



# AmericanRhetoric.com

**Rod Rosenstein**

*A Constitution Day Address – Heritage Foundation*

delivered 14 September 2017, Washington, D.C.



[AUTHENTICITY CERTIFIED: Text version below transcribed directly from audio]

Thank you, General Meese, for that kind introduction.

I am the 32nd Attorney -- Deputy Attorney General of the United States. The position has been in existence for 67 years. The average tenure is 14 months. I'm at -- I'm at about 4 months and 2 weeks -- but who's counting?

It's a remarkable privilege for me to be on this stage with Ed Meese. General, you are a legend at the Department of Justice. When Ed Meese served as Attorney General under President Reagan, he emphasized one thing over all else: the rule of law.

General Meese famously told the American Bar Association in 1985,

*We will pursue our agenda within the context of our written Constitution of limited yet energetic powers. Our guide, in every case, will be the sanctity of the rule of law and the proper limits of government[a] power.<sup>1</sup>*



# AmericanRhetoric.com

Those words resonate today. The rule of law -- it's not merely a *feature* of America. The rule of law is the *foundation* of America.

A generation after the era of Reagan and Meese, President Trump honors their legacy by nominating judges who "administer justice without respect to persons,"<sup>2</sup> and by appointing Department of Justice officials who promote the rule of law.

Attorney General Jeff Sessions reveres the rule of law. That's why a portrait of Ed Meese enjoys pride of place today in the Attorney General's conference room. Towering above our meetings, his visage serves as a reminder of the legacy we inherited, an inspiration to carry it forward, and an admonition that the right path is not always the easy path.

On Constitution Day, it is appropriate to keep in mind that although the power of the Federal Government is vast, it is expressly limited. And those who are entrusted with the exercise of federal authority must be energetic in enforcing the law, but we must restrain ourselves from assuming authority beyond our lawful mandate. Our power is limited by law. And we are obligated to respect those limits -- even when no one objects.

Unfortunately, too few American citizens know the details of our Constitution, and some discount the rule of law. If you ask whether a particular legal decision is right, most citizens focus only on whether they favor the policy outcome. Even many lawyers instinctively look to the result rather than the reasoning.

But today, I want to discuss the role of the Executive Branch, and particularly the Department of Justice, in maintaining and advancing the rule of law. Article II of our Constitution states that the President must "take Care that the Laws be faithfully executed." Those few words raised complex questions at the Founding, and they continue to challenge us today.

Many citizens do not think about our legal system in terms of the words written in the Constitution or the United States Code. Instead, they think of the people and the institutions they encounter in their everyday lives, whether in person, on television, or in social media: politicians; police officers; prosecutors; court clerks; defense lawyers; and, of course, judges.

That's a practical reason why the people who run our institutions are so critical to the success of our democracy: They symbolize the democracy.



# AmericanRhetoric.com

But there is a deeper reason why the people matter. The rule of law is not just about words on paper. The rule of law is about the character of the people who are charged with enforcing the law. If they uphold it faithfully, the result will be a high degree of consistency and uniformity. Those features are among the primary reasons why our nation has thrived.

There's an insightful story about a remark made by Benjamin Franklin after he finished deliberating with the Framers in Philadelphia. As the story goes, Franklin was walking home from the Constitutional Convention, when he encountered a woman named Mrs. [Elizabeth Willing] Powel. Mrs. Powel approached him with a question. She asked Dr. Franklin what sort of government the Founders had created. And Franklin replied with these words: "A republic, madam, if you can keep it."<sup>3</sup>

And Mrs. Powel's question illustrates that it was not inevitable that our nation would begin as a democratic republic. And Franklin's answer reminds us that it is not inevitable that our nation will remain a democratic republic. Franklin realized that the Constitution comes with a condition: You need to keep it.

When we use the word "keep" in modern English, we usually mean it in the sense of holding something in our possession: "Here's a twenty dollar bill; keep the change." Keeping something, in that sense, is passive. But that's not the meaning Franklin intended. He used the word "keep" in the same sense that someone today might say, "Keep the Sabbath." It's an active verb. It means there are things you need to do if you want to preserve it.

Some people think that the duty to keep our government falls to politicians. But Franklin spoke to an ordinary person on the street<sup>4</sup> -- more significantly, a woman who at the time did not even have the right to vote. Yet Franklin said it was up to her to keep the republic.

Franklin's work was done. The words were written on parchment. The decision whether or not to keep the republic, though, was left to others. The lesson is that we're all keepers of the republic. More specifically, each of us has a duty to keep the republic.

One of the most important things that we, as Executive Branch officials, do to keep the republic is to promote the rule of law. As Attorney General Sessions said a few days ago: "We inherited from [our] Founders...an unsurpassed legal heritage, which is the foundation of our freedom, safety, and prosperity."<sup>5</sup>



# AmericanRhetoric.com

The Attorney General explained:

*[T]he Department of Justice does not represent any narrow interest or any subset of the American people. We represent all of the American people...and protect the integrity of our Constitution. That is our charge.<sup>6</sup>*

Those words convey a fundamental precept. The Department of Justice does not choose sides because of the identity of a party. We do not enforce the law against some people, and ignore others, based on our own biases or any other inappropriate considerations.

We follow neutral principles.

The point of the rule of law is to maintain a fair and rational system characterized by impartiality and universality -- that is, it applies equally to each person. Under the rule of law, the people tasked with enforcing the law need to do it impartially.

And that is active work. To say that we enforce the law impartially does not mean that we enforce it mechanically. It means that we enforce it rationally. Different results must be based on different facts. And the differences need to be objective.

That brings me back to my earlier point about the people who make up the Department of Justice. The ideal prosecutor is dogged, but not an automaton who proceeds at all costs. Nor is the ideal prosecutor a zealot who demands criminal punishment for every arguable violation of the law.

Robert Jackson, another of our nation's great Attorneys General, observed that:

*If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate.<sup>7</sup>*

Driving the point home, Jackson explained, "no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning."<sup>8</sup> With an ever-growing criminal code, those words are more true today than they were when Jackson spoke them in 1940. His point was simple: Violations of the law abound.



# AmericanRhetoric.com

"What every prosecutor is practically required to do," he said,

*is to select [the] cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.*<sup>9</sup>

As Jackson recognized, the prosecutor necessarily chooses which cases to prosecute.

And that ability to choose which cases to prosecute is an extraordinary power. Courts exercise the ultimate authority to rule on the strength of the evidence and the meaning of the law. But the decision whether or not to prosecute, as the Supreme Court has ruled, is "ill-suited to judicial review."<sup>10</sup> Such unreviewable power calls for the exercise of discretion, and the wise use of that discretion.

So when asked, "Why did you prosecute this case?" it will not do for the prosecutor to respond, "Because I can," or "Because I must." The only right answer is, "Because I should." The task of enforcing the law is not devoid of discretion. Discretion is simply inherent in law enforcement.

So when used by lawyers, the word "discretion" means freedom of choice -- the power to make a decision according to one's own judgment. When someone decides to act on a matter that is trusted to their discretion, the decision is permissible regardless of whether it is wise.

I chose to speak at Heritage today, and not at Brookings or Cato. That choice was within my lawful discretion. I made it in good faith. I hope you agree that it as a good choice. But you're free to criticize it. I do not need to prove that it was the best choice. By definition, discretion means that the rules allow a range of permissible options. So discretion is the power to make a choice that is wrong, in the sense that it may not the objectively best choice.

But when government officials are vested with discretion, they have a special obligation to take care that they do make the objectively best choice. And that requires wisdom. A Seventh Circuit opinion described the challenge for federal prosecutors with these words:

*The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; and responsibility implies knowledge, experience, and sound judgment, not just good faith....*<sup>11</sup>



# AmericanRhetoric.com

Not just good faith. Of course, good faith is important. It's often essential in order to avoid doing the wrong thing. And good faith is generally a valid defense to a claim of misconduct. But the Department of Justice does not measure success by whether we acted in good faith. The issue of whether we use the right motive is not dispositive. Our goal is to make the objectively right choice, based on articulable reasons.

The most difficult management challenges we face in the Department of Justice are prosecutors who act in good faith but make unwise judgments. Acting with honor is no substitute for acting with wisdom. It's important to have the right motive, but it is even more important to do the right thing. So in our world, that's what it means to "keep" the republic and to uphold the rule of law. We uphold it by making wise decisions -- usually in the absence of complete information; often in the presence of exigent circumstances; and sometimes in the face of sincere criticism.

I've spoken so far about a prosecutor's need to act, and act wisely. Let me take a few minutes also to speak about the consequences of not acting. Attorney General Sessions observed last week,

*Enforcing the law saves lives, protects communities and taxpayers, and prevents human suffering. Failure to enforce the laws . . . put[s] our nation at risk of crime, violence, and even terrorism.<sup>12</sup>*

Inaction always comes at a cost, although sometimes the cost is hidden. If government fails to enforce the law, then honorable people may be forced to choose between being cheated and becoming corrupt themselves.

A society that allows crime to flourish may soon lose its commitment to the rule of law. That's why I worry when local governments seemingly abdicate their duty to keep the peace, and instead allow criminals to control their streets. It's why, when I served as United States Attorney, my office stood up to corruption in places where people needed to compromise their principles in order to run their businesses.

Keeping the peace and fighting corruption is hard work. Turning a blind eye and ignoring the consequences is usually easier, and often more lucrative, at least in the short run. But in the long run, defending the rule of law is the very best way to maintain liberty.



# AmericanRhetoric.com

It is important to keep in mind that the rule of law is not just about prosecuting people who violate our laws. It's also about protecting people even when they offend our sensibilities.

We see this play out when government officials are called upon to defend protestors, even when the cause is repugnant. In recent months, we've watched police officers protect marchers who disparage them, and extremists who reject their values. The professionalism of those courageous officers demonstrates their devotion to the rule of law.

But not everyone shares that commitment. Senator Ben Sasse recently expressed concern about the number of young Americans who think the First Amendment is dangerous, because someone can use freedom of speech to hurt another person's feelings. "That is actually...the [whole] point of America,"<sup>13</sup> as the senator observed.

We would all do well to remember the words of a young state legislator in 1838. At age 28, Abraham Lincoln had recently moved from a small, struggling pioneer town to the capital city of Springfield, Illinois. Lincoln was alarmed by the rising political passions and mob violence of that era.

In a nearby town of Alton, Illinois, a pro-slavery mob had set out to destroy the printing presses of an abolitionist publisher named Elijah Lovejoy. The mob raided a warehouse, burned a building, and murdered Lovejoy. According to Lincoln's friend William Herndon, the future President was revolted by the episode.

That murder influenced Lincoln's first published address. He gave his speech a prophetic title: *The Perpetuation of Our Political Institutions*. Lincoln spoke movingly about the rising lawlessness in the land, and the necessity of the rule of law. Lincoln recognized that adherence to the rule of law is what makes self-government possible. If people reject their responsibility to obey the law, political institutions may collapse.

And Lincoln offered two vivid examples to illustrate his point. The first involved the death by hanging of people that Lincoln referred to as, (and I quote), "regular gamblers." I don't know what other type there were. Regular gamblers. These were "a set of men, certainly not following...a very useful, or very honest occupation." I clarify those were Lincoln's words. In his words those gamblers were "worse than useless" and their execution, in an abstract matter, was "never [a] matter of reasonable regret with any one."<sup>14</sup>



# AmericanRhetoric.com

But the executed gamblers had received no due process. By turning a blind eye to extrajudicial killing, the government set a snowball rolling down the hill. Next, said Lincoln, they went after men who were "caught up and hanged in [all] parts of the State"; then, friends of the earlier suspect; and finally, strangers, from neighboring States...were, in many instances, subjected to the same fate."

Thus, according to Lincoln,

*...went on this process of hanging...till dead men were seen literally dangling from the boughs of trees upon every road side; and in numbers almost sufficient, to rival the native Spanish moss of the country, as a drapery of the forest.<sup>15</sup>*

Now mind you, I think that was a bit of overstatement on Lincoln's part. But his second example was similarly vivid. As he described it, a man in St. Louis,

*....was seized in the street, dragged [to the suburbs of the city], chained to a tree, and actually burned to death; all within a single hour from the time he had been a freeman, attending to his own business, [and] at peace with the world.<sup>16</sup>*

Now in this case, there were suspicions that the victim was himself a criminal who had murdered

...one of the most worthy and [respectable] citizens of the city; and had [not he] died as he did, he [must] have died by the sentence of the law, in a very short time afterwards.<sup>17</sup>

But that was not the point. Lincoln observed that,

*When men take it in their heads to day, to hang gamblers, or burn murderers, they should recollect, that, in the confusion usually attending such transactions, they will be as likely to hang or burn some one who is neither a gambler nor a murderer as one who is; and that, acting upon the example they set, the mob of to-morrow, may, and probably will, hang or burn some of them by the very same mistake.<sup>18</sup>*

It's worth noting that Lincoln's stories predate by about a century Martin Niemöller's better-known quotation which concludes, "[When] they came for me...there was no one left to speak [up]."<sup>19</sup>



# AmericanRhetoric.com

Robert Bolt illustrated the same point in his brilliant play about Sir Thomas More, *A Man For All Seasons*. In Bolt's version, More defends the rule of law in an argument with his son-in-law, William Roper. Roper is angry that More would give the benefit of the rule of law even to the Devil. Analogizing laws to trees, Roper insists that he would cut down every tree, if necessary, in order to destroy the Devil. And More replies, "Oh? And when the last law was down, and the Devil turned round on you -- where would you hide, Roper, the laws all being flat?"<sup>20</sup>

The point is that if we permit the rule of law to erode when at first it does not directly harm our personal interests, the erosion may eventually consume us as well. The rule of law is not self-executing. And if it collapses -- if the people lose faith in the rule of law -- then everyone will suffer.

So what was Lincoln's solution? The Declaration of Independence and the Constitution were his guide stars. Just as the patriots of 1776 and the Founders of 1787 revered the Declaration, the Constitution, and the rule of law, so too should future generations.

"Let reverence for the laws," he implored,

*be breathed by every American mother...let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and [in] Almanacs -- let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.*<sup>21</sup>

And, Lincoln concluded,

*Let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, [sacrifice unceasingly upon its altars].*<sup>22</sup>

Let them all keep the rule of law. When that ethos prevails throughout the nation, Lincoln said, efforts to subvert liberty will be "fruitless" and "vain."

Abraham Lincoln understood that the best way to ensure the survival of our "edifice of liberty and equal rights"<sup>23</sup> is to enshrine reverence for the rule of law in the hearts of the people, and not just in the words of the law books.



# AmericanRhetoric.com

So in that spirit, as we celebrate Constitution Day this weekend, I want to thank each of you - and especially Ed Meese and the Heritage Foundation -- for everything that you do to defend rule of law and to *keep* the republic.

Let me close with a toast that the generation of 1787 might have uttered to celebrate our Founding contract:

*To the rule of law at the beginning, to the rule of law today, and to the rule of law for generations to come.*

Thank you very much.

---

<sup>1</sup> Meese, E. (1965). *Address to the American Bar Association*. Available at: <https://www.justice.gov/ag/aghistorical/meese/1985/07-09-1985.pdf>

<sup>2</sup> From the Judicial Oath (28 U.S. Code § 453 - Oaths of justices and judges)

<sup>3</sup> There is apparently some question as to whether Franklin used the word "Madam" in this widely cited story (and indeed whether the event in question actually occurred). In representing the story, MountVernon.org cites James McHenry as its original source. There, "Madam" is included in the MountVernon.org's account. Alternatively the Library of Congress references *The Records of the Federal Convention of 1787*, ed. Max Farrand, vol. 3, appendix A, p. 85 (1911, reprinted 1934) in its accounting of the story, also endorses the primacy of McHenry's account, and includes what appears to be authentic digital reproduction of his original notes on the encounter. The word "Madam" is there excluded. If the gentle reader of this footnote has additional information on the matter, kindly consider e-mailing AmericanRhetoric.com for consideration.

<sup>4</sup> Although largely forgotten, Mrs. Powel cut an entirely extraordinary figure in her day. Indeed, as to the question of which political organizing principle might best serve our collection of disparate colonies, she was perhaps uniquely qualified to ask just such a question of just such a person on just such an occasion. See <http://www.mountvernon.org/digital-encyclopedia/article/elizabeth-willing-powel/> [and] <http://gwpapers.virginia.edu/friends-grief-martha-washington-elizabeth-willing-powel/> [and] <http://blogs.dickinson.edu/hist-117pinker/2014/11/07/elizabeth-willing-powel-the-real-first-lady/>

<sup>5</sup> In Attorney General Sessions' Briefing on DACA, 5 September 2017.

<sup>6</sup> Ibid.

<sup>7</sup> In Robert Jackson's Address to the Second Annual Conference of United States Attorneys, Available at: <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> See, for example, USSC Justice Powell's opinion in *Wayte v. United States*, 470 U.S. 598 (1985).

<sup>11</sup> See *United States v. Van Engel*, 15 F.3d 623, 631-32 (7th Cir.1993).



# AmericanRhetoric.com

<sup>12</sup> In Attorney General Sessions' Briefing on DACA, 5 September 2017.

<sup>13</sup> Full quotation: "We have to be talking more about the ideas that both unite us as a nation -- or used to and need to again -- and the ideas that, frankly, are corrupting our discourse right now. I mean, 41% of Americans under age 35 now tell pollsters they think the First amendment is dangerous because you might use freedom of speech to say something that would hurt someone else's feelings. That's actually the whole point of America. America is about each of us protecting each other's right to be wrong. We want to argue about heaven and hell and we want to do it free from violence, and that acknowledges the dignity and personhood of the person with whom we're arguing." [Source: <http://www.albertmohler.com/2017/05/23/vanishing-adulthood-ben-sasse/>]

<sup>14</sup> Quoted material in the previous paragraph in Lincoln, A. (27 January 1838). *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois*. Available at: <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Niemöller, M.E. *First they came for the Socialists...* Holocaust Encyclopedia. United States Holocaust Memorial Museum. Available at: <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007392>

<sup>20</sup> Extended exchange at: [https://en.wikiquote.org/wiki/Robert\\_Bolt](https://en.wikiquote.org/wiki/Robert_Bolt)

<sup>21</sup> Lincoln, A. (27 January 1838). *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois*. Available at: <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>

<sup>22</sup> Ibid. Final line in this passage included in-text to heighten the tone of Lincoln's political-religion metaphor. Several years earlier, Tocqueville's expansive treatise on American life offered a perspective by which to view Lincoln's uniquely American vision of a republic: "[In America there is] a form of Christianity which I cannot better describe than by styling it a democratic and republican religion...and from the beginning, politics and religion contracted an alliance which has never been dissolved." [Tocqueville, A. (1966). *Democracy in America*. New York, NY: Alfred A. Knopf, Inc.]

<sup>23</sup> Ibid