

West Point "Evening Lecture"
Wednesday, October 17, 2007

Thank Colonel Ryan and General Finnegan

Thank cadets: Finally and most importantly, I want to thank all of the cadets here this evening—not for attending this talk (I'm told it's not optional!), but for all you will do to defend, protect, and strengthen this country. Each of you has made a decision—a profound commitment—to join "the long grey line" of service. I am in awe of your courage and your dedication, especially in these times of great uncertainty and danger. I know how much my security and freedom and indeed everything else I value depend on all of you.

Honored to give Evening Lecture: That is why I am honored—and humbled—to be here tonight delivering this year's Evening Lecture. I've been told that I'm following in some pretty big footsteps in giving these remarks: people like Antonin Scalia and Rudy Giuliani, to name just two. But in truth, the importance and meaning of this lecture for me has much less to do with the luminaries who have delivered it in the past than with the audience listening to it this evening. I don't accept many outside speaking invitations; this may be the only talk of this kind that I'll give this year. I accepted *this* invitation primarily to thank all of you senior cadets -- and to wish you godspeed as you go forward to serve your country and your fellow citizens in the greatest and most profound way possible.

Honored to be at West Point: This is a special institution, the United States Military Academy. It is an institution that symbolizes excellence and that produces leaders who have an impact on the world. Those words—"excellence," "leadership," "impact"—come pretty easily to me; I use them all the time when talking about Harvard Law School. And in fact, I think there are quite a few similarities and connections between my home and yours, between Harvard and West Point:

George Washington: For starters, both have campuses in some sense chosen by the same person for the same reason. As you probably know, George Washington was instrumental in the location of the West Point campus. He believed that this high ground overlooking the Hudson River was an important strategic position. You may not know that the Harvard campus was, at one time, one of George Washington's strategic positions. In 1775, on the eve of the American Revolution, a small wooden house in Harvard Yard served as one of Washington's command posts. That little building—known as Wadsworth House—still stands today.

Toughness: A more present-day similarity between our schools is that both have a reputation for toughness—for demanding the very best from students. At Harvard Law School, we pretty well invented a technique of teaching called Socratic Method – a kind of relentless question-and-answer, designed to make students think harder than they knew they could. Law students often find this way of learning difficult; and they sometimes complain about it. But as I've been reading about West Point, I've decided our students

don't really know how lucky they are. I've been thinking that our next innovation should be the introduction of West Point's "Indoor Obstacle Course Test." Of course, I'm not sure our students could handle the part where the oxygen is sucked out of the gym to make the experience still more exhausting. So maybe we'll just stick with Socratic Method. But you get the idea: both schools believe that we should challenge our students to make them stronger.

People: Yet another connection between our two schools is the people we have in common—the men and women who've attended these two great institutions. I'm thinking of people like Senator Jack Reed of Rhode Island, who served in the 82nd Airborne Division, and is now a member of the Senate Armed Services Committee. I'm also thinking of Colonel Mark Martins, who is currently serving in Iraq as a top adviser to General Petraeus. And, more recently, there's Kevin Terrazas, who came to Harvard Law School following a tour in Iraq with the 101st Airborne and graduated just last year. When Kevin was a student, he got to the final round of our very prestigious moot court competition, and was questioned there by Justice Scalia and two other federal court judges. For most students, this is an intense and, frankly, very scary experience. But Kevin was cool as a cucumber. When I went up to him and commented on his composure, he told me he had some experience with stressful situations, which kind of put things in perspective.

At odds on don't ask: In part because of these connections, still more because of the vital role the military plays in the well-being of our country, I have been grieved in recent years to find your world and mine, the U.S. military and U.S. law schools, at odds – indeed, facing each other in court – on one issue. That issue is the military's don't-ask-don't-tell policy. Law schools, including mine, believe that employment opportunities should extend to all their students, regardless of their race or sex or sexual orientation. And I personally believe that the exclusion of gays and lesbians from the military is both unjust and unwise. I wish devoutly that these Americans too could join this noblest of all professions and serve their country in this most important of all ways.

Partners: But I would regret very much if anyone thought that the disagreement between American law schools and the US military extended beyond this single issue. It does not. And I would regret still more if that disagreement created any broader chasm between law schools and the military. It must not. It must not because of what we, like all Americans, owe to you. And it must not because of what I am going to talk with you about tonight – because of the deep, the fundamental, the necessary connection between military leadership and law. That connection makes it imperative that we – military leaders and legal educators – join hands and be partners.

Law all over: I think no one in this country understands this connection between the military enterprise and the legal enterprise better than military officers themselves. Ask a person on the street what's the connection between armed conflict and law, and she'll probably tell you there is none. War, she'll tell you, is the place where anything goes, as removed from legal rules as any sphere of activity could possibly be. But people who have served – still more, people who have occupied command positions – in the military

know better. They know how many of the decisions they make are affected and constrained by law. Very few of you will become military lawyers. But most of you will – and indeed will *have to* – consider law, reflect on law, and even make judgments about law often in your military careers. Law will surround you, and you will feel its presence all over.

But what should your stance, your attitude toward all this law be?

New Yorker: I was reading the New Yorker last week, which really means I was looking at the cartoons. One seemed relevant to this talk. It was a picture of a man. On each of his two shoulders, there was a miniature version of himself. The mini-man on the man's left shoulder, whispering into the man's left ear, had a halo: the caption underneath him said "run it by legal." The mini-man on the man's right shoulder, whispering into the man's right ear, had horns: the caption underneath him said "run it by accounting." Now I don't think we should denigrate the accounting profession; and indeed I don't think we should glorify the legal profession. The reason I mention this cartoon to you is that it illustrates different approaches to decision-making in situations where law is, or at least may be, in the background. One can treat law with more respect or less; give it more or less power; evade, manipulate or bend it more or less; view it more as a nuisance or more as a thing of glory.

Constitution corner: There is a remarkable place on this campus, which suggests what approach that the military should adopt, and indeed long has adopted – the approach, that is, of honoring the law and abiding by the constraints it imposes. The place, which I'm sure all of you know, is Constitution Corner. It was a gift of the West Point class of 1943, a group that surely knew something about warfare and its sometimes extraordinary stakes. Constitution Corner has five plaques, each with important text such as the cadet oath, the officer oath, and so on. The fifth plaque is titled "Loyalty to the Constitution," and begins with the following statement: "The United States boldly broke with the ancient military custom of swearing loyalty to a leader. Article VI required that American officers thereafter swear loyalty *to our basic law*, the Constitution."

Meaning: I do not think I have ever come across a more moving tribute to the rule of law. What Constitution Corner says, almost in so many words, is that we live in a government of laws and not of men or women. That fidelity – faithfulness – to law is the foundation stone of our society. That the military fully accepts, and indeed reveres, this national commitment. That even in the sphere of life most distinguished by power and force, respect must be accorded to legal norms and principles.

Examples: Now it is important, but relatively easy, to state these propositions. It is still more important, and much, much harder, to figure out what they require, and then to do what they require, in concrete instances. So I thought I would give you a couple of examples of people struggling to uphold the rule of law in difficult circumstances, and needing great courage and integrity to do so. The stories come from my world – the world of lawyers and actually, I must admit, the world of Harvard Law School professors – because that's what and who I know. But after I relate these stories, I want to come

back to the question of what lessons they offer to people like you – people who are serving in government, and particularly people serving the military, not as lawyers but in other roles.

Cox introduced: The first story comes from before you were born. It is the classic, the paradigmatic story about the rule of law from your parents' generation – and from mine. It involves a Harvard Law professor named Archie Cox, now deceased, who had a long and illustrious career, but who is best known for the choices he made during a few months in 1973, when he defined for an entire country what the rule of law meant and what it required.

Cox story: The story begins when President Richard Nixon's Attorney General appointed Cox to the position of special prosecutor to investigate any crimes arising out of the burglary of the Democratic National Committee offices in the Watergate building during the 1972 presidential campaign. Shortly after he began his work, Cox learned that President Nixon had secretly taped conversations in the White House potentially relevant to his investigation. Cox subpoenaed those tapes. Nixon resisted the subpoena. Cox took the matter to the courts, which ruled unanimously in Cox's favor. Still, Nixon refused to hand over the tapes and ordered Cox to stop pursuing them. Still, Cox refused to back down, saying he was bound by law to seek evidence relating to his prosecutorial charge. Nixon responded by having Cox fired. But that was a pyrrhic and short-lived victory, because that very act marked the beginning of the end of Nixon's presidency.

Cox and the rule of law: In a then-famous press conference that he gave after he was fired, Cox talked about what was at stake in his actions and decisions. He said: "Whether our government shall be a government of laws and not of men is now for the American people to decide." He spoke, that is, of the primacy of the rule of law – of the necessity for governmental officials, including the very highest governmental official, to live under law, to defer to its purposes, to bow to its demands. Archie Cox taught a nation in those few brief months about these values. He taught a nation that it would be strong only to the extent that *law* would be respected *above all*. For my generation, his story – the story of a humble professor-qua-prosecutor facing off against a President, with nothing but the law on his side – serves as a kind of reference point for what law means and how it matters in a nation.

New story: But today this story may seem too much like *history* – too remote and distant in time to speak vividly to you. So let me add another rule-of-law story, much more timely for you – a story we've learned about only in these last few months. This one also has elements of high drama. This one also concerns a dispute among high governmental officials. This one, again I have to admit, also involves a Harvard Law professor. Most important, this one also teaches fundamental lessons about the role of law in a good society. And I should add here, as I perhaps also should have when reciting the Archie Cox example, that I do not think this is in any way a story about politics. Everyone in the incidents I'm about to recount is a Republican; everyone in these incidents is a conservative. What divides them is not their politics, but their approach to law.

Goldsmith views: The story begins when Professor Jack Goldsmith arrives at the Office of Legal Counsel in the Justice Department in 2003. Goldsmith began to review a set of opinions issued by that office in the prior two years and found them not legally supportable. At least one of these opinions involved the use of coercive interrogation. Another of these opinions, the one most relevant to the story I will tell tonight, related to and authorized a top-secret wiretapping program. Goldsmith agreed wholeheartedly with the purpose of this memo, which was to prevent another terrorist attack. In a recent newspaper article about these matters, Goldsmith explained that he is no civil libertarian, but instead a lifetime security hawk. But Goldsmith thought that there was no legal support for the opinion authorizing the wiretapping program. He wrote in a recent book with respect to this and several other matters: "I went as far as I could. But at some point the legal arguments ran out." He took his concerns about the wiretapping opinion to the Deputy Attorney General James Comey and the Attorney General John Ashcroft, each of whom accepted Goldsmith's analysis. They all agreed that the opinion had to be rewritten and that the wiretapping program, in certain important respects, had to change. And they communicated that view to the White House.

Hospital scene: Now shift your focus with me to then-Attorney General Ashcroft. Just a few days after he has informed the White House of his view about the wiretapping program, he becomes seriously ill and is taken to the hospital for an emergency operation. The next evening, while he is under medication and in intensive care, he receives two visitors – the White House Chief of Staff Andy Card and the White House Counsel, Alberto Gonzalez. Although Ashcroft, because of his incapacitation, has officially handed the reins of power to his deputy, Jim Comey, these two high White House officials press Ashcroft to re-certify the wiretapping program in its then-current form, thereby allowing it to continue. From his hospital bed, both groggy and in pain, Ashcroft refuses. Back at the Justice Department, numerous officials are ready to resign over the matter. As a result, the White House eventually backs down and agrees to comply with a set of additional legal requirements for the wiretapping operation.

Unbelievable: It's an extraordinary story really. The standoff between two powerful sets of people, the hospital bedside scene – all of this makes it seem as though it comes from the movies. And yet it happened.

Lawyers all over: What is striking is that there are lawyers on both sides of the story at each of its stages. One lawyer who issues expedient and unsupported legal opinions to justify whatever his clients (in this case, high officials in the White House) want to do. And another lawyer who questions those opinions on the basis of precedent and principle and insists, even as he tries his hardest to serve his client's legitimate goals, on steadfast adherence to legal restraints. A third lawyer who attempts to pressure a sick and sedated man to declare something legal that he thought was not. And the final lawyer, that same hospitalized man, who refuses to bend under this pressure notwithstanding his illness, his own career goals and ambitions, and his appropriate loyalty to the President. This is a story, to put it bluntly, of some lawyers who failed to respect the rule of law and of other lawyers who, Archie Cox-like, stood up for and vindicated it – who understood that law

represents a set of commitments that transcend and trump what is expedient at the moment.

Relevance: But what does all of this have to do with all of you? None of you are lawyers now; and most will never be. So why should you care and why should it make a difference to you that some lawyers understand, and others do not, that the rule of law governs – that the law and its precepts reign supreme, no matter how high and mighty the actor and no matter how urgent the problem.

Similar responsibilities: The answer, I think, is that even without a law degree you have similar responsibilities – not to know the law (no one can expect you to do that), but to honor and respect the law. The military, I think, has understood these responsibilities very well throughout the years; indeed, I think the Armed Forces ranks as one of the most law-conscious institutions in this country. The very class you're all taking demonstrates the point. Most college students don't get any training in law. You do. Why? Because the command structure of the US Army has understood that you will be in a position to determine whether law is followed, and because it wants to ensure that you choose law-compliance. In this sense, you too, no less than the attorneys whose stories I told, are guardians of the rule of law, which often requires great courage.

My executive experience: But still there remains the question: how does one fulfill this responsibility as a military officer who is not a lawyer? I would not presume to answer that question fully because there is so much I do not know about the application of law in war and other military operations. But I thought I might say a few very simple things relating to this question, which arise from my own experience in the executive branch of government. During most of the time I spent in the White House, I did not serve as an attorney; I was instead a policy adviser. So my position was similar in this respect to the one most of you will occupy: it was part of my job not to give legal advice, but to choose when and how to ask for it. Sometime I did that well; sometimes I did it badly. But looking back, here are some things I learned from the experience.

Ask: First, when in doubt and when possible, ask. I guess this brings me back to the New Yorker cartoon I told you about: run it by legal. I'm quite sure that in military operations this will not always be possible, just as it is often not possible for a police officer. But I also know that the military has gone a substantial way toward embedding lawyers in many kinds of units, or otherwise making them available for consultation. Use them. Use them even when you think they may say no. Use them *especially* when you think they may say no. That's when you need them.

Right people, right way: Second, ask the right people in the right way – meaning ask so as to get a real, not foreordained, answer. In the story I told earlier in this talk about counterterrorism policy, one lawyer always gave the White House staff the answers it wanted. So the White House staff kept on going back to that lawyer, and indeed arranged all the approval processes so that only he had access to information or authority to provide opinions. Convenient, but really not the point. The point is to talk with lawyers who will tell you when the legal arguments run out. And that means also giving these

lawyers the straight scoop. If you tell a lawyer only half the story, to get the answer you desire, there's not much purpose in going to the lawyer at all. Or to be more precise, the purpose can only be to cover your backside. That has nothing to do with the rule of law, only with its pretense.

Your problems: Third, insist that your lawyer understand your problems and their urgency. There's nothing worse than a lawyer who just tells you no, without giving you any ways to achieve your most essential purposes. The best lawyers, even when they have to say no, explore with you and discover alternative possibilities – ways of complying with the law *and* accomplishing your principal goals. When lawyers don't do this naturally, clients – that's you – should force them to do so. There's nothing that so undermines respect for law as the sense, almost always false, that law necessarily stands in the way of achieving legitimate and important objectives.

Not everything: Fourth and finally and perhaps surprisingly coming from me, don't think that law is everything. Even when the lawyers clear something, it may not be the right thing to do. It may be unethical, even if it's not illegal. Or it may be just plain dumb. I was amazed, when I worked in government, how often the legal question, once recognized, became the only question. That shouldn't happen. It makes for bad policy. And frankly, it makes for bad law too, because when lawyers begin to think that they are effectively making the critical decisions, and not just advising on one aspect of them, they tend to stop thinking as lawyers – which, if the rule of law is to be maintained, someone has to do.

Critical time: There is really no more important time to think both deeply and concretely about these questions – to determine how lawyers and non-lawyers alike can serve the rule of law. We are facing an enemy (actually, let me be blunt: all of you will be facing an enemy for the rest us) that does not share this value – an enemy that appears to take a kind of pride in its flouting of legal rules and norms. The world is watching whether, under this provocation, we adhere to our self-declared principles. And the world will properly condemn us to the extent *we* become lawless.

Back to the corner: And this is not merely a lesson for today; it is in fact a more timeless truth. Return with me to Constitution Corner and the West Point class of 1943. The members of that class were the ones who stormed the beaches at Normandy and seized the airfields at Iwo Jima. They witnessed firsthand the travails of war, and they courageously upheld their pledge, as I know you will, to “Duty, Honor, Country.” But when they returned home and came back to their alma mater – back home to West Point – they chose to commemorate something other than the battles and bloodshed they left behind. They chose, with Constitution Corner, to pay tribute to the rule of law.

Thank you for listening. And thank you for all you will do for your country.