

**MILITARY ETHICS AS THE BASIS FOR
THE SENIOR LEADER TO ENSURE THAT
MILITARY FORCE IS USED RESPONSIBLY**

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MILITARY ETHICS AS THE BASIS FOR THE SENIOR LEADER TO ENSURE THAT MILITARY FORCE IS USED RESPONSIBLY

The leak in the dike always starts from within.

-- VADM James Bond Stockdale¹

I. INTRODUCTION

This paper will analyze the critical role that military ethics plays in providing a defensible basis for the most senior military leaders to ensure that the President, as Commander-in-Chief, deploys military forces in a Constitutionally responsible fashion. After surveying the myriad definitions of military ethics offered, the paper will propose a working definition of military ethics tailored for the unique responsibilities of the most senior military leaders -- the Joint Chiefs of Staff (JCS).

The paper then assesses the peculiar ethical dichotomy facing the members of the JCS: each is both a ranking senior military officer in command of an Armed Service, sworn by oath to the defense of the U.S. Constitution,² and each is a principal military advisor to the Commander-in-Chief (often to the same President responsible for selecting the Chief for his present position) and who must loyally defend the military policies of the President before Congress and the public. The obvious potential conflict of ethical interests in these two discrete obligations is analyzed through the JCS's crisis surrounding their contemplated resignation on August 25, 1967, and the lost opportunities as a result of this difficult episode.³

The paper then examines two mechanisms of military ethics offered for military officers in command who oppose the policies proposed by the senior civilian leadership of the Armed Forces, and concludes that one model is preferable for the United States' JCS to meet their Constitutional obligations and, thereby, ensure that the use of American military forces promulgated by the Commander-in-Chief is a militarily ethical choice.

¹ Stockdale, James B., "In War, in Prison, in Antiquity," reprinted in The Parameters of Military Ethics, edited by Matthews, L.J. & Brown, (McLean, VA: Pergamon-Brassey's Internat'l Defense Publishers Inc., © 1989) p. 171.

² The same ethical dilemma faces the Chairman and Vice Chairman of the Joint Chiefs, although neither is the senior military officer of a branch of the Armed Forces.

³ The recent revelations of then-Secretary of Defense Robert S. McNamara that, within 90 days of the Chiefs' contemplated and rejected-- but never revealed-- resignation *en masse* in protest over President Johnson's Vietnam policy, he, too, was convinced of the futility of the Commander-in-Chief's continued policy of gradualization in Vietnam only underscores the magnitude of the lost opportunity when the entire constellation of military counsel to the Commander-in-Chief oppose his decision yet none acts on the opposition and all remain silent.

1967, and former Defense Secretary McNamara's recent *apologia*, In Retrospect. I am summarizing a significant portion of each book's coverage of this brief period in history in reciting these events in order to understand the ethical crisis, and the response thereto by the actors involved.

The Congress, the President, the Secretary of Defense, and the JCS were on a collision course over the prosecution of the war in Vietnam: manpower, targeting, escalation versus gradualization, funding, strategy, and outcomes were being analyzed, criticized, studied, and debated on Capitol Hill, in the press, and on campuses throughout the country. The JCS had concluded that a successful conclusion to the War could only be achieved if the supply routes into North Vietnam were cut -- both land and sea routes -- and not just a continued focus on disrupting the North's re-supply lines into the South. A CIA report had also indicated that continued focus on disrupting only the re-supply routes was unlikely to be fruitful, although the report was little more optimistic over the possibility of interdicting North-bound supplies in sufficient amounts to affect the war in the South. The JCS's recommendation had been forwarded by the Chairman of the JCS, General Earle G. Wheeler, via Defense Secretary Robert S. McNamara, to President Johnson, along with a collateral report on the additional funding and manpower necessary to disrupt the supply lines into the North, as well as a request for authority for additional bombing and mining targets. The Joint Chiefs testified as to the necessity for this expansion and new focus before the Senate Armed Services Committee's Preparedness Investigating Subcommittee in mid-August, 1967, and mentioned that some of the targets they were seeking to bomb had been on the JCS recommended target list for just shy of two years.³⁹

One week later, on August 25, 1967, Defense Secretary McNamara was called before the same subcommittee, and grilled over the rejection of the JCS advice. McNamara testified that the President had rejected the JCS recommendation, as was his right and prerogative, and that the Administration's program of gradualization and disruption of the re-supply routes into the South was both correct and proving to be very effective:

"As long as October 1965," he (Senator Howard Cannon, D-Nev.) said, these targets . . . were unanimously recommended by the Joint Chiefs of Staff. I am wondering whether or not you have confidence in the members of the Joint Chiefs . . . , and just what the reason is their recommendations on military matters and military targets are not followed."

I replied that "the Constitution gives the responsibility of Commander in Chief to a civilian, the President, and I am sure it didn't intend that he would exercise that by following blindly the recommendations of his military advisers. So you must assume that under

³⁹ *ibid.*, pp. 150-165.

the Constitution, it was recognized that the President would act contrary to his advisers at times.

"The Constitution," I went on, "recognizes that other factors than the narrow military factors must be taken into account by the Commander in Chief in making decisions in this area, and that, of course, is exactly what has happened."⁴⁰

The impact of this public repudiation of the JCS's advice, as well as the throwing down of the gauntlet that the President would accept or reject the counsel of the JCS as he saw fit, was profound within the JCS:

The JCS was stunned. Not only had McNamara ignored the CIA's report, he had dismissed the most important JCS contention: that a successful conclusion could only be gained by shutting off supplies to the North, not to the South

* * * *

The highest ranking officers now believed that they had been betrayed by their civilian leaders, that the war could not continue without an irrational loss of American lives, and that, given McNamara's bad-faith defense of a clearly discredited strategy, there was little reason to hope for an eventual American victory.⁴¹

JCS Chairman Wheeler recognized that the situation was grave between the JCS and the White House, and that the JCS must act:

Within hours of the testimony, Wheeler realized that in order to convince the American people that the tenuous consensus on the war between the nation's elected leaders and its military officers had been shattered, he would have to convince all the JCS members to make their break public. . . . For Wheeler, it was paramount that the public event . . . shift the public debate from an argument over the scope to an argument over the type of American involvement in Vietnam.

* * * *

On the late afternoon of August 25, Wheeler presented his plan to the rest of the JCS. The meeting was unprecedented. Not only did it not take place in the tank, Wheeler barred all JCS aides and did not allow anyone to take notes. . . . His next step was even more unusual. When the chiefs convened in his office, he asked each of them to pledge that what they were about to discuss would be kept strictly secret as long as any of them remained alive; they agreed. . . . Wheeler said he believed they should resign "*en masse*" during a press conference to be held the next morning.

⁴⁰ McNamara, Robert S., *In Retrospect: The Tragedy and Lessons of Vietnam*, (New York, NY: Times Books, Random House, Inc. © 1995) pp. 289-90 (parenthetical added.)

⁴¹ Perry, M., pp. 162-3.

Nothing in the UCMJ prohibits an officer, regardless of rank, from tendering his resignation. Of course, nothing in military law requires that the President accept such a resignation request; the President could decline and order the officer to continue performing assigned duties. A more interesting esoteric discussion surrounds the clause that links a mutiny to the usurpation of "lawful military authority": Would the commission of acts that are in conflict with the Constitutional oath of office transform an otherwise lawful authority into an "unlawful military authority? Put another way, would the President's continuation of a military policy that is acknowledged to neither ensure rapid, efficient victory nor prevent the needless loss of lives transform the President into an "unlawful military authority" such that the refusal of his order would not constitute mutiny? Or, does "lawful military authority" refer merely to those military authorities established under the law, regardless of the lawfulness of particular actions by that authority? Such questions are unsettled in the law, although under other sections of the UCMJ, the lawfulness of general orders is predicated on their consonance with the Constitution, the laws of the United States, or other lawful superior orders, and other orders are assumed to be lawful, provided the order does not conflict with the statutory or constitutional rights of the recipient of the order.⁴⁵

In hindsight, the political realities for the President militated against any realistic possibility of repercussion or recrimination against a JCS member who resigned over an ethical objection to the President's policies: Would a sitting President, enmeshed in an increasingly unpopular war, want to order a court-martial (for mutiny, disobeying an order, or whatever other offense could be fashioned from these facts,) where the defense to such charges would subject the policies, strategies, and competence of the White House and the Secretary of Defense to sustained public scrutiny, analysis, and criticism? Would the White House want it to become public knowledge that the President and the Secretary of Defense were marginalizing the JCS's counsel on the prosecution of an increasingly unpopular war, and that the nation's "principal military advisers to the President, the National Security Council, and the Secretary of Defense" were unanimous in their belief that the war could not be brought to a successful conclusion, absent a significant and substantial shift in military policy and strategy regarding the interdiction of supplies to the North?

Given Secretary McNamara's cavalier dismissal of Senator Cannon's concerns over the administration's divergence from the advice of the JCS, it is very likely that, as General Wheeler predicted to the JCS, the President would replace the JCS members, quickly and quietly, with five other flag and general officers who were willing to publicly support the Johnson Administration's war strategy. From a pure military ethics standpoint, the only remaining questions are: What would have been so wrong, so bad, or so dangerous for the American military structure (as General Wheeler intimated in his comment about throwing away all their combined dedication to obeying the orders of the civilian leaders) if the JCS had suddenly resigned, in public, over an ethical dispute with the Commander in Chief over his prosecution of the war? Would resignation *en masse* by

⁴⁵See, Article 92c(1)(b), 10 U.S.C. § 892, and Article 90c(2)(a)(iv), 10 U.S.C. § 890(2).

[A]vailable evidence drawn from the past suggests that staying within the system and trying to change it simply do not work. Consider that during the 10 years of the Vietnam conflict, a multitude of individuals faced the problem of moral choice over one policy or another. Yet, since no one resigned at the general officer level, we may assume that such men stayed on to continue their efforts to change the system. However, it seems clear for all their efforts, little in the way of major policy change was accomplished and the Vietnam "horrors" endured . . . In the end, it seems more probable that the system changed the dissenters than that the dissenters changed the system.⁵⁹

The social opprobrium attendant to contemplation of ethical resignation within military society is severe: one who does so is branded a "quitter" or "disloyal." Given our unique political history and lack of familiarity with the concept of public official resignations over moral issues, a sea change within professional military attitudes would be required before the concept of ethical resignations could become an effective ethical check on the civilian authority direction of military forces.

B. Ethically Pure Military Focus As Basis for Politics-Free Public Commentary.

A second alternative is to retreat from the increasing politicization of our senior military leaders in order to reestablish their pure military focus on national security issues under consideration by the civilian leadership and the President. As Professor Zoll proposes:

It is necessary to rethink the relationship of military officers with the political realm, if only to revive an ethical foundation for the profession that is transfused with political dicta. Politics obeys an ethics of its own -- more intricate and no less noble in its composition than that of the military -- but such a moral outlook is not appropriate to military circumstances. It is not merely a question of repulsing the enticements of political power; it is a matter of not adulterating military competency by an excessively political orientation, a world view . . . usually only dimly understood by most career officers. . . . The sharp line must be reestablished between the political and the military, and the reconstituted professional military ethic must include a strict prohibition against the incursion of professional military officers into political government service and a reconcentration of talents and energies on the development of military arts. This change of posture must also include . . . the refusal of senior officers to become expressly identified with specific governmental administrations.⁶⁰

The products of such an effort are two-fold:

⁵⁹ Gabriel, R.A., *Military Ethics*, p. 114.

⁶⁰ Zoll, D.A. p. 121.

First, a return to a more purely military focus will facilitate the military leadership's adherence to concepts of military ethics: to ensure proper forces and resources are applied to combat situations to maximize chances for victory and minimize risk of loss and fatalities through rapid attainment of military objectives. This combines a Clausewitzian victory focus with the public stewardship component advocated by General Taylor.

The second beneficial product is that the maintenance of such a militarily pure focus would tend to reduce the politicization of comments by senior military leaders -- by distancing themselves from the hurdy-gurdy of White House politics, the JCS's voices grow in stature, independence, and credibility when discussing the ethical imperatives of any particular course of action under contemplation. Instead of being co-opted into the White House public relations stable of talking heads, the JCS remain above the political fray, offering the definitive analysis of the military ethicality of the force, strategy, resources, weapons, rules of engagement, etc. that the political leadership intends to deploy. Ultimately, the divergent views of JCS and White House officials would coalesce into a policy that meets military ethical objectives before deployment of forces occurs. Such a course of events is in the fullest possible compliance with the Constitutional oaths of the JCS to provide for the common defense, and would work to impose a military ethics filter on all White House strategizing, without sucking the JCS into becoming the politico-military partners of the transient occupants of 1600 Pennsylvania Avenue. Professor Zoll argues that such restrictions would enhance, not restrict, the freedom of military officers to engage, even publicly, in dissent and discussions about the military aspects of national security policy that are within their professional competence.⁶¹

By unshackling the newly-refocused JCS to engage in sophisticated public discussions of military policies, both the independent stature of the JCS, and the level of public discourse and understanding about these critical national issues, would be enhanced significantly. Such a discourse would necessarily refocus military force deployment debates on ethical questions that go to the heart of the Constitutional oath of military officers: -- Does the policy contribute to the common defense? Is the policy designed to provide sufficient force and resources to ensure a rapid attainment of the military objective while minimizing the risk of fatalities wherever possible?

Because of the absence of a moral-resignation history within the U.S. military, this mechanism for senior level military ethics may be most feasible for the JCS to pursue.

V. CONCLUSIONS

Military ethics is critically important for every military officer, both personally and institutionally. Military ethics are an essential readiness issue for the JCS and other senior flag leaders because military ethics provides a mechanism for the JCS to impose military ethics parameters and filters onto the national security deliberation and decision process

⁶¹ *ibid.*, pp. 121-122

and thereby ensure that force use decisions of the President are Constitutionally supportable, and ethical by military ethics standards. The loss of adherence to a purely military focus by senior officers is a continuing and bedeviling problem that contributes to actions and decisions decried as careerism vice militarily ethical force leadership. And, as seen in the Vietnam era, the alternative to moral protest or dissent by senior officers was effectively impotent in effecting the unethical policies. The silent acquiescence of the JCS in August 1967 abetted the immoral continuation of a policy that was determined to guarantee neither a military victory nor the fewest fatalities possible in achieving the military objectives. Two ethical mechanisms for voicing opposition were analyzed for effectiveness in applying an ethical control filter to Commander in Chief policies, as well as a "fit" with the American historical perspective. The more comprehensive return to a pure military perspective and focus by the JCS is the preferred alternative. Restoring the pure military focus will provide the JCS the politics-free academic liberty to speak freely, authoritatively, and above the political din on military issues within their competence, and ensure that the ethical demands of military leadership positions, based on the loyalty to Constitutional principles contained in the oath of office, are applied to all force use decisions by the President. Such applications will ensure that force is used responsibly and ethically.