

Right vs. Right: Personal Beliefs vs. Professional Obligations

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America's servicemembers earnestly discuss notions of ethics and values throughout their professional careers. In fact, each service promulgates and aspires to certain core values, such as integrity, service, excellence, obedience, and honor. Lists of core values, however, can cause some difficulties, and there are reasons to doubt seriously the efficacy of their practice. Most obviously, these lists are often relegated to words on a wall that are given lip service on occasion but fail to guide conduct. Furthermore, even if taken seriously, core values can conflict with each other in difficult situations.

In practice, the services provide little help to military members thinking their way through such conflicts. How often, for example, does the value of loyalty lead to ethical failure because individuals think loyalty is more important than maintaining discipline and standards? In addition, many servicemembers tend to reduce *ethics* in the military to the advice of military lawyers. Rather than grappling with true ethical conflict and complexity, servicemembers may think avoiding violations of legal requirements such as the *Joint Ethics Regulation* is all that matters.¹ Even when ethics is approached sincerely during the decision-making process, discussions often concern dilemmas and focus on simple binary cases of differentiating right from wrong.

In reality, many genuinely difficult ethical challenges are not binary but involve tension between two or more competing *right* issues. What do military professionals do when their professional obligations collide with their personal beliefs—especially if those beliefs are grounded in deeply held moral or religious tenets? How do we resolve these issues, or counsel people who face such tough ethical dilemmas? Which right prevails—and why?

A better understanding of the ethical system grounded in the Constitution and of the military as a *profession*, in a sociologically robust sense of the term, reveals the answers. Military professionals adhere to the ideals of constitutional ethics as a consequence of their oath to protect and to defend the Constitution. Rarely, however, are members of the military provided with an opportunity to think deeply through the implications of their oath.

To understand better the requirements of this oath and the notion of constitutional ethics, this commentary reflects on the implications of the military as a profession. The discussion considers how and, more importantly, why the Constitution constrains the US military. In particular, we explore the obligations the oath imposes on the military

¹ US Department of Defense (DoD), *Joint Ethics Regulation (JER)*, Directive 5500.7-R (Washington, DC: DoD, 1993).

profession through a review of three Supreme Court cases and one Court of Appeals of the Armed Forces decision. Then, we propose a model for thinking through clashing obligations. Finally, we highlight how one senior leader dealt with a right-versus-right issue in the context of the repeal of the “Don’t Ask, Don’t Tell” policy, which provides a standard for military professionals to follow.

The Military as a Profession

In recent years, the services have explored the implications of the idea that the US military is a profession in a robust sociological sense. Society uses the term *profession* colloquially to refer to anything someone does for pay, as in “professional athlete.” But a much more precise and helpful definition in the sociology literature distinguishes professional work from the work observed in a bureaucracy such as the branches of the US military. The discussion about professions throughout the Department of Defense has been energized by the recognition that inevitable bureaucratic needs must be balanced by continually reinforcing the professional dimension of military service.

Army discussions on this approach began earnestly after a collection of essays that addressed various aspects of the Army’s professional identity were published.² With the appointment of Rear Admiral Margaret D. “Peg” Klein as the senior advisor to the secretary of defense for military professionalism, a mechanism for disseminating a shared set of overarching concepts and a common vocabulary for the services developed in the form of service-specific centers and professional learning opportunities.³ Thus, servicemembers can now frame questions of ethics in terms of the distinctive individual and collective professional obligations in contrast to simply the “obedient military bureaucracy.”⁴

How does thinking about military service as a professional activity inform a deep understanding of constitutional ethics? When individuals value their vocation in professional terms, their understanding of and motivation for their work improves. To help servicemembers think through such issues, Don M. Snider developed a framework to contrast professional and bureaucratic work through the following dimensions:

Societal service. Professions provide a specific service deemed essential to their societies. In the early modern period, only three true professions existed in the West: clergy, medicine, and law. In terms of the societal values at that time, those professions arguably provided the most important services: salvation, health, and justice, respectively. Similarly, the military services provide what is perhaps the most vital service, national defense, without which society would be unable to engage in other important services.

Technical knowledge. Professions possess a highly developed technical knowledge, and jargon, as well as a repertoire of skills and behaviors

2 Lloyd J. Matthews, ed., *The Future of the Army Profession* (Boston: McGraw-Hill, 2002).

3 The organizational platforms that engage in regular dialogue, share best practices, and forge shared concepts are the Center for the Army Profession and Ethic, the Naval Leadership and Ethics Center, the Profession of Arms Center of Excellence (Air Force), and the Lejeune Leadership Institute (Marine Corps).

4 Don M. Snider, “The U.S. Army as a Profession,” in *The Future of the Army Profession*, ed. Don M. Snider and Lloyd J. Matthews (Boston: McGraw-Hill Education, 2005), 16.

unique to the profession. Only members possess this knowledge, which is acquired over a long period of training, education, and experience.

Discretionary practice. Professions make discretionary decisions about the best ways to apply their unique knowledge and skills in the service of their clients. In contrast to highly repetitive and routinized bureaucratic work, professionals approach each situation as unique. Different professionals may, and often do, exercise discretion to approach novel situations in different ways.

Autonomy. Professions collectively have a high degree of autonomy, with correlative responsibility to the society for maintaining the quality, discipline, and conduct of their members. Unlike bureaucracies, professions generally control admission, promotion, and discipline of their members to the extent that they maintain the trust of the society they serve.

Public trust. Societies allow professions to exist only to the extent they possess and maintain a high degree of public trust. The need to maintain such trust generates an internal requirement for a strong ethic because insofar as members truly understand themselves and their fellows as professionals, they recognize that sustaining trust is vital to maintaining the society's permission to continue professional work. Every ethical failure of a profession's members invites societal intervention and regulation, which diminishes collective and individual autonomy as well as the freedom of self-regulation.

Lifelong service. A professional is motivated by a strong and lifelong service motive. As members mature, *what they do is not just their job*, the profession becomes integral to their identity and self-concept.⁵

These dimensions bear on constitutional ethics because understanding the responsibility of vowing to uphold the Constitution and to serve professionally, establishes obligations in a fundamentally different way than starting a job. Assuming a professional identity helps one realize the basic purpose of one's role and maintain society's trust toward the professional and the profession. In that light, any behavior or expression that threatens or undermines that societal purpose, or trust, is an ethical failure.

Of course, it is perfectly possible any individual member of the profession might think that he or she has a personal moral belief that is fundamentally at odds with those professional obligations. But when that occurs, if that individual strongly feels he or she can not or will not subordinate those beliefs to his or her professional obligations, the proper conclusion should cause the individual to leave the profession. In other words, when one joins a profession, one forfeits a certain degree of personal freedom of expression and moral autonomy. No person of conscience should join a profession if his or her own values and beliefs are in fundamental tension with its requirements. But what one cannot do is accept limitations, such as those associated with an oath of office, then act in ways that degrade the profession's, or the individual's, status as a full member of the profession.

5 Snider, "The U.S. Army as a Profession," in Snider and Matthews, *Army Profession*, 3, 14.

The Constitution and the Oath of Office

Contrary to popular opinion, one does not give up every constitutional right when joining the service. Servicemembers, as representatives of the profession of arms, do, however, forfeit several important constitutional rights upon taking the oath of office, as highlighted in the following four cases:

Orloff v. Willoughby, 345 U.S. 83 (1953). In this case, the Army had paid for the medical schooling of a young doctor. Prior to the doctor's commissioning, however, the Army required him to sign a form attesting that he was not a Communist. When the doctor refused, the Army denied him a commission and instead forced him to repay his commitment with service as an enlisted lab technician. The doctor sued, arguing that he was entitled to his commission. The Supreme Court rejected his claim stating, "The very essence of [military] service is the subordination of individual desires and interests of the individual to the needs of the service."⁶ In other words, the oath of office requires that service needs trump individual desires.

Parker v. Levy, 417 U.S. 733 (1974). This case, too, involved an Army doctor, but this time period was during the height of the Vietnam War. Captain Howard B. Levy was a doctor who refused to train special operators because they were "murderers of women and children" and who encouraged black soldiers to refuse to go to Vietnam due to what he perceived to be discriminatory policies of the Army. The doctor was court-martialed and found guilty. He then appealed, arguing his free speech rights were violated. The Supreme Court rejected his claim citing the following lofty language: "The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."⁷ In other words, after swearing an oath, an officer no longer has unfettered ability to say whatever he or she chooses. The military's need for discipline and duty trumps one's individual rights.

United States v. Sterling, 75 M.J. 407 (2016). The principle that military discipline may trump individual rights was affirmed by the highest military court in the case against Lance Corporal Monifa J. Sterling, who hung three signs in her workplace that read "no weapon formed against me shall prosper." Sterling placed this biblical quotation after a dispute with her supervisor. When ordered to remove the signs, Sterling refused and was court-martialed for violating a lawful order. The appeals court dismissed the assertion that posting the signs was a protected religious exercise stating "having restraints placed on behavior that is religiously motivated does not necessarily equate to either a pressure to violate one's religious beliefs or a substantial burden on one's exercise of religion."⁸ The court also "reject[ed] the argument that every interference with a religiously motivated act constitutes a substantial burden on the exercise of religion."⁹ In so doing, the court reaffirmed the principle put forth in *Parker v. Levy* that the military's need for discipline may override a servicemember's right to engage in religious exercise.

6 *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953).

7 *Parker v. Levy*, 417 U.S. 737, 733, 744 (1974).

8 *United States v. Sterling*, 75 M.J. at 417.

9 *United States v. Sterling*, 75 M.J. at 418.

Greer v. Spock, 424 U.S. 828 (1976). The last case deals more with civil-military relations and emphasizes the importance of the military being subservient to political civilian leadership. This case involved an installation commander who refused to allow a political organization to distribute leaflets on base. The group sued, arguing the military cannot restrict the free speech of civilians. The court upheld the military's action by stating policies that keep the military "insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes" are "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."¹⁰ In other words, the military can restrict political speech because the military must—in both reality and appearance—be apolitical.

In sum, the Supreme Court and the Court of Appeals for the Armed Forces have provided a roadmap to the obligations of the oath of office. When military professionals commit to support and defend the Constitution, they also affirm that the services' needs will trump their personal interests, that concepts of discipline and of duty may outweigh their personal rights, and that they cannot be or appear to be partisan. These concepts form the basis of our constitutional ethics. While easy to say and to agree to in an abstract sense, this concept can be much more difficult to practice, especially if these obligations pit deeply held personal convictions directly against solely professional obligations and requirements. To aid in resolving such dilemmas, we need a framework or model to assist with clearly analyzing them.

Constitutional Ethics and The Oath

The oath of office certainly does not require military professionals to eliminate all personal thoughts or moral beliefs or to cease all personal pursuits or religious practices. Servicemembers must, however, identify situations or contexts in which their professional obligations take precedence and when their personal beliefs can reign. The following model supports such assessments.

First, a military professional should identify the circumstance: is this situation isolated in a purely personal or an essentially professional sphere or is it occurring in a complex combination of personal and professional contexts. This determination is not as easy as identifying whether one is in uniform or in the workplace when a situation develops. One's place of worship, for example, would normally be considered the height of a personal setting. But if during a coffee hour after the service, a military retiree asks for an opinion on the president's Syrian strategy or on the Defense Department's latest recommendations for retirement benefits, the context becomes a bit murky.

Factors one should consider in such circumstances include the status of the individual and the listener or audience and the characteristics of the individual's speech or actions. For example, one could encounter personal situations, such as a colleague dealing with a death in the family or a divorce, in which personal beliefs and tenets might be brought to bear while in uniform at the workplace. This would especially be the case if both parties know they share religious affiliations or other personal

10 *Greer v. Spock*, 424 U.S. 828, 839 (1976).

beliefs and the conversation is clearly private, such as in a closed office where the conversation would not be overheard.

Next, one should identify the purpose of the action. This assessment requires honesty with oneself and time for self-reflection. One must be able to ask, and answer, tough questions such as what is motivating my action? What loyalty is driving me? Am I making this choice or statement because of a personal belief, a professional obligation, or both? In Levy's case, his personal views about the Vietnam War drove his comments, and he allowed those views to conflict directly with his professional commitments. In this situation the captain's behavior clearly diverged from the obligations he accepted with his professional oath of office. Likewise, the comments of General Stanley McChrystal and his staff to a *Rolling Stone* reporter were also motivated by a sense of personal grandeur and lack of professional self-discipline rather than the professional military ethic of selfless service described by Samuel P. Huntington.¹¹

Finally, one should consider the likely effects of one's actions to determine whether the consequence will likely advance one's personal beliefs or one's professional obligations. Similar to the *Greer v. Spock* case, this evaluation considers the possible perceptions of a reasonable observer. Would an outsider deduce I was endorsing my personal beliefs over my professional obligations?

Putting the Model into Practice

The decisions of General Carter F. Ham, US Army retired, while conducting an assessment of the possible repeal of "Don't Ask, Don't Tell" clearly demonstrate the practical application of this model. In January 2010, President Barack Obama delivered his State of the Union address that called for repealing the statute by the end of the calendar year. In a Senate Armed Services Committee testimony on February 2, 2010, Secretary Robert M. Gates stated the question surrounding the repeal was not "whether the military prepares to make this change but how we must—how we best—prepare for it."¹² At that time, Admiral Michael G. Mullen stated, "speaking for myself and myself only, it is my personal belief that allowing gays and lesbians to serve openly would be the right thing to do. . . . For me, personally, it comes down to integrity—theirs as individuals and ours as an institution."¹³ Later in the week, Ham was asked to cochair the Comprehensive Review Working Group to assess the impact that repealing the policy would have on the force.

Despite the personal beliefs held by this devout Catholic and Jesuit-educated man, Ham later commented "when Secretary Gates appointed me as co-chair of this review, I was not thrilled."¹⁴ Yet, Ham

11 Michael Hastings, "The Runaway General: The Profile that Brought Down McChrystal," *Rolling Stone*, June 22, 2010; and Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, MA: Belknap Press of Harvard University Press, 1985), 63.

12 *Hearing on the Future Years Defense Program, Before the Senate Armed Services Committee*, 111th Cong. (February 2, 2010) (statement of Robert Gates, Secretary of Defense).

13 *Hearing* (Robert Gates).

14 *Hearing on the Policy concerning Homosexuality in the Armed Forces, Before the Senate Armed Services Committee*, 111th Cong. 1 (December 2, 2010) (testimony of General Carter F. Ham, Commander, US Army Europe, Cochair Comprehensive Review Working Group).

recognized his professional obligations took priority over his personal beliefs. During the group's first meeting, the general stated his number one rule: "Check your personal views at the door."¹⁵ He explained to the team that personal views did not matter: the secretary of defense had given the team a tasking with the expectation that the team would accomplish it to the best of its ability. Ham then directed that if anyone could not accomplish that task based on personal beliefs, he or she needed to depart the team. The question before the group was not whether the individual members approve of homosexuality in general or of gays and lesbians serving openly in the military. Instead, Ham asked whether individual members could put aside their personal beliefs to accomplish the professional task before them in an objective manner. In framing the question in this way, Ham clearly communicated that duty and discipline trumped each individual's rights and beliefs, demonstrating his commitment to the group's professional obligations.

During the first week of the group's efforts, Ham asked his legal advisor to clarify when he was required to give his personal opinion before Congress. The advisor found the agreement he signed with Congress when becoming a four-star general and determined that he was required to provide his personal opinion when asked to do so before a duly constituted committee of Congress. Over the next ten months and prior to each one-on-one meeting with senators, representatives, or staffers, he would clarify this requirement. On November 30, 2010, the working group released its final report. In it, Ham and his cochair Jeh C. Johnson, who was then general counsel for the Department of Defense and later became the secretary of Homeland Security, concluded "based on all we saw and heard, our assessment is that, when coupled with the prompt implementation of the recommendations we offer below, the risk of repeal of 'Don't Ask, Don't Tell' to overall military effectiveness is low."¹⁶

That same morning, in a closed-session hearing before the House Armed Services Committee, a young democratic congressman asked Ham for his personal opinion about gays and lesbians serving openly in the military. The representative clearly expected an answer that rang consistent with Ham's professional assessment in the report. The representative—and the rest of the committee room—was instead surprised by Ham's response explaining his personal, deeply held religious views did not condone homosexuality.¹⁷

When asked just a short time later by the media to restate his personal opinion given to the closed House committee, Ham summarily responded, "I am, as all senior military officials are, obliged if asked by a member of Congress before a duly constituted committee to offer my personal opinion, and in that setting, I would do that."¹⁸ This statement demonstrates Ham's clear understanding of the intersection between his professional responsibilities and his personal beliefs: he provided his

15 For more on this statement, see GEN Carter F. Ham, "Report on Don't Ask, Don't Tell Policy," C-SPAN, November 30, 2010, 55:32–56:00, <https://www.c-span.org/video/?296799-2/report-ask-policy&start=2450>.

16 DoD, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell"* (Washington, DC: DoD, 2010), 3.

17 For more on this exchange, see Ham, "Report on Don't Ask, Don't Tell Policy," 55:32–56:04.

18 For a similar response during this press engagement, see Ham, "Report on Don't Ask, Don't Tell Policy," 56:05–56:19.

personal opinion before the committee because he had a professional obligation to do so. But the Pentagon press room setting did not give him license to repeat his personal opinion. In this context, the audience would perceive his response to be official. Perhaps an even greater testament to the general's adherence to constitutional ethics and the requirements of his oath was Johnson's reflection of Ham's conduct: "Today was the first time I heard him give any type of personal view on this issue, when asked by a member of Congress."¹⁹

Concluding Thoughts

The military oath of office demands that servicemembers be willing and able to subordinate their personal beliefs to their professional obligations. By reflecting on constitutional ethics, military professionals can prepare themselves to recognize such dilemmas and determine which obligation prevails in a given situation. Servicemembers cannot begin thinking about such challenges only after being selected for senior leadership levels. Instead, they must challenge themselves and their subordinates to read and to think about the Constitution, the oath of office, and the role of constitutional ethics in their daily endeavors. Military members must talk about their profession of arms and its rights and obligations openly with their people and their peers. They must make constant and explicit efforts to inculcate a clear understanding of the moral meaning of constitutional ethics to junior members of the profession and to socialize all military personnel into a clear and consistent understanding of their profession and its unique obligations. And finally, every time servicemembers raise their hands and repeat an oath of office, either as the officiating officer or the promotee, they should ensure it is an open-eyed event where they recommit themselves to their profession and its obligations.

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¹⁹ Mr. Jeh C. Johnson, "Report on Don't Ask, Don't Tell Policy," C-SPAN, November 30, 2010, 56:25–56:44, <https://www.c-span.org/video/?296799-2/report-ask-policy&start=2450>.