defining down our ethical boundaries—or, looked at the other way, by legitimizing extortion.

"Grass-roots community organizing builds on indigenous leadership and direct action," Obama wrote in his contribution to

After Alinsky: Community Organizing in Illinois—a retrospective published fifteen years after Alinsky's death in 1972. In another revealing passage, the up-and-coming organizer elaborated:

> The debate as to how black and other dispossessed people can forward their lot in America is not new. From W. E. B. DuBois to Booker T. Washington to Marcus Garvey to Malcolm X to Martin Luther King, this internal debate has raged between integration and nationalism, between accommodation and militancy, between sit-down strikes and boardroom negotiations. The lines between these strategies have never been simply drawn, and the most successful black leadership has recognized the need to bridge these seemingly divergent approaches.

Breathtaking! No wonder that his media allies resist reporting it even as they scorch the earth in search of Sarah Palin's third-grade report card. Lawfulness and lawlessness, thuggishness and regular politics—we're not to divine any moral or ethical differences. They are just different "approaches" to empowerment. They only "seem" to be "divergent." It may be important to maintain the veneer of respect for legal processes, but it is just as legitimate to stretch or break the rules whenever necessary to achieve the desired outcome—social justice being a higher form of legitimacy than society's rule of law. Separatism, menacing, and civil disobedience: none of these is beyond the pale; they are simply choices on the hard power menu Obama "bridges" with soft power

(i.e., the system's mundane legal and political processes).

As recounted in Stanley Kurtz's *Radical-in-Chief*, the definitive political biography of Obama, the young organizer's formative experiences included the use of Alinsky's "direct action" tactics—alliances with aggressors like ACORN and the SEIU (Service Employees International Union). Indeed, Obama personally orchestrated a demonstration in which scores of protestors broke into a private meeting between bank executives and local community leaders, menacing them as they tried to negotiate a controversial landfill deal. As Obama earned greater prominence through his organizing activities, especially in the field of registering thousands of ne'er-do-wells to vote, he was invited to sit on the boards of left-leaning foundations, enabling him to steer funding to notorious direct action practitioners. One of his close allies in that endeavor was the avowed "small-c communist" William Ayers. The former Weather Underground terrorist knew a thing or two about direct action.

In the short run, the goal of direct action is sheer extortion—i.e., to coerce capitulation in the controversy of the moment, be it a private business's right to compensate employees or build production plants as it sees fit; a state's sovereign power to defend itself by enforcing immigration laws; or Leviathan's grab of one-

sixth of the U.S. economy under the banner of “healthcare reform.” Over the long haul, the goal is to demoralize civil society, to convince opponents that the “change” in regular processes—particularly, reliance on the law—will be unavailing.

This is the distinctive slice of Chicago that Obama has brought to the White House. Of its signature traits, the most informative is this: If the lips of administration officials are moving, they’re projecting. Thus, their rebukes of President George W. Bush as a unilateralist whose administration preferred secrecy to transparency even as they stretch the limits of imperiousness and stonewalling. Thus, their monotonous paeans to “the rule of law” even as they use law as a cudgel, run circles around it, and ride roughshod over it.

The power to enforce the law, which carries with it the equally salient power not to enforce the law, is a president’s most imposing domestic weapon—rivaled in importance only by the awesome authority (and potential for global mischief) inherent in a president’s status as commander-in-chief of the U.S. Armed Forces. After a Supreme Court ruling that angered him, President Andrew Jackson is said to have scoffed, “John Marshall has made his decision. Now let him enforce it.” The story may be apocryphal; the lesson it conveys is only too real. Congress writes

laws and courts assess the laws' validity, but neither has to power to breathe life into the law. Absent executive action, the exertions of the other branches are dead letters.

In various justice systems, particularly in Europe, prosecutors share powers with judges, and, at least theoretically, are duty-bound to charge crimes whenever there is sufficient evidence. Not so in the United States, where prosecutorial discretion is the rule of the road. Through public hearings and withering opinions, Congress and the courts can try to pressure the executive into enforcing particular laws, investigating potential violations, or staying his hand. But they cannot compel a president to act or refrain from acting. They have no means of taking enforcement action on their own. The judiciary's capacity to halt capricious executive action is entirely dependent on the administration's willingness to honor judicial directives. Congressional oversight requires an administration's cooperation. A president of dictatorial persuasion who coopts the media in his disregard for the system's checks and balances is nigh impossible to contain.

Nor is there any longer reciprocity in our separation of powers. While the other branches cannot enforce their statutes and decisions, the executive now legislates and rules. The imperial presidency has become the administrative state, the legacy of

Progressive fondness for a metastasizing government whose purportedly expert, apolitical bureaucracies supplant popular sovereignty. The Wilsonian vision was installed through the ceaseless exigencies of Roosevelt's twelve-year reign—and long before Rahm Emanuel came along, FDR knew that a crisis was a terrible thing to waste.

Today, well beyond the New Deal and the Great Society, the administrative state has reached its apogee—socializing healthcare, micromanaging industry, dictating education standards, taking over automotive and insurance giants, underwriting mortgages and student loans, borrowing trillions of dollars from itself (i.e., printing trillions of dollars for itself), and even mandating coverage for contraceptives and abortifacients. The president oversees a vast expanse of departments and agencies to which Congress delegates seemingly limitless legislative authority in the form of regulation-writing, much of its tens of thousands of pages insulated from judicial review. Presidents issue executive orders to shape Leviathan's priorities and procedures. The lines blur, and it becomes increasingly difficult to stop a president hell-bent on imposing his political aims as if they were legal duties.

Congress is endowed by the Constitution with the power to impeach a president for serious violations of law ("high crimes and

misdemeanors"). Impeachment is a grave remedy on the order of a nuclear strike. It has only been sparingly invoked against presidents: Three times in our history: Richard Nixon resigned to stave off sure impeachment and removal; Andrew Johnson and Bill Clinton were acquitted in Senate trials after being impeached by the House. As we shall see, impeachment is a *political* remedy: even if palpably guilty of profound transgressions, a president will not be ousted absent a groundswell of public ire sustained by a hostile media. It has thus been thought impractical as a response to all but the most egregious abuses of executive power. Such abuses involve attacks on the very constitutional foundation that safeguards our liberty.

It is the burden of this book to persuade readers the President Obama and his administration are engaged in just such a campaign.

If a president is the type of man who couples his hope with audacity, if, despite his oath to uphold the Constitution, he is willing to play Alinsky-style hardball, there is little that can stand in his way – not if Congress is unwilling to use its competing constitutional powers. Law becomes a dispositive weapon in the service of the president's ideological crusade, never a brake against the crusade's advance. In the Obama administration, "rule of law" talking-points are just rhetorical camouflage. True law is the moral

and ethical consensus of a civil society, reflecting the conscience of free and virtuous people. But "conscience," to quote Alinsky, "is the virtue of observers and not of agents of action." For Obamaphiles, their agent of action is the Ruler of Law—its master, not its servant.

As one would expect, this is best illustrated by the Obama Justice Department, a sort of full employment program for progressive activists, race-obsessed bean-counters (redundant, I know), and lawyers who volunteered their services during the Bush years to help al-Qaeda operatives file lawsuits against the United States. To lead the Department of Justice, Obama tapped Eric Holder, whose tenure as the Clinton administration's deputy attorney general featured the scandalous pardons of both FALN terrorists and the politically connected fugitive fraudster Marc Rich—embarrassingly naked instances of justice succumbing to influence peddling.

They are an exquisitely matched pair, the President and his attorney general. Setting the tone for his tenure, Holder took the first available occasion to lecture that America remained "essentially a nation of cowards" on racial matters. It was February 2009, and the newly minted Attorney General's subordinates had been assembled to witness this scathing indictment, the highlight

of a February 2009 speech Main Justice billed as the Department's celebration of "Black History Month." They got the new boss's message loud and clear.

In flagrant violation of the Constitution's guarantee of equal protection under the law, the Department of Justice now practices racial discrimination in enforcing, and in choosing not to enforce, the federal civil rights statutes. These laws, enacted to safeguard our basic liberties, are not invoked when the victims are white and the lawbreakers are black. The most brazen example of this noxious policy—but far from the only one—is the Department of Justice's astounding decision to drop a voter intimidation case against members of the New Black Panther Party *even though Justice had already won the case*.

The jackbooted Panthers, arrayed in paramilitary garb, one wielding a billy-club, had been videotaped menacing voters and poll-watchers at a busy polling station in Philadelphia on Election Day 2008. "You're about to be ruled by the black man, cracker," they brayed, under the leadership of King Shamir Shabazz, renowned in the local black community for such serenades as "You want freedom? You're gonna have to kill some crackers! You're gonna have to kill some of their babies." Another of the threatening Panthers that day turned out to be an accredited

Democratic Party poll-watcher.

The case, brought by the Bush Justice Department's Civil Rights Division, was a slam-dunk. Bartle Bull, a legendary civil rights champion and longtime Democrat, witnessed the goings-on and later filed an affidavit saying they "qualified as the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960s." J. Christian Adams, the veteran Department of Justice attorney who filed the case, described it as "the simplest and most obvious violation of federal law I saw in my Justice Department career." The Panthers did not even bother to answer the suit; they defaulted.

But then Obama's political appointees took the helm. While declining even to read the memorandum prepared by the team of career Department of Justice lawyers to justify the case, Holder's minions held meetings with left-wing activists like the NAACP Legal Defense Fund. Though the civil rights laws are written in a racially neutral manner, literally protecting all Americans, it is leftist dogma that they exist as the scarlet letter of American slavery and racism: They must never be used against blacks, no matter how egregious the conduct in question. With a federal judge poised to enter judgment in favor of the United States, the political

appointees directed the career prosecutors to deep-six the case.

The dismissal provoked public uproar, but Justice has stonewalled inquiries by congressional Republicans and an investigation by the Civil Rights Commission. Nevertheless, Adams eventually resigned in defiance of orders from Department of Justice superiors that he not comply with Commission subpoenas. So did his direct supervisor, Christopher Coates, who was transferred to South Carolina (i.e., outside the Commission's subpoena reach) to try to block his testimony.

Refuting the peremptory denial by Thomas Perez, Obama's Civil Rights chief, that racial considerations guide Department of Justice prosecutions, Adams and Coates described a deeply ingrained culture of hostility in the Civil Rights Division—one predating the Obama administration—to racially neutral enforcement of voting laws. There had been, in fact, a mini-mutiny in 2003, when Bush Department of Justice appointees overrode the Division's resistance against defending white voters in Mississippi, who'd been disenfranchised by the shenanigans of Ike Brown, the local Democratic Executive Committee boss.

Under Obama, the mutineers are now running the ship. They complained bitterly that the Ike Brown case had strained their cherished relationship with left-wing civil rights organizations

(yes, redundant again). These groups are a revolving door for progressive lawyers desirous of burnishing their credentials with a stint at Justice. As a recent PJ Media investigation has shown, the Obama administration recruits from the ACLU, the NAACP Legal Defense Fund, the American Constitution Society, the Mexican American Legal Defense Fund, La Raza, the SEIU's "Civic Participation Project," and similar radical redoubts. The Civil Rights Division has thus staffed up with lawyers who have spent years opposing voter identification laws, challenging the rights of states to verify that voters are American citizens, seeking to overturn state laws that disenfranchise convicted felons, advancing the gay rights agenda, lobbying for Big Labor's goals of organizing graduate students, and ending the secret ballot in unionization votes. There is even a recruit from the "Intersex Society of North America," a Clinton Department of Justice veteran who returned to the Civil Rights Division having worked for "systemic change to end shame, secrecy, and unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female" (I kid you not).

The Holder adjutant at the center of the Panthers dismissal was Loretta King, a fierce advocate of racial quotas, despite their constitutional invalidity. Before being promoted by President Obama, King's best known work was a frivolous civil rights

complaint, in which she and other Department of Justice lawyers, as the Supreme Court later recounted, "commanded" the state of Georgia to engage in "presumptively unconstitutional race-based districting." Their ploy ultimately cost U.S. taxpayers nearly $600,000 in legal fees, awarded by the lower court to compensate the state they'd harassed, with the judge finding especially "disturbing" the "considerable influence of ACLU advocacy" on Department of Justice's voting rights decisions.

After she was named Obama's acting assistant AG for Civil Rights, King took offense at Coates's practice of quizzing job applicants on whether they would be willing to enforce the Voting Rights Act in a race-neutral manner. King directed him to stop asking the question.

Meanwhile, ignoring the Supreme Court's 2009 ruling in the New Haven firefighters case that promotion test results cannot be invalidated for the purpose of imposing racial quotas, King has filed suits attempting to coerce New York into disregarding low test scores (i.e., to hire her preferred quotient of minority firefighters), and to compel the police department in Dayton, Ohio, into accepting F as a passing grade (the Department of Justice contends too many black applicants fail the test). King has also sued Kinston, North Carolina, a tiny, overwhelmingly black and

Democratic city, for attempting to institute "non-partisan elections" (that is, there are no party affiliations listed on ballots). By the Department of Justice's lights, this could result in Republicans being elected and blacks thus being denied their "candidates of choice."

Another top Obama appointee, Julie Fernandez (named Deputy Assistant Attorney General for Civil Rights), instructed Coates, Adams, and other line attorneys that the Obama administration was only interested in bringing voting rights cases that "would provide political equality for racial and language minority voters." She also emphasized that the Obama administration would not be enforcing Section 8, an anti-fraud provision of the Voting Rights Act that requires states to maintain their voter rolls diligently and purge them of ineligible persons—generally, those who have moved out of state or died.

The Bush Justice Department had brought a number of Section 8 cases despite their intense unpopularity with civil rights activists, who are far more concerned about empowering aliens than ensuring that the votes of citizens are not diluted by the casting of unqualified ballots. Not content with refraining from enforcement, the Obama Justice Department has also quietly cashiered Section 8 cases begun by the Bush administration. In stark contrast, King,

who has become Holder's Luca Brasi, has sued Georgia again, this time attacking its voter verification program. As the state attorney general inveighed in response:

> The Department of Justice has thrown open the door for activist organizations such as ACORN to register non-citizens to vote . . . and the state has no ability to verify an applicant's citizenship status or whether the individual even exists. . . . Clearly, politics took priority over common sense and good public policy.

That does not end the flight from common sense. Throwing overboard the Constitution's federalist system—the bedrock principle that the states are sovereign, with a fundamental right of self-defense against invasion and lawlessness—Holder's Department sued Arizona for attempting to enforce the federal immigration laws. The administration relied on the principle of pre-emption, which bars the states from *undermining* federal law when there is an overriding national interest. It's absurd: Arizona's law strongly *bolsters* federal law. In this imperial presidency, however, Congress's laws are irrelevant. Under the Obama pre-emption doctrine, states are barred from undermining *Obama administration policy*. The Supreme Court rejected this theory insofar as the administration sought to preclude state police from inquiring about a detained suspect's immigration status. Before the ink on the ruling was dry, the president's minions defiantly

announced they were suspending immigration enforcement cooperation with Arizona police – telling the state to "drop dead," as Governor Jan Brewer put it. Or as Obama himself might have said, putting on his best Old Hickory, "John Roberts has made his decision. Now let him enforce it."

When not scheming to inflate the due process rights of captured enemy combatant terrorists, the Obama Justice Department has engaged in banana republic–style probes of its political opponents. It re-opened investigations of the CIA agents who implemented Bush-era interrogation policies. This was sheer harassment: the agents had been cleared after an aggressive, apolitical investigation by career prosecutors. Holder similarly pursued ethics investigations against Bush Department of Justice lawyers who had developed well-founded legal theories in support of Bush counterterrorism tactics. The cases against the intelligence agents and the lawyers were eventually wrapped up without charges, but the transparent purpose was not to charge but to vex. The subjects had to retain counsel and endure months of anxiety. Their travails serve as cautionary tales for government officials who might dare elevate national security concerns over the Left's bugaboos.

And for commentators who might dare engage in public criticism of Dear Leader. The Department has recently filed a felony

indictment against Dinesh D'Souza, a prominent conservative writer and film producer whose book and movie about Obama's radical past enraged the White House. The case involves an alleged campaign finance violation in an amount so puny it is in the category routinely handled by administration fine – indeed, it is orders of magnitude smaller than multi-million dollar campaign finance infractions as to which (*surprise!*) Holder's Department opted not to prosecute Obama campaign officials. But in D'Souza's $20,000, Justice filed a felony charge and through in a second felony "false statements" count for good measure.

Obama Justice's *pièce de résistance*, combining politicization and malign non-enforcement, may turn out to be "Fast and Furious," an inane operation in which the executive branch willfully armed savage Mexican drug gangs south of the border. Top administration figures are—of course—rabidly anti-gun. With that as the backdrop, the Bureau of Alcohol, Tobacco, and Firearms (ATF), in collusion with Justice Department lawyers, contrived an investigation in which arms dealers were encouraged to make illegal gun sales to "straw purchasers"—faux buyers whose true intention is to bulk transfer the weapons to persons (usually illegal aliens and other criminals) who are not legally eligible to obtain them.

At best, the agents foolishly believed the straw purchasers would lead them to violent gangs against whom they could make a splashy case. More plausibly, the ideologues believed that the guns would end up tied to various atrocities and bolster their political argument that America's gun culture fuels international violence. Thousands of guns were allowed to walk, no meaningful prosecutions were developed, and, predictably, things went horribly wrong: some of the ATF guns have been tied to the murder of a U.S. border patrol agent. Congress is investigating. As in the probe of the Panthers dismissal, the Obama administration is in stonewalling mode. The president frivolously invoked executive privilege to stall the probe after Holder was been held in contempt of Congress following his misleading testimony and refusal to turn over Justice Department memoranda.

The attorney general followed up that performance with more inexplicable congressional testimony about the Department's secret investigations of journalists. Soon, it emerged that the Internal Revenue Service had selectively targeted and harassed conservative organizations, denying or slow-walking their petitions for tax-exempt status and thus frustrating their ability to organize and raise funds … particularly in the run-up to the 2012 presidential election. Holder responded by placing in charge of the investigation a heavy Obama campaign donor from his trusty,

hyper-partisan Civil Rights Division. A senior IRS official took the Fifth rather than testify before a congressional investigating committee. Yet, the Justice Department has filed no charges, and none are in the offing.

The Justice Department is merely the manifest symptom of a deep, corrosive disease, eating away at the rule of law. President Obama appointed a shadow cabinet of "czars"—leftist radicals like Van Jones and Carol Browner—precisely to circumvent the Constitution's requirement that officials wielding executive power be vetted by the Senate's advise-and-consent power. This unaccountable juggernaut is helping Obama strangle fossil fuel industries in regulatory red-tape while sluicing billions of federal dollars to mirages like "green energy" and apparatchiks like the union grandees.

The president has stacked the National Labor Relations Board with ideologues who purport to dictate where corporations may and may not build plants: Big Labor states, yes; right-to-work states, no. So intent on getting just the right statists on the NLRB that he gave his nominees recess appointments to avoid Senate confirmation. There was just one problem: the Senate was not in recess. A federal court has invalidated the appointments as unconstitutional. Obama, in the interim, has stacked the Federal

Communications Commission with ideologues on a crusade to repeal the First Amendment under the guise of "net neutrality" and promoting minority media ownership – transparent efforts to silence the president's Talk Radio detractors. And Obama has stacked the Environmental Protection Agency with ideologues who've usurped the business-destroying power to regulate carbon dioxide—the air we exhale—as a pollutant under the Clean Air Act.

Anyone who gets in the way, especially if he tries to do so in the name of law and order, is steamrolled. Obama has cashiered two agency inspectors general for questioning corrupt financial dealings and government incompetence—thus ignoring law that requires Congress to be notified if an inspector general is to be terminated. In the wake of the Deepwater Horizon oil spill, Obama's Interior Department imposed a drilling moratorium that devastated the local economy and contemptuously ignored court orders to lift it. And when the president decided to nationalize two of the big three automakers, he obliterated federal bankruptcy law: Out came the pitchforks, raving about "shared sacrifice" until secured creditors were finally bludgeoned into forfeiting their legal rights—and into watching the transfer of their wealth to the United Auto Workers.

Wherever possible, Obama has simply written Congress out of the equation. For example, he usurped the power to declare war by attacking the Libyan regime without congressional authorization under circumstances where the United States had not been threatened and no American interests were at stake. Not to worry, naysayers were told, after all, Obama did get a thumbs-up from the United Nations and the Arab League.

The unprovoked war predictable empowered jihadists in Eastern Libya, who proceeded to attack Western targets and, on the eleventh anniversary of the 9/11 attacks, murdered the American ambassador to Libya and three other U.S. officials in Benghazi. At the time, the stretch run of the 2012 campaign, Obama was claiming that his policies had "decimated" al Qaeda. Though aware from the first hours that the Benghazi massacre was a coordinated terrorist attack involving al Qaeda affiliates, the administration thus contrived a fraudulent story blaming an obscure anti-Muslim video for sparking a supposedly spontaneous protest that raged out of control – trumping up a prosecution of the video producer for good measure.

Susan Rice, Obama's confidant and ambassador to the United Nations, went on the Sunday shows to weave the video yarn while Mike Morrell, a top CIA official with close ties to Secretary of

State Hillary Clinton, obligingly purged references to al Qaeda in agency talking-points used for briefings on the massacre – later deceiving Congress about his edits and the fact that they were done in coordination with the White House. Again, the Obama administration is stonewalling Congress's investigation.

Federal law requires the President to address a fiscal imbalance in Medicare if the program's trustees issue a "funding warning" that the "trust fund" cannot carry the program's costs. With Medicare careening toward insolvency, the trustees issued the warning in August 2010; Obama has ignored them. Furthermore, when the federal treasury brushed up against its statutory debt limit, and Congress resisted the notion that adding $2.4 trillion to a bankrupt nation's credit line was the way to go, Obama threatened to raise the limit and issue bonds unilaterally. In his defense, he offered a tortured construction of the 14th Amendment that melted against the Constitution's express assignment to Congress of the power to borrow money. The president's threat may not have passed the laugh test, but it worked. GOP opposition softened, the president got his new trillions to spend . . . and Standard & Poor promptly downgraded the nation's credit rating for the first time in history. The Obama administration responded by … having the Justice Department trump up a fraud case against S&P.

American constitutional republicanism has been strong enough to survive over two centuries of revolutionary self-governance, civil war, world war, terrorism, social upheaval, and periodic economic calamity. But can it survive a Ruler of Law and his trusty pitchforks?

The Constitution says we need not be put to that test. The Framers gave Congress checks to combat executive lawlessness. The ultimate one is impeachment. There is a rich legal case for using it – for the proposition that President Obama has committed many high crimes and misdemeanors. But much like the president, impeachment has little to do with what the law allows. Impeachment is a matter of political will.[1]

Introduction

[1] This introduction is adapted from an essay that appeared in the September 2011 edition of *The New Criterion*. See Andrew C. McCarthy, "The Ruler of Law: On 'justice' in the age of Obama."