

## Remarks By Sandra Day O'Connor

Associate Justice, Supreme Court of the United States

**Upon receiving the Sylvanus Thayer Award  
West Point - October 20, 2005**

It is a great privilege and honor to be at West Point today. The beauty and history of this institution make it one of our nation's most treasured places. To be here and receive the Thayer Award, and to review a Parade is the experience of a lifetime. The previous recipients have most often been people with substantial military experience, such as General Colin Powell, Senator Robert Dole, and General Douglas MacArthur. By comparison, I am merely a sideline observer. Even Bob Hope – who came here to receive the award in 1968 – had more military experience than I do. As a result, West Point is making a bit of an exception in presenting the award to a mere Supreme Court Justice.

I understand that the Thayer award is supposed to be given to an "outstanding citizen of the United States whose service, accomplishments, and stature exemplify personal devotion to the ideals expressed in the West Point motto, "DUTY, HONOR, COUNTRY." That is a wonderful and grand motto. I have been tested a bit lately on the "duty" front: As many of you know, I did my best to retire from the Supreme Court this summer. The President nominated Judge John Roberts to be my successor, and I assumed I might be trout fishing in Montana or seeing my grandchildren in Arizona on the first Monday of October, when the new term started. Then the nation learned of the sudden death of our Chief Justice, William Rehnquist. He served on the Supreme Court for 33 years in all and was a great Chief Justice. He was also a close and longtime personal friend. After the Chief Justice's passing, the President decided that John Roberts should be asked to serve instead as the new Chief Justice. Next thing I knew I picked up the phone and there was the President, telling me the news, and saying that my retirement might have to be postponed a bit. They say your country calls sometimes, but I didn't know they meant it called on the telephone! In any event, I am still on the bench pending confirmation of a successor. This marks the 25th year of my service on the Supreme Court. The time has gone quickly and it has been both challenging and fascinating to address our nation's most difficult issues.

As I look out today and see all the uniforms I think of my view from the bench in our courtroom. We Justices wear uniforms of a sort — plain black robes. In earlier days advocates at our Court usually wore formal attire — a morning coat. That former practice brings to mind a story. Colonel William Colston, who was a well known attorney in Kentucky, in the last century. He was counsel for the Southern Railway System for many years and on one occasion he took the president of the company to Washington to watch Colston argue a case before the Supreme Court. While they were waiting for their case to be heard, the client walked around the building inquiring of the Court's staff about the habits of the Justices.

One thing he learned from a Court employee was that it was the practice at the Court that every male attorney wear a vest. "In fact," the garrulous attendant elaborated, "some of the attorneys go far beyond the rules and appeal to the vanity of the Justices by dressing in formal attire. But your lawyer is complying with the rules by wearing only a plain business suit."

Several weeks later the ruling of the Court came down deciding the case against Colston and the Railroad. Colonel Colston immediately telephoned the company president to give him the bad news.

"Well, we lost our case," he said.

"I know why," was the disgruntled response.

"Why?" asked the Colonel.

"Because you weren't dressed right," said the president."

"Well, by golly," the belligerent Colonel Colston replied, "that's a lot better reason than any they gave in the opinion."

Each of the West Point Cadets here today joined the long grey line after 9/11. Each of you chose in the aftermath of that terrible September day to come here, to train, and to serve your

country, braving the risks and the challenges of future conflicts with a shadowy, unidentified enemy and a war like no other we have seen. Your years here are marked by where you will go afterwards: Iraq, Afghanistan, or other unknown places to which the service calls you. As you head out into that future, you will face profoundly difficult choices. You will perhaps also come across the old Roman maxim, "in time of war the laws are silent." That maxim seems almost quaint today. The Romans had no Geneva Conventions, nor did they have a JAG Corps (or for that matter, a press corps). Today, law and war seem inseparable. But there is still some truth to that old saying, because to the extent that there is a law of war, it is always the law of the last war. So there is some tension there. Today, this tension is made most clear when we talk about how the United States treats its prisoners in the war on terror. What law governs the detention and interrogation of terrorist suspects? And how are you to know what standards apply? What does your duty demand? What does your honor demand? And what does your country demand? It is hard enough to answer the first two questions, but harder still when the nation's elected leaders are silent about the last.

The Geneva Conventions and their Protocols were not made for conflicts between a state and an international terrorist network. For the most part, they were drafted with traditional armies of nation states in mind. Some have said that we need to rethink these Conventions and amend them. But that is a daunting process and takes many years. And what are soldiers meant to do in the meantime? For many years, the Conventions have set the basic ground rules for the U.S. armed forces in matters related to the treatment of prisoners. The Army has devoted a great deal of effort to implementing and specifying the standards set out in the Conventions in its Field Manuals and manuals about intelligence interrogation. But no one has yet written the book for the rules that apply when the Geneva Conventions do not. That is a very difficult situation. And there has been a lot of confusion about what rules apply to whom, and where.

As a result, military personnel from the front lines in Iraq have reported that they do not know what rules apply, and that they have not received clear guidelines from their superior officers.<sup>1</sup> Some of their superior officers are saying that they were not able to get clear guidelines from people higher up in the chain of command.<sup>2</sup> This is clearly not a good situation. When soldiers are being told to go out and get intelligence, but not told the limits on how they may do so, they may overstep the bounds. That in turn may lead to both legal and diplomatic difficulties. And if our military is not treating prisoners of war "properly," that may also increase the dangers to US soldiers if they are captured by the enemy. Often it is the low-ranking soldiers that are blamed for the abuses. They, of course, have to take responsibility for their own actions, but those that would lead them also need to take responsibility. Finally, it seems to me we need a clear set of rules to reaffirm our values as a nation. This is crucial in the ongoing war of ideas. We have to demonstrate two things in particular: First, this country believes in protecting the basic humanity of all people, and that includes even our adversaries. Second, we will not stoop to the atrocities and inhumane tactics of some of our adversaries.

But where will we get specific guidance? Our Supreme Court has said very little about what the government may and may not do to people captured by US forces on the battlefield. The Supreme Court takes cases that have arisen in the lower courts, which are often decided some years after the events being litigated. In a case in 2003 called *Hamdi*,<sup>3</sup> we said that US citizens who are being held on US soil as enemy combatants have to be given some minimal due process of law. But we were cautious about putting too much of a burden on the military, and deciding too much. So the command of that case is modest. The military must give citizens who are being detained – not at the moment they are captured on the battlefield, but later, when the military makes the decision to hold onto them – a "meaningful opportunity" to challenge the factual basis for their detention. It must tell them why they are being held, and give them a fair opportunity to contest the facts before an impartial adjudicator. We did not decide if this process could be achieved through a military tribunal. We simply said that there has to be some way for a US citizen who is being indefinitely detained to have some outside review — a second look if you will.

In another case that we decided at the same time, called *Rasul*,<sup>4</sup> we said even less. *Rasul* held that detainees held as enemy combatants at the Guantanamo Bay Naval Base could bring an action in federal courts challenging the legality of their detention. This also was a narrow decision. It said only that in a place like Guantanamo, which is under the "complete jurisdiction and control" of the United States, prisoners who are being held indefinitely can bring a challenge to their detention. But we said nothing about what kinds of claims will succeed once the detainees get to federal court.

These were limited steps and decisions. Some criticized the Court for doing too much. But the Court was bound by the Constitution and by the historical precedents of the Court to do no less. Some criticized the Court for doing too little. But the Court is naturally reluctant to rule more broadly than necessary. The Court is only one branch of government, and it cannot, and should not, give broad answers to the difficult policy questions that face our nation today.

So the Supreme Court treads cautiously. One of the architectural features of the Supreme Court are the small bronze turtles that hold up the lampposts in our courtyards. They symbolize the pace of justice: slow but steady. And that is the nature of our duty, our honor, and our service to country, as members of the Supreme Court. We move slowly, but steadily, under the light shed by our Constitution. Sometimes that light does not illuminate very much. It is an old document – and it is very short. But with good reason: It is designed primarily not to govern the people, but to allow the people to govern themselves.

We guard the ground rules, so that the people, through their elected representatives, can run the country. This is where we expect Congress to step in. But it has done surprisingly little to date to clarify United States policy towards prisoners in the war on terror. That may be changing, of course. The Senate recently voted to insert an amendment into a military spending bill to make the US policy on interrogations clear. The Bill would establish that it is the same as in the U.S. Army Field Manual on Intelligence Interrogation. The Bill also states that this country will not engage in cruel and degrading treatment of prisoners under any circumstances. It is not my place to express views about the merits of this or any other legislation, but I think it is not too much to say that I believe some clarity from Congress and the President would be welcomed by our armed forces.

Justice Brandeis once said, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."<sup>5</sup> That statement is true in many circumstances. But this is not one of them. Here, it is important that the law be settled, and that it be settled right. So perhaps Congress will continue to try to get the law right, and, from time to time, these kinds of questions will end up back before the federal courts.

Insofar as the courts have not delimited with clarity the standards and the limits, it is more likely that the other branches will step in and make the political choices that at the end of the day in their application may return to the courts in a different form – but it takes years for most of these matters to be resolved.

In the meantime, the nation has placed an enormous burden upon our Armed Forces. We have asked you to be our soldiers and our statesmen, to be our combatants and our conscience. This burden has been placed upon you with only limited guidance. But the history and honor of this institution suggests that if anyone can bear this responsibility, it is the Corps of Cadets, and your previous graduates. This institution has been producing our Nation's military leaders for more than 200 years. It has done so during times of peace and times of war. It has always done so with skill and distinction. We are facing military challenges today unlike any in the past. Our nation will rely on you new young military leaders to do as you have done in the past — to defend our nation here and abroad, to conduct yourselves honorably with or without specific guidelines, and to enable our nation to survive in some of the most challenging times we have faced. Our military personnel have had to become more than soldiers. Now they are our diplomats, our peacekeepers, our nation builders as well. There is much to do and no blueprints for doing it.

May I say as someone without a military background that we citizens are deeply grateful and appreciative for your courage and dedication. Without you, we would not long survive.

May God bless you — each and every one.

#### Endnotes

<sup>1</sup>See Final Report of the Independent Panel to Review DoD Detention Operations ("The Schlesinger Report") (August 2004), pp. 13–14; Human Rights Watch, *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division*, Vol. 17, No. 3 (Sept. 2005); Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, Washington Post (Oct. 6, 2004) A1.

<sup>2</sup>Human Rights Watch, *supra*.

<sup>3</sup>*Hamdi v. Rumsfeld*, 542 U. S. 507 (2004).

<sup>4</sup>*Rasul v. Bush*, 542 U. S. 466 (2004).

<sup>5</sup>*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

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2005 Winner

Sandra O'Conner won the 2005 Sylvanus Thayer Award.

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