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**Discussing Freedom, Security, and the Rule of Law:
There Is an Elephant in the Room**

Remarks of
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It is a pleasure and an honor to be with you this afternoon. I am grateful to my friend Dr. Richard Downie for inviting me, and to all of you for having the patience to listen to me on this important occasion.

It is no good sign of a speaker's promise if he begins his remarks with a cliché. Yet I can think of no more accurate way of telling you that I want to talk about a subject that is unpleasant to mention, but that 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 expression, I want to talk with you about the elephant in the room.

You have come here to delve deeply into the topics of freedom, security, and the rule of law, and I will not stray too far afield from those topics. I will tell you, as your instructors have, about the importance of properly balancing the gravitational pulls of democracy and security, and about the overriding obligation to do so in accordance with the governing principles of international law.

But the pachyderm that demands our attention is hiding in plain sight here at the Center for Hemispheric Defense Studies. We are assembled at an educational facility maintained by the United States Department of Defense, in Washington, D.C. 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 international law, the champion of democracy, and the great defender of the law 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. 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 around the world reveal that it is the United States that is blamed for the deterioration of the fabric of the global rule of law. The United States is widely perceived as a threat to, and not a proponent of, international peace and security, and as no longer the beacon of democracy that we Americans were raised to believe is our birthright.

These views, whatever their ultimate merits, are shared by many around the world who are not instinctive haters of everything American. Indeed, many of our country's dearest friends have remarked on the 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 serious question the missions of such institutions as the one in which we come together on this day.

So there is a very big and very distracting question that we must address. It is not far from everyone's mind, even if it is rarely the topic of public conversation. This is my rhetorical elephant. The question is this: in light of events over the last five years, does the United States – and does a United States military establishment in particular – still have the moral authority to teach international law to students from the rest of the world?

Teaching international law, after all, requires acknowledging the normative force of the law. It requires accepting that the law may on occasion require 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.

In 2008, we must recognize what even its strongest supporters admit: there has been a consistent effort by the Government of this nation to dilute the universality of international law as a set of binding rules. I personally would go further: there has been, and there is today, a campaign (one might even say a crusade) to scale back the evolution of international law in general, and of international humanitarian law and the law of human rights in particular: to undo, in other words, the very progress that we as a nation championed in the second half of the last century.

These are brutal accusations, but I am far from the only one making them. Retired flag officers of all branches of our military have been publicly saying the very same things. And I would be willing to stake a bet that each you who is not from the United States has, at least once, wondered about the consistency of the lessons taught here at the Center with reports you have read daily in The Washington Post: 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 elsewhere.

Some of you, perhaps, have taken those thoughts even further. Some may have asked how it can be that the United States considers itself to be at war with a global enemy that it cannot name, seeking a victory that it cannot define, all the while insisting that the law of war does not apply. I would ask whether, if the invocation of the language of war is anything more than metaphoric, it is logically possible to argue that everyone participating in this supposed war against the United States is automatically, and by virtue of that very fact, engaged in an unlawful enterprise, and is therefore without the protection that the civilized world has provided to combatants for decades. And even if it were possible to resolve that first issue in the way that our Government urges, it must nevertheless be accepted that regardless of Geneva Convention protections, all

people are beneficiaries of the international system of human rights, applicable regardless of whether or not there is a state of belligerency.

My point here is not to debate the wisdom of the war, or even its necessity. It is to raise the question whether the means of prosecution of the war are consistent with international legal obligations binding on the United States, and what this means for our educational mission.

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 under the law of war from the requirements of criminal law, and on the other, to 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!

These anomalies pose a real challenge to both teachers and students of international law. If we are to preserve the legal regime that has emerged over the last several hundred years, and if we are to nurture its continuing development as a protector of rights and enforcer of obligations, then we have to ensure that the law applies to all, even to the strongest.

The law itself provides a mechanism 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. We have built into both our domestic and our international legal regimes systems of adjudication, by which neutrals learned in the law are commissioned to apply that law to the facts dispassionately, announcing the outcomes of their assessments, as the motto of The New York Times would have it, “without fear or favor.” 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 they 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.

Our elaborate system of criminal law, 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. In a case to be decided over the next several weeks, the Court will rule on whether individuals held under the jurisdiction of the United States may be stripped of the most fundamental right to test the lawfulness of their detention. I am ready to predict that, in the case of *Boumediene v. Bush*, the Court will conclude that even Congress may not take away that right, 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 will remind 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.

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 it is as if our economy is suddenly in trouble, and we can no longer afford the luxuries to which we have become accustomed. In our supposedly enlightened era, we feel that we must make choices between freedom, on the one hand, and security, on the other. Yet 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. And we have done so without regard for the law. 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: the 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. Our political leaders may have had reason to seek to prevent the law from playing its natural function, as adjudicator of the

apparently contrasting requirements of freedom and security. Yet most fundamental to our identity as a society and as a nation throughout our history is the preeminence we claim to have accorded to the law as capable of performing just this service.

And that is also the most valuable legacy that we can leave to the next generation. What we must be able to say to them 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. That is to say, 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.

I hope that the lessons that you will have learned in your time here at the Center for Hemispheric Defense Studies are precisely these. Unless what you now take away from here is profoundly embedded in the fundamental values that infuse domestic and international society, then you will have acquired only skills, not insight. 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.

None of this is to say that the law is impervious to change, or that we must accept the current content of the law as if it were infallible. The right – or the responsibility? – to protect, which was the subject of much of your study here, is a new development in international law, whose contours we must still explore. What are the nations of the world to do in the face of the Burmese regime's refusal to allow aid to reach the victims of the cyclone? How tolerant must its African neighbors be of the increasing irrationality of the Mugabe administration, as it seeks to preserve its hold on power despite its rejection by the people of Zimbabwe?

These are topics about which reasonable people can and do differ, both in their understanding of the law, and in their consideration of the practical consequences that must be in the minds of responsible makers of policy. But those disagreements should and will lead to resolutions in a manner consistent with the legal principles that govern.

Incidentally, my high praise for the role of the law should not be understood as ignoring the fact that the law can be misused, even by its practitioners. Lawyers advising no less than the President of the United States have, in recent years, developed elaborate legal defenses even for the use of techniques of interrogation that were considered torture even when practiced on hapless black citizens in the segregationist South 80 years ago. There is a difference between urging in good faith that the law change, or that its interpretation change, and arguing that the law does not apply to conduct that is so obviously within its scope.

We in this country should be especially aware of this, since our Constitution, which we rightly see as the ultimate protector of our liberties, was written in large measure by men who owned other men as chattels. Yet changes in our fundamental views of our fellow citizens could be accommodated within the deathless words written more than two centuries ago.

It is the principles reflected in those words that are so much more important than the words themselves. That is the heart of what your instructors here have meant for you to take away from this place. Unless you grasp how the sacrifice of liberty for security results in the loss of both, as Benjamin Franklin knew, you will have internalized techniques for addressing problems, not the understanding that will help you to avoid them, or to learn from them.

I hope that your experience here has been beneficial to you in every way. I hope that you have appreciated the scholarship and dedication of your teachers, and have enjoyed the friendship and professionalism of your fellow students. And I hope you have taken advantage of your time in the United States, and in this great capital city. I hope that all of you – including those born on these shores, who may occasionally take such things for granted – have been able to consider the lessons of those who taught us as a nation the values that we today defend, from Washington to Roosevelt, from Jefferson to Martin Luther King. I hope that you have been able to visit our great museums of art and science and history, and our Supreme Court, whose cornice bears the words of our secular prayer, “Equal Justice Under Law.”

And I hope you have come to appreciate the role that the United States of America has played in developing 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.

My most fervent hope for you, however, and for us all, is that when the next class receives these tokens of achievement at this Center for Hemispheric Defense Studies, it will not be necessary for anyone to deliver the remarks I have shared with you on this special day.

Please accept my warmest congratulations on your accomplishments here, my best wishes for successful careers as you return home, and my thanks once again for listening to my thoughts this afternoon.