

# LECTURE

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## A Constitution Day Address *The Honorable Rod Rosenstein*

**Abstract:** *The rule of law is not really a feature of America. The rule of law is the foundation of America. A generation after the era of Reagan and Meese, President Donald Trump honors their legacy by nominating judges who administer justice without respect to persons and by appointing Department of Justice officials who promote the rule of law. One of the most important things that executive branch officials do to keep the republic is to promote the rule of law. As Attorney General Jeff Sessions said, we inherited from the Founders an unsurpassed legal heritage, which is the foundation of our freedom, safety, and prosperity. Therefore, the Department of Justice does not represent any narrow interest or any subset of the American people; it represents all of the American people.*

**MR. EDWIN MEESE:** It's a pleasure for me to welcome you to The Heritage Foundation and also to the first event in our *Preserve the Constitution* series, which we have each year at this time—and which we'll continue over eight programs, starting today and running through November. I'll say more about that later on. It's appropriate, I think, that we begin our series on preserving the Constitution by observing Constitution Day, which, as you know, is the 17th of September, this Sunday, commemorating the day when, in 1787, the representatives of 12 states signed the original document and then sent it to the states for ratification.

In my opinion, this date, Constitution Day—in terms of the historical antecedents of our country—is second only to the 4th of July. I say that because, as we know, on Independence Day, 1776, 56 men signed the Declaration of Independence and pledged to each other

### KEY POINTS

- 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.
- 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 is ill-suited to judicial review. Such unreviewable power calls for the exercise of discretion and the wise use of that discretion.
- What every prosecutor is practically required to do is to select 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.
- 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.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1283>

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their lives, their fortunes, and their sacred honor. Well, over the next seven years, in the War for Independence, some of them lost their lives and many of them lost their fortunes—but none of them ever lost their sacred honor. Indeed, it was their courageous actions and their sacrifices that they made and, in many cases, their families made as well, that ultimately made possible a new nation.

But the job that they accomplished with the Declaration of Independence and with the war, the job was not yet finished because they also had to establish an effective national government that would still preserve the liberty that had been won at great cost in that war. And that's why some of the original signers of the Declaration, augmented by several others who had come along into positions of prominence in their various states, gathered together in Philadelphia in 1787, and they produced—after much debate and much discussion—the Constitution that basically translated the principles of the Declaration of Independence into what you might call a strategic operational plan for the governance of the country. And that's why we celebrate the 17th of September as Constitution Day.

To lead us today in this commemoration, we are fortunate to have as our guest the Honorable Rod Rosenstein, the 37th Deputy Attorney General of the United States. It's interesting. When I was there, Rod, I was the 75th attorney general. It seems to me there must be better longevity for deputies than there are for attorneys general. In any event, Rod was sworn in in April of this year by Jeff Sessions, the Attorney General, and he has a very distinguished background for this position.

He was graduated from the Wharton School at the University of Pennsylvania with a *summa cum laude* degree. And then he went to Harvard, received his J.D., again *summa cum laude*. He was editor of the Harvard Law Review and then, upon graduation from law school, he served his initial position as law clerk to Judge Doug Ginsburg on the United States Court of Appeals for the District of Columbia. After serving as a clerk, he joined the Department of Justice through their Attorney General's Honor Program in 1990 and has been in several divisions and several positions in the Department of Justice. He was counsel to the deputy attorney general. He served in the Criminal Division in the Public Integrity Section. He served in the Tax Division. He was an Assistant United States Attorney for the District

of Maryland, and ultimately was the United States Attorney for the District of Maryland, where he served from 2005 to 2017.

You might note, if you figure out those dates, that he served in two different Administrations for two different parties with senators who were not necessarily the same party as his, and it is an indication, I think, of the quality of his work and the respect that he had as the U.S. Attorney for that district. He was confirmed by the Senate on the 25th of April of this year as Deputy Attorney General. We're very happy to have him with us today to commemorate the Constitution. Please join me in welcoming Rod Rosenstein.

**ROD ROSENSTEIN:** Thank you, General Meese, for that kind introduction. I am the 37th Deputy Attorney General of the United States, a position that's been in existence for 67 years. The average tenure is 14 months. I'm at about four months and two 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 power.” Those words resonate today.

The rule of law is not really a *feature* of America. The rule of law is the *foundation* of America. A generation after the era of Reagan and Meese, President [Donald] Trump honors their legacy by nominating judges who administer justice without respect to persons 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 a 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.

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.

### **A Republic, If You Can Keep It**

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 on 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.

But there’s 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. Powell. Mrs. Powell 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.”

Mrs. Powell’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 \$20 bill; keep the change. Keeping something in that sense is passive. But that’s not the meaning that 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.

Now, some people think that the duty to keep our government falls to politicians. But Franklin spoke to an ordinary person on the street. 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, and 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 just a few days ago, we inherited from the Founders an unsurpassed legal heritage, which is the foundation of our freedom, safety, and prosperity. The Attorney General explained the Department of Justice does not represent any narrow interest or any subset of the American people; we represent all of the American people. And we protect the integrity of our Constitution. That is our charge. 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.

## Discretion Is a Key Part of Law Enforcement

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 great attorneys general, observed that if the Department of Justice were to make even a pretense of reaching every probable violation of federal law, 10 times its present staff would be inadequate.

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.” And with an ever-growing criminal code, those words are truer today than they were when Jackson spoke them in 1940. His point was simple. Violations of the law abound. What every prosecutor is practically required to do, he said, is to select 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.

As Jackson recognized, a 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. 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.

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 [his or her] 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 was a good choice. But you’re

free to criticize it. I don’t need to prove that it was the best choice. By definition, discretion means that the rules allow a range of permissible options.

Discretion is the power to make a choice that is wrong in the sense that it may not be 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>1</sup>

Of course, good faith is important. It’s often essential in order to avoid doing the wrong thing. And good faith generally is 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 used 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.

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1. *United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993).

Failure to enforce the laws puts our nation at risk of crime, violence, and even terrorism.” 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.

### **Enshrining Reverence for the Rule of Law in the Hearts of the People**

But in the long run, defending the rule of law is the very best way to maintain liberty. It’s 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 their 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 [R-NE] 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 quite the point of America,” 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 the 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 the 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 “regular gamblers.” These were, as Lincoln put it, “a set of men, certainly not following a very useful or very honest occupation.” In his words, those gamblers were “worse than useless[,] and their execution in an abstract matter was never a matter of reasonable regret with anyone.”

But the executed gamblers had received no due process. By turning a blind eye to extra-judicial killing, the government set a snowball rolling down a hill. Next, said Lincoln, they went after men who were “caught up and hanged in other 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 ...’til dead men were seen literally dangling from the boughs of trees upon every roadside and in numbers almost sufficient to rival the native Spanish moss of the country as a drapery of the forest.” And 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 away, 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.” Now, in this case there were suspicions that the victim was himself a criminal who had murdered “one of the most worthy and honorable citizens of the city, and had he not died as he did, he would have died by sentence of the law, in a very short time afterwards.”

But that was not the point. Lincoln observed, “When men take it in their heads today, 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 someone

who is neither a gambler nor a murderer as one who is; and that, acting upon the example they set, the mob of tomorrow may, and, probably will, hang or burn some of them by the very same mistake.”

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.” 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 law as the 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?”

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.

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 law,” as 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 almanacs. Let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.” 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,” 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” 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. 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 you do to defend the 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.

**MR. MEESE:** Rod, thank you very much for an outstanding talk on behalf of the Constitution and for the commemoration of this particular day. I hope this will be instructive for people, because I think one of the problems today is that not enough people understand the Constitution, know enough about it, or understand its origins. What can be done, particularly in the absence of civic education in our schools and colleges, in order to get the kind of a message that you gave us today to more people, particularly young people?

**ROD ROSENSTEIN:** Well, that’s a challenging question—what can be done in the absence of civic education—and my answer would be you *should* have civic education. And I think to some extent we do. My children are in schools where they learn a fair amount about the Constitution. But I do think we all need to take it upon ourselves. We should hold events like this one, we should recognize Constitution Day every year, and we should take every opportunity we can to focus on the fact, as we say, that liberty should not be taken for granted. We haven’t always had it, and there’s no guarantee we will always have it. The Constitution is a fundamental guarantee that we have here in America. I think that the solution really is education, if not in schools then in other venues, but as Lincoln said, we should take every opportunity to promote the rule of law and to teach it to the next generation.

**MR. MEESE:** This is a rare opportunity that this audience has, and that is to have one of the ranking members of the Department of Justice here. I’m sure there are a lot of questions that many of you have, so please don’t hesitate to write out the question and hand it to one of the people that are picking them up here. I’ve already received a couple. One of the questions is, “How badly have you and Jeff Sessions been hampered by the very slow pace of executive appointees being confirmed?”

**ROD ROSENSTEIN:** It has been very frustrating at the Department of Justice. We have some really superb nominees for the leadership positions in the Department of Justice, and the process has been extremely slow. The confirmation process, for

reasons having nothing to do with the merit of the candidates, has been slowed down. I think that's what to me is most depressing about the current circumstances. It would be understandable if occasionally there were issues with a particular nominee—but for the most part it's just a matter of being mired down in process for people that we know are exceptionally qualified and ultimately will be confirmed.

And so that's not my responsibility, the legislative branch, but I do think it would be better for everybody if the Congress could at least identify folks who aren't controversial nominees, who are going to be confirmed eventually, and rather than delaying their confirmations, and disrupting their lives and creating difficulties, to allow that process to move a little more quickly. As I say, there certainly are going to be situations where legislators have legitimate concerns about particular nominees, but what we've seen really is just an across-the-board obstruction of good people who deserve to be confirmed and should be permitted to come on board and get started.

**MR. MEESE:** Another question that's come up, and that is, there's been quite a bit of talk about leaks. I think it's a perennial subject with any Administration, but is the Department going to revisit its policy on how to deal with the press in terms of conducting leak investigations?

**ROD ROSENSTEIN:** In the Department of Justice, obviously we're bound by the Constitution and the laws, and then we have policies and practices. And the policies and practices are not written in stone, so it's a continuing effort to identify ways that those policies and practices might be changed to more effectively accomplish our work. The Attorney General made reference to a longstanding written policy in the Department of regulation governing the way we conduct investigations that may implicate news media interests. That policy was revised a few years ago and, as the Attorney General said, we're reviewing it to determine whether or not it's appropriate to make any other changes. And I think people should withhold criticism unless and until we do make changes. There are legitimate concerns on all sides, but from the Department's perspective we really are making a good faith effort to consult with our prosecutors and our agents. We're going to talk with media representatives. And if we got it exactly right in the most recent version, we won't need to change it, but it's possible that there are some provisions that might warrant revision.

**MR. MEESE:** The Attorney General has given a number of talks already—and I think it's been very interesting that he's gone around both with the lay audiences and also with law enforcement audiences—about the Department of Justice and the policies of this Administration. What do you see as some of the major policy initiatives and emphases of this Administration in the Department?

**ROD ROSENSTEIN:** I'll give you a few highlights. The Attorney General has been very energetic in implementing policies and making policy changes, and I should emphasize, though, that you should understand the Department of Justice is a large institution with 115,000 employees and tens of thousands of contractors, a lot of different functions. The majority of the work of the Department goes on from Administration to Administration. There are some significant changes, but most of the work goes on.

In terms of the highlights, the most significant change that any Administration brings is a sense of what its priorities should be, and that's reflected in where we put additional resources, what things we're tracking on a daily basis. And so the Attorney General has made clear that we are elevating drug enforcement, violent crime enforcement, and immigration enforcement because there's been a lapse of enforcement. Where do we see the impact of that? We see it in crime rates. And so I think drug enforcement is an area where it's most obvious and most devastating.

The number of Americans who are dying of drug overdose deaths has been skyrocketing. And there's an increase in the amount of publicity, but I still think not enough is apparent to teenagers. I think it's important for people to recognize that we are losing a lot of people around the country to drug overdose deaths. The preliminary totals for 2016 are 64,000. Sixty-four thousand Americans lost their lives to drug overdoses last year, and a large proportion of them—I think it's about half—were due to opioid drugs. That's heroin, oxycodone, and increasingly, fentanyl, which is a synthetic drug that has many analogs, most of which are imported from China, that are causing devastation throughout the country. And so the question is about priorities. What's the logical thing to do if more people are dying of illegal substances? It makes sense that we should invest more of our resources in prosecuting that. And so we're ramping up the commitment of resources to drugs.

Similarly, with violent crime, we've seen significant increases in violent crime in many places in the

country—and the academics debate whether what we see is a trend or a blip and whether it's uniform or merely a matter of increases in many cities. We know it's increasing. I saw a dramatic increase in Baltimore where I was U.S. Attorney. It's continuing to rise. The murder total is devastating in places like Chicago and many other American cities. And so we are making that a priority and devoting our resources to combating that in terms of policy changes.

One concrete thing that we've done is to change what we refer to as the department's "charging policy." I don't want to go into too much detail today, but there's a policy written by the Attorney General that instructs our prosecutors, our assistant U.S. attorneys, about how they should go about determining what charges to bring in their discretion in a particular case. And the traditional policy of the department—which actually has been in place for a very long time, certainly through the Meese era, but there's a written policy that was first codified by Attorney General Ben Civiletti in 1979—that says that we should always, as a default, charge the most serious, readily provable offense. That's sort of our baseline.

And about three or four years ago, the Department varied somewhat from that policy in drug cases and prohibited prosecutors from charging the most serious readily provable offense unless certain conditions pertained, and the Attorney General has changed that policy, vesting discretion back in our prosecutors. And one of the goals of that is to allow our prosecutors on the front lines throughout the country, in appropriate cases, to bring serious charges that are going to allow them to dismantle violent gangs and drug organizations, and we think that can have an impact on violent crime and drugs. I could talk a very long time, but I know you have other questions, so I'll stop there.

**MR. MEESE:** There's another question that's really on that point. Particularly, what is the policy of the Department in regard to enforcing Title 21, the federal marijuana laws, particularly in states that have now, under state law, legalized it, at least in part or sometimes beyond that?

**ROD ROSENSTEIN:** This is an interesting challenge. The Attorney General has been very clear about our position and the position of the United States, because it's reflected in law: Marijuana is illegal. And it's a controlled substance, and there are no authorized uses for it, with very limited exceptions for research approved by DEA [Drug Enforcement

Administration]. But there are several states that have decriminalized marijuana, so they're not enforcing it under state law, and in some states they're actually licensing certain marijuana growers.

The Department responded to this several years ago in a series of memos that were intended to provide guidance for U.S. attorneys in those districts about when they should prosecute marijuana cases. And it was largely an effort to codify the traditional principles of federal prosecution; that is, as I mentioned, we have discretion, we have limited resources, how do we determine which cases we're going to pursue? And so it set forth certain conditions for evaluating which cases to pursue. That's been perceived in some places almost as if it creates a safe harbor, but it doesn't—and it's pretty clear that it doesn't. That is, even if under the terms of the memo you're not likely to be prosecuted, it doesn't mean that what you're doing is legal or that it's approved by the federal government or that you're protected from prosecution in the future. And so we are reviewing that policy. We haven't changed it, but we are reviewing it.

We're looking at the states that have legalized or decriminalized marijuana, trying to evaluate what the impact is. And I think there is some pretty significant evidence that marijuana turns out to be more harmful than a lot of people anticipated, and it's more difficult to regulate than I think was contemplated ideally by some of those states. So we're going to take that all under consideration and then make a determination whether or not to revise that policy.

**MR. MEESE:** I have one last question. In terms of white collar crime, does the Department plan to revisit its policies and guidance concerning corporate prosecutions?

**ROD ROSENSTEIN:** With regard to corporate prosecution, once again, this is an area where there's discretion, and there have been various policies written from time to time. Most recently, my predecessor, [former Deputy Attorney General] Sally Yates, wrote a memo a couple of years ago, which was an effort to articulate how we would go about corporate fraud prosecutions. And one of the goals was to clarify the way we were going to prosecute individuals as opposed to resolving cases against corporations. Corporations, of course, don't go to prison. They do pay fines.

And so the issue is, can you effectively deter corporate crime by prosecuting corporations, or do you in



some circumstances need to prosecute individuals? I think you do. And so the Yates memo was an effort to advise federal prosecutors and civil attorneys in the Department of Justice about how to go about making that decision whether to pursue individuals or accept corporate resolution. Once again, it's under review, and I anticipate that there may be some changes to the policy on corporate prosecutions.

And to clarify again, we're not talking about changing the Constitution or the laws. It's the policies and practices of the Department, and that's really pretty routine. Every Administration, I think, looks at these issues and determines whether or not the internal guidelines that have been written in the last Administration are effectively addressing what we think is the crime problem in the present. And so I don't have any announcement for you today about that, but I do anticipate that we may in the near future make an announcement about what changes we're going to make to the corporate fraud principles.

**MR. MEESE:** Well, Rod, on behalf of Heritage and this audience today, we appreciate very much not only your words about the Constitution in your eloquent speech, but also your candor in answering the questions that have been presented to you here. Thank you very much.

**ROD ROSENSTEIN:** Thank you.

—*The Honorable Rod Rosenstein is the Deputy Attorney General of the United States.*