Voices from the Stars? America’s Generals and Public Debates

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Military officers rarely relish the prospect of testifying before Congress, particularly if it means disagreeing with the Commander-in-Chief. As I can personally attest, it is absolutely excruciating when headlines like “Military Lawyers Fault Bush Plan for Terror Suspects” follow your testimony. Loyalty to one’s commander is a bedrock value of the profession of arms, and seeming to deviate from it is counterintuitive to every officer’s makeup. Respectful disagreement with policy drafts is not, one hopes anyway, viewed as disloyalty.

The protocol of Congressional testimony is, I learned, for Administration officials to clear an officer’s opening statement. However, once questioning begins, the process permits personal opinions identified as such. That is what happened when senior military lawyers (judge advocates— “JAGs”) testified before the House Armed Services Committee (HASC) hearings in early September on the complicated issue of the legal architecture for military commissions.

As only a democracy like America’s can tolerate, the concerns of the JAGs received a very public airing. Opponents of the Administration’s plan understandably seized upon the critical portions of the testimony as demonstrating the proposal’s
flaws. Shortly thereafter, however, those same opponents were perplexed when the judge advocates who had testified vigorously against key parts of the draft nevertheless signed a letter saying they did not object to two other portions of the proposal (purporting to clarify the meaning of Common Article 3 of the Geneva Conventions).

Why the consternation? Unbeknownst to the military attorneys, the “do not object” language was touted by some advocates of the Administration’s proposal as indicating support for harsh CIA interrogation techniques. Of course, this JAG (and likely the others) had not only never subscribed to that view, he had never been asked to opine upon it. The letter was signed wholly in the context of a JAG’s knowledge and expertise, that is, the armed forces, not the activities of intelligence agencies to which he is not privy.

Such is the nature of Washington politics. In an article aptly headlined “Military Lawyers Caught in Middle on Tribunals” the New York Times observed that the experience “demonstrated the perils of active-duty officers’ speaking openly about sensitive subjects.” Regardless, the two main opponents in this controversy eventually achieved a compromise that included rectifying the key problems the JAGs had identified in their HASC testimony, as well as in earlier Congressional hearings.

JAGs are not the only senior officers who find avoiding political minefields difficult, especially in an election year. Consider the situation of General George Casey, America’s top commander in Iraq. At a Pentagon news conference last June, he insisted that setting a timetable for withdrawal would “limit his flexibility” and “send a terrible signal” to Iraq’s new government of national unity.

This presumably strictly military opinion also happened to dovetail perfectly with the view of one side of a highly-politicized debate. Yet hardly a day later media reports claimed that a drawdown was, in fact, under consideration by the general, much to the delight of the other side of the argument.

Others may determine there is no real inconsistency, but the question remains: what is the proper public role of active duty officers? Most active duty generals fully appreciate the dangers of an overly-assertive military caste. The deeply-ingrained American tradition of an apolitical military subservient to civilian control properly instills reticence, especially in the senior ranks.

Generals also know the risks of disagreeing with the civilian leadership. Accepted wisdom holds that officers should invariably reflect the views of the Executive Branch. Stray from the official line? The treatment of Army General Eric Shinseki after testifying honestly (and, as it turns out, accurately) about troop requirements for Iraq’s occupation is widely viewed as an object lesson of the most negative type.

Some believe generals can speak their minds so long as they limit themselves to purely military matters. The problem? There is really no such thing as “purely” military matters. Clausewitz famously observed that war is “a continuation of political intercourse… by other means.” With war’s enormous demand on blood, treasure, and national honor, military matters intertwine every dimension of a nation’s life, including politics.

Instinctive loyalty to - and respect for - the chain of command disinclines military professionals from airing their personal views. This is as it should be, unless and until that loyalty and respect becomes interpreted publicly as ideological agreement that contradicts their true professional judgment. The Supreme Court rightly advocates insulating the armed forces from “the reality or appearance of acting as a handmaiden for partisan political causes.”

A fundamental misunderstanding of the real meaning of civilian control also confuses the issue. Of course, it requires prompt, respectful, and complete obedience to lawful orders. But it does not mandate open support — or even silent acquiescence —

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to the partisan views of the military’s civilian masters.

Actually, unlike the militaries of some nations, American military officers do not take an oath of fealty to any particular individual or political party, but rather to the Constitution itself. The Constitution, in turn, tasks all the three branches of government with civilian-control responsibilities.

The Executive and Legislative branches usually predominate because they are subject to the electorate as the courts are not. For this process to work properly, however, elected officials and, ultimately, the people themselves, need the fullest possible exposition of the issues. In America’s democracy, the First Amendment facilitates the kind of public discourse that produces the world’s most powerful military.

Logically, the expert views of senior military leaders, including its JAGs, would seem to enhance a discussion of any other national security matter. For many reasons, career military officer-lawyers have views distinct from their civilian counterparts. Because they are military officers, JAGs strive to be independent and nonpartisan in ways a civilian lawyer who is a political appointee need not be nor, especially, ought to be.

And there is more. Long-term service in uniform gives JAGs a depth of understanding of armed forces—the “separate society” in Supreme Court parlance—to a degree impossible to acquire otherwise. As fellow military members subject to the same altruistic “unlimited liability contract” that everyone in uniform undertakes, they have a special bond with those with whom they serve that simply cannot be replicated.

All of this creates a different mindset in JAGs. In an especially insightful recent article in *Slate* (http://www.slate.com/id2150050/) Professor Richard Schragger captures an example of this unique perspective that JAGs acquire:

Military lawyers seem to conceive of the rule of law differently [than civilian counterparts]. Instead of seeing law as a barrier to the exercise of their clients’ power, these attorneys understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.

In any event, a nation dependent upon an enormous all-volunteer force ought to know what their military leaders are thinking. Indeed, opening their generals’ opinions to public scrutiny might serve a democracy’s long-term interests. Nevertheless, should concepts of duty and decorum exclude generals from public dialogue? Absolutely, if the subject is, for example, the suitability of civilian leadership. Likewise, security and operational concerns can appropriately close mouths.

The danger of unsettling the troops also obliges caution. Lt. Gen. John Vines, then a senior commander in Iraq, reportedly characterized the mere existence of last winter’s Congressional debate about Iraq as “disturbing.” This is indeed sobering commentary because everyone understandably fears undermining the morale of soldiers far from home.

Yet real support of the troops might demand a frank, national debate, however painful. Still, should America’s generals participate? If so, how? Occasional congressional hearings seem to be an appropriate forum, but are such hearings the only proper outlet? Uncertain of their authority to speak openly, some generals may talk privately to the press, members of Congress, or to another proxy—including officers in the retired ranks.
But is this the way Americans ought to divine the views of their still-serving generals? Plainly, few fully accepted paths exist. The electorate and their political leaders need to decide when and how they want to hear from their generals, if at all. Once they decide, it is then for the generals to salute smartly and obey.

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