AG William Barr Constitution Day Speech – Transcript
https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event
[VIA DOJ] – I am pleased to be at this Hillsdale College celebration of Constitution Day. Sadly, many colleges these days don't even teach the Constitution, much less celebrate it. But at Hillsdale, you recognize that the principles of the Founding are as relevant today as ever—and vital to the success of our free society. I appreciate your observance of this important day and all you do for civic education in the United States.

When many people think about the virtues of our Constitution, they first mention the Bill of Rights. That makes sense. The great guarantees of the Bill of Rights—freedom of speech, freedom of religion, and the right to keep and bear arms, just to name the first few—are critical safeguards of liberty. But as President Reagan used to remind people, the Soviet Union had a constitution too, and it even included some lofty-sounding rights. Ultimately, however, those promises were just empty words, because there was no rule of law to enforce them.

The rule of law is the lynchpin of American freedom. And the critical guarantee of the rule of law comes from the Constitution's structure of separated powers. The Framers recognized that by dividing the legislative, executive, and judicial powers— each significant, but each limited—they would minimize the risk of any form of tyranny. That is the real genius of the Constitution, and it is ultimately more important to securing liberty than the Bill of Rights. After all, the Bill of Rights is a set of amendments to the original Constitution, which the Framers did not think needed an express enumeration of rights.

I want to focus today on the power that the Constitution allocates to the Executive, particularly in the area of criminal justice. The Supreme Court has correctly held that, under Article II of the Constitution, the Executive has virtually unchecked discretion to decide whether to prosecute individuals for suspected federal crimes. The only significant limitation on that discretion comes from other provisions of the Constitution. Thus, for example, a United States Attorney could not decide to prosecute only people of a particular race or religion. But aside from that limitation — which thankfully has remained a true hypothetical at the Department of Justice — the Executive has broad discretion to decide whether to bring criminal prosecutions in particular cases.

The key question, then, is how the Executive should exercise its prosecutorial discretion. Eighty years ago this spring, one of my predecessors in this job —then-Attorney General Robert Jackson — gave a famous speech to a conference of United States Attorneys in which he described the proper role and qualities of federal prosecutors. (By the way, Jackson was one of several former Attorneys General who went on become a Supreme Court Justice. But I am one of only two former Attorneys General who went on to become Attorney General again.)

Much has changed in the eight decades since Justice Jackson's remarks. But he was a man of uncommon wisdom, and it is appropriate to consider his views in the modern era.

The criminal process is a juggernaut. That was true then and it is true today. Once the criminal process starts rolling, it is very difficult to slow it down or knock it off course. And that means federal prosecutors possess tremendous power — power that is necessary to enforce our laws and punish wrongdoing, but power that, like any power, carries inherent potential for abuse or misuse.

Justice Jackson recognized this. As he put it, "The prosecutor has more control over life, liberty, and reputation than any other person in America." Prosecutors have the power to investigate people and interview their friends, and they can do so on the basis of mere suspicion of general wrongdoing. People facing federal investigations incur ruinous legal costs and often see their lives reduced to rubble before a charge is even filed. Justice Jackson was not exaggerating when he said that "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."

The power to, as he called it, "strike at citizens, not with mere individual strength, but with all the force of government itself" must be carefully calibrated and closely supervised. Left unchecked, it has the potential to inflict far more harm than it prevents.

1. Political Supervision

The most basic check on prosecutorial power is politics. It is counter-intuitive to say that, as we rightly strive to maintain an apolitical system of criminal justice. But political accountability—politics—is what ultimately ensures our system does its work fairly and with proper recognition of the many interests and values at stake. Government power completely divorced from politics is tyranny.

Justice Jackson understood this. As he explained, presidential appointment and senate confirmation of U.S. Attorneys and senior DOJ officials is what legitimizes their exercises of the sovereign's power. You are "required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor."

Yet in the decades since Justice Jackson's remarks, it has become fashionable to argue that prosecutorial decisions are legitimate only when they are made by the lowest-level line prosecutor handling any given case. Ironically, some of those same critics see no problem in campaigning for highly political, elected District Attorneys to remake state and local prosecutorial offices in their preferred progressive image, which often involves overriding the considered judgment of career prosecutors and police officers. But aside from hypocrisy, the notion that line prosecutors should make the final decisions within the Department of Justice is completely wrong and it is antithetical to the basic values underlying our system.

The Justice Department is not a praetorian guard that watches over society impervious to the ebbs and flows of politics. It is an agency within the Executive Branch of a democratic republic — a form of government where the power of the state is ultimately reposed in the people acting through their elected president and elected representatives.

The men and women who have ultimate authority in the Justice Department are thus the ones on whom our elected officials have conferred that responsibility — by presidential appointment and senate confirmation. That blessing by the two political branches of government gives these officials democratic legitimacy that career officials simply do not possess.

The same process that produces these officials also holds them accountable. The elected President can fire senior DOJ officials at will and the elected Congress can summon them to explain their decisions to the people's representatives and to the public. And because these officials have the imprimatur of both the President and Congress, they also have the stature to resist these political pressures when necessary. They can take the heat for what the Justice Department does or doesn't do.

Line prosecutors, by contrast, are generally part of the permanent bureaucracy. They do not have the political legitimacy to be the public face of tough decisions and they lack the political buy-in necessary to publicly defend those decisions. Nor can the public and its representatives hold civil servants accountable in the same way as appointed officials. Indeed, the public's only tool to hold the government accountable is an election — and the bureaucracy is neither elected nor easily replaced by those who are.

Moreover, because these officials are installed by the democratic process, they are most equipped to make the complex judgment calls concerning how we should wield our prosecutorial power. As Justice Scalia observed in perhaps his most admired judicial opinion, his dissent in Morrison v. Olson: "Almost all investigative and prosecutorial decisions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations."

And those considerations do need to be balanced in each and every case. As Justice Scalia also pointed out, it is nice to say "Fiat justitia, ruat coelum. Let justice be done, though the heavens may fall." But it does not comport with reality. It would do far more harm than good to abandon all perspective and proportion in an attempt to ensure that every technical violation of criminal law by every person is tracked down, investigated, and prosecuted to the Nth degree.

Our system works best when leavened by judgment, discretion, proportionality, and consideration of alternative sanctions — all the things that supervisors provide. Cases must be supervised by someone who does not have a narrow focus, but who is broad gauged and pursuing a general agenda. And that person need not be a prosecutor, but someone who can balance the importance of vigorous prosecution with other competing values.

In short, the Attorney General, senior DOJ officials, and U.S. Attorneys are indeed political. But they are political in a good and necessary sense.

Indeed, aside from the importance of not fully decoupling law enforcement from the constraining and moderating forces of politics, devolving all authority down to the most junior officials does not even make sense as a matter of basic management. Name one successful organization where the lowest level employees' decisions are deemed sacrosanct. There aren't any. Letting the most junior members set the agenda might be a good philosophy for a Montessori preschool, but it's no way to run a federal agency. Good leaders at the Justice Department—as at any organization—need to trust and support their subordinates. But that does not mean blindly deferring to whatever those subordinates want to do.

This is what Presidents, the Congress, and the public expect. When something goes wrong at the Department of Justice, the buck stops at the top. 28 U.S.C. § 509 could not be plainer: "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General."

And because I am ultimately accountable for every decision the Department makes, I have an obligation to ensure we make the correct ones. The Attorney General, the Assistant Attorneys General, and the U.S. Attorneys are not figureheads selected for their good looks and profound eloquence.

They are supervisors. Their job is to supervise. Anything less is an abdication.

Active engagement in our cases by senior officials is also essential to the rule of law. The essence of the rule of law is that whatever rule you apply in one case must be the same rule you would apply to similar cases. Treating each person equally before the law includes how the Department enforces the law.

We should not prosecute someone for wire fraud in Manhattan using a legal theory we would not equally pursue in Madison or in Montgomery, or allow prosecutors in one division to bring charges using a theory that a group of prosecutors in the division down the hall would not deploy against someone who engaged in indistinguishable conduct.

We must strive for consistency. And that is yet another reason why centralized senior leadership exists—to harmonize the disparate views of our many prosecutors into a consistent policy for the Department. As Justice Jackson explained, "we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law."

2. Detachment in Prosecutions

All the supervision in the world will not be enough, though, without a strong culture across the Department of fairness and commitment to even-handed justice. This is what Justice Jackson described as "the spirit of fair play and decency

that should animate the federal prosecutor." In his memorable turn of phrase, even when "the government technically loses its case, it has really won if justice has been done."

We want our prosecutors to be aggressive and tenacious in their pursuit of justice, but we also want to ensure that justice is ultimately administered dispassionately.

We are all human. Like any person, a prosecutor can become overly invested in a particular goal. Prosecutors who devote months or years of their lives to investigating a particular target may become deeply invested in their case and assured of the rightness of their cause.

When a prosecution becomes "your prosecution"—particularly if the investigation is highly public, or has been acrimonious, or if you are confident early on that the target committed serious crimes—there is always a temptation to will a prosecution into existence even when the facts, the law, or the fair-handed administration of justice do not support bringing charges.

This risk is inevitable and cannot be avoided simply by — as we certainly strive to do — hiring as prosecutors only moral people with righteous motivations. I am reminded of a passage by C.S. Lewis:

It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth.

Even the most well-meaning people can do great damage if they lose perspective. The road to hell is paved with good intentions, as they say.

That is yet another reason that having layers of supervision is so important. Individual prosecutors can sometimes become headhunters, consumed with taking down their target. Subjecting their decisions to review by detached supervisors ensures the involvement of dispassionate decision-makers in the process.

This was of course the central problem with the independent-counsel statute that Justice Scalia criticized in Morrison v. Olson. Indeed, creating an unaccountable headhunter was not some unfortunate byproduct of that statute; it was the stated purpose of that statute. That was what Justice Scalia meant by his famous line, "this wolf comes as a wolf." As he went on to explain: "How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it."

Justice Jackson understood this too. As he explained in his speech: "If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Any erosion in prosecutorial detachment is extraordinarily perilous. For, "it is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself."

Advocate Just and Reasonable Legal Positions

In exercising our prosecutorial discretion, one area in which I think the Department of Justice has some work to do is recalibrating how we interpret criminal statutes.

In recent years, the Justice Department has sometimes acted more like a trade association for federal prosecutors than the administrator of a fair system of justice based on clear and sensible legal rules. In case after case, we have advanced and defended hyper-aggressive extensions of the criminal law. This is wrong and we must stop doing it.

The rule of law requires that the law be clear, that it be communicated to the public, and that we respect its limits. We are the Department of Justice, not the Department of Prosecution.

We should want a fair system with clear rules that the people can understand. It does not serve the ends of justice to advocate for fuzzy and manipulable criminal prohibitions that maximize our options as prosecutors. Preventing that sort of pro-prosecutor uncertainty is what the ancient rule of lenity is all about. That rule should likewise inform how we at the Justice Department think about the criminal law.

Advocating for clear and defined prohibitions will sometimes mean we cannot bring charges against someone whom we believe engaged in questionable conduct. But that is what it means to have a government of laws and not of men. We cannot let our desire to prosecute "bad" people turn us into the functional equivalent of the mad Emperor Caligula, who inscribed criminal laws in tiny script atop a tall pillar where nobody could see them.

To be clear, what I am describing is not the Al Capone situation — where you have someone who committed countless crimes and you decide to prosecute him for only the clearest violation that carries a sufficient penalty. I am talking about taking vague statutory language and then applying it to a criminal target in a novel way that is, at a minimum, hardly the clear consequence of the statutory text.

This is inherently unfair because criminal prosecutions are backward-looking. We charge people with crimes based on past conduct. If it was unknown or even unclear that the conduct was illegal when the person engaged in it, that raises real questions about whether it is fair to prosecute the person criminally for it.

Examples of the Department defending these sorts of extreme positions are unfortunately numerous, as are rejections of our novel arguments by the Supreme Court. These include arguments as varied as the Department insisting that a Philadelphia woman violated the Chemical Weapons Convention Implementation Act — which implemented the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction — by putting chemicals on her neighbor's doorknob as part of an acrimonious love triangle involving the woman's husband, which the Supreme Court unanimously rejected in Bond v. United States … to arguing that a fisherman violated the "anti-shredding" provision in Sarbanes-Oxley when he threw undersized grouper over the side of his boat, which the Supreme Court rejected in Yates v. United States … to arguing that aides to the Governor of New Jersey fraudulently "obtained property" from the government when they realigned the lanes on the George Washington Bridge to create a traffic jam, which the Supreme Court unanimously rejected earlier this year in Kelly v. United States. There are other examples, but these illustrate the point.

Taking a capacious approach to criminal law is not only unfair to criminal defendants and bad for the Justice Department's track record at the Supreme Court, it is corrosive to our political system. If criminal statutes are endlessly manipulable, then everything becomes a potential crime. Rather than watch policy experts debate the merits or demerits of a particular policy choice, we are nowadays treated to ad naseum speculation by legal pundits — often former prosecutors themselves — that some action by the President, a senior official, or a member of congress constitutes a federal felony under this or that vague federal criminal statute.

This criminalization of politics is not healthy. The criminal law is supposed to be reserved for the most egregious misconduct — conduct so bad that our society has decided it requires serious punishment, up to and including being locked away in a cage. These tools are not built to resolve political disputes and it would be a decidedly bad development for us to go the way of third world nations where new administrations routinely prosecute their predecessors for various ill-defined crimes against the state. The political winners ritually prosecuting the political losers is not the stuff of a mature democracy.

The Justice Department abets this culture of criminalization when we are not disciplined about what charges we will bring and what legal theories we will bless. Rather than root out true crimes — while leaving ethically dubious conduct to the voters — our prosecutors have all too often inserted themselves into the political process based on the flimsiest of legal theories. We have seen this time and again, with prosecutors bringing ill-conceived charges against prominent political figures, or launching debilitating investigations that thrust the Justice Department into the middle of the political process and preempt the ability of the people to decide.

This criminalization of politics will only worsen until we change the culture of concocting new legal theories to criminalize all manner of questionable conduct. Smart, ambitious lawyers have sought to amass glory by prosecuting prominent public figures since the Roman Republic. It is utterly unsurprising that prosecutors continue to do so today to the extent the Justice Department's leaders will permit it.

As long as I am Attorney General, we will not.

Our job is to prosecute people who commit clear crimes. It is not to use vague criminal statutes to police the mores of politics or general conduct of the citizenry. Indulging fanciful legal theories may seem right in a particular case under particular circumstances with a particularly unsavory defendant—but the systemic cost to our justice system is too much to bear.

We need to recognize that and must take to heart the Supreme Court's recent, unanimous admonition that "not every corrupt act by state or local officials is a federal crime."

If we do not, more lives will be unfairly ruined. And more unanimous admonitions from the Supreme Court will come.

3. Conclusion

In short, it is important for prosecutors at the Department of Justice to understand that their mission — above all others — is to do justice. That means following the letter of the law, and the spirit of fairness. Sometimes that will mean investing months or years in an investigation and then concluding it without criminal charges. Other times it will mean aggressively prosecuting a person through trial and then recommending a lenient sentence, perhaps even one with no incarceration.

Our job is to be just as dogged in preventing injustice as we are in pursuing wrongdoing. On this score, as on many, Justice Jackson said it best:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Thank you.