

A POLITICAL AND LITERARY FORUM

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## Forum

### The Moral Responsibility of Volunteer Soldiers

#### Opening the Debate

**Jeff McMahan:** Traditional just war theory has it wrong. Soldiers are morally culpable for fighting in unjust wars, and thus deserve the option of selective conscientious objection.

#### Responding

*Assaf Sharon*

*Brian Imiola*

*Shannon E. French*

*Seth Lazar*

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**Reply: Jeff McMahan**

Wednesday, November 6, 2013

Selective conscientious objection is not just an idea whose time has not yet come; it is one that those who value democratic principles and human rights should hope *never* comes.

The central flaw in Jeff McMahan's proposition is easy to discern: the judgment about what is a just or moral use of force resides not with the collective wisdom of a secular, pluralistic, and lawfully constituted democratic government, but with individual soldiers, whatever their ideologies. In essence McMahan advocates the triumph of the government-armed individual over the judgment of free society writ large.

Does such an explicit rejection of civilian control of the military set off alarm bells for McMahan? Apparently not. He seems to assume that individual judgments about what is just and moral would inevitably conform to some unstated philosophical construct of his liking.

That is not the human condition. As the Supreme Court pointed out in *Gillette v. United States*—the 1971 case that denied virtually the same claim as McMahan is now making—America is a “nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions.”



Charles J. Dunlap Jr.  
Former Deputy  
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## We don't allow our troops to overrule civilians on issues of war and peace.

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While we tolerate vastly different and sometimes onerous points of view in our society—and to an extent in our military—we don't allow the troops to overrule civilians on the critical question of war and peace. Indeed we ask that the few sacrifice their ideological preferences for the benefit of the many. As the Court recognizes, “The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.” Why? Because “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”

McMahan's scheme invites some frightening scenarios. Suppose that the armed forces, empowered as he would have them, announce that based on a collection of judgments from certain key members it will fight wars only against Muslims, people of color, and gays, because such wars are the ones they judge to be moral and just.

It makes no more sense to allow individual troops to pick and choose their wars than it does to allow people to pick and choose what laws they will obey. When a democracy goes to war, it does so as an expression of the rule of law, notwithstanding often contentious and partisan political disagreement. It is not for the military, or its individual members, to involve themselves in such arguments. History has given us too many examples of the disastrous effects of a politicized military.

In a real way the citizenry's collective assessment of moral rectitude and justness is reflected in the authorities the law provides. So while U.S. military law does not permit disobedience based on the “dictates of a person's conscience, religion, or personal philosophy,” it also does not require anyone to obey an illegal order. To the contrary, adherence to a patently illegal order is itself a crime. No soldier is obliged to do what the American people consider unjust or immoral as reflected in law.

McMahan's essay inevitably raises questions: What sane citizenry would provide advanced combat training to its self-selected military, arm it with the finest weapons on the planet, and then allow it to defy the orders of its democratically elected commander-in-chief and legislature? Moreover, what kind of democracy is libertarian enough to permit individuals in its most powerful, authoritarian, and least democratic institution—its military—to pick and choose the wars they will fight, yet also sufficiently dastardly and despotic to order them to wage an unjust and immoral war?

There are other logical oddities in McMahan's essay. He suggests that troops that are fighting what *he* considers to be an unjust war should not be protected by international humanitarian law. The International Committee of the Red Cross properly rejects such thinking for the obvious reason that a “denunciation of guilty parties . . . would be bound to arouse controversy and paralyze implementation of the law, since each adversary would claim to be a victim.”

More legal paralysis is not what the world needs right now. Decisions about the morality and justness of wars are rightly the product of the legal architecture the Constitution provides. The wisdom of those decisions ought to be decided in ballot boxes, legislatures, and courtrooms, *not* in barracks.