Gordon Dean, DOJ & AG Jackson's "Federal Prosecutor" Speech (1940)

John Q. Barrett[*]

April 1, 2015, marks the 75th anniversary of then-Attorney General of the United States Robert H. Jackson's great, enduring, much remembered and much quoted April 1, 1940, speech, "The Federal Prosecutor." Jackson delivered the speech, to the assembled U.S. Attorneys from across the country, in the Great Hall at the U.S. Department of Justice. (The full text is below.)

Jackson had worked in Washington, D.C., in high federal offices since 1934, in DOJ since 1936 and as Solicitor General of the U.S., then the Department's number two position, since March 1938. In January 1940, he was nominated, confirmed and commissioned to serve as AG. President Franklin D. Roosevelt had simultaneously appointed the predecessor AG, Frank Murphy, to be an Associate Justice of the Supreme Court and elevated SG Jackson to succeed Murphy in DOJ's top office.

Although Murphy had courted and garnered good press as AG, in fact he was not a good fit with the job and had mismanaged DOJ in many ways. His year as AG left employees demoralized. Unfounded and inappropriate federal cases were pending in various locations. Important and difficult investigations were ongoing, some not well and some being discussed much too publicly. Other announced "investigations" were no more than press releases. (These were some of the reasons why F.D.R. "fired" Murphy to the Supreme Court. He went reluctantly, but he went.)

For new AG Robert Jackson, the first months of 1940 were a whirlwind. He rallied beleaguered DOJ colleagues—they applauded his appointment, which meant a restoration of the ethics and excellence that they valued in DOJ. He also restored some of them, banished by Murphy,

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[*] Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). I emailed an earlier version of this essay to my Jackson List on April 1, 2015.

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to central, significant positions in the Department. Jackson dismissed some celebrated cases, taking public criticism in the process. He also evaluated and advanced some investigations and decided to close others. He consulted widely with DOJ personnel, in Washington and across the country. He worked with executive branch colleagues, including on military buildup, assistance and other war-related issues. He argued (and soon won, narrowly) a Supreme Court motion matter that he had been handling as Solicitor General.[1] He met regularly with F.D.R., discussing all of the above to some degree, plus policy issues and politics.

Attorney General Jackson also kept a grueling travel and public speaking schedule. He made major speeches in Cleveland on January 8th, in Buffalo on February 10th, and in Philadelphia on February 28th. He also held press conferences and delivered quite a few major speeches in Washington. His speeches, mostly on topics much broader than DOJ and its work, raised Jackson's already significant public profile. They were, not subtly, part of his potential 1940 presidential candidacy—in those early months of the election year, when President Roosevelt and many, many others expected that he would be, in the American tradition, retiring after two terms in office, Robert H. Jackson was a, and perhaps he was the, leading prospect to carry the New Deal and Democratic Party presidential standard.

For all of these reasons, Jackson was, by March, quite exhausted. He had been so ill for a couple of weeks—fighting "the grippe," they called it then—that he cancelled some scheduled events.

Jackson had some open days—or he created them—before he was scheduled to speak, in Main Justice in Washington, on March 30th at a National Police Academy graduation exercise, and then two days later at the Second Annual Conference of United States Attorneys. So in mid-March, he traveled by train, with his son Bill who was a college junior on spring break, to Florida. Bill spent some time there with his dad and some time out with friends. Robert Jackson rested, relaxed and, in spots, worked. He stayed in close contact with Washington and received work mail regularly.

[1] *See Oklahoma ex rel. Williamson v. Woodring*, 309 U.S. 623 (1940) (mem.).

One significant letter came from Jackson's colleague and friend Gordon E. Dean. He was a young, talented, experienced DOJ lawyer. He had worked in the Criminal Division and as a special assistant to and press spokesman for F.D.R.'s first Attorney General, Homer S. Cummings. Attorney General Murphy had dismissed Dean from the AG's immediate office, sending him to unspecified duties in the Antitrust Division. Attorney General Jackson, in his January 18th press conference just hours after his swearing in, had announced a new policy of having a lawyer in charge of DOJ press relations, and that Gordon Dean would be resuming the position he had held under Cummings.

On March 25, 1940, Gordon Dean sent this letter to Attorney General Jackson:

VIA AIR MAIL

PERSONAL and CONFIDENTIAL

Honorable Robert H. Jackson
The Towers
Miami Beach, Florida

Dear Bob:

> The more I think about it the more convinced I am that your [April 1, 1940,] address before the United States Attorneys should be on the serious side. The convening of these Federal District Attorneys furnishes the opportunity for a really great speech. There are two notes which I think might be stressed:
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> 1. Having in mind the extreme sensitiveness of these fellows about their prerogatives, it might be well to stress at the opening your conviction that the administration of Federal justice would be in a bad way if we tried to handle it all from Washington. I know you feel that except in unusual and rare instances the local District Attorney is the man to handle litigation. You might refer to some of your early experiences in private practice when in going to a distant town you consulted local counsel for the purpose of picking the jury and steering you through local variations in

procedure. It would not hurt a bit to say, as Attorney General, that you are thankful every day that we have delegated our worst headaches to the District Attorneys. In line with your suggestion that this should be a conference run by the District Attorneys, Ben Harrison [the U.S. Attorney in Los Angeles] has suggested that we invite William J. Campbell [the U.S. Attorney in Chicago] to speak, and we have issued such an invitation to him. I know he will accept. If he does, he will stress the importance of letting the District Attorney run the office the way he wants to, which of course is a bit extreme but at least, if you stress the above suggested note in your opening remarks, it will take some of the sting out of Campbell's talk. The District Attorneys of course will appreciate these sentiments. [Rep.] Hatton Sumners [(D.-TX)], the States-righter, will love you for it, and, what is more important, it is true, that we would have an awful time if we did not have these local men on the firing line. I do not think that this first point needs developing, but I think it would definitely help to get the Conference off on a friendly level.

2. The second point would be the real thesis of the address. You have touched upon this briefly in one of your recent speeches when you indicated that even though the government loses a case it really has won if justice is done. Also, in the [January 20th] Federal Bar Association speech you emphasized the need for dispassionate and impartial enforcement of the law, particularly in times of hysteria. You touched on the subject also in your first speech at the [National] Press Club [on January 31st] when you pointed to the pressure groups that work on the Department, of well-intentioned political, racial and religious groups—the people that cry for a man's scalp because they do not like his views, the people who would have us try a man for one offense and sentence him for another, etc. In this connection I am enclosing a letter which I wrote to Homer Cummings last October following several talks that we had had late in the summer of 1939 on the subject of the powers of the prosecutor. At that time the magazines were after him for articles [i.e., to write and submit articles they could publish], and I was suggesting subjects. I suggested an article entitled

"Government by Indictment", and prepared a manuscript with that title, which I also enclose. With several points you will disagree. For example, I recall your saying in a recent conversation that our criminal law is loaded in favor of the defendants. This particular manuscript develops a somewhat contrary thesis, although the major thought is not so much that the laws are loaded against the defendant as that the powers of his adversary, the government, which arise in part from laws, are instruments of terrific potential abuse. I am a little reluctant to enclose the article because in the first place it was never finished, and in the second place what there is of it is in rough form. It deals largely with State prosecutors and consequently would not in its entirety be fitting for a talk to Federal prosecutors. I had planned to write an ending suggesting a few remedies. They would have included the necessity for getting reacquainted with the Bill of Rights, pointing to the 28 committees formed by bar associations dealing with this subject which have sprung up during the last year. I had also planned to suggest the desirability of appointing rather than electing prosecutors, the importance of improving personnel—that is, the human element in the picture, the part that could be played by the public defender to offset the overzealous prosecutor, etc. Mr. Cummings did not want to sign the article because he was afraid that it was too pointedly critical of Frank Murphy and [Manhattan District Attorney] Tom Dewey, although it referred to neither. At that time I was particularly concerned about Murphy's methods, and I thought that the article if properly dressed up would have been very timely. Of course in view of the criticisms which have been leveled at [Federal Bureau of Investigation director J. Edgar] Hoover, anything in the manuscript that looks like a personal crack at him would have to come out, and my references at pages 10 and 11 to third degree, wire tapping and the abuse of subpoena power would consequently have to be toned down, even if you agreed with the sentiment. At any rate I think that whether or not you agree with the article it will suggest things which might be incorporated in the April 1 speech. If you do think this is an opportunity to do a landmark speech on the subject of the prosecutor we really ought to have it ready for mimeograph some time Saturday [March 30th] or Sunday

> [March 31st]. If it is worth giving it is worth getting out to the press in advance.
> …[2]

Jackson actually was back in Washington by March 25th—Dean's letter reached him there, and obviously Jackson found it and the enclosed Dean manuscript to be quite helpful and persuasive. Over the next week, Jackson prepared his speech for the April 1st assembly of U.S. Attorneys. It followed many of Gordon Dean's suggestions and drew heavily on his ideas and words. And five years later, when President Truman recruited by-then-Justice Jackson to serve as U.S. chief prosecutor of Nazi war criminals at what became the Nuremberg trial, he not surprisingly recruited then-Lieutenant Gordon Dean, U.S. Naval Reserve, to be one of his principal assistants.

Justice Robert H. Jackson & Lt. Gordon E. Dean
in Nuremberg, circa July 21, 1945.

[2] Letter from Gordon E. Dean to Robert H. Jackson, Mar. 25, 1940, in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 39.

Jackson's speech follows.[3] It bears rereading in full. It also, if I may, bears absorption and implementation by every person who wields prosecutorial power.

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The Federal Prosecutor

By Robert H. Jackson
Attorney General of the United States
April 1, 1940

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. 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.

These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

[3] The speech is published as Robert H. Jackson, *The Federal Prosecutor*, 31 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 3-6 (1940) and Robert H. Jackson, *The Federal Prosecutor*, 24 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 18-20 (June 1940). It also is available at www.roberthjackson.org/Man/theman2-7-6-1/.

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus 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.

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it, different district attorneys were striving for different interpretations or applications of an Act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just,

judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. Reputation has been called "the shadow cast by one's daily life." Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.

The federal prosecutor has now been prohibited from engaging in political activities. I am convinced that a good-faith acceptance of the spirit and letter of that doctrine will relieve many district attorneys from the embarrassment of what have heretofore been regarded as legitimate expectations of political service. There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations. I think the Hatch Act should be utilized by federal prosecutors as a protection against demands on their time and their prestige to participate in the operation of the machinery of practical politics.

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. 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. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do 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.

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. With the law books filled with

a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. 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.

In times of fear or hysteria, political, racial, religious, social and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views. Particularly do we need to be dispassionate and courageous in those cases which deal with so-called "subversive activities." They are dangerous to civil liberty because the prosecutor has no definite standards to determine what constitutes a "subversive activity," such as we have for murder or larceny. Activities which seem benevolent and helpful to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as "subversive" by those whose property interests might be burdened or affected thereby. Those who are in office are apt to regard as "subversive" the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as subversive. We must not forget that it was not so long ago that both the term "Republican" and the term "Democrat" were epithets with sinister meaning to denote persons of radical tendencies that were "subversive" of the order of things then dominant.

In the enforcement of laws which protect our national integrity and existence, we should prosecute any and every act of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Another delicate task is to distinguish between the federal and the local in law-enforcement activities. We must bear in mind that we are

concerned only with the prosecution of acts which the Congress has made federal offenses. Those acts we should prosecute regardless of local sentiment, regardless of whether it exposes lax local enforcement, regardless of whether it makes or breaks local politicians.

But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely. The same variation of attitudes towards other law-enforcement problems exists. The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

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.