

**“Support Our Troops”:  
Pride in Our Soldiers and the Rule of International Law**

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Ladies and Gentlemen:

It is a pleasure and an honor to have been asked once again to address the student body of the Western Hemisphere Institute for Security Cooperation during Democracy and Human Rights Week.

When I spoke from this very platform on this same occasion last year, my topic was whether, in light of what had been happening in the Middle East and the reports that were just beginning to be received from Guantanamo, the United States had lost the moral authority to insist that other countries obey international law. I thought that topic was especially appropriate here at WHINSEC, an institution whose very purpose of existence is to do exactly that: to remind Latin American friends and our own fellow citizens of the importance that this country has historically placed in the obligation to comply with the law of nations, including both the international law of human rights and international humanitarian law, also known as the law of war.

My answer last year was equivocal. I said that, in my opinion, the reports of torture and mistreatment by men and women in uniform, and the policies of our government that seemed inconsistent with its historical and fundamental commitments in this area, raised legitimate questions that the United States can and must be called upon to address.

I was personally very gratified last year to have been approached by many of your predecessors in this Command and General Staff Course who thanked me for presenting to them a point of view that they had rarely heard from other speakers. I am now inspired by the maxim that fools rush in where angels fear to tread. I am going to try to provoke you even more, I hope, than I challenged those who attended this talk last year. Because it seems to me that, from the perspective of our own military services, there is (as another old saying goes) an elephant in the room, and we ignore it at our peril. It has to do with the violations of international law committed by our own troops and our own government in prosecution of its policies in Iraq and globally, and what this means for the future of the international legal regime.

I hope that all of you who wear the uniforms of the United States Armed Services are as profoundly troubled as I am by the facts that we have all had to learn about the treatment of detainees at Abu Ghraib, Guantanamo, and Bagram. I hope that all of us who carry the passport of the United States are no less troubled than you are by actions we have seen and heard, which cannot be justified.

At this Institute, you have all learned that the obligations imposed by international humanitarian law are non-derogable. They are, to use the term that international lawyers

prefer, *jus cogens*. That is, there are, and there can be, no acceptable excuses for ignoring those duties. It is not permissible to torture prisoners just a little bit, or to abuse only those who misbehave or who challenge their guards in especially obnoxious or offensive ways.

The Western Hemisphere Institute is founded on the notion that members of the United States military are competent to impart to everyone who passes through these doors a deep respect for the rule of international law, and for the specific regulations that govern conduct on the battlefield and afterward. Students are taught here about how those rules have come to emerge in their current forms: about their grounding in principles of history and of morality, and also about their utility in practical situations. You learn here that not only is it morally and legally wrong to torture detainees, but it is not a good war-fighting tactic: it is unreliable as a developer of solid information, and it is risky in that it subjects you and your own colleagues to similarly brutal treatment should you have the misfortune to be taken prisoner.

So you have learned that mistreatment of prisoners in war is illegal, and it is dumb. Armies and soldiers committed to the rule of law agree on this, and so do armies and soldiers who want to accomplish their missions efficiently so that they can return home.

Yet we must now admit something, publicly and contritely, before this audience largely composed of military officers from Latin American countries who have come here to learn about the current state of military arts and sciences, and that is this: officers and soldiers of the United States Army, wearing the very uniforms you see in this room right now, have engaged in systematic and deliberate acts of torture, both near and far from the battlefield, over the course of their campaigns in Iraq and Afghanistan and elsewhere in the Middle East. They have, to make it absolutely clear, violated the most basic lessons taught to you by Major Raimondo, and by your Chaplain, and by your Commandant.

Now, these are facts, but however unpleasant it may be to confront them, they are not, in my view, the most important lesson now to be learned. The history of the world, and of warfare, sadly contains no small number of chapters in which disclosures like these have had to be made. Moreover, the existence of law violators is not itself evidence that there is no law, or that the law is not held in high regard by the vast majority who do not violate it.

My point today is not merely to report that there have been abuses, committed by individuals we American citizens believed to be incapable of such conduct, because they are members of this country's military. You already know that. It reflects only the fact of human imperfection, of which every one of us is aware. There is no cause to be especially troubled by the fact that soldiers operating in the name of this, or any, country are not perfect.

But what is truly bothersome, and what I believe is inconsistent with a real belief in the importance of international norms that govern behavior during armed conflict, are systematic efforts to ignore or to overlook these abuses, or even – and this is far worse – to suggest that, in some larger sense, they do not matter. Indeed, what is new about the U.S. campaigns in the Middle East, even in contrast with the War in Vietnam, is that political forces are managing to define patriotism in terms of willingness to accept this kind of misbehavior as somehow warranted in light of the nature of the struggle, or of the provocation that got us into these fights, or of the enemy.

I have stood on this platform many times discussing the importance of the international rules governing the ways in which men and women in uniform must treat combatants and civilians.

On any number of those occasions, during the question period following my talk, I have heard some variant of the following response. It usually comes from someone in the uniform of an armed service that has been required to engage in actual combat against irregular forces showing no allegiance either to law or to military honor.

“Sir,” my interlocutor usually begins, “it is all well and good that you tell us that we are required to be kind and respectful to those who are trying to kill us. But perhaps you do not understand what life is like for us. We are carrying heavy packs into the jungle, or we are operating in the darkness of our cities. Our housing and our food are inadequate, and we have no contact with our families. You say we must distinguish between those who bear arms and those who do not. But our enemy operates under no such restraint. Our enemy is not above trying to booby-trap a sleeping child or a pregnant woman. I have known service members who were lured into lethal situations by those kinds of trickery. The simple truth is that if I follow the guidelines that you tell me are required by the Geneva Conventions, or the Pact of San Jose, or the Sermon on the Mount for that matter, I will be risking the lives of myself and the men under my command. I am not willing to do that.”

Sometimes, the questioner goes on. “What is most troubling is that your analysis is not symmetrical, which is to say it is not balanced and it is not fair. If I do anything wrong, I am called a human rights abuser, an outlaw, an enemy of all mankind. But those who are trying to destroy my country and my battalion violate human rights every day in a thousand ways, and you do not condemn them. Where is the respect for my human rights and the rights of my men? Where is the acknowledgment that, in active combat, things are not nice, not pretty, and not orderly? Where is the recognition of the realities that we in uniform have to live with, in terrible conditions far from home, as we witness atrocities committed by people with no respect for life or for law, but who are dedicated to doing whatever it takes to overthrow our government, and to kill me and my troops?”

You have all heard such a position taken in your classes or in discussions with colleagues and friends, and perhaps more than a few of you will admit to having taken it yourselves. Obviously, my hypothetical questioner deserves an answer. How do we respond?

It seems to me that there are two parts to the answer we must give. The first is to acknowledge that which is correct in the premise of the question. The second shows that, however correct, the premise does not support the conclusion.

Yes, there is an asymmetry in international humanitarian law. Yes, the law does impose obligations on you as a woman or man in uniform, which are not dependent on whether the enemy considers himself to be bound by the same law. Yes, with the power that you are issued along with your service weapon comes a responsibility regarding the use of that weapon, owed to those who entrusted the power to you, which is to say the people of your country.

Moreover, as you know, members of the armed forces are agents of the state, and as such they are obligated to obey the rules adopted by the state in its capacity as a participant in the international community. The Geneva Conventions are among those rules. Only states are parties to treaties, and only states participated in the formation, negotiation, and entry into force of those treaties. But states can act only through individuals or groups of individuals. So when a nation agrees to adhere to a treaty forbidding the torture of prisoners, for example,

it agrees that it will not permit its agents – including those in its military forces – to engage in that kind of conduct.

But there is no unfairness in this asymmetry. It does not imply any justification for the acts of terrorists, or of other criminals. It merely restates the dilemma of everyone who is responsible for enforcing the law in any area: the other guy is going to cheat, and we know that from the outset, but that does not give you permission to do the same. If an illegal act is aimed at a soldier – if, for example, an apparent non-combatant launches an improvised explosive device at a convoy – then the perpetrator of that act may be taken into custody and subjected to all of the punishments that the law allows. If he is even arguably eligible to be considered a prisoner of war, then the Geneva Conventions dictate what is and what is not permitted. If he is a civilian, then there are domestic laws that apply. My own view, incidentally, shared by many (but not all) international legal scholars, is that there is no third category: the law of war has never provided for a class called “unlawful combatants,” or any of the other recent creative attempts to avoid the Geneva rules, while denying detainees basic due process rights guaranteed by domestic legal systems.

A combatant detained under the Geneva Conventions is entitled to certain rights and privileges, but he still may be taken out of the conflict and held prisoner. Compliance with those Conventions is not voluntary, it is obligatory. No nation has the right to declare that the Conventions do not apply to any situation that comes within its coverage. The Conventions are not, as the Attorney General of the United States is reported to have said, “quaint”: they are the law.

By the same token, offenses committed by people outside of the protection of the Conventions cannot be said for that reason to be beyond punishment. On the contrary, our President himself stated in the immediate aftermath of September 11 that a critical part of his and the nation’s objective would be to bring the perpetrators of those horrible attacks to justice. When Saddam Hussein was captured in Iraq, the first requirement of the Coalition forces was that he be put on trial, before a domestic Iraqi court, applying Iraqi law to determine both guilt and punishment. The categorization of terrorism as coming within domestic law, with terrorists to be treated according to that law, does not imply any lack of resolve in the campaign to eradicate this particular species of inhumanity. We in this country have handled such matters before, and in fact we apprehended, tried, convicted, and executed Timothy McVeigh for what had been at the time the worst act of terrorism ever committed on U.S. soil: the murder of nearly 200 men, women, and children at the federal building in Oklahoma City in April 1995.

The treatment of the soldier, on the one hand, and of the insurgent or the domestic terrorist, on the other, may be different, but violating the law is not a permissible option for either one, and the election of that option subjects him to punishment. As I suggested, therefore, the premise of my imaginary questioner’s analysis is correct, but it does not sustain its conclusion. There may be differences between the contents and the sources of law that apply to them, but criminal conduct may be resisted, and its perpetrators caught, and punished, within the limits of the law.

That, I think, is the answer to my questioner. International law does not ignore the rights of the soldier. Nor does it give license to those who attack him. It defends those rights, and it endorses the efforts of national legal systems to punish those guilty of violating them.

Within the question, however, there is another premise, typically unspoken. It is important that it be discussed, and I propose to do that now.

According to the laws of war, just as according to most countries' legal regimes, the vileness of the enemy's actions in no instance justifies retaliation in kind. It is a basic premise of humanitarian law – as, incidentally, it is a basic premise of ordinary criminal law – that acts of reprisal are not permitted, and that punishments must be meted out according to certain very strict standards, including the presumption of innocence. Everyone is entitled to a fair trial, including someone whose guilt is as clear to us as it can be. And the state bears a very heavy burden of proving the elements of guilt before it may deprive someone of his life, liberty, or property.

Let me digress for a moment to tell a story. I am currently representing a man on death row in the State of Alabama. Just a few weeks ago, my team and I presented evidence to a Circuit Court judge sitting in Alexander City – just about 90 minutes drive from here – in a formal hearing to establish that my client's trial and sentencing denied him basic due process rights. My good friend Tony Raimondo did me the honor of coming to watch a day of the trial, along with two of his WHINSEC students from Colombia and Guatemala. Their presence was noted, believe me: they don't see too many Colombian army majors in full uniform in the courthouse in Tallapoosa County.

There is no question but that my client, Tony Barksdale, fired the shot that killed Julie Rhodes in a hold-up that got out of hand. But there are many questions about the legal defenses that were available to him, the proper way to instruct the jury about the definitions of the various homicide crimes that may be relevant to this case, and whether there might be circumstances that would make it inappropriate to subject Tony to a capital sentence. There are very important questions about whether the assistance he had from his counsel at trial was effective, as the Constitution requires. In other words, the writ of habeas corpus, almost as old as Magna Carta, exists to guide the courts in trying to ensure that no one is subjected to punishment by the law unless the state has itself strictly complied with the law in seeking that punishment.

The family of my client's victim attended the trial. Now, as the father of two daughters, I cannot imagine the pain that Julie Rhodes's father must have suffered, and must suffer still, as he has to go on with his life without his only child. I watched as Julie's mother cradled a photograph of her daughter, and looked at it as the testimony about her murder was presented to the court. And I thought: as terrible as it is to contemplate what is happening in this courtroom right now, someone searching for a definition of the term "civilization" might start right here. Ours is a civilized system, in which the rules that govern society, and that regulate our behavior, are more important than the grief of one family, and the desire for retaliation of one community. Everyone is to stand equal before our law, and the Constitution grants everyone an entitlement not only to a fair trial, but to a judge's review of the results of that trial to ensure conformity with the laws and with that Constitution. Of course, these high principles are not always followed. But they are always the standard by which we measure ourselves.

It is ironic that the objective of this trial was to determine whether someone should be put to death at the hands of the state: a practice most members of the community of nations condemn as barbaric and uncivilized, and which they therefore ended a century ago. But that is a topic for a future talk.

In any event, the next day, the local newspaper carried a front-page story about the trial, and about the crime. I was somewhat disheartened to note that the reporter who was in the courtroom had found time to interview the victim's family and the state's lawyers, but never said a word to me or to my client's mother, who had also come to testify. But in the article, one of Julie's relatives was quoted as saying, "He did the crime, so why don't they give him the lethal injection right now? What do we need this trial for?"

What was really disappointing to me was the treatment of this remark as the simple expression of a point of view, the taking of one side in a debate. It is my belief that what this person said – and again, I offer this opinion with all respect for the emotional background against which it must be understood – is about as profoundly contrary to the notion of civilized society as any I can conceive. My immediate response to that article was to make myself a mental bet: I was willing to predict to a virtual certainty that the person who said that, like almost everyone else in central Alabama, drives a car or a pickup truck with a bumper sticker that says "Support our troops."

I wish that instead those stickers read, "Support the values of the country our troops are fighting for."

Amnesty International has just come out with its annual report for 2004. I have been a regular reader of those reports for two decades at least. Never in my experience has the United States been subject to such scathing criticism, not just for the usual offenses involving the death penalty and the International Criminal Court, and not only for the physical and mental abuse of detainees in the Middle East and in Cuba, but also for the denial of due-process rights to prisoners, and for the systematic attempt to hide these violations of the law from the scrutiny of outsiders. These, it may be argued, are worse offenses than the ones pictured at Abu Ghraib, since there can be no suggestion that they were undertaken in the heat of the moment, by someone whose real crime was simply not knowing where to stop.

Just after the report was issued, Senator Richard Durbin of Illinois read portions of it on the floor of the United States Senate, and asked rhetorically whether what he was reading described the actions of the German Wehrmacht in World War II or the United States Army in the 21<sup>st</sup> century. Irene Khan, the Secretary General of Amnesty, described the United States treatment of prisoners as "the new Gulag," invoking the Soviet camps in which millions were tortured and many of them died in the 1940s and 50s.

These two statements were a profound disservice to the cause espoused by their speakers. Analogies to the Nazi or the Soviet regimes are not helpful in understanding what is happening now, either on the ground in Iraq and Cuba or in the corridors of power in Washington. They are even less constructive in motivating improvements in the future. Senator Durbin and Ms. Kahn are public figures skilled in advocacy, and both should have known better than making remarks that themselves became the subject of public debate, which was therefore distracted from the proper topic, which is U.S. conduct, and in particular adherence to international legal rules, in the course of our various military campaigns.

It is important, however, that the Amnesty report be distributed and discussed, because it says things that are very important to our country, and to other nations who look to us for guidance or for lessons learned. It describes not the occasional brutal acts of a group of renegade enlistees, bored and scared in the stifling heat of Baghdad. It accuses our government of consciously and deliberately and systematically adopting a policy to circumvent and to

violate the laws of war whenever it suits us, and, worst of all, to justify those acts by suggesting that to denounce them is somehow an act of questionable patriotism.

It is not my position here that the Amnesty charges are entirely accurate: I do not have the information that would permit me to opine on that. We do know that Amnesty is not the only NGO to report such allegations, however, and that U.S. Government-sponsored investigations such as the one led by Major General Antonio Taguba found evidence supporting Amnesty's charges. We know that, time and again, uniformed defense lawyers from the Judge Advocate General's Corps, themselves captains, majors, and lieutenant colonels, are claiming that their clients at Guantanamo have been abused, in ways suggesting that their interrogators were following orders issued by military superiors, all the way up the chain of command.

In fact, let me say a word about the extraordinary role played by military lawyers, even to the level of the services' Judge Advocates General, in attempting to persuade civilian leaders not to abandon the historic American commitment to international humanitarian law. It was the highest-ranking lawyer in the Department of the Navy, for example, who protested the Justice Department's proposal to define torture so narrowly as to permit tactics obviously forbidden under the Geneva Convention. Military lawyers immediately and instinctively recognize that the use of unacceptable interrogation techniques puts our own service members at risk. It is lawyers in uniform, in this case prosecutors as well as defense counsel, who have complained about the unfairness built into the system of military commissions about to try defendants at Guantanamo.

Notwithstanding those efforts, however, Amnesty and other NGOs consistently report that abuses of prisoners are systematic, and are condoned by superior officers well up into the chain of command. No one wearing a military uniform with whom I have ever talked believes for a single second that the use of dogs to intimidate prisoners in Abu Ghraib, the kinds of abuse we all saw in those photographs, and the stripping and binding of detainees at Guantanamo, were policies adopted on the whim of a few privates first class. And yet it is very low-ranking enlisted personnel who are before courts martial, while those who gave ambiguous orders, or looked the other way, are all too often pinning stars onto their uniforms.

What in Heaven's name is going on here? How did we come to this? And why is there not an uproar among the United States population, insisting that the men and women of our military services, at all ranks and stages, as well as the civilians who have designed their strategy, adhere to the rules that lie at the core of our national character?

I want to propose an answer to this question. I think that there has been a cynical political manipulation of opinions in the United States, deliberately confusing criticism of the conduct of our military with a failure to feel gratitude to those of you who have shouldered the awesome burden of defending our country. And I think that is profoundly wrong.

This is not new, even in recent history. I well remember my high school years, in New York, when the slogan of the day was "Support your local police." What, I wondered then (and wonder now), can those words mean? Everyone supports the police in the literal sense, in that we pay the taxes that go to their salaries and pensions and Christmas parties. And nearly everyone supports them in a more principled way, in that we approve of their mission, and recognize that they are a vital element of a free and functioning society.

But the exhortation to “Support your local police” was not a battle cry to remind people to pay taxes, or to recognize the role that the police play in defending law and order. It had a very different purpose, a political one. It encouraged listeners to reject the arguments and the evidence and the testimony of individuals who were coming forward with charges of police brutality. It asked people to disbelieve accounts of police corruption and bribery. It entailed specific positions on various other important and controversial issues of the day, from race relations to the role of the state.

Yet instead of encouraging discussion of those issues, the proponents of these views concealed themselves behind clichés about “New York’s finest,” the “thin blue line” separating us, good citizens all, from the savages surrounding us. And the immediate response any time that the “support your local police” chanters were challenged was always one of these variations on the same theme: “you have it as good as you do because police officers are willing to do your dirty work”; “you would act the same way if you had to carry out the dangerous missions of our cops”; “you cannot imagine the sacrifices that these men and women have to make for you”; and “your criticizing them instead of thanking them is the very definition of ingratitude.”

I have a confession to make, which I doubt will make me the most popular person in this room. I cringe when I hear the call to “Support our troops” being used as a political slogan, to elicit support for the war in Iraq. I cringe because I do not believe that it is driven by any perceived lack of support for our men and women serving their country, whether in Fallujah or in Fort Benning. I do not believe that those asking me to “Support our troops” are urging that taxes be raised to pay decent incomes or to provide decent care to veterans and wounded soldiers, or to supply Bradleys on the ground in Iraq with proper armor. I do not think it has to do with improving conditions for our fighting men and women, or even for giving them a clear understanding of just what it is they are being asked to do.

I cringe because that line has become a rallying cry for a political point of view, and is now being used by those who would defend what cannot be defended. It is an attempt to avoid responsibility for illegal actions, not by trying to justify those actions under the governing law, not by pleading for leniency or for a different interpretation of the law, but by impugning the motives of those who insist that the women and men of the United States military, at all ranks, must obey the laws of war, and that their civilian leaders may not betray our Constitution.

If the charges of torture, psychological abuse, and denial of fundamental rights are true, then the law has been violated by the United States: the country that only a generation ago stood in the forefront of efforts to develop international law, and to extend its obligations and protections to individuals. It cannot seriously be maintained that the law does not govern our nation, while it affects everyone else. It cannot seriously be maintained that the provocations suffered by our troops on the battlefield – or by our civilians at the World Trade Center or the Pentagon, for that matter – somehow are of a gravity sufficient to warrant illegal responses. The United States should be held accountable before the world for this, and those individuals whose own conduct violated the laws of war, or the Constitution of this country, should be called to account according to our domestic laws.

Let me be clear: I am most definitely not suggesting that our soldiers and sailors and Marines are habitual violators of the law, who have committed their bad acts despite the best intentions of the political leadership. I am certainly aware of the small number of actual



offenders, compared with the large number of people now under arms. I think that, in our constitutional and legal regime, the civilians who ultimately are responsible for the design and supervision of military exercises bear responsibility as well for the consequences, legal and practical, of what they have done. And here, it appears as if our civilian leadership have much for which they must answer. At the end of the day, if the lesson that the world is learning from the behavior of the United States in Iraq and Afghanistan and Cuba is that international humanitarian law is for everybody except the only remaining superpower, then the incalculable damage done to the international legal system will be the fault of politicians, not soldiers.

Should we “Support our troops”? We most certainly should, since they are risking (and in all too many cases giving) their lives in the name and for the sake of our country. But should we therefore not review their actions, should we not evaluate in each instance whether they have or have not acted in ways that justify our pride in them? Or should we grant them blanket approval, in advance, even when they disobey proper orders, or when they dutifully obey orders that are illegal?

It is not patriotism to ignore violations of law committed in the name of your own country. Men and women of courage and determination have always been willing to stand firm against just the kind of manipulation that I believe is abroad today. We must be willing to make distinctions, we must defend not only our country but the principles for which it stands, and we must be willing to insist that those with whom we serve obey the law. For it is those principles, including the belief in the rule of law – and only those – that are worth the fight.

I also worry about the impact that unquestioning acceptance has on soldiers themselves. People who are told that they will have support no matter how they behave need not fear the consequences of behaving badly. We Americans are and should be proud of our men and women in uniform, but we must say that knowing that some of those people will inevitably show themselves not to be worthy of that pride. This proposition should not be controversial: it is simply human nature according to which, if you are constantly told how wonderful you are, sooner or later you are going to start believing it, at which point you are likely to behave in a manner that is anything but wonderful.

You all know the epitome of all supposedly patriotic slogans, “My country, right or wrong.” G.K. Chesterton wrote of it, “‘My country, right or wrong’ is a thing no patriot would ever think of saying except in a desperate case. It is like saying ‘My mother, drunk or sober.’” I fear that to say “my country right or wrong” as if our country can do no wrong, or to say “Support our troops,” as if our soldiers can do no wrong, is the beginning of a process of abandoning judgment and allowing standards to deteriorate.

So what does pride in our troops have to do with the rule of international law? It has everything to do with it. Because neither military members nor civilians must allow the pride we feel in our United States soldiers and sailors and Marines and airmen to overwhelm our insistence that they perform their jobs in accordance with the legal norms that govern them. Nor should that pride distract us from holding accountable those civilian leaders whose decisions led to this state of affairs. We must not allow the repetition of patriotic chants to distract our attention from the very serious consequences of permitting significant violations of those norms to go unpunished. And we must be vigilant to ensure that the political and policy decisions that inspire illegal actions of our servicemembers, whenever they do occur, are not shielded from view by mindless appeals to “Support our troops.”

Some of you will know – and I will close with this thought – that in fact “My country right or wrong” were not the words actually spoken by the person to whom they are usually attributed, Massachusetts Senator Carl Schurz, a German immigrant, in the 19<sup>th</sup> century. What he actually said was this: “My country: if right, to be kept right, and, if wrong, to be put right.” That is the proper expression of patriotism toward one’s country, and, in my view, the proper measure of pride in, and support for, those of you who have dedicated your lives to defend the rest of us from danger.

Thanks again for inviting me to speak today. It is, I think, especially important that this discussion take place here at the Western Hemisphere Institute, and now, during Human Rights and Democracy Week. I hope I have contributed positively to the Week’s agenda.

I look forward to hearing your questions.