Lawyers at War

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*by Dennis Jacobs**

Thank you for the opportunity to deliver this lecture, named for Barbara Olson. She was a commentator who spoke to us about compelling matters with directness, candor, and wit. So it weighs on me to do justice to this occasion.

I'm going to talk about lawyers at war—more particularly, the professional elite and the bar associations that are at war with the military of our own country.

I am not the first to notice that, among educated classes and cadres in this country, there is a prevailing hostility to all institutions that are organized on military lines, or that assimilate military values, and a suspicion of the people in these institutions and professions: the police and FBI, of course—but even the Boy Scouts.

This is nothing new. I am not parting the curtain. It is part of a wider current of fashion. To borrow a phrase: whenever many Americans consider the military, the worst thing they can bring themselves to imagine is the only truth they know. Elsewhere, in other fields and professions, it may just be a matter of fashion, snobbery, and ingratitude. But we need to take this phenomenon seriously in our sphere, because of our power, our influence over the Constitution, our weight in policy, and the roles we have been given, and have taken, in American life. With us, there are consequences and features beyond the cultural divide; it becomes a great and consequential problem. What we hold in trust should cause us to examine ourselves by fair standards, even if we are not flattered by what we find; yet, so far as I can see, the disjunction between the military and the bench and bar is unremarked on within our profession.

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I start with the safe premise that anti-military animus is pervasive in the elite legal communities of the American coasts and our myriad institutions: the bar associations, the large firms and their pro bono projects, the law schools and all their works, the courts, the judges, jurisprudence itself: what can be called (collectively) Big Law.

I will talk about how this came about, and then I will make several points about it. Most simply, this is unbecoming for the legal profession and betrays ingratitude; it distorts our law; and it is downright dangerous because, ironically, it weakens rather than tightens civilian control of the military.

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The isolation of the military can be explained in part by the existence for decades of this country's All-Volunteer Force. Among baby-boomers in the upper reaches of the legal profession, service in the military has been rare; it is rarer still among their children.[1] Those in the military, especially the enlisted ranks, are just assumed to be mentally limited or (at best) luckless refugees from unemployment in economically distressed and backward areas of the country.

They are not like us. There is a well-grounded impression that the demographics and characteristics of people in the military differ from the make-up of people who form the legal elite. Secretary of Defense Robert Gates observed at Duke University that the "propensity to serve is most pronounced in the South and the Mountain West, and in rural areas and small towns nationwide," while "the percentage of the force from the Northeast, the West Coast, and major cities continues to decline." Thus the military is composed of southern and mountain types, or Gulf dwellers, while *we* are uni-coastal or bi-coastal; many of them are rural, while we are urbanites (albeit with country houses). The military maintains secrecy, while we profess an interest in openness and disclosure (chiefly excepting the attorney-client privilege, and our work product). Then there's the money. And the military does not have our share of women, sociologists, gays, Volvo drivers, English majors (like me), persons with handicaps, the elderly (me again), and so on. And to be clear, I am an example of the uni-coastal urban legal elite: the little island I live on is Manhattan, I drive a European car, and I did not serve in the military. So I am not engaged here in special pleading.

Given our differences, our encounters would be limited in any event. But in the elite institutions of the bar and legal education, people in the military are actually sequestered, or excluded altogether. There seems to be no effort in the law schools to correct this exclusion. To the contrary, the separation is policed. Law schools welcome to their faculties philosophers, sociologists, ethicists, scientists, political scientists, and even criminals. But there are few with military experience on the (self-selecting) law faculties. This absence is most remarkable among the

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considerable faculty teaching the law of war, international law, human rights law, and treaty law. I asked a member of a distinguished law faculty how many of his colleagues had served in the military; after some thought, he said "one"—adding after a moment that the service was in the Israeli army.

The banishment of ROTC from campuses has a counterpart in the longstanding ban on military recruiting in the law schools. Today, there is a competing moral imperative: the need for federal funding prevents the actual exclusion of military recruiters. But I am told that in hiring season some law schools circulate a cautionary memo warning students away from military recruiters, and other schools take other measures, with the result that military recruiters sit all the day through without a visitor to their desk—in effect and design, sent to Coventry. Although official statements may say otherwise, it would seem that in most elite law schools, military service is not credited as public service for purposes of scholarship funding or preferential admissions. I would bet that it is easier for a law school applicant to claim the credential of public service by having done voter registration in a cemetery than by a stint in the Navy.

Thus a *cordon sanitaire* is thrown up to prevent recruitment in the law schools. I know that it is an article of faith that there is a principled ground for hostility and discrimination. No doubt, many people feel strongly about the policy called "don't ask, don't tell." But the cultural alienation I am talking about long pre-dates that Clinton-era policy. Aversion to the military became a dominant current of liberal and academic passions during the Vietnam War. And since then, it has not abated—or even much developed. Young people who have been indoctrinated to recoil from all things military have been taught to attribute that instinct to the policy on gays. There is unfinished business in this country when it comes to gay rights, and opposition to "don't ask, don't tell" is fairly argued, and unresolved; but it also has a pretextual element. If "don't ask" is no longer not asked, there will be other grievances: women excluded from combat, homophobic hostility in the ranks, instances of violence, institutional bias, and so on. Prejudice never runs short on its fuel of rationalizations.

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It must be said that the citizens of a republic *should* be wary and skeptical of their military—as they should watch with caution over all government institutions. (Even lawyers need watching.) But distrust of government power by the legal elites is largely suspended when it comes to many centers of government power that are staffed by civilian lawyers: the EPA, the NLRB, the EEOC, OSHA, not to mention the courts. As to these institutions, the bar and the judiciary tend to be indulgent, deferential, trusting, and nurturing. But when it comes to the military professions, even military lawyering, the distrust manifested by American legal institutions becomes a fixation, a calling, and is considered a badge of honor.

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Some of the implacable hostility against the military by the legal elite has to do with the culture of the lawyers themselves, their financial and political interests, and their pretensions.

Between upper-caste lawyers and the military profession, there is a competition for ascendancy: for prestige, resources, influence, and authority. But it is an uneven competition. Among our natural advantages are: all the legislatures and all the courts. So there are few external constraints on our exercise of power. Internal restraints are deficient as well because, as a profession, we are not self-examining: our critical and investigative skills are always other-directed. And law in competition does not get along well with others. We tend to press our advantages without apology: we celebrate our dominance as Judicial Independence, and the Rule of Law.

This competition has become intensified by war. Lawyers and judges are of the view that if something is of great importance, it can be safely left to us. We lack humility in approaching great matters. We tend to assume that adversarial hearings and expert testimony will render judges omni-competent and fit to decide the great questions, and that a legal mind applied to a constitutional text is the highest order of decision-making. Our mindset is that if something is of the greatest consequence—such as speech, thought, and expression; race, identity, and sexuality; property; life and death—it cannot safely be left to any ultimate influence or insight but ours. Armed conflict is one of those great matters. Civilian judges reserve the last word on all consequential matters; so we think it is normal for us to exercise power over the taking and detention of prisoners, interrogation, conscientious objection, surveillance, military tribunals, and so on. But there is a structural problem: the legal profession is not vested with responsibility for defense of the nation; indeed, it is a positive virtue of our system that judges are *not* held accountable for our decisions. But in matters of defense and intelligence, it is critical that there be scrupulous accountability of a kind that can be located only in the political branches. If critical measures for our

defense are pleaded by lawyers in terms of constitutional questions, and if judges rule on them as constitutional requirements, accountability fails, and the flexibility needed in these areas—both tactical and moral—is lost.

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This state of affairs has other large and highly ramified consequences for our law and for the country.

No doubt, law and internal legal structures are needed to check a culture of militarism and arbitrary abuses. The branch of our profession that performs that work every day is the judge advocate general corps. They are among the best of us, and work full-time for the public good, without statutory fees or contingency awards. Yet in our elite legal communities, military lawyering is dismissed as unworthy of practice, or even study. When occasionally it reaches public attention that a military lawyer is zealously representing a client in a court martial or military tribunal, it is assumed that the lawyer is some anomaly, is performing an act of courage or defiance, and is risking retribution: ah, at last, someone *as good as we are*.

Thus students and civilian lawyers are schooled to think that courts martial are kangaroo courts, that results there are dictated by officers of high rank, that there are no real juries, and that the Uniform Code of Military Justice lacks the essential attributes of due process. This is a cartoon.

I know little of military justice. Few law students can take courses in it, and there are few professors who could teach it knowledgeably if it were in the course book. Yet no less a trial lawyer than F. Lee Bailey observed: "The fact is, if I were innocent, I would prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by any court, state or federal."

It is bad enough that service in the military is not honored as service *pro bono publico*; it is much worse that reciprocal influences are cut off. Insulation between the legal elites and the military impedes the best graduates of our law schools from contributing to the culture of justice in the military, and the civilian legal communities are detached from the insights of distinguished lawyers and judges in the military.

In other times, the military has been a place where people of different advantages in life rubbed together, and came to know each other and trust each other. It must have made a difference when citizens of privilege, expensive education, and prospects, interacted closely, every day for years, with people who had none of these advantages. The privileged who went on to wield influence had been in community with the rest. I discussed these subjects with my colleague, Judge D. Barrington Parker, who was a trial judge before designation to the circuit court. To his observation, the cultural divide has had an impact on sentencing. Once, judges had known shared experience, even camaraderie, with people drawn from the class of people who appeared before them for sentencing. Judges could appreciate the strengths and decent instincts of people who had been without a head start or a good hand in life. Judges had known people without advantages—their loyalty, service, and courage, and their honest roles in life—and had encountered them as members of ranks other than the criminal classes. The harsh sentencing regimes that prevail in all our criminal courts may owe some of their bite to the disjunction between the military and the rest of us.

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I said that war has intensified a felt competition between the legal elite and the military. I think that is why the legal elite is deeply reluctant to acknowledge a war footing, a predicament that gives advantage to the military, and requires military calculation and response. The military branches claim resources; they gain influence in deciding policy and strategy; they have the indispensable insights and critical experience; they become the heroes (however unwillingly). And because war thus elevates military influence in government, policy, and constitutional imperatives, it thereby discounts and subordinates our own, and (for the duration) displaces the legal elite from its dominant place of influence and prestige in American life.

Both lawyers and soldiers have indispensable roles in defense of our constitutional government. Our Constitution needs both defenses—the internal and the external—with a certain amount of flexibility and reciprocal accommodation. While some competition is inevitable, the antipathy of the lawyer elite for the military makes the competition destructive. Constitutional values—due process, civil liberties, and civilian control of the military—are pressed into service as instruments for preserving our dominance.

It is not surprising that this competition manifests itself most obviously in the ongoing debate over how to classify the threat from Islamist terrorism: is it a matter of national defense, or a matter of law enforcement? Fair arguments lie on both sides, but, to my observation, the perspective of lawyers is self-interested and promotes the salient role of the lawyer caste.

Many lawyers and law professors simply deny that

we are at war. Lawyers have a stake in peacetime; and while we all do—*and the military most of all*—peace is a time when soldiers are a contingent asset, and lawyers are ascendant. So the law elite has an interest in denying that we are at war or in peril—denying that we are in need of a military intervention, or military expertise, or a military point of view that is decisive.

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Competition and antipathy also manifest themselves in pro bono activity, and affect lawyers' ideas of what the public good is. In the fiasco following the 2000 election, I watched on TV idealistic young pro bono lawyers arguing to election boards that absentee ballots mailed in by those in active service abroad should be discarded by reason of late arrival. Maybe the ballots were properly disqualified, but I would not have accepted such an advocacy role. And the young pro bono lawyers avidly doing that work would have scorned with disgust the work of narrowing the voting opportunities of *any other group* in this country. I suspect that every last one of them would happily assert pro bono the right to vote of felons in jail. But there was something alien to them about persons serving in the military, and it warped their idea of the public good.

By the same token, many inmates of the facility at Guantanamo Bay find themselves well-represented, if not actually over-lawyered. True, there are important constitutional issues, such as those involving the balance of powers, that have been sorted out in productive litigation. But Assistant Attorney General Ronald Welch tells us that thirty-four of the fifty largest law firms in the country have advocated on behalf of Guantanamo detainees, while at the same time, in some family courts, soldiers and sailors are found to be unfit parents because they are being deployed abroad. *They* can look in vain for high-powered legal assistance.

The defense of Guantanamo detainees has been cast as a courageous act vindicating the finest tradition of our profession to protect the accused and the despised. I hesitate to judge a lawyer for taking on a representation; many lawyers and judges in the past have had to pay a lot for their acts of conscience. The civil rights movement generated heroic models for our profession, among judges as well as lawyers. But, really, it is hardly an act of courage for lawyers to do the most fashionable thing a lawyer can do nowadays, to do so with the applause of the bar associations, the law schools and the media, and to enjoy the prominence and glamor of advocacy on big, consequential issues—not to mention the thrill of representing clients who would kill their lawyers if they could, that is, if military types were not standing by. My experience is that people do not fall all over one another to perform lonely acts of courage. So permit me to doubt that the outpouring of legal resources for the detainees is a reluctant duty—or one of those courageous and selfless acts of the Wall Street law firms. Something else drives this phenomenon.

The main field of struggle in the competition between the military and the legal community has to do with civil liberties. Lawyers have an interest in exaggerating threats to civil liberties said to be posed by measures designed to protect the nation. Consider the civil-liberties litigation that arose when the nation's librarians were required to let the federal government see who had taken out various library books. As Michael Mukasey has pointed out, it was just such an inquiry that allowed the police to identify Ted Kozinski as the Unabomber. (The Unabomber's "Manifesto" had been cribbed from books he'd taken out.) That episode excited no anxiety among civil liberties lawyers. Why should it? I remember that every library book had a card in the back cover that recorded the name of every person who borrowed that book, and when. The idea that this controversy involved a threat to liberty was overwrought. But it is of a piece emotionally with other litigation challenging measures for the defense of a country under attack—litigation involving surveillance, data-mining, POW habeas corpus, Guantanamo, and other things: in wartime, it allows lawyers to cast themselves in a heroic and *dominant* role as the real defenders of the Constitution, in league of course with the journalists who chronicle their achievements on behalf of the constitutional order.

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Why do lawyers worry? What do we lose when the military rides in to join us in preserving our constitutional system of government? The problem is that the legal establishment and the military are not exactly engaged in the same project. For lawyers, the Constitution is often a means to other ends. As I once pointed out in an opinion, constitutional law professors may know the intricate workings and mainsprings of the Constitution, but many of them use their technical skills instrumentally, and regard the Constitution the way a good safecracker regards the safe.[2] So anything that diminishes the primacy of lawyers vis-a-vis the Constitution is something that undermines the claim of entitlement by the elite bar and the legal professoriate—and the judges—to control the Constitution itself.

Whatever the legal merits may be of the kinds

of litigation I am talking about (and I have no trouble approaching such cases on the dispassionate merits), the theater of litigation allows the lawyer caste to set itself up as the true defender of the nation and its people. The more numerous the civil liberties issues, the easier it becomes for litigators, law-school clinics, bar committees, and summer associates to present themselves as the authentic defenders of the Constitution—in actual opposition to the military, and (not incidentally) in opposition to the law enforcement and intelligence professions that value military service and share military values.

Competition with the military is sharpened by the fact that upper-caste lawyers cannot just join the other side. We differ in skill-set, tactical imagination, culture, values, and attitudes toward physical risk; we cannot shine or prevail in the other sphere. And what is at stake is a great thing. Ultimately and at bottom, lawyers and the military are in competition for honor. The word has lost currency, but the concept has lost none of its potency.

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The greatest danger for our country is structural. In order to maintain civilian control, we need civilians who understand the military: what they do and who they are; their rivalries and internal politics; how weapons work and which are needed; what they should cost and how to allocate resources; strategy, tactics, intelligence, logistics; whom to put in charge, and listen to; and when to check the military, when to mobilize it, and when to deploy it. All these are things I don't know.

It does not do to lodge such powers in the hands of civilian leaders who, like me, are ignorant of military life and culture. It is worse to put in charge civilian leaders who are suspicious opponents of the military—just as such powers should never be in the hands of jingoists or ignorant military groupies.

It is not necessary or possible that all our leaders should serve. But I do think that the skills needed for effective civilian control are acquired only by the management of appalling responsibilities, the weighing of incommensurable values, and consequential action taken decisively in ambiguous conditions—not by a degree in public policy, by journal publication, by a fellowship abroad, or by a clerkship on an international tribunal.

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It cannot be easy to heal the breach between lawyers and the military. Whenever cultures merge on common ground, there is puzzlement, dawning on, adjustment, and re-calibration. There is no way to do this without discomfort. So, first, it must be embraced as a worthy project. The law schools need to be unsealed. Pro bono activity should be credited as much by service in the military as by suing it. The judge advocate general corps should be recognized as integral to the common project of justice. Those in military service should be recognized by us as peers in the defense of our constitutional republic. And the military calling should be understood to be a profession among professions--ancient, honorable, ethical, expert, and indispensable.

Endnotes

1 Kathy Roth-Douquet & Frank Schaeffer, AWOL: The Unexcused Absence of America's Upper Classes from Military Service—And How It Hurts Our Country 29ff (2006).

2 Landell v. Sorrell, 406 F.3d 159, 178 (2d Cir. 2005) (Jacobs, J., dissenting from denial of rehearing in banc).