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SOME CASES OF CONFLICTING LOYALTIES:
OBEDIENCE AND "LAWFUL" ORDERS
- IS IT REALLY THE ISSUE?

by
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The papers this morning raised a number of issues regarding last year's Iran-Contra affair and its investigation. During the appearance of Marine Lieutenant Colonel Oliver North before the joint Congressional investigating committee, Lieutenant Colonel North suggested that he was "only following orders". This generated a reference by Senator Daniel K. Inouye (D-Hawaii) to the Nuremberg principles,² which prompted a reaction of indignation by Lieutenant Colonel North's lawyer that merits an Academy Award nomination. Regardless of the facts in the Iran-Contra affair, which may not be determined until Special Prosecutor Lawrence E. Walsh completes his work, the defense of "superior orders" once again entered public discussion. It is an issue over which ethicists, journalists, and international lawyers wax eloquent. In my opinion, it is a "non-issue" 99.9999% of the time, whether

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on the battlefield or in a peacetime garrison environment. It is one of the more settled areas of the law, at least in American military jurisprudence³. It also masks a larger issue. Before turning to that issue, let me address "superior orders" first, by recalling an event that occurred almost twenty years ago, then by discussing briefly the law and practice of the United States with regard to superior orders.

On March 16, 1968, soldiers of C/1/20, Americal Division, entered the village of My Lai (4) in Quang Ngai Province, Republic of Vietnam, and commenced the systematic murder of more than one hundred unarmed, unresisting women, children, and elderly men. To take you back to these events, I'd like to play for you the CBS News broadcast for November 25, 1969, which features an interview by Mike Wallace with Paul Meadlo, a rifleman at My Lai (4) on that fateful day.

[Meadlo interview]

The issue of superior orders was raised in the My Lai incident, but not by Paul Meadlo. Army Chief of Staff General Creighton W. Abrams, fearing a public backlash against the Army for court-martial of the disabled,

discharged Meadlo, blocked his prosecution. The defense of superior orders was raised by First Lieutenant William L. Calley, and was rejected by both the triers of fact and appellate authorities.⁴

There are parallels between the My Lai incident and the Iran-Contra affair, but before turning to them - and the larger issue - brief discussion of the defense of superior orders is appropriate.

Writing in The History of the Peloponnesian Wars, Thucydides observed that "The strength of an army lies in strict discipline and undeviating obedience" to orders of superiors. The armed services of the United States, like the military of other nations, insist upon obedience to superior orders. This obligation is recognized in a number of articles of the Uniform Code of Military Justice.⁵

Unlike most nations, however, the United States military has a long tradition of permitting use of the defense of superior orders with respect only to lawful orders.⁶ United States practice is well illustrated in the Vietnam-era case of U.S. v. Keenan,⁷ in which the appellate court held as follows:

"A Marine is a reasoning agent, who is under a duty to exercise judgment in obeying orders to the

extent that where such orders are manifestly beyond the scope of the authority of the one issuing the order, and are palpably illegal upon their face, then the act of obedience to such orders will not justify acts pursuant to illegal orders."

I am suggesting that the "superior orders" issue, when litigated, consistently has been clearer than defense counsel, journalists, or some academicians may wish or believe it to be. Moreover, refusals of illegal orders generally go unreported and therefore do not receive the same attention as an assertion of the defense of superior orders. Most people are familiar with the assertion of the defense of superior orders by many Nazi criminals tried in the post-World War II war crimes trials; few, however, are aware of the instances where Wermacht officers refused illegal orders to (for example) execute captured allied personnel, or to carry out Hitler's "Commando Order."⁸

While there is a general perception that Lieutenant Calley's platoon ran amok at My Lai, there were soldiers present who refused to participate in the massacre, including one who shot himself in the foot rather than follow an order that was clearly illegal. In another Vietnam-era case, a Marine

squad leader ordered the murder of three Vietnamese civilians in his custody. Of the eleven Marines present, six (including the squad leader) carried out the illegal order; five refused. In the subsequent courts-martial of the six participants, none claimed a defense of superior orders.⁹

Similar refusals occurred during the Iran-Contra period. In September 1983 - one month before the attack on the Marine headquarters in Beirut - Robert C. McFarlane sent a handwritten note (on White House stationery) to the Joint Chiefs of Staff directing that the Marine peacekeeping force and its supporting naval task force commence "offensive peacekeeping." Fire directed at the Marines would be answered by salvos by the battleship New Jersey and airstrikes, even if it resulted in the destruction of entire villages and the loss of hundreds of civilian lives. The service staffs and chiefs were unanimous in their refusal to follow an order that was totally inconsistent with the peacekeeping mission of the Marines in Beirut, and manifestly illegal.¹⁰

There are related issues that, while relatively clear in the law, pose dilemmas to individual members of the military. Fraternization is one. In last year's Moscow spy

scandal involving members of the Marine Security Guard (MSG) force, a policy of nonfraternization with citizens of certain Socialist bloc nations was found to be vague, implemented in an irrational, uneven manner, and observed more by its breach than in its observance, particularly by individuals other than the members of the MSG. There are problems within the military and in the civilian sector with a superior taking advantage of his or her rank in order to obtain sexual favors or financial gain from a subordinate. The last problem involves abuse of authority rather than superior orders. Seldom, if ever, does the victim feel that he or she was "ordered" to consent, or if ordered, that the order was lawful. Rather, the victim assented because of the threat of authority posed by the superior.

With regard to the debate over consensual fraternization between subordinate and superior, or the nonfraternization policy invoked against the Marines in Moscow, the issue is one of clarity of orders. Helmuth von Moltke warned that "an order that can be misunderstood will be misunderstood."¹¹ This perhaps was a problem at My Lai. Lieutenant Calley claimed that the briefing by his company commander preceding the My Lai operation suggested to him that all persons found in the village were to be killed. While few would interpret the remarks of Captain Ernest

Medina in that fashion,¹² the failure of clarity of orders apparently was a factor leading to the subsequent massacre. A parallel exists to the Iran-Contra affair: vagueness in the prohibition of funding for the democratic resistance in Nicaragua in the various forms of the Boland Amendment prompted, if not encouraged, exploitation of the situation. Unlike the My Lai incident, where carelessly worded directions were foolishly and tragically interpreted by a subordinate who was ill-suited for command, the Iran-Contra debate was brought on in large measure by a provision that was made purposely vague by Congress and whose vagueness was intentionally exploited by members of the Executive Branch. Unlike the military superior-subordinate situation, in which subordinates are encouraged to seek clarification if an order is unclear,¹³ the long-standing confrontational state between the Executive and Legislative branches made perpetuation of the ambiguity desirable or its resolution politically undesirable by all concerned.

This avoidance of tough issues or difficult decisions brings me to what I regard as the larger problem: a failure of accountability, whether for misfeasance or malfeasance. Several examples come to mind.

- My Lai, while an aberration, was - given policy decisions by senior elected and appointed officials, and

senior military officers - an incident waiting to happen.
Its causes are easily identified.¹⁴ While the on-the-scene
commanders were responsible in varying degrees for what they
did (or failed to do) with regard to the massacre and its
subsequent cover-up, overall responsibility was much broader
- but unenforced.

- On 22 October 1983, the Marine peacekeeping force
headquarters in Beirut was destroyed by a truck bomb, with
the loss of 241 lives. The rules of engagement, which
placed a Marine sentry on the gate with an unloaded weapon,
had been tampered with by every echelon of command from the
U.S. Ambassador to Beirut to the National Security Council.
Visits by high-ranking officials, members of Congress, their
staffs, and the press, occurred daily and caused a serious
degradation of the capabilities of Marine force to
accomplish its mission or to defend itself. Yet the
official investigation carefully avoided the imputation of
responsibility to any individual higher than the
on-the-scene commander.¹⁵

On December 14, 1986, Marine Sergeant Clayton J.
Lonetree, a member of the Marine Security Guard detachment
assigned to the American Embassy in Vienna, Austria,
approached a U.S. intelligence officer and admitted to him
that he had been involved in acts of espionage while serving

as a member of the MSG at the U.S. Embassy in Moscow. An investigation by the Naval Investigative Service implicated other Marines. The Marine Corps replaced the MSG detachments in Moscow and Leningrad; it also instituted new MSG selection, screening, training, and assignment policies. Sergeant Lonetree and other members of the MSG were charged with violations of the Uniform Code of Military Justice. Sergeant Lonetree, Staff Sergeant R.J. Stufflebeam, and Sergeant K.J. Kelleher subsequently were tried and convicted by general courts-martial. Almost forty Marines received nonjudicial punishment. The Marine Corps approach was positive: rather than become defensive, it acknowledged its mistakes and moved quickly to correct them.

Although a preliminary internal investigation by the Department of State concluded that MSG misconduct in Moscow and Leningrad occurred solely as the result of misfeasance by the Marine Corps, the independent Moscow Assessment Review Panel¹⁶ established by President Reagan found to the contrary. The official report has not been released, but three of its unclassified findings are relevant to this conference:

1. Utilizing classic command responsibility standards, the panel concluded that the U.S. Ambassador to Moscow at the time of the alleged events knew or should have known of

the MSG misconduct, as well as the factors that led to the misconduct, and failed to take appropriate steps to correct the situation.

2. Although the panel concluded that the U.S. Ambassador to Moscow during the period in question was directly responsible for creating a work environment in which members of his MSG detachment could be successfully targeted by the Soviet intelligence services, the dual chains of command of the Department of State and the Marine Corps were criticized for their failure to adequately appreciate the uniqueness of assignment to a United States Mission in the Soviet Union. The panel commended the Marine Corps for the positive actions it had taken to avoid recurrence of the problem; it found that action (or inaction) at virtually every level within the Department of State had served to create or exacerbate the situation that permitted Soviet intelligence targeting of the MSG, and that those conditions continued to exist.

3. The panel expressly condemned the practice of successive administrations of a senior official "accepting" responsibility for the misfeasance or dereliction of duty of subordinates, but without the resignation of the official admitting responsibility.¹⁷

The panel's report was accepted by President Reagan, and

favorably endorsed by the National Security Council, the President's Foreign Intelligence Advisory Board, the Secretary of State, the Director of Central Intelligence, and the Commandant of the Marine Corps. The panel's assignment of responsibility to all levels within the chain of command reversed the practice of limiting responsibility to the lowest ranking individuals.

Regrettably, however, responsibility, though assigned, was not accepted. The panel's report¹⁸ was quickly and quietly filed away. An unclassified version of the report was destroyed, and its very existence denied when a copy was requested by a member of the House of Representatives. Department of State officials to whom responsibility was imputed by the report have been selected for promotion to higher positions of responsibility.

The action taken in each of these cases with regard to assignment of responsibility can be compared to Marine Corps actions in the Moscow case or Soviet actions following the Chernobyl incident and last May's landing of a West German Cessna on Moscow's Red Square. In each case responsibility was assigned at every level, and appropriate discipline awarded.

The original purpose of this paper was to address the conflict faced by subordinates between the obligation to

obey the orders of superiors and the obligation to refuse an order that is illegal. Certainly the Meadlo interview illustrates a worst-case scenario in which a below-average soldier followed the patently illegal order - and example - of an incompetent, amoral officer. In my opinion, however, the greater and more frequent problem is that of the conscientious subordinate who is faced with following the lawful (albeit unwise) directions of his superiors, including those of staff officers in no-risk positions who cannot resist micromanaging subordinate commands while avoiding any responsibility for the problems that might befall the subordinate commander as a result of their actions.

Certainly senior commanders and their staffs must make decisions that will not always set well with subordinates; and a commander rarely has the opportunity to move into harm's way under ideal circumstances, with every person, bullet and bean to which he is entitled. The problem is one of senior commands and staffs giving directions to subordinates that are tantamount to "rudder orders" that will unnecessarily increase the risk to the subordinate, while avoiding the risk should disaster or failure occur. ¹⁹

In the principal superior orders case from World War II, the court stated that a subordinate commander has four

options upon receipt of an illegal order: (1) he can issue an order countermanding the order; (2) he can resign; (3) he can sabotage the enforcement of the order within a somewhat limited sphere; or (4) he can do nothing. Unhappily, although the court acknowledged that the options were not altogether feasible in wartime service in the armed forces of a totalitarian nation, it offered little advice as to how a commander should resolve his dilemma.²⁰

The options available to a subordinate commander for "rudder orders" are similar, if not the same. However, most such orders, taken individually, seldom would present an individual with a situation in which he or she is faced with this dilemma; generally their effect is cumulative. The problem can be avoided in three ways: (1) By senior commanders and their staffs providing maximum support possible to subordinates while resisting the temptation to "tinker" with or second-guess on-the-scene subordinates. Thus during the 1983 Grenada rescue operation the Chairman of the Joint Chiefs of Staff made it clear to his staff and the service staffs that they would not micromanage the operation from Washington, as so frequently occurred during the Vietnam War.²¹ (2) By subordinate commanders challenging decisions of superiors, whether they are illegal (as was illustrated in the 1983 "offensive peacekeeping"

order) or unwise, or done repeatedly "in the name of" a senior commander by an uncontrolled staff. Or (3) by holding all levels in a chain of command accountable for the actions of their subordinates, where those actions occurred as a result of steps taken by a senior or his staff, or that a senior failed to take when he had an obligation to act. The examples I have cited - the My Lai incident, the attack on the Marines in Beirut, and the Moscow Embassy espionage case - illustrate the problem. Certainly none of those punished was a scapegoat; each could be faulted for his actions. But until we get away from offering up only junior sacrificial lambs, subordinates daily will be faced with the ethical dilemma of following instructions or orders of superiors that place them and their men at unnecessary risk. When that risk is men's lives, as it was in Beirut, the dilemma is greatest. A return to accountability at all levels of command can alleviate the problem. Failure to acknowledge the responsibility will ensure a repetition of My Lai, Beirut, and Moscow.

FOOTNOTES

- 1 Captain Wayne A. Mastin, USA, "LtCol. North and the Problems of Means and Ends;" Captain Kelly M. Fitzpatrick, USA, "The Limits of Loyalty and Obedience for Military Professionals."
- 2 Principles of the Nuremberg Charter and Judgment, contained in Department of the Army Pamphlet 27-161-2, International Law II (1962), pp. 303-304. The fifth principle states:

"The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."
- 3 See Yoram Dinstein, The Defense of Superior Orders in International Law (Leiden:Sijthoff, 1965); Leslie C. Green, "Superior Orders and the Reasonable Man," Canadian Yearbook of International Law (1970), p.61; M.L. Duke, "A Plea of Superior Orders," Marine Corps Gazette (March 1971), p. 34; Green, Superior Orders in National and International Law (Leiden:Sijthoff, 1976); Brigadier Sir David Hughes-Morgan, "Disobedience to a Lawful Military Command," Journal of the Royal United Services Institute (March 1977), p. 9; and Nico Kiejer, Military Obedience (Leiden:Sijthoff, 1978).
- 4 U.S. v. Calley, 46 CMR 1131; 22 USCMA 534, 48 CMR 19 (1973).
- 5 Uniform Code of Military Justice, articles 90(2), 91(2), and 92(1) and (2).
- 6 For a comparative analysis, see Nico Kiejer, Military Obedience, supra note 3. In a recent example, a Soviet defector and veteran of Afghanistan revealed that a Soviet soldier was ordered to murder a captured Afghan resistance fighter. When the soldier refused, his superior drew his pistol and killed the soldier - the Soviet Army penalty for failure to follow an order, even when it is patently illegal. Vladislav Naumov, "My War in Afghanistan," Washington Post, January 3, 1988, p. B5.
- 7 18 USCMA 108, 39 CMR 108 (1969).

8 The Commando Order, dated October 18, 1942, was Hitler's response to British raids on Bruneval (27 February 1942), St. Nazaire (28 March 1942), Dieppe (19 August 1942), and other commando operations into Nazi-occupied Europe. The order read in part:

"Henceforth all enemy troops encountered by German troops during so-called commando operations...are to be exterminated to the last man....If such men appear to be about to surrender, no quarter should be given them...."

"I will summon before the tribunal of war all leaders and officers who fail to carry out these instructions - either by failure to inform their men or by disobedience of this order in action."

On March 24, 1944, a U.S. Army reconnaissance unit of two officers and thirteen enlisted was captured one hundred kilometers north of La Spezia, Italy. The following morning the detaining unit received a written order from General Anton Dostler, its superior, directing the execution of the men in compliance with the Commando Order. After several exchanges of messages during which time the subordinate endeavored unsuccessfully to challenge the order, the executions were carried out. After the war, General Dostler was tried by a United States Military Commission in Rome. His defense of superior orders was rejected. Dostler was convicted on October 12, 1945, and subsequently executed by firing squad. The Commando Order and Dostler case are discussed at I Law Reports of Trials of War Criminals 22-34.

Other commanders refused to implement the Commando Order and similar directives. General of the Army Wilhelm von Leeb not only advised his subordinate commanders of his opposition to such orders, but advised them that he would fully implement the German high command's "maintenance of discipline" order, which provided for strict measures to be taken against any soldier committing war crimes. U.S. v. von Leeb, X and XI Trials of War Criminals. There are other instances in which captured Allied special operations personnel were not executed. See, for example, Bruce Marshall, The White Rabbit: The Story of Wing Commander F.F.E. Yeo-Thomas (London: Evans Brothers, 1952; and Aaron Bank, From OSS to Green Berets (San Francisco: Presidio Press, 1986).

9 U.S. v. Allen, NCM 68-3152, 19 USCMA 604 (1970); U.S. v. Belknap, NCM 68-3657, 18 USCMA 636 (1970); U.S. v.

Licciardo, NCM 67-0205, 18 USCMA 643 (1970); and U.S. v. Crider, NCM 69-4114, 44 CMR 815 (1970). For a summary of the incident, see Parks, "The Law of War Adviser," 31 The JAG Journal (Summer 1980), pp. 44-48.

10 Personal knowledge of the author, who participated in drafting the refusal. McFarlane had fallen into the trap of being induced into causing civilian casualties that was a common practice of the Viet Cong during the Vietnam War. There, Viet Cong would fire mortars or 122mm or 140mm rockets from the center of a village at night, hoping to draw U.S. counterbattery fire that would kill innocent civilians. The same tactic was used in the Beirut area, except that individuals would fire at the Marines from positions that would draw fire into villages or areas occupied by rival factions.

11 Robert D. Heinl, Jr., Ed., Dictionary of Military and Naval Quotations (Annapolis: U.S. Naval Institute, 1966), p. 226.

Upon publication of his principles of war, Sun Tzu was summoned before a leading warrior king and asked to submit his theories to a test; Sun Tzu consented. Two companies of women, untrained in military matters, were formed up and each placed under the command of one of the king's favorite concubines. They were armed and given cursory instruction in the manual of arms and close order drill. Then, to the sound of drums, Sun Tzu gave the order, "Right Turn!" The only response of the companies was one of laughter. Sun Tzu remarked: "If the words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame." Again uttering the same command and receiving the same response, Sun Tzu then declared:

"If the words of command are not clear and distinct, if orders are not thoroughly understood, then the general is to blame. But if orders are clear, and the soldiers nevertheless disobey, then it is the fault of their officers."

So saying and much to the consternation of the warrior king, Sun Tzu ordered the two company commanders beheaded and replaced by a member of each company. The execution was viewed by all, the drum was again sounded for drill, and the companies thereafter executed all maneuvers with perfect accuracy and precision, never venturing to utter a sound. Sun Tzu, The Art of War (L. Giles Trans, 1944), p. 9.

12 Lieutenant General W.R. Peers, USA (Ret.), in The My Lai Inquiry (New York: W.W. Norton, 1979), reported:

"[The company commander, Captain Ernest L.] Medina told his men they were to burn the houses, kill the livestock, and destroy the crops and foodstuffs. There is less unanimity about what he told them concerning noncombatants. However, by telling them that no civilians would be in the hamlet..., he created the impression in the minds of many men in the company that they were to kill or destroy everything in the area." (p. 170).

13 See, for example, U.S. Army Training Film 21-4228, "The Geneva Conventions and the Soldier" (1972).

14 Peers, supra note 12; Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident ("The Peers Report") (1970); and Parks, "Crimes in Hostilities," Marine Corps Gazette, August and September 1976.

15 The Long Commission Report, (28 December 1983), the executive summary of which was published in the Marine Corps Gazette (February 1984), pp. 10-13. See also Bemis M. Frank, U.S. Marines in Lebanon, 1982-1984., Washington: U.S. Marine Corps, 1987. Separating ammunition from weapons in a hostile environment is reminiscent of the early days of the Vietnam War, in which Marines on combat patrols could not load their weapons until they were fired upon. In both cases, fear by commanders of an accidental discharge outweighed the risk of loss of Marine lives. As was the case in Beirut, Marines died as a result of this decision.

16 The Moscow Assessment Review Panel, which met from May 6 to July 17, 1987, was headed by former Congressman and Secretary of Defense Melvin R. Laird. Other panel members were former U.S. Ambassador to Iran and Director of Central Intelligence Richard M. Helms; former Chairman of the Joint Chiefs of Staff John W. Vessey, Jr., USA (Ret.); and former U.S. Ambassador Diego C. Ascencio. The author was a staff member. It should be distinguished from the investigation conducted by former Secretary of Defense and Director of Central Intelligence James R. Schlesinger into Soviet espionage in construction of the new U.S. Embassy complex in Moscow.

17 Thus President Carter "accepted" responsibility for the failure of the Iranian rescue mission; President Reagan "accepted" responsibility for the bombing of the Marine headquarters in Beirut; and Secretary of State Shultz "accepted" responsibility for Soviet espionage in the construction of the new U.S. Embassy in Moscow; all without further disciplinary action or resignation of the official "accepting" responsibility. These may be compared to British Foreign Secretary Lord Carrington's acceptance of responsibility for the 1982 Argentine invasion of the Falklands/Malvinas, which was accompanied by his resignation.

18 Report of the Assessment Review Panel for United States Missions in the Soviet Union, 17 July 1987.

19 A poem popular during the Vietnam era summarizes the problem:

I'm not allowed to run the train
The whistle I can't blow.
I'm not allowed to say how fast
The railroad train can go.
I'm not allowed to shoot off steam
Nor even clang the bell.
But let the damned train jump the track
And see who catches hell!

20 U.S. v. von Leeb, supra n.8.

21 For an example of Washington micromanagement at its worst, see Parks, "Rolling Thunder and the Law of War," Air University Review (January-February 1982), p. 2. During the 1975 SS Mayaguez recovery operation, at one point there were so many senior officials and commanders endeavoring to "get a piece of the action" that there was a 2 and 1/2-hour backlog of FLASH OVERRIDE messages, a classification normally reserved for the National Command Authorities and the Chairman of the Joint Chiefs of Staff.