

GRADUATION, MAY 6, 2007

Thank you all for your invitation to speak today. I was touched and honored to be asked. It is a teacher's highest privilege to address a class as it stands on the world's doorstep.

It is also a great challenge. A graduation speaker's job is to take three years of discovery, drudgery, and delight, wrap it up in a couple hundred words, and say, "Here – *this* is what we've done together, and *this* is what you take away."

Several days ago I sat struggling with this task, arranging and rearranging my couple hundred words. . . . A current news story offered some help. Over the past several weeks, the House Judiciary Committee has been posting on line thousands of emails from within the Justice Department. The topic was the recent firings of several United States Attorneys. These emails offer a peek inside the highest echelon of American law enforcement. And they hold several lessons about what we should be teaching here – and perhaps what we fail to teach. . . . [They teach] lessons for all lawyers who live in large legal bureaucracies, the lives many of you soon will lead.

They teach most of all the risks of divided accountability. At the tops of many emails were rows of recipients' names. Next to many names were acronyms and titles. The acronyms stated agency affiliation – USAEO, ODAG, WHCO, USAMT. And the titles were often lots of layers thick – Principal Associate Deputy Attorney General, Associate Counselor to the Director, that sort of thing.

Amid this chaos of affiliation and subordination, it sometimes seems no one was in charge – and no one was making the fateful decision to fire the eight U.S. Attorneys. As our alumna Dahlia Lithwick wrote, “It seems that at no point . . . did any human brain fire an actual neuron that triggered the message to terminate an actual U.S. attorney.”

And the two people at the top seemed least in charge of all. I did not see one email from the Attorney General or copied directly to him. Even his second in command, the deputy attorney general, seemed oddly detached. When he finally spoke up just days before the firings, he sounded like a spectator, unable to stop what his subordinates had set in motion. He wrote of one targeted prosecutor two days before his dismissal: “I’m still a little skittish about Bogden. He has been with DOJ since 1990 and, at age 50, has never had a job outside of government. . . . Sorry to be raising this again/now; it was just on my mind last night and this morning.”

That U.S. Attorney, Daniel Bogden of Nevada, was fired with the others on December 7. An internal Justice Department evaluation had concluded he was “highly regarded by the federal judiciary, the law enforcement and civil client agencies, and the staff of” his own office. Two weeks ago, when the Attorney General himself testified before Congress, he insisted again and again that he had simply relied on the “consensus judgment of [his] senior leadership.” When asked to justify Daniel Bogden’s firing, he said, “Senator, this is probably [the] one that to me, in hindsight, was the closest call. I do not recall what I knew about Mr. Bogden on December 7th. That’s not to say that I wasn’t given a reason; I just don’t recall the reason.” The emails, he said, showed “that the deputy attorney general agonized over this one. And I think that’s good. That’s a good thing that we’re thinking about what is the effect of making this kind of decision on people.”

Well, sort of. This is the problem when no one takes responsibility, when no one claims a decision. There's a failure of decency and a failure of guts—the decency to take stock of the impact of one's actions and the guts to speak up when it counts.

When I speak with you about decency, I speak without concern. I know most of you a little and many of you well. It would be hard to assemble a more decent, compassionate, and humane group. But guts are something else. It's easy out there to feel powerless. The stakes can seem enormous. Nerves can fail. The Justice Department lawyer who recently told Congress, "I could have and I should have helped to prevent this," had decency—but it was only the decency to see that his nerve had failed.

My worst memories of practice are of those days my nerve failed. Let me tell you about one. I had been prosecuting about three years when a new case crossed my desk. A young man's leg had been broken in a public park in broad daylight on a Sunday morning. This was a no-nonsense, contract-style job. The attacker had an iron bar. He broke our victim's leg, climbed back in his van, and drove off.

As cases go, it was a strong one. The victim had seen his attacker. So had his teenage friend, who hailed a passing police cruiser. As the two men told the officer what happened, the defendant drove by in his van. "That's him!" the men shouted. The officer stopped the van, arrested the defendant, and found his weapon. The weapon was just as the men had described it—an iron bar, about three feet long, an inch thick, and very heavy. It had no obvious use besides breaking people's legs. The doctor who set the victim's leg showed me the X-ray. One of the shinbones was snapped cleanly in two. There weren't many ways that could happen, the doctor said.

And the defendant's crime was hardly out of character. His last turn with the law had landed him in state prison for assault with attempt to kill. He had shot his victim from an arm's reach away. Only good surgeons and good fortune had saved him from a life term for murder. Instead he served six years. Now he was free — and off to a bad start.

But my case grew harder. Our young victim was probably a drug dealer, the police said, who had wandered onto someone else's turf. Predictably he grew scarce and though subpoenaed to appear for trial, never showed. Neither did his friend. No doubt they were scared. The defendant was a bad guy, and they had thought better of accusing him. But my job as prosecutor seemed clear. A vicious defendant should not walk free because his victims fear him. So I asked the judge to order my witnesses' arrest, and she sent two officers out to find them.

An hour or two later, the officers returned with the victim in handcuffs. They couldn't find his friend. And the victim, now angry at everyone, refused to testify. He insisted his testimony could incriminate him.

Now I had a decision to make. If I went forward, I would have to put on my case without victim or eyewitness. My supervisors advised me to drop the case — to save my fight for another day, for a case I could win, for a victim who wanted our help. But I felt they were wrong. I still had an iron bar, an x-ray, and a doctor's opinion. And I had a police officer who could tie these pieces together. He had seen our victim with his freshly broken leg. And he had found an iron bar in the defendant's passing van after the young men had shouted their identification. I felt I could win this case. And I felt I had a duty to try because this was a defendant who could kill one day.

Yet I dropped the case. When the moment arrived and it was time to call in a jury and the judge asked if I was ready for trial, I moved to dismiss. I told myself it was the sensible thing to

do. It's what my supervisors recommended. It was a wise use of court resources. I had a stack of other cases on my desk.

But as soon as the words were out of my mouth, I knew I had simply lost my nerve. I had grown trial shy, as courtroom hacks call it—afraid of long days of grueling combat and long nights spent patching cracks and bracing for the next day's fight. And afraid of losing. I didn't want to see the defendant's smug smile if the jury heard my evidence and sent me packing.

The judge, who was an old prosecutor herself and a little worse for the wear, knew all this. When I uttered my request to dismiss, she scrunched up her nose and turned down her lips and said, "You could win this!" And I knew she was right. I knew I had just watched my nerve fail, and it made me cringe.

Not long from now, you'll face choices that test your nerve. And you will learn as I did that one option you never will have is not to decide. You can confer with colleagues and superiors, you can ask their advice, but in the end you will have to decide.

And when you face those decisions that test your nerve, take the time to walk a few steps down the road and look back at yourselves. Don't leave yourselves wishing as I did that your nerve had held.

You will be rookies. You may have cheap desks in bad offices; you may spend your days doing document review. You may have six levels of hierarchy over your heads. But still it will be true, beginning with the first decision you make, that every decision you make will be your own.

You may be rookies, but keep your nerve. Don't get rattled. And don't get pushed around.

Thank you.