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The Military and the Law Elite

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SPECIAL COMMENT

THE MILITARY AND THE LAW ELITE

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The legal community has worked to overcome many raw prejudices, and has cultivated respect for many groups of people who were excluded, distrusted, or otherwise treated with disdain. There is a stark, stubborn omission: animus against persons in military service and veterans. In the elite legal communities of the American coasts, there is an open and concerted refusal to acknowledge and value their contributions. The gap between the legal elite and the military is wide, bad for legal education, dangerous for the country, and ungenerous to people serving this country in uniform.

When I speak of the elite legal establishment, I refer to all of us—the top law schools, the big firms, the bar associations, and the public-interest institutions. But, this gap may be at the widest at fine law schools that otherwise profess openness to every ethnicity, every culture, every influence, and every pattern of thinking.

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In the elite institutions of the bar and legal education, the military are 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. Few are those with military experience on the (self-selecting) law faculties, even among the considerable faculty teaching international law, human rights law, and the law of war. 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 effective ban on recruiting in the law schools. Today, the competing moral imperative of getting federal money prevents actual exclusion[1]; but I am told that at least one law school circulates a cautionary memo on the eve of the arrival of military

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* Chief Judge, United States Court of Appeals for the Second Circuit. These remarks were delivered at Cornell Law School on October 28, 2009. This transcript of the Judge's remarks has been lightly edited.

[1] *See* 10 U.S.C. § 983 (2006); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).

recruiters, who sit all the day through without a visitor to their desk—in effect and design, sent to Coventry. Moreover, you may be sure that in most elite law schools, military service is not credited as public service for purposes of scholarship funding or preferential admissions—though official statements may say otherwise. Indeed, one lecturer on these subjects, Kathy Roth-Douquet, told me that when she spoke at Yale Law School in 2006, there were just three veterans in the whole three-year J.D. program. I believe it is easier for a law school applicant to claim the credential of public service for having done voter registration in a cemetery than for a stint in the Navy.

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The same prejudice is observable in the legal community at large. There are several sources for this hostility. To start with general tendencies, discrimination has always been most difficult to overcome for groups that are conspicuous and distinct. Color, sex, accent, dress, and culture are badges that set people apart. Those who serve in the military are distinctive by uniform, by habits of speech, by bearing, and above all by a distinctive culture and set of values. We should keep in mind, however, that military culture has evolved for reasons indispensable to its role and mission: to prevail in conflict, at risk of life. Some elements of this culture are unfashionable—uniforms and hierarchy, for example. But the dominant elements are profoundly admirable and do not go out of style—duty, bravery, loyalty, honor, and self-sacrifice. In the more materialistic environment of the legal profession, however, virtues characteristic of military service tend to be suspect; they are heavily discounted, and they provoke recoil.

The cultural isolation of the military from the elite legal community can be ascribed in part to the decades-long nature of this country's military as an 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.[2]

There is, moreover, a well-grounded impression that the demographics and characteristics of people in the military differ from the make-up of those who form the legal elite. The military is mid-western and southern, while we are coastal, from the east and west;[3] many mili-

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[2] *See* KATHY ROTH-DOUQUET & FRANK SCHAEFFER, AWOL: THE UNEXCUSED ABSENCE OF AMERICA'S UPPER CLASSES FROM MILITARY SERVICE—AND HOW IT HURTS OUR COUNTRY 29–66 (2006).

[3] *Compare* SHANEA J. WATKINS & JAMES SHERK, HERITAGE CTR. FOR DATA ANALYSIS, WHO SERVES IN THE U.S. MILITARY? DEMOGRAPHIC CHARACTERISTICS OF ENLISTED TROOPS AND OFFICERS 7–8 (Aug. 21, 2008), http://www.heritage.org/Research/NationalSecurity/upload/CDA_08-05.pdf (noting the highest recruit-to-population ratios in the South and Mountain West, and lowest ratios in the Northeast and Pacific West), *with* Harvard Law School, Fact

tary types are rural, while we are urbanites (albeit with country houses); the military does not have our share of women, sociologists, the elderly, and so on.[4]

These differences—cultural and demographic—induce isolation, and isolation breeds ignorance. And in a sad, familiar way, ignorance creates stereotypes. Senior officers are demonized as careerists and warmongers, while those in the enlisted ranks are assumed to be mentally limited or (at best) luckless refugees from unemployment in economically distressed and backward areas of the country.

I know that it is an article of faith in the law schools (and among other academics and the *bien-pensant* community) that there is a principled ground for this 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. It has been said that if you remember the Sixties, you weren't there. But I was there, and I can tell you. This aversion to the military became a strong current in liberal and academic feeling during the Vietnam War; since then it has not abated—or even developed. Young people who have been indoctrinated to feel revulsion for all things military have been taught to attribute that reflex to the policy on gays. As a feeling, it is no doubt sincere, and opposition to the policy is fairly argued, and unresolved. But it is also a pretext, not all that different from the rationalizations that are invoked to bless other forms of discrimination.[5] The policy on gays in the military is an Act of Congress,[6] and compliance by the military is required by the principle of civilian control. Hostility to the military itself on the ground of its compliance with this Act of Congress is (especially on the part of lawyers) simply ignorant.

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There is a far more compelling and convincing reason for the implacable hostility directed against the military by elite lawyers and students at elite law schools. It has a lot to do with the culture of the lawyers, their financial and political interests, and their pretensions. To be fair,

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Sheet, *available at* http://www.law.harvard.edu/prospective/jd/apply/hls-fact-sheet.pdf (indicating that 47% of the incoming class in 2009 hailed from the Northeast, New England, and the Far West (defined as California and Nevada)).

[4] *Compare* Women In Military Service For America Memorial Foundation, Inc., Statistics on Women in the Military (Apr. 7, 2009), http://www.womensmemorial.org/PDFs/Statson WIM.pdf (indicating that women comprise 14.2% of Active Duty and 15.1% of Reserve and Guard forces), *with* Harvard Law School, *supra* note 3 (indicating that women comprised 48% of the incoming class in 2009).

[5] If Congress alters the current policy on gays in the military, one can anticipate similar objections will be registered citing recruitment discrimination based on age and disability.

[6] *See* 10 U.S.C. § 654 (2006).

lawyers also have a lively disrespect for many other professions and callings—ask your family doctor; or consider what happened to the accounting firms. But the military is a special case.

Between upper-caste lawyers and the military profession, there is a competition for ascendancy—for prestige, resources, influence, and authority—and (in one potent word) honor. In that competition, lawyers have natural advantages—among them, all the legislatures and all the courts. There are few internal constraints on our exercise of power. And law in competition does not get along well with others. We tend to press our advantages brutally and without apology—we praise our dominance as the rule of law.

This competition has been intensified by war. Acknowledgment of a war footing immediately gives advantage to the military. War 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, 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 legal elite to 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 the legal elite's dominance in this internal competition, and for weakening the military opponents.

It is not surprising that this competition manifests itself in the ongoing debate over how to classify the terrorist threat—as a matter of national defense or as a matter of law enforcement. Fair arguments lie on both sides; but to my observation, the perspective of lawyers is self-interested, reflexive, and self-oriented.

Many lawyers and law professors simply deny that we are at war. While we all have a stake in peacetime—the military most of all—the legal community has a special interest. During peacetime, soldiers are a contingent asset, while lawyers rule. So the legal 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.

Lawyers and law professors will explain that this current conflict is not like other wars, which is true enough. Then again, few wars are like

other wars—fortification and sieges are history; our Civil War was like nothing ever seen; likewise, the First and Second World Wars, Vietnam, Kosovo. Lawyers and law professors ask, "If this is war, when will it be over so that its constraints can be relaxed?" But one could also ask when the Korean conflict will be over (North Korea repeatedly abrogates the cease-fire), and the Cold War (of fifty years duration) was predicted to last indefinitely. And of course, the present conflict could be over quite soon—if we lose.

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Competition and antipathy manifest themselves in pro bono activity. Many inmates of the facility at Guantánamo Bay find themselves well-lawyered. Yet, in some family courts, parents are found to be unfit because they are soldiers and sailors being deployed abroad;[7] they can look in vain for high-power legal assistance.[8] But 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 allow the federal government to see who had taken out various library books.[9] As former Attorney General Michael Mukasey has pointed out, it was just such an inquiry that allowed the police to identify Ted Kaczynski as the Unabomber—an episode that excited no anxiety among civil liberties lawyers.[10] Why should it? I remember when every library book had a card in the back cover that listed the name of every person who had borrowed that book, and when. The idea that this controversy involves a threat to liberty is overwrought. But it is of a piece with litigation involving surveillance, data-mining, prisoner of war and habeas corpus claims, Guantánamo, and so on; in wartime lawyers may thus cast themselves in an heroic role as the real defenders of the Constitution.

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[7] *See* Associated Press, *Deployed Troops Fight for Lost Custody of Kids*, MSNBC.COM, May 5, 2007, http://www.msnbc.msn.com/id/18506417/.

[8] *Cf. In re* Marriage of Bradley, 137 P.3d 1030, 1032–35 (Kan. 2006) (service-member, proceeding in a custody dispute from a military base in another state, faulted for failing to meet procedural requirements of statute). The federal legislation intended to protect the legal rights of service-members stationed at base or abroad, the Servicemembers Civil Relief Act, 50 app. U.S.C. §§ 501–96 (2006), has been an inadequate safeguard. *See* Associated Press, *supra* note 7.

[9] *See, e.g.*, Doe v. Gonzales, 546 U.S. 1301, 1302–07 (Ginsburg, Circuit Justice 2005) (describing the controversy); *see also* Resolution on the Use and Abuse of National Security Letters, American Library Association (June 27, 2007) *available at* http://www.ala.org/ala/aboutala/offices/oif/statementspols/ifresolutions/nationalsecurityletters.cfm.

[10] *See* Michael Mukasey, Op-Ed., *The Spirit of Liberty*, WALL ST. J., May 10, 2004, at A16.

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Why do lawyers worry? What do they 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, constitutional lawyers 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 the skilled safecracker regards the safe.[11] So anything that diminishes the primacy of lawyers vis-à-vis the Constitution is something that undermines the claim of entitlement by the elite bar and the legal professoriate—and judges—to control the meaning of 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 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 go over to the other side. We differ in skill-set, tactical imagination, culture, values, 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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"Militarism" is a state of mind that extends the values of the military profession outside its proper sphere, invades civil society, and subordinates civil society's values and prerogatives.[12] It is dangerous in our country to the extent that it might erode the great principle of civilian control of the military. At the same time, however, there is no observed

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[11] *See* Landell v. Sorrell, 406 F.3d 159, 178 (2d Cir. 2005) (Jacobs, J., dissenting from the denial of rehearing en banc).

[12] *See* ALFRED VAGTS, A HISTORY OF MILITARISM 17 (Meridian Books 1959) (1937) (describing militarism as a state of mind that ranks "military institutions and ways above the ways of civilian life, carrying military mentality and modes of acting and decision into the civilian sphere").

trend toward militarism in our country. The fact is, an opposite state of mind has taken hold—civilian values are invading military precincts, discounting superior military values, and impairing the necessary services of that profession. We are not at risk of militarism; but we are increasingly in the grip of a militant civilianism. And the military is powerless to counteract this tendency because the military has internalized the values of civilian control, and because those values are enforced by tradition and regulation.

This state of affairs has consequences. I have mentioned the ongoing debate over classification of the terrorist threat (as a matter of national safety or as a matter of law enforcement) and the unwillingness of the legal profession to see or acknowledge the existence of hostilities when they arise, let alone figure out how to deal with peril and war.

But, 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; how weapons work and which are needed; strategy, tactics, intelligence, logistics; when to check the military, when to mobilize it, and when to deploy it. It is dangerous to lodge such powers in the hands of civilian leaders who are ignorant and suspicious adversaries of the military, just as such powers should not be entrusted to ignorant cheerleaders or jingoists. It is not necessary or possible that all our leaders should serve in the military. But the skills needed for effective civilian control can be acquired only by the management of appalling responsibilities, the weighing of incommensurable values, and decisive action taken in ambiguous conditions—not by the thin gruel of internships and fellowships, clerkships, junior years abroad, and courses on public policy.

This alienation of the military is not good for the legal academy either. The exclusion of the military perspective and profession drains the law schools of necessary influences in such areas of study as treaties, human rights, war, and geopolitics. These are not inconsiderable things. A recent course list shows that Harvard Law School offers over 275 courses, including "Law and the Unconscious" (I've taken several courses like that).[13] Fewer than half a dozen of these courses arguably intersect with the military. One of them, "National Security Law," seems to deal with national defense (though the issues are chiefly those raised by constitutional lawyers). Two others are "International Human Rights" (which would be concerned with moral restraints on use of force) and a "War Crimes Prosecution Workshop" (which speaks for itself).

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[13] *See* Harvard Law School, 2009–10 Course Catalog, *available at* http://www.law.harvard.edu/academics/courses/2009-10/.

Outside the academy as well, the legal establishment increasingly lacks people who have indispensable skills and insights. In legal work, the impact is visible on issues such as habeas corpus for prisoners of war; disclosure of secrets that entail risk to American and allied soldiers; and pro bono activity that instinctively and systematically opposes itself to measures that assist the nation's defense. And on the military side, the Judge Advocate General Corps is hampered in recruitment of graduates from elite law schools, so that the military itself loses influences that might be broadening.

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What is my interest in this and why do I care? I have no military credentials. Like many judges, I know nothing about the military. I make no bones about these things. But I owe gratitude to the people who are protecting me and my country, my city, and the liberal democratic republic that is the only environment in which I could live. Gratitude is the least powerful human emotion, and the one that passes most quickly; but I think that the alienation I am talking about—which I too experience—is a moral failing. At the scores of bar events I have attended since this country has been at war, not once has a moment of silence been asked to call to mind Americans in the military who are in peril abroad.

The commitment of the military to our Constitution, their dedication, and their sacrifice, should be met on our side with respect and gratitude—and with preferment in opportunities—not by truculence, ignorance, hostility, and litigation. The law elite, which honors those of us who defend the Constitution in our way, should not exclude this one group just because, in defending the Constitution, they risk all.