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Keynote Address

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FIGHTING CORRUPTION IN AMERICA AND ABROAD

KEYNOTE ADDRESS

*Preet Bharara**

Thank you, professor, for that introduction. It was quite the introduction. It is true my brother started a very successful online diaper company. It was mentioned that we do not have enough followers on our Twitter feed. My brother is a much more clever member of the family. My recollection is that when he started that company, he had a slogan—he and some folks came up with this slogan for the diaper company—which was—and it was emblazoned on a t-shirt which was one of the few perks of being related to somebody who started a company, and I from time to time proudly wear that t-shirt—and the slogan for his company was: “We are number one in number two.”

It is particularly great to be here at Fordham Law School for, among other reasons, it is the only institution from which I received an honorary degree after I spoke at the commencement a couple of years ago.¹ I don’t even have my actual college diploma or law school diploma hanging on my office wall, but I do have my honorary degree from Fordham hanging up as a reminder to myself of the best and greatest undeserving accolade I’ve ever gotten.

I want to, before I talk about what brings us here, give a shout out to the people from my office, who are scattered here somewhere: members of the Public Corruption Unit; the Deputy U.S. Attorney, Rich Zabel; the Chief of the Criminal Division who was on a panel a moment ago, Joon Kim; Chief Counsel, Dan Stein. Where are my folks?

Oh there they are! They’re the ones who do the work. I see the Chief, Arlo, back there too and a bunch of others. Those are the heroes who work hard, night and day, to fight against the corruption we have been referring about today at this conference, not me.

* U.S. Attorney for the Southern District of New York. This keynote address was delivered during a symposium entitled *Fighting Corruption in America and Abroad* held at Fordham University School of Law. The text of this address has been lightly edited and footnoted. For an overview of the symposium, see Jed Handelsman Shugerman, *Foreword: Fighting Corruption in America and Abroad*, 84 FORDHAM L. REV. 407 (2015).

1. See Preet Bharara, *Commencement Address*, 82 FORDHAM L. REV. RES GESTAE 1 (2013), http://fordhamlawreview.org/assets/res-gestae/volume/82/1_Bharara.pdf [<http://perma.cc/RKW6-4QH8>].

You may be reading about recent efforts that have been made with respect to public corruption. It is not just our office, there are lots of offices in New York and throughout the country. I think we noted recently there have been over eighteen state legislators prosecuted by federal, state, and local prosecutors in just the last few years. Just Wednesday, just this week, a judge sentenced a former state council member to a ten-year sentence for his role in the bribery and fraud schemes. We have been aggressive in using every aspect of the law that we can, including one, I might point out, that some people were skeptical about a couple of years ago when I testified about it in the Moreland Commission.² Convicted politicians should not grow old comfortably cushioned by a pension that was paid for by the very people that they disgraced in office. And we have been using the tools of asset forfeiture to make sure we uphold that principle when justice requires it, and more recently, there appears to be some movement to do something in the New York State Constitution to fulfill that principle also.

So I am going to speak a little about what I was invited to speak about and that is public corruption. I know there are people here from around the country: academics and practitioners. There is a lot of interest in public corruption throughout America, but I intend, based on my experience, to talk about some things that I have observed more locally. By the way, I am speaking generally; unless I mention any particular person or case by name, I do not mean to talk about any of them.

So why is it important—public corruption? First of all, it is important because elected officials have power, state legislators have power, people in the executive branch have power, federal officials have power. They have power over how you educate your children, power over what you eat, power over how energy is brought to bear, power over so many things so when you have people who are engaging in corruption, violating their oath—given how much power they have, there is nothing more important than that in democracy. It is important also because public corruption, when it becomes pervasive especially, undermines people's faith and confidence in democracy. It is hard, I would tell you, to overstate how corrosive it is, the fact that corruption and the perception of corruption over time. There are real people who are supposed to be represented fairly and honestly that care about it.

Our public corruption cases have more resonance than perhaps people even in this room might realize. I want to quote from just a few of the kinds of letters we get now on a regular basis from ordinary New Yorkers. The tone of so many of those letters demonstrates that people actually do care about government, but they have just been turned off by it because they just believe that circumstances never change, status quo will never change, and nothing ever improves and bad and corruption will always remain in office. And they tune out. But when you begin to show that you can clean

2. See PUBLIC HEARING ON THE MORELAND COMMISSION TO INVESTIGATE PUBLIC CORRUPTION 13-26 (2013), <http://publiccorruption.moreland.ny.gov/sites/default/files/PUBLIC-CORRUPTION09-17-13.pdf> [<http://perma.cc/C7GZ-EB7J>].

things up, you can get rid of and hold accountable people who have violated the public trust; they will tune back in again. And that is not a small thing if you care about democracy.

So here are samples from a few letters. Here is one: “For far too many years, corruption in Albany has been the white elephant in the room that everybody knew about, but no one did anything about, becoming almost the normal way of business. That is why I am very thankful to you for having taken up where the Moreland Commission left off.”³

Here is another one: “Please believe me. You have the support of a vast number of people that have been silent because they thought the problems were unfixable. Maybe one day we can have politicians that we can trust in New York.”⁴

Here is a third: “Go after the crooks with vigor and intensity and with good success. The pervasive corruption in all political levels of state government filters down and rots citizens’ respect for and adherence to the law.”⁵

Here is another one: “Since I began law school in 2008, I confess, I have lost the little faith that I once had in the integrity and legitimacy of those office bodies which claim the right to rule over us. Your office’s work has rekindled in my heart a tiny ember of hope that all may not be lost and I cannot possibly be the only one who feels that way.”⁶

And then finally: “I feel compelled to write you as a resident of upstate New York to personally thank you for your efforts to identify and bring to justice those political officials who abuse our trust for their personal gain. It is a long time coming. The people of New York are hardworking and resilient and we deserve better than the trail of corruption that pervades our state government.”⁷

And that is just a sampling of some of the sentiment that is out there in recent times.

So, why is it important to talk about public corruption? First, it is important to talk about it because it is an important issue. It is why you all convened here today. Most important thing is our prosecutors, folks who are sitting here and some who are probably toiling away back at work still, to do their bread and butter: to prosecute cases. But forums like this are also important, bringing together professors and practitioners and prosecutors to join in discussion, given their collective insight. As the chief federal law enforcement officer in the Southern District of New York, I oversee all manner of the prosecutions and I speak publicly from time to

3. Letter from Constituent (on file with the U.S. Attorney’s Office for the Southern District of New York).

4. Letter from Constituent (on file with the U.S. Attorney’s Office for the Southern District of New York).

5. Letter from Constituent (on file with the U.S. Attorney’s Office for the Southern District of New York).

6. Letter from Constituent (on file with the U.S. Attorney’s Office for the Southern District of New York).

7. Letter from Constituent (on file with the U.S. Attorney’s Office for the Southern District of New York).

time about how we might deter different types of crimes—how we might create systems and cultures so that those crimes are not committed in the first place and shine the light surrounding the circumstances behind those crimes and that criminal behavior. Whether it is gang violence or cybercrime, national security or drug trafficking, or a prescription pill endemic or a fraud of Wall Street, it is a fundamental part of the job to talk about these issues, sometimes as a community or as a country. We are not just focusing narrowly on prosecuting crime, but also preventing it and deterring it. That is why I accept invitations to speak at corporate groups and to hedge fund associations and to civic groups and to law schools and to business schools, and that is why I accepted the invitation to testify at the Moreland Commission. And that is why I accepted the invitation to testify here today.

Public corruption is as important a priority for us as any other area, and I think we are right to make it a high priority. You heard from some of the letters I cited earlier. There was a recent Siena College poll that 92 percent of New Yorkers believe state government corruption is a serious problem,⁸ and it is not a coincidence that the highest nonterrorism criminal priority in the FBI is public corruption.⁹ Deterrence is a central part of our mission. It is the central mission of anybody who is involved in law enforcement. I have, on occasion, told prosecutors in my office that it is great to have prosecutions and it is great to hold someone accountable and that it is good and that it is all in a day's work. But, for example, if you were a gang prosecutor or a narcotics prosecutor and you had taken out a group of individuals who were pushing poison in a neighborhood or a housing project and you kicked them off the streets and appropriately prosecute them, that is a great job—well done. You are holding those people accountable and you are incapacitating them, but you should think about the impact that has. Because if the very next day or the very next week or the very next month another gang moves in—it gets to terrorize those same good people who inhabit that neighborhood—then we have not quite respected what we are doing, we have not quite done the job. And that is true if you are talking about national security, that is true if you are talking about fraud, it is true if you are talking about narcotics trafficking, and it is certainly true when you are talking about public corruption. So anyone who denies the fact or suggests that corruption is not a pervasive problem, given the case of the corrupt recently in Albany, is off base, and every one who's in a position to do something about it bears a responsibility to cure the problem—and that includes prosecutors and the public and the

8. Press Release, Siena Research Inst., Siena College Poll: While Small Majority Says Gov's Ethics Package Would Reduce Corruption, Bigger Majority Says on Time Budget Is More Important (Feb. 24, 2015), https://www.siena.edu/assets/files/news/SNY_February_2015_Poll_Release_-_FINAL.pdf [<http://perma.cc/WC6Z-MYYQ>].

9. See generally *Public Corruption: Why It's Our #1 Criminal Priority*, FBI (Mar. 26, 2010), https://www.fbi.gov/news/stories/2010/march/corruption_032610 [<http://perma.cc/4SET-CQTP>].

press and the politicians themselves. So let me say two things before I go any further.

Number one: there are many, many, many, many great, honorable, excellent, ethical people who are elected to serve in public office. I mean, I spent four and a half years working for a legislator in Washington. I would not have spent four and a half years working in a place like that if I was so cynical to think that nothing good could come of legislating and that there were no good people who were trying to do good things for the people of New York or the people of the country or the people of their locality. There are many, many good people out there.

A second thing: part of the reason to have discussions like this and to talk about a problem is not just to excoriate and warn people who might commit crimes. When I go speak at business schools, I tell the following story—I think it is analogous to public corruption. And I talk to students at some of the best business schools in the country, and I say, “I am not here to direct my words to the two or three of you in this classroom who statistically speaking are likely to commit securities fraud in the future. Although I know who you are. And we will be following you.”

Rather, if we direct—because there’s always going to be bad people in any institution of any size and sometimes institutions of small size—but to direct my words and exhortations to the ears of the vast majority in any institution, whether it is a school or a bank or it is a hedge fund or it is a prosecutor’s office or it is a legislature, who are good and honorable and honest and decent and want to do the right thing. The problem is the biggest problems arise in institutions and in countries and in financial institutions when the good people do not do anything. So it is not enough to simply ensure you are getting rid of the bad folks. You want to make sure you are empowering and sometimes embarrassing the good folks at any institution that exists to do something when they see something bad going on. All the big prosecutions in my office that you read about, including the financial ones, all involved places where lots and lots of people, long before the FBI showed up, long before prosecutors showed up, knew that there was something wrong. That was true of the Galleon Group; that was true of SAC Capital; that was true of Madoff. Good people who do nothing bear responsibility for the bad things that go in their institutions. That is just as true in public corruption as it is anywhere else. So it is incumbent upon good people at institutions not just to complain that their institution is being mocked and maligned, but to do something about it.

By the way, forget about what the prosecutor may say about the problem of public corruption, here is what actual legislators in New York have said—this is Assemblyman Eric Stevenson, in his own words, recorded talking about his colleagues: “Bottom-line, . . . if half the people up here in Albany was ever caught for what they do[,] . . . they . . . would probably be in [jail]. [S]o who are they [BS]ing.”¹⁰

10. Sealed Complaint at 22 ¶ 61, *United States v. Stevenson*, No. 13 MAG 00873 (S.D.N.Y. Apr. 2, 2013), <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/>

This is State Senator Liz Krueger recently:

Over the last thirty to thirty-five years, we have seen the rules evolve such that individual members give almost all their power up to the leaders, but it's not just the faults of the [T]hree [M]en. It's the rank and file of the majority party in each house saying, "Okay, we're going to let the leaders make all the decisions for us and we're going to choose to sit on the sidelines."¹¹

Here's Seymour Latchman, former State Senator, who wrote a book called *Three Men in a Room*.¹² He writes, "What was more, I determined that it didn't matter whether Democrats or Republicans controlled Albany now or in the future, because the place was rotten to its core."¹³ Latchman on page two: "Over time I became surprised, distressed, and finally repelled by the routine subversions of democratic values and processes in a state that was once America's most progressive and activist . . ."¹⁴

This is how Albany legislators, themselves, have talked about the problem. Obviously, there is a problem and it is a fairly pervasive one, and we all need to be part of the solution.

Now let me switch gears semi-dramatically for a moment.

The solution, to my mind, the cure to what ails our political system and for what allows so much corruption seemingly to go unchecked, is in many ways a pragmatic project. The road to honest government calls for hard-nosed investigations, fearless prosecutions, and savvy watchdogs. And to be sure, the passage of real world reform requires political will and political compromise by actual people with the power to do so. All of this requires blood and sweat in the arena and that is all well and good. But those in the arena have to remember what it is they are fighting for and why they are fighting in the first place.

Because good government is about honest democracy. It is about the will of the people, not the self-aggrandizement of politicians. Ultimately, it is about the social contract itself and what its terms should be. And so the path to honest democracy cannot just be about strategy and tactics, just about politics and politicking; it cannot be just about fighting in the arena—it has to involve reflection about and dedication to principles. Part of the problem is that few think to match principle to pragmatism. Few think to marry theory and practice. It is all too easy to forget, in the rough and tumble of politics, in the back and forth of compromise, in the give and take of power, that principle has a place in the establishment of rules, principle

03/25/U.S.%20v.%20Eric%20Stevenson%20et%20al%20Complaint.pdf [http://perma.cc/994Z-LS2T].

11. Karen Rouse, *Can Albany Open the Door on Three Men in a Room?*, WNYC NEWS (Feb. 26, 2015), <http://www.wnyc.org/story/albany-open-door-men-room/> [http://perma.cc/73FS-B SXG].

12. SEYMOUR P. LACHMAN WITH ROBERT POLNER, *THREE MEN IN A ROOM: THE INSIDE STORY OF POWER AND BETRAYAL IN AN AMERICAN STATEHOUSE* (2006).

13. *Id.* at 3.

14. *Id.* at 2.

has a place in the organization of democracy, and principle has a place in the delivery of justice.

Now there are, of course, obstacles to the reformation of rules that have grown up in what is sometimes a seedy and self-protective political environment. The debate about rules or about transparency or outside income or campaign finance or proper oversight or anything else that might promote honest government—whether that debate is open, or behind closed doors—tends to revolve around issues of power and partisan avenger. It tends to revolve around a calculation of who loses and who wins in the immediate term—who will be up and who will be down if there is even an incremental change in the textbook. Rulemakers do not often rush to change the rules they themselves made, often to maximize power and profit and clemency. There has forever been something of a fox-guarding-the-henhouse problem in every form of government, no matter how many checks have been worked into the system at the outset. Now that is understandable, even though it is unfortunate and sad, especially when obvious and nearly universally supported proposals never go anywhere because of self-interest and shortsightedness.

But I think there is nonetheless value, from time to time, in taking a step back—philosophically step back. Reflect on what rules we would want for honest government if we could start all over again. I think it can help to orient our action, it can help to anchor our thinking, and it can help to justify our cause in the pursuit of honest government. And so what better forum than to ruminate, for just a few minutes, on the social contract, than at a leading law school like Fordham, who reconvenes this conference of leading academics and practitioners to deliberate on the issue of public corruption.

So, in that vein, I have been thinking for a while by something I studied and cared about in college. When I was in college, I studied for a time under a man widely renowned as one of the most influential theorists of the twentieth century, John Rawls. His name is synonymous, as many of you know, with his defining life's work—a fairly thick book called *A Theory of Justice*.¹⁵ It is a book about the meaning of justice in institutions and the procedures by which institutions might aspire to and achieve justice. This book sits on my home office shelf still, worn and largely forgotten, but it contains a feast of thought—a feast of idealistic thought. I confess, I did not always go to class when I was in college, but I always went to John Rawls's class. I got an A.

Rawls, like Rousseau and other social contract theorists before him, have faith that people could think that they could use thought to organize fair societies and just institutions. So I hope that the professors in the audience can forgive my oversimplification and slight bastardization of a key concept from *A Theory of Justice*. But I evoke it, not to impress my thesis advisor on the off chance she ends up reading about this speech, but because I want to discuss today one tool of reason that Rawls employed to provide another

15. JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

way of thinking about and justifying, on principle, some of the honest government reforms that are more hotly debated now than in a long while. So Rawls postulated the concept—this may be very rudimentary for a lot of you—but to the few: Rawls postulated the concept of the original position. Essentially, a hypothetical initial situation in which rational parties, unaware of any of their real world attributes, like wealth or race or age, will collectively choose procedures and principles for society that are just.

Rawls writes in his book,

The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis [for] theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.¹⁶

Does that sound Albany to you guys? A feature of the original position is the notion of the veil of ignorance. Rawls continues,

[I]n order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.

It is assumed . . . that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence or strength, and the like.¹⁷

And so from behind this veil of ignorance, “the parties much choose principles the consequences of which they are prepared to live with whatever” social, natural, or economic position it turns out they have in the real world.¹⁸

So again, apologies to both the attendees and my former professor for the oversimplification. There are many, many theoretical problems to this exercise. Let us for a moment apply a version of the original position and veil of ignorance to the original issues that brought us here today. So, in the exercise, from behind the veil of ignorance, you know a few things. You’ll be living in a well-ordered democratic society. Even behind the veil of ignorance, you know that you will desire fairness and justice. You know that you want your fair share of primary social goods, as Rawls called them. You also know the basics of human psychology. You know, among other things, that people are attracted to power, that they seldom surrender power voluntarily, and they consolidate it whenever they can. They are more often purely self-interested than not, but there is much we do not know behind the veil of ignorance. We do not know what representative we will have at any given time. We do not know if your representative is conservative or liberal, is a Democrat or Republican or Independent, is rich or poor, is in the majority or minority. From behind the veil of ignorance, you do not

16. *Id.* at 118.

17. *Id.*

18. *Id.* at 119.

know whether your representative shares whatever you may have on energy or education or on taxes or trade or on anything else. You do not know whether your representative will agree with you—all of your views, some of your views, or none of your views. You do not know if you, yourself, will be rich or poor, urban, suburban, or rural, or whether that status will change over time.

And so the question of the exercise is from that vantage point before you know your particular lot in life and before you know the attributes of your particular representatives you might have to choose from—what are some of the rules of the road that you would reasonably advocate to maximize just and fair representation and honest government? And what are the rules that you would be prepared to live with?

From behind the veil of ignorance, what would you as future citizens choose in connection with your social contract? What would you choose for the rules for your representative in order to ensure honest government? Would you choose gerrymandered districts? What would you criminalize and what would you make a mere censure offense? Would you want a level of self-policing on the part of elected officials or trust government to an outside watchdog or some combination? Would you want rules that make it easier for challengers to get elected or easier for incumbents to stay in power? Would you favor unlimited terms for your representatives or term limits or some set of rules that tended to cause natural and substantial turnover? At the ballot box, how would you ensure against conflicts of interest? Would you permit unlimited outside income? Choose rules that favor disclosure of outside income? Would you fashion a weak legislature and strong executive? Or would you want more balance and checks working in both directions? Would you desire a system in which individual representatives have some power or one in which all power is concentrated in a single leader, or, perhaps, just three leaders? Would you want to know whether your representatives were being paid by industries affected by their decisions and with how much specificity and how much sanction if that information is not disclosed? Would you want to reward corrupt representatives with lifelong pensions? Would you prefer public votes on all matters of importance, including legislation—person by person? Or would you choose shadowy committee procedures that make it hard, if not impossible, to know what the chosen representative stands for? How difficult would you want to make it to convene a constitutional convention? How difficult would you want the constitutional change to be?

Now I do not have particular views on any of these particular questions, but it seems these are the kinds of questions worth asking. Sometimes—for reasons of principle and clarity, outside of the give and take of politics—sometimes it is better to ask first what is right and then see what is possible, from the perspective of the people who pine for honest government.

Let me end by saying that all this discussion about public corruption and the arrests and commissions that take place have people sometimes saying that they feel pessimistic and they say to me, “Preet, you are always so negative!” I am actually not pessimistic. I am actually optimistic. I think

the level of attention based on the cases we brought and forums like this and others have caused people to be thinking more deeply, more thoughtfully, and more actively about the ways in which we can have honest government than I have seen in a very, very long time. And there are so many smart and dedicated people who have been blatantly watching as bad things happen—who, I think, are coming alive now. So I actually do feel a lot of optimism.

So before we mourn the futility of it all—the seeming futility of affecting our flawed democratic institutions, the seeming incongruity of principled people to serve in compromised settings, the seeming impossibility of healing a deeply diseased political body—we can remember another metaphor that John Rawls sometimes evoked: the proposition that even seemingly immovable objects can be moved.

It is the idealistic crying of Archimedes who posited that if circumstances were right, he could lift the very earth off its foundation. It is what is known as the Archimedean point. To move Earth itself, all that he needed was a long enough level and a place to stand.

To put it in blunter New York terms: If we can clean up Times Square, can we really not clean up Albany? Just give good people a long enough lever and place to stand.

Thank you.