

**Discussing Democracy and the Rule of Law at WHINSEC:
There Is an Elephant in the Room**

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Ladies and Gentlemen:

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

This year I want to talk a little bit about WHINSEC itself. If I am going to do that, though, it is only appropriate that I begin by paying tribute to my friend, your Commandant, COL Gilberto Perez. It seems like only yesterday that as Chairman of the Board of Visitors, I welcomed COL Perez to his new responsibilities as he assumed command. In his years at the helm of this institution, he has shown himself to be a great promoter of human rights and humanitarian values. His support for this annual event, in which human rights and democracy occupy center stage at the Institute, has been unflagging and invaluable. He does great honor to the uniform that he so proudly wears, and that he will take off for the last time, to enjoy a well-earned retirement, in just a few short weeks.

Gil, thank you for your service to WHINSEC, and thank you for your friendship. You have been a teacher and an inspiration to your students, and a model to your colleagues. I believe that there is no greater compliment that can be offered to someone who has run an institution than the one that I think you deserve: you are leaving the Western Hemisphere Institute a better place than it was when you came here.

It is no good sign of a speaker's promise if he begins his remarks with a cliché. Yet I cannot think of a more accurate way of telling you that what I want to talk about today is a subject unpleasant to discuss, but which may not be avoided in a time and at a place like these. So, with an apology for my obvious lack of imagination in crafting a more original metaphor, I want to talk with you about the elephant in the room.

You have come here to further your professional education as military officers, and I will not stray too far afield from that agenda. Here at WHINSEC, and especially this week, you are reminded constantly of the legal obligations that are imposed on you in your professional roles. You are required to observe the laws of war. You must respect human rights. You must operate within the democratic structures of your countries' constitutional regimes.

In my remarks today I will remind you, as your instructors have, of the importance of properly balancing the gravitational pulls of democracy and security, military necessity and

constitutionalism, and about the overriding obligation to strike these balances in accordance with the governing principles of international law.

But the pachyderm that demands our attention is hiding in plain sight here at the Western Hemisphere Institute for Security Cooperation. We are assembled at an educational facility maintained by the United States Department of Defense, at Fort Benning, Georgia, which has been commissioned by the Congress among other things to impart respect for human rights and democracy. In one sense, this seems perfectly natural. The United States in the second half of the last century was the world's leading promoter of the development of the international legal regime, the champion of democracy, and the great defender of human rights. Our adherence to international law, both in war and in peace, was beyond question.

Yet we must admit how drastically this has changed. To be perfectly if unfortunately candid, our country has behaved very badly in recent years, as measured by its observance of its international legal obligations. We have violated international law □ indeed, we are violating international law □ in the conduct of our wars in the Middle East, and especially in our treatment of the people captured during those conflicts. And we have done so in a manner that calls into question our commitment to international law in general. Nor, sadly, is this the end of the story: we have at the same time violated our own beloved Constitution, and dishonored the principles for which it stands.

These are brutal accusations, but I am far from the only one making them. Flag officers of all branches of our military have been publicly saying the very same things, with increasing frequency, and increasing alarm. Major General Antonio Taguba, recently retired, who while still in uniform oversaw the investigation of the shameful abuses of Abu Ghraib, now writes that the United States is responsible for war crimes there, and that the only remaining question is whether someone will be held accountable. And on the domestic front, the Supreme Court has now concluded for at least the third time (depending on how we are counting) that the policies applied to detainees at Guantanamo Bay are inconsistent with the Constitution.

I will have much more to say about the Supreme Court in a few moments.

I would be willing to stake a bet that each you who is not from the United States has, at least once during this course, wondered about the consistency of the lessons taught here at WHINSEC with reports you read daily in the newspapers and see on television: about abusive interrogation, secret prisons, the deconstruction of the definition of torture, the systematic denial of due process of law to detainees, the use of "irregular rendition," and the mistreatment of prisoners in Iraq, in Cuba, and in other places that we cannot name because our government continues to keep this information secret from us, its citizens. Every one of these things directly contravenes what you have been taught at WHINSEC.

Not long ago, the world rallied around the cause of the United States after the murderous assaults of September 11, 2001, exemplified in the *Le Monde* editorial, famously entitled "*Nous Sommes Tous Américains*" ("We Are All Americans"). Today, surveys taken in all parts of the world reveal that the United States is widely blamed for the deterioration of the fabric of the global rule of law. The United States is perceived as a threat to, and no longer a proponent of, international

peace and security, and as not the beacon of democracy that we Americans were raised to believe is our birthright.

These views, whatever their ultimate merits, are shared by many who are not instinctive haters of everything American. Indeed, many of our country's dearest friends constantly remark on this recent shift in our attitudes with great regret. These facts alone, even were the content of the arguments on which they are based ultimately rejected as faulty, call into question the missions of such institutions as the one in which we come together on this day.

What I propose that we think about today is not, however, driven by the results of polls or surveys, however reliable or not they may be. It is the question whether the United States risks undoing the international legal gains of the twentieth century, and placing this great country outside the bounds of legal propriety for a substantial portion of the twenty-first.

I want to review these developments from the special perspective of WHINSEC. They raise a host of very particular and very vexing dilemmas that go to the heart of its mission. For years, the pattern of instruction at the Institute and its predecessor (with exceptions, of course) was that instructors wearing the uniforms of the Armed Forces of the United States were the professors, and soldiers from elsewhere in the Hemisphere the students. This was entirely appropriate, because ours was universally recognized as the preeminent professional military the world has ever known. We had much to share, and much to offer, in a spirit of hospitality and collegiality, not only here at Fort Benning, but in Columbus, and in the country in general.

And we had an agenda. We had an ideology to promote, or, more precisely, we had an ideology to oppose. Our drive to ensure that Communism never got a foothold in the Hemisphere undoubtedly resulted in our country's embracing of unsavory leaders, whose commitment to the ideological struggle we mistakenly believed outweighed in importance their systematic violation of the rights of their peoples.

So were the missions of institutions like this one conceived. Latin American officers and our own captains and majors and lieutenant colonels came here to Fort Benning, to study together what it means to be a professional military officer in the modern age. However, as society's assignment of the role of soldiers changed, so did the missions change.

With the decline in the prospect of traditional, set-piece warfare, other lessons and other values came to carry increased significance for armed services and their members. Militaries around the Hemisphere have found themselves carrying out operations not very similar to those they have traditionally performed. Now, they are the bearers of relief in the wake of natural catastrophes. They are on the front lines of law enforcement, including drug interdiction operations that, in some cases, amount to combating civil insurrection. And they are volunteered by their democratic governments to participate in peacekeeping missions all around the world, under the auspices of the United Nations and other international organizations.

So the roles of all military forces in the service of democratic governments changed, and as the Cold War ended, the role of the United States military changed as well. By the end of the last century, we had no fear of competition, and we bestrode the world, as Shakespeare had Marc

Antony say of Julius Caesar, like a Colossus. We could be the teachers of an entirely professional legal regime, battle-tested but fair, rigorous but responsive to the lessons of history.

When it abolished the School of the Americas and established WHINSEC at the end of 1999, the United States Congress was keenly aware of these changes. It was also conscious of allegations that this country had not been sufficiently vigilant in addressing widespread violations of human rights engaged in by undemocratic governments in this Hemisphere, acting through their militaries, in decades past.

Thus it was that Congress mandated by law what was already taking place in practice: the teaching of human rights to every student who passes through the doors of the Western Hemisphere Institute for Security Cooperation. It was entirely unremarkable that this should be part of the mission of the new institution at the very dawn of the 21st Century. The commitment of the United States to the law of human rights, after all, seemed well established and beyond question, while the records of our neighbors to the south were seen as in need of vigilant management, and, in some cases, repair.

It may have been confidence, or arrogance, that led the United States to feel that it had the right to help our friends and allies to achieve the same level of legal enlightenment that we ourselves claimed to have accomplished. But when this Institute was founded, Congress required that it proclaim the gospel of human rights to all who enter: that it ensure that this institutional creature of the United States Department of Defense will never again be accused of encouraging, or even tolerating, human rights abuses by any of the men and women who study here.

And the Institute has consistently accomplished its mission. Its lessons have been impeccable, its faculty excellent, and its curriculum the envy of other institutions, military and civilian. WHINSEC has, from an academic perspective, succeeded in its charge of offering its students a working knowledge and a practical understanding of how human rights law, and international humanitarian law, are to govern the actions of every person wearing the uniform of his or her country.

I hope I am not the only one noticing a delicious irony here. WHINSEC, the favored whipping boy of those who disparage all aspects of the American military, has become the model of what military education should be. To those who demand that the Institute close down, I respond that the world would be a happier and more law-abiding place today if there were in existence also an Eastern Hemisphere Institute for Security Cooperation, or even better, a Middle Eastern Institute for Security Cooperation.

For many reasons, I have always found it laughable that the opponents of the School of the Americas and of WHINSEC have pretended to believe that Latin American soldiers are taught how to torture here. In their moral indignation, and in their willingness to believe everything bad about the United States, they missed, and continue to miss, the real issue.

If you want to disparage the program of WHINSEC, I have always wanted to say to them, do not do it on the basis of the easily-rebutted claim that people are taught how to abuse human rights at Fort Benning. That is simply silly. It will not be believed by anyone willing to spend even a few

moments checking the facts. Nor is it sensible to decry the Institute because the occasional graduate violates the law years after her or his tenure here. It makes no sense to attribute to WHINSEC responsibility for human rights abuses of a military commander 20 years after he studied helicopter repair in Georgia.

Make a better argument. Argue that this institution is infused with a kind of misguided cultural imperialism: here, the United States claims the right to tell soldiers and civilians from other countries how they can achieve the level of respect for human rights and other international legal norms that characterizes our own military forces . . . except that the premise of the syllogism is faulty. This is the argument that opponents of the Institute should make. To put it starkly, they should say: it is no use teaching other nations' soldiers to be as good as we are in their observance of international legal duties, because we are really not very good at it ourselves. The problem is not that people are taught to torture here. The problem is precisely that people are taught not to, but by a military establishment that no longer has standing to communicate that message.

How do we, in 2008, answer that challenge? How do we continue to tell students at WHINSEC, for example, that certain rules in the law of armed conflict are immutable, with no exceptions allowed? That persons captured on the battlefield are entitled to certain rights, with no questions asked and irrespective of their status? That the rights of detainees are codified in international humanitarian law, including in particular the Geneva Conventions? And that they also are grounded in domestic law, with the great protector, the writ of habeas corpus, as the ultimate guarantor that no one will be detained under any legal authority without being accorded the right of judicial review?

How can we teach those rules when we have been so open and defiant in violating them? To put it crudely, in light of events over the last five years, how is it that the United States □ and a United States military establishment in particular □ has the nerve to tell men and women wearing the uniforms of other countries' armed services that they are obligated to obey international law?

Teaching international law, after all, requires acknowledging the normative force of the law. It requires accepting that the law sometimes requires those governed by it to act in ways they would rather not act, and to refrain from acting in ways that they may perceive as in their best interests. And when the law speaks with its full authority, the governed must obey, except in those rare cases in which the law's admonitions are rejected out of deference to a higher moral obligation. If a set of rules imposes no requirement of adherence, if it can be ignored or its legitimacy undermined without consequence, then it does not deserve to be called a legal system.

What is it, then, that you have been studying at Fort Benning? Is it a set of legal rules, deriving from legitimate authority, which mandates certain conduct and punishes unexcused violations? Or is it merely a set of customs and conventions, to be observed when it is convenient to do so, but to be ignored with impunity when to adhere to them might entail risk or bother?

In the closing years of the last century, I doubt that there would have been much debate about this point. But in 2008, we have seen a consistent effort by the Government of this nation to

dilute the universality of international law as a set of binding rules. This is not a political accusation: it is merely a description of the policies of the Government, which reasonable people might well endorse, but which have deep consequences for institutions like this one.

My point here is not to debate the wisdom of our wars, or even their necessity. It is to raise the question whether our methods of prosecution of these wars are consistent with international legal obligations binding on the United States. And if it is not, then I suggest that there is an unavoidable inconsistency with the educational mission of this institution.

Let me give an example of what I mean. As you all know, it is not a crime for a soldier in war to commit certain acts of violence that would otherwise subject him to criminal punishment. It is, in particular, not unlawful *per se* for a soldier of one warring state to injure, or even to kill, an armed soldier of the other engaged in hostilities.

There are, of course, prerequisites that must be satisfied before an individual may claim the privileges to which the law of war entitles him. But the question whether such requirements are met in a given case is to be decided according to the law as applied to particular facts. It cannot be resolved by a blanket consideration that everyone fighting for the other side is outside the law by virtue of his dedication to the promotion of evil, and to the destruction of our humanitarian values. It cannot be resolved by the juxtaposed commitment, on the one hand, to the prosecution of battlefield detainees deemed not entitled to exemption from the requirements of criminal law, and on the other, trials before military tribunals that do not observe the due process rights that every criminal defendant must receive because, after all, there is a war going on!

It is impossible, in my view, to reconcile this position with the rules that you are being taught at WHINSEC: rules imposed by international humanitarian law, and by the Constitution of the United States. So what do we do now? Congress has directed that the curriculum of this Institute include, among other things, “mandatory instruction for each student, for at least eight hours, on human rights, the rule of law, due process, civilian control of the military, and the role of the military in a democratic society.” Do we report to Congress that we can no longer carry out that mission?

Those of you who may have heard earlier talks that I have given here at WHINSEC will know that the punch line is about to come. And here it is: the law itself provides mechanisms for resolving these issues, whose existence may offer the only spark of hope that we will be able to salvage the fragments of the law from the ruins in which they currently lie. It is in our national commitment to the rule of law where we may find the answer to the challenge that I posed. For that same reason, WHINSEC can and does meet its mission: its commitment as an institution is precisely to imparting respect for the rule of law. And that commitment endures.

In light of the magnitude of the outrages of September 11, 2001, it was understandable to assume instinctively that the normal rules would no longer apply. The assaults on our nation and our Western culture not only were greater in bloodthirsty scale than anything previously experienced, but demonstrated an audacity, a level of planning and organization, that made them qualitatively different from events in our history that might have offered a measure by which to determine our response.

Acts of terrorism, however, are crimes: they are crimes under the laws of the United States, and they are crimes under the laws of every country in the world. The United States, the United Kingdom, and numerous other nations have prosecuted, convicted, and sentenced individuals accused of acts of terrorism, even when they have involved mass murder that is the terrorist's stock-in-trade, and the disruption of daily life that is his objective. And they have done so with full respect for the process to which even the most unsavory defendant is entitled.

Our elaborate legal system, developed over the ages, does a respectable job of balancing the rights of those accused of breaching the peace with the rights retained by the rest of us, and by our social institutions. In the United States, that system has been strained on occasion, but it has never been broken. It has withstood enormous pressures, including the dismantling of slavery and legally-enforced separation of the races, wars both hot and cold, and the revolutions that introduced technological innovation, the unprecedented mobility of our people, and the equality of the sexes before the law.

It is capable of addressing itself to our current crises. Indeed, the Supreme Court has repeatedly reminded us of just this, holding, for example, that the existence of armed conflict does not give the President "a blank check" to override constitutional guarantees. And most recently, in the case of *Boumediene v. Bush*, the Court concluded that even Congress may not take away the sacred right of all individuals to judicial review before they may be punished at the hands of the state, save under the very exceptional circumstances foreseen in the Constitution itself.

In *Boumediene*, as it has done in the earlier cases of *Hamdan*, *Hamdi*, and so many others, the judicial branch of our Government reminded us all of the primacy of the rule of law, and of our overarching obligation to maintain respect for the law if we are to avoid the threats of tyranny and empire. It was precisely this lesson that motivated our forefathers, who declared the independence of this nation in an age when Jeffersonian values were perceived as radical, provocative, and deeply destructive of the established order.

In particular, the Court in *Boumediene* reminded the world that, in the United States of America, judges and not the President get to "say what the law is." The law requires due process for all who would be deprived of liberty, and that due process includes the right to seek a writ of habeas corpus, to test the lawfulness of one's imprisonment. Congress may not do away with that right. This is a fundamental feature of our constitutional system, and it is a key element in defining what we mean when we say that ours is a government of laws, not of men.

Only days after *Boumediene* was decided, the Court of Appeals for the District of Columbia Circuit for the first time struck down a determination by a so-called Combatant Status Review Tribunal at Guantanamo Bay. The Court held that the Tribunal, in its consideration of evidence and in its judicial procedures, denied due process of law to a Uighur detainee with absolutely no connection to the evildoers who attacked New York and Washington, and absolutely no connection to any armed struggle against the United States. The law, then, and the courts, are performing their traditional functions of reining in the executive branch when it would go outside its permitted role in government. And they are insisting that there can be no excuses for failing

to respect basic human rights, not even the extraordinary dangers this country faces, and not even national security as invoked by this, or any, President.

One of the heroes of the American Revolutionary era, Benjamin Franklin, is said to have been the author of an important proposition that has guided our Republic for well over two hundred years. “Those who would give up essential liberty to purchase a little temporary safety,” wrote the author of Poor Richard’s Almanac in 1755, “deserve neither liberty nor safety.”

This country has mostly been able to acquire both liberty and safety, without needing to pay great heed to the price of either one. Yet now our economy is suddenly in trouble, and we can no longer afford the luxuries to which we have become accustomed. We must, all too often, choose between them. And in too many instances, we have chosen security □ or, better, the illusion of security □ and we have been willing to pay for it with the coin of liberty. In making those choices, we have provided evidence for the truth of Franklin’s maxim: we have risked losing our moral claim on both liberty and safety.

My thesis is that this dilemma could have been avoided, had we but paid the proper respect to the third element: one missing from Franklin’s proposition, which is the supremacy of the law. We can only hope that is not too late to rectify these errors. Nor is this a radical idea. Most fundamental to our identity as a society and as a nation throughout our history is the natural function of our legal system as adjudicator of the apparently contrasting requirements of freedom and security.

Our judges know this well. Justice Kennedy, in his opinion for the Court in *Boumediene*, wrote that “security persists in a fidelity to freedom’s first principles.” That, I believe, is the most valuable lesson that can be taught at WHINSEC, and especially during Human Rights and Democracy Week. What we must be able to say is this: we survived the threat of nihilistic but highly organized and lethal terrorism, without abandoning our principles. We maintained our honor and our fundamental values. We responded to terrorism in ways consistent with the international and domestic legal systems established to govern us in good times and in bad, in peace and in war, in times of uncertainty and in times of prosperity.

Those values are enshrined in treaties, and in domestic constitutions and legislation. They are referenced in the Universal Declaration and the Inter-American Convention. They are the rights that we all have as humans, and the principles that regulate the mutual respect that sovereign nations are obligated to extend to one another. They are the standards for stability and security from which we all benefit. They are the protectors of international peace.

And they are binding on us all: on all nations, and on all who serve their nations. The teachers here at WHINSEC claim their standing to teach you these things not because they are American servicemembers, but because they understand the universal application of the principles of the law of war, and of the international law of human rights. Unfortunately, other American soldiers, at Abu Ghraib and at Guantanamo, may not have understood these things. Even more unfortunately, those who occupy the higher reaches of the chains of command, way above the miscreant privates first class, even to the highest levels of civilian authority, may not have

understood them either. But violations of the laws of war must not and will not go unrecognized, if the universality of these principles is to endure.

If the United States has not lived up to the standards it has set for itself, it must improve its performance, not abandon its standards.

The United States of America has played a proud role in an international legal regime designed to protect those least able to protect themselves, to constrain the power of those who would act without regard to the rights of others, and to transform the rules of international conduct into meaningful and enforceable rules of law. WHINSEC, here at Fort Benning, performs its part in promoting the values that infuse our American society, and that inspire the thinking and the conduct of women and men from around the world who believe in the rule of law.

I recommend that his keeper remove the elephant that has been observing us from the back of this room, because we have noticed him, but it is time for him to go, and it is time for us to get on with our work of promoting respect for human rights and democracy.

It's the American way.

Thank you for listening to me this afternoon. I hope I have provoked some critical thinking. I will be pleased to try to address your questions.