

“Facts Are Stubborn Things”

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Charge to the Class of 2017

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In my last official act today, it is my job to charge the class of 2017.

Before I do, though, let me say to the family, friends, and loved ones of our graduates: Thank you for being here today to mark this important occasion with them and with us, thank you for sharing these exceptional people with us, and, most of all, thank you for supporting them and helping make them who they are because, as I said at the beginning of this event, they rock. It has been our privilege to teach them and to know them, they have helped make us better, we are sad to see them go, but, like you, we cannot wait to see where they will go from here.

Back to the charge to the graduating class. What, you might ask, is a charge?

There are many different meanings of the term: there is the bill, the expense, what you might be inclined to call, say, the tuition; there is the always-contested call in basketball—the charge—or was it a block?; there is the jury charge; and there is of course the criminal charge.

But for me, the term “charge” calls to mind the military charge. This is the battle maneuver when one side advances toward the enemy, fast, and engages in close combat. It is a shock attack, and has been a decisive moment in many battles throughout history, from the Greek phalanx to the Charge of the Light Brigade—so decisive (in both victory and defeat for those charging) that the maneuver has been remembered in poems, songs, and depicted in many films. Some of you in this audience have been in battle. I have not, so when I think of the military charge, I am embarrassed to admit in the presence of actual soldiers that I think of the movie version. In that version, the leader is in front of the assembled army or cavalry, says some words, turns around, shouts charge, and they all surge forward.

There are three key features of this speech in advance of the charge, and I am going to follow them today: that speech is honest in admitting that what is ahead will be difficult; that speech reminds the assembled group that, despite that, “they got this”; and, you will be relieved to hear, the speech is short because...the battle awaits. In our case, the reception awaits.

So, let me say two things. Briefly.

First, let me be honest in admitting that what lies ahead might be difficult. I say that even though, in so many ways, you have it all. Your talent, your learning, your dedication, your smarts, your verve, your savvy, your many opportunities. Even with all of that on your side, what is ahead of you is daunting. Building a life, professional and personal, that has meaning and brings satisfaction for you—that’s no easy task.

But I want to focus on another challenge that revolves around the state of the world you are entering. Let’s face it. Daunting does not begin to capture it. There is one challenge today that should rightly shake us all—deeply so—and especially those of us trained in law. I am sure you know the often-repeated phrase that “*facts are stubborn things.*” The challenge I want to talk about is this: today, facts don’t seem so stubborn.

A common intuition is that we are in a state of crisis over what is and is not a fact because of our many divisions—especially our partisan divisions—that fuel our inability to agree on facts. But this cannot be right. It is simply not the case, and I think I have the historians on my side here, that we more divided today on matters of great importance than we or any other society has ever been. Compared to the Revolutionary War? The Founding? The lead up to and the Civil War? Reconstruction? Have we forgotten the history of dueling? Aaron Burr—then the sitting vice president of the United States—killed Alexander Hamilton in a duel in 1804. In 1859, the Chief Justice of California David Terry shot and killed California Senator David Broderick in a duel triggered by a rift over slavery. And it wasn’t just dueling. In 1856, a South Carolina Congressman Preston Brooks bludgeoned Massachusetts abolitionist Charles Sumner with a cane on the floor of the Senate. A similar beating by cane happened in the Capitol in 1866. The fact is, profound divisions have existed here (and in many other nations) many times before.

What is different today is the technological and digital change that makes it difficult to know whether what we are reading, or seeing, or hearing is “true” – true in a non-fancy sense. By non-fancy, I just mean a statement about the way the world is. Is that actually my neighbor who is talking in that video that was just sent to me? Is this email from my sister? Am I to believe that what I am observing is happening?

In an age of social media, bots, artificial intelligence, digital manipulation of voices and video, hacking, and hijacking of personality—we are experiencing something new. New in good ways of course: We are more connected to one another, our sources of information are broader, and these tools are both a reflection of and have unleashed creativity. But this is new in bad ways too: We are much more vulnerable to being convinced of the truth of something that has no basis.

We should all be disturbed by this, but, as lawyers, we have particular reasons to worry. The design of all established legal systems, whether they be adversarial or inquisitorial, reflects serious thought about how facts are to be established and tested. Our own legal system is committed not just to facts, but to specific procedures that guide how we

ascertain, prove, and test facts—the hearsay rule, the right to confront witnesses, the right to counsel to name just a few. These procedures were developed over centuries through trial and error.

Let me go back to that phrase “facts are stubborn things” to highlight one of the most important reasons legal systems are devoted to careful methods by which we must establish facts. The phrase came from the mouth of a lawyer, and a famous one at that. It was uttered by the country’s second president, John Adams, 27 years before he was elected president. It was part of his closing argument as he defended a group of British soldiers—a reviled and hated group of soldiers—who were accused of murdering colonists in what we now commonly call the “Boston Massacre.”

I suspect you know the story of the Boston Massacre. It is March 1770, in a context of escalating tensions between colonists and the British. Two years earlier, British troops have been sent to Boston to maintain order and make sure the new tax acts are enforced. Those soldiers were an irritant in Boston, and the troops were regularly harassed by colonists. In David McCullough’s telling, late on the snowy evening of March 5, 1770, a single British sentry was being taunted by a group of colonists. A church bell (which served as a fire alarm) rang and crowds came into the streets, and many came from the waterfront with sticks and clubs. Several hundred gathered around the guard who was then reinforced by 8 British soldiers. The soldiers were hit with oyster shells, sticks, trash, and there were cries of “kill them, kill them.” In the chaos, the soldiers opened fire, ultimately killing five men.

Seizing an opportunity, many patriots capitalized on the event to stoke anti-British sentiment. Samuel Adams called the killings “bloody butchery.” Paul Revere had a major hand in creating and distributing a famous engraving that depicted the event as a slaughter—with British troops in redcoats lined up, in the light of day, opening fire on the colonists. The facts at trial revealed a very different story. Pretty low-tech, but it turns out that Paul Revere was a master of fake news.

The day after the event, John Adams, then 34, was asked to defend the British soldiers and their captain. He accepted on principle—the principle that no one should be denied the right to counsel and a fair trial. But, after studying the facts, he became convinced of the actual innocence of the soldiers, that they had acted in self-defense. It was in this context that, after an exhaustive review of the evidence adduced at trial, he closed his argument to the jury in this way:

“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.”

In the end, Adams obtained acquittals for the captain and six of the soldiers; the remaining two soldiers were found guilty of manslaughter, not murder. Late in life, he

called it the most exhausting case he ever undertook, but “one of the best pieces of service I ever rendered for my country.”

The lesson of Adams and the trial is one that I believe you know given what you have learned and what you have done here. There are countless examples of tragedies and injustices that occur if a legal system does not have a workable system for the establishing and testing of facts—either because participants don’t even try, as when the mob takes over and dispenses its own brutal justice, or because the guardians of the system of fact-finding fail. You know too who suffers when that happens. It is the people at the margins, the outnumbered, the hated—the nine young African-American men jailed in Scottsboro and nearly murdered by a mob only later to be subjected to show trials, or the poor drifter Clarence Earl Gideon convicted without a lawyer on the testimony that was later picked apart easily when he did have a lawyer. There is no mystery about what will happen, and who will suffer, when fact-finding breaks down.

You leave here when our ability to actually establish facts about the world is under serious threat, and you know well, as people trained in law, just how dangerous that is.

The moment is challenging, but you are ready to face this challenge. Class of 2017: You’ve got this.

First, it is your education and training in law. Regardless of your professional path, you are students of law and legal systems, and you have internalized the ways of a profession that knows the centrality of facts, and the importance of ascertaining them fairly, a profession that has developed and refined procedures over centuries to do so. What you know about law, in other words, gives you special appreciation of the danger of a breakdown in our capacity to establish what is true, but it also equips you to meet the challenge. And you have internalized these ways of thinking like a lawyer. In the past few weeks, I’ve asked many of you how law school has changed you. Much of what you said focused on how you have intellectually changed: You think more rigorously and critically and analytically; you are more capable of considering things from many angles; you are able to anticipate counter-arguments; you grasp complexity and nuance and that means you don’t punt on the hard problems; you are more capable of questioning the propositions of others in a respectful and substantive way; you better appreciate the need to understand and engage others even when you do not agree or even think you understand their position. These are minds of people who do not rush to judgment without ascertaining the facts—a person of this disposition does not join the mob. In fact, a person of this disposition does the opposite. She steps to the front and calms the (in John Adams words) the “wishes” “the inclinations” and “the passions” that threaten to override the stubborn facts. You are exactly who we need to meet this challenge.

Second, you are doers, problem solvers, people of action. We are in awe of what you can do, as demonstrated by what you have done here. The clinic clients you have represented, the policy labs projects you have completed, the new organizations and programs you have created, the issues you have put on the agenda for this school, the building of community you have done. And this – this doing, this solving problems, this engagement for the good – this is what matters to so many of you. When I asked you about your most meaningful and memorable experience in law school, so many of you identified work you have done for others, and the community you helped build here.

Third, to use an over-used word, you are inspiring. We have long thought that—that’s why we recruited you here. We are betting on you to face the challenges of the future. Maybe the most compelling evidence for this is what you think of each other. You told me that you are inspired by your classmate’s talent, dedication, creativity, ambition and good will; you are in awe of their ability to rise to challenges; your classmates have given you an appreciation of what committed people can accomplish when they work as a team; your classmates have enlarged your own sense of both your ability and desire to create change in the world. One of you put it just the way I would: “I feel better about the future knowing that my classmates are the ones charging up the hill to meet it.”

I admit it, the task is daunting; but there are no better people to meet it than you.

Chaaaaaaarrgggge.