

AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

DOMESTIC CHALLENGES TO THE OATH OF OFFICE:
THE MODERN OFFICER'S RESPONSIBILITY IN REVOLUTION

by

James P. Luke, Major, USAF

A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements

Elective Instructor: Major Kenneth Hamner

Maxwell Air Force Base, Alabama

April 2000

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE APR 2000		2. REPORT TYPE N/A		3. DATES COVERED -	
4. TITLE AND SUBTITLE Domestic Challenges to The Oath of Office: The Modern Officer's Responsibility in Revolution				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Air University Press Maxwell AFB, AL 36112-6615				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT UU	18. NUMBER OF PAGES 26	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Disclaimer

The views expressed in this elective paper are those of the author(s) and do not reflect the official policy or position of the US government or the Department of Defense. In accordance with Air Force Instruction 51-303, it is not copyrighted, but is the property of the United States government.

Contents

	<i>Page</i>
ABSTRACT.....	IV
CONFLICTING DUTIES.....	1
THE CONSTITUTION OVERRULED	4
Domestic Enemies	5
The Rights of the Minority, the Rights of Man	7
Natural Rights versus Constitutional Rights	7
CONSTITUTIONAL AMBIGUITY	12
The Source of Conflict	12
Competing Arguments.....	13
Status of Issue Today.....	17
CONCLUSION.....	19
BIBLIOGRAPHY.....	22

Abstract

Noting that the military oath of office requires defense of the Constitution against enemies “foreign and domestic,” this paper examines the concept of a “domestic enemy” and assesses the implication of that domestic threat for the military officer called to the Constitution’s defense. The author proposes that there are two legitimate challenges to the oath taken by the commissioned officer. The first arises from the proposition that constitutional law is secondary to natural law. Since the officer is *morally* obligated to support natural law over constitutional law and the two have historically conflicted, a clash with the officer’s sworn oath is inevitable. The second challenge occurs when known constitutional issues remain unresolved; it may also be brought about simply by accepting the position of those who argue that the “living nature” of Constitution allows its “re-interpretation” in light of a changing culture. The resulting constitutional ambiguity has the potential to leave the officer without moorings on which to interpret his responsibilities under the oath.

Part 1

Conflicting Duties

Jefferson said we would probably need a revolution every twenty years or so and, by my reckoning, we are apparently long overdue.

—Colonel Wesley Allen Riddle, USA

I, [state your name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God.¹

An officer of the United States military, upon accepting a commission to serve his country, recites the above oath and obligates himself to support and defend the Constitution of the United States. Interestingly, the oath of office does not directly bind the officer to defense of the US government, nor to protection of those in power, or to defense of US property or territory. Rather, it requires devotion to ideals and ideas of freedom, it expects loyalty and assumes freely given allegiance, and it demands sincere effort. In each of these respects – all of them general in nature – the claim made on the officer is both noble and reasonable.

Careful examination of the oath's wording, however, suggest that there is one aspect of the oath that should give all officers pause. Specifically, the words that identify two types of enemies that might pose a threat to the Constitution – “enemies, foreign and domestic” – raise the issue of what constitutes a domestic threat to the Constitution. Without question, the

possibility of a foreign threat to American constitutional government is realistic, but more importantly from the officer's perspective, it is easily defined. Since a foreign entity, by definition, is not a member of our union of states nor in any way a participant in our government, an attempt by that entity to affect our system of government can be clearly categorized as a threat. Less clear, however, is what might constitute a domestic threat to the Constitution.

The purpose of this paper is to examine and clarify the concept of a "domestic enemy" of the Constitution and to assess the implications of that domestic threat for the military officer called to the Constitution's defense. It approaches an understanding of these issues by, first, examining the "theory" behind the concept of a domestic threat. In this regard, it seeks to identify from which quarter a domestic threat to the Constitution might be expected, the circumstances under which that threat might emerge, and – in light of the preceding factors – the officer's responsibility in responding to that threat. This avenue of approach reveals a fundamental challenge to the officer's oath. Specifically, it develops the argument that natural law is superior to constitutional law and, further, that an officer's *moral* obligation to the Constitution's defense is trumped by his obligations under natural law. Given the history of conflict between these two standards, the officer might expect that the future will hold similar challenges to his sworn oath.

The second avenue of study is an examination of America's most significant historical challenge to the Constitution – specifically, the American Civil War. By noting the role of long-standing constitutional issues in precipitating that conflict (specifically, state nullification of federal legislation and secession from the Union), this examination proposes that a second challenge to the officer's oath may result when known constitutional issues remain unresolved. It may also be brought about simply by accepting the position of those who argue that the

Constitution must be “interpreted in light of the constantly evolving experience of the American people.”² This challenge recognizes that a common understanding of the Constitution does not exist, potentially leaving the officer to his own personal interpretation in the event of a constitutional crisis.

In essence, this paper asserts that the officer’s commitment to oppose domestic enemies of the Constitution is unclear in some cases and, in others, it is rendered invalid by the same philosophical foundation on which the Constitution itself is based. It further posits that these dilemmas are not likely to be resolved – or avoided, concluding that the responsibility will fall upon the military officer confronted by a domestic crisis to ascertain the validity of his oath in the given circumstances.

Notes

¹ Oath of Office, Title 5 of the US Code, Section 3331, September, 1966.

² Al Gore, response to question about his criteria for selecting Supreme Court justices, Presidential Debates, March 1, 2000, online @ <http://www.boortz.com/march2.htm>, accessed March 14, 2000.

Part 2

The Constitution Overruled

One man with courage makes a majority.

—Andrew Jackson

Having themselves initiated a revolution against established authority, the generation that produced America's Founders knew firsthand both government tyranny and the ability of the governed to rise up and resist that tyranny. Given their background, the Founders likely envisioned potential domestic threats to the system of government that they created. Certainly the checks and balances which restrain each branch of the American system indicate that they feared the power of a dominant executive or a congressional faction seizing power. However, with nearly a century and a half elapsed since the American system of government was last challenged from within, and a history that has shown the system resistant to the executive and legislative tyranny that concerned the founders, the concept of a domestic threat to the Constitution is no longer a familiar one to contemporary America. This section begins by examining the concept of a domestic threat to the Constitution, arguing that the American experience suggests that the term may be narrowed to one specific domestic threat: that posed by the popular minority. Next, it assesses the rights of the minority and identifies the potential for conflict between those rights and the oath of office taken by military officers. This examination of the "theory" behind the concept of a domestic threat concludes with the assertion that the

demands of the oath are, on occasion, in conflict with the principles of law on which the oath is based.

Domestic Enemies

For the purpose of this paper, a domestic enemy of the Constitution is defined as one which attempts to subvert America's constitutional system of government not simply from within territorial boundaries of the United States but from within the system itself. While all Americans participate in "the system," there are clearly two distinct levels of participation. At one level are federal government officials: from clerks to congressmen, judges, and the president. It is unlikely that the armed forces would be required to take an active role in correcting unconstitutional acts occurring at this level. Historically, the military has not been expected to address subtle (though powerful) subversions of the system like the gradual increase in executive power during this century or recent criticisms of the judicial branch for "legislating from the bench." Even more dramatic usurpations of the Constitution, like Lincoln's suspension of the Writ of Habeas Corpus did not bring a military remedy despite a Supreme Court ruling of unconstitutionality. In the extreme – an attempt by an individual or group to seize power – it is unlikely all areas of government would fall in line without widespread coercion – and a coercive force of this magnitude is simply not available outside of the military. Thus, at this level, if the military simply supports the Constitution (thereby *not* supporting the unconstitutional action), no active defense of the system appears to be necessary; the system has the capacity to correct itself.

At a second level of participation, one finds the ordinary citizen, or in plural form, the people. Having dismissed the need for a military defense of the Constitution from those "within" the government, it is only from the citizenry that one might expect a domestic challenge to our

constitutional system. This is significant given the constitutionally sacred role of the people in the US system of government. It is the people who alone are sovereign, who alone have rights, and who alone can delegate authority to the government. While this might suggest that the people would have no need of revolution, such is obviously not the case: the sacrosanct role of the people does not imply that government action is dictated only by *unanimous* consent of the people. Rather, America's founders recognized the wisdom of John Locke who, in his *Second Treatise on Government*, argued that

if the consent of the majority shall not in reason be received as the act of the whole and conclude [or "bind"] every individual, nothing but the consent of every individual can make anything to be the act of the whole; but such a consent is next to impossible ever to be had...¹

Consistent with Locke's proposition, the American system of government puts all avenues of power in the hands of the majority. In possession of such power, therefore, it is unlikely that "the majority" would be compelled to revolution in pursuit of their aims. In a democracy, rather, revolution is a tool of the minority.

Alexis deToqueville, in his survey of American government, institutions, and culture in the early 1830s, provided one of the most eloquent statements of the challenges facing a minority in America:

When an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority, and implicitly obeys it; if to the executive power, it is appointed by the majority, and serves as a passive tool in its hands. The public force consists of the majority under arms; the jury is the majority invested with the right of hearing judicial cases; and in certain States, even the judges are elected by the majority. However iniquitous or absurd the measure of which you complain, you must submit to it as well as you can.²

Living under what deToqueville termed the "tyranny of the majority," it is not surprising that it is against the minority that the military officer might expect to be called in defense of the

Constitution. In light of this, a clear understanding of the rights of the minority and the implications of those rights is imperative.

The Rights of the Minority, the Rights of Man

Given the natural tension one might expect to exist between majority and minority and, further, given the preeminent role of the minority in fomenting revolution, one might expect an extensive discussion of the status and rights of the minority in the literature which accompanied our nation's founding. Yet despite a thorough explanation of the rights of "the people" in foundational literature – and in those texts which provided the philosophical basis for that literature – little attention is given to the rights of the minority except to note their subordination to the majority's will.

However, the rights of the minority are no less than the rights of the men who make up that minority – and the rights of the individual are substantial. For the purpose of this paper, it is not necessary to conduct a broad examination of the rights of man. Rather, the right of man to rebel, to throw off the government that oppresses him, is the primary subject of this analysis.

Natural Rights versus Constitutional Rights

The argument in favor of the minority's right to revolution revolves around those rights guaranteed to the individual both by the Constitution and by nature. As to the first, there exists some disagreement over whether the Constitution recognizes the right of revolution. One viewpoint claims that "a revolution, by definition, attempts to change the fundamental politico-legal order. A constitution, by definition, attempts to entrench that order...It would be absurd, in this view, to assume that a constitution contains the seeds of its own undoing..."³ However, a

countering view proposes that a revolution that attempts to preserve or restore constitutional government against the efforts of those attempting to subvert it – a “conservative revolution” – might indeed be recognized as constitutional.⁴

In fact, however, whether a constitutional right to revolution exists is only a secondary issue in determining the response required of an officer sworn to the Constitution’s defense. The primary consideration must be drawn from our Constitution’s foundation. The philosophical basis upon which American government is founded recognizes that man is “endowed by his creator with certain unalienable rights.” These rights are deemed “unalienable” because, being consistent with God’s law, or nature’s law, they are above man’s prerogative to oppose. While man, acting in society, still maintains the authority to form his own laws and even establish additional rights, Blackstone asserts that “no human laws are of any validity, if contrary to [the law of nature].”⁵ Or, as Indiana University law professor, David Williams, notes, “If the materials of constitutional law fail to safeguard a natural right, then the constitution is simply wrong.”⁶ Thus, it is to natural law that one must look to assess man’s right to revolution. If such a right is thereby established, it trumps any determination made by the Constitution.

One might anticipate that this idea of natural law’s superiority to constitutional law sets the stage for a moral/legal crisis for those individuals bound by an oath of constitutional loyalty. Yet, to carry the argument to conclusion, it is important to examine the position taken by natural law on the specific issue of man’s right to revolution. Not surprisingly, scholars are not in unanimous agreement on the issue.* Yet among the several sources examined for this paper, the

* Among the dissenters is 20th century author W. Cleon Skousen, who entitles one section of his text, *The Five Thousand Year Leap*, with the title “No Right of Revolution in a Minority” [Skousen, p 149]. Skousen’s support for his argument, however, relies exclusively on paragraph 208 of Locke’s *Second Treatise on Government*. Interestingly, Skousen’s excerpt of Locke omits two key elements of the text. The complete excerpt from Locke’s composition follows, with Skousen’s omitted text italicized.

But if the unlawful acts done by the magistrate be maintained – by the power he has got – and the remedy which is due by law be by the same power obstructed, yet the right of resisting, even in such manifest acts of tyranny, will not suddenly or on slight occasions disturb the government; for if it reach no farther than some private men’s cases, though they have a right to defend themselves *and to recovery by force what by unlawful force is taken from them*, yet the right to

dominant perspective and most compelling argument is summarized by John Zvesper who, writing in the *Encyclopedia of the American Constitution*, states bluntly that “the right of revolution is not a right that is defined and protected by the Constitution, but a *natural right*.”⁷ In supporting his argument, Zvesper is careful to reference the works of America’s founders (Federalist #40 and 43 [Madison] and #16 [Hamilton]), the Declaration of Independence, and the work of other scholars. America’s forefathers would seem to be in agreement, themselves having initiated – in union with only a minority of British subjects – a revolution against the British government. Even the supreme nationalist, Daniel Webster, while denying revolution as a constitutional right, acknowledged that the “right of revolution always existed.”⁸

Interestingly, Abraham Lincoln realized not only the natural right to revolution but also the distinction between that right and a constitutional equivalent. In his First Inaugural Address he stated, “Whenever [the people] should grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember, or overthrow it.”⁹ David Williams notes that it was only because Lincoln had taken an “oath registered in Heaven” to “preserve, protect, and defend” the Constitution that he felt himself honor-bound to resist attempts to overthrow it.¹⁰ This observation reveals an important point about the individual’s, and the minority’s, natural right to revolution. Specifically, their right grants them authority to act against society, but it does not demand that society respect their action. In fact, natural law can justify the majority’s opposition to minority revolt. Though not addressing revolution directly, Locke acknowledges this principle in his discussion of the rights of the individual.

do so will not easily engage them in a contest *wherein they are sure to perish*; it being as impossible for one or a few oppressed men to disturb the government, where the body of the people do not think themselves concerned in it... [Locke, p 227, para 208]

With all the text included, the paragraph seems to state the opposite of what Skousen asserts, instead clearly recognizing the right of man, acting as an individual, to redress grievances by force against society. If Locke is correct, then man also possesses that right when acting in concert with

But if the unlawful acts done by the magistrate be maintained – by the power he has got – and the remedy which is due by law be by the same power obstructed, yet the right of resisting, even in such manifest acts of tyranny, will not suddenly or on slight occasions disturb the government; for if it reach no farther than some private men’s cases, though *they have a right to defend themselves and to recovery by force what by unlawful force is taken from them, yet the right to do so will not easily engage them in a contest wherein they are sure to perish*; it being as impossible for one or a few oppressed men to disturb the government, where the body of the people do not think themselves concerned in it...(emphasis added).¹¹

Thus, although the minority maintains the natural right to act against society, it is not a right that the majority – or the officer – is obligated to respect *unless it is precipitated by unlawful acts against the minority*. The challenge to the officer’s oath arises when those unlawful acts have been committed. The supremacy of natural law over constitutional law demands that an officer’s allegiance be, first, to the former.

The implications of this principle are profound and the potential effects of its application significant. From a historical perspective, this principle would have dictated a completely different response to slave insurrections; it might have changed dramatically the manner in which American Indians were relocated to reservations; and had it been ingrained and widely known to exist in the American officer corps, it might have encouraged a revolt by Japanese-American’s interred during World War II. It would not have guaranteed a less bloody history, nor does it predict a less violent future. The application of this principle, however, does allow officers to meet the moral obligations imposed by nature and nature’s God in the performance of their duties.

Notes

¹ John Locke, *The Second Treatise of Government*, in *Two Treatises of Government*, Thomas Cook, ed., Hafner Publishing, New York, 1947, p 170, para 98.

other men. Typically, the act of a group acting to forcibly change government policy or behavior would be categorized as rebellion or revolution.

Notes

² Alexis de Toqueville, *Democracy in America*, Richard Heffner, ed., Mentor, New York, 1984, p 115.

³ David C. Williams, "The Constitutional Right to 'Conservative' Revolution," *Harvard Civil Rights-Civil Liberties Law Review*, 1997, Vol. 32, No. 2, p 413.

⁴ Ibid, 414.

⁵ Blackstone, *Commentaries on the Laws of England: in Four Books; with an Analysis of the Work*, Lippincott, 1903, Bk 1, para 63.

⁶ Williams, p 421.

⁷ John Zvesper, "Right of Revolution," *Encyclopedia of the American Constitution*, Levy, Karst, and Mahoney, ed., Macmillan, New York, Vol. 3, p 1581.

⁸ Maurice G. Baxter, *One and Inseparable: Daniel Webster and the Union*, Harvard, 1984, p 216.

⁹ Abraham Lincoln, *First Inaugural Address*, 4 March 1861, online @ <ftp://sailor.gutenberg.org/pub/gutenberg/etext90/linc111.txt>, accessed 6 April 2000.

¹⁰ Williams, p 424..

¹¹ Locke, para 208.

Part 3

Constitutional Ambiguity

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

—Thomas Jefferson

The preceding section demonstrated that Constitutional law and natural law may conflict and, in so doing, pose a direct challenge to officers sworn to the Constitution's defense. The American Civil War provides a good example of a second domestic challenge to constitutional government, though scholars may differ on whether it was the Union or the Confederacy that actually posed a threat to constitutional principles. From the perspective of the American Constitution, however, it is the most significant historical example of a direct challenge to the legitimacy and authority of the US federal government available for examination. Further, it provides insight into the dilemma that officers may face when constitutional processes are unable to resolve constitutional ambiguities.

The Source of Conflict

It is readily apparent that the institution of slavery played a dominant role in bringing about the crisis that resulted in civil war. Yet, any examination of the congressional and editorial debates of the day will reveal that revolution did not result from noble action taken by

Northerners to secure the natural rights of Negro slaves. While many Northerners may have found slavery repugnant, the slavery issue was only an indirect cause of the war. Previous issues had had nearly the same result. For example, debates over protective tariffs in 1832 had led South Carolina legislators to adopt an ordinance declaring the tariffs “unconstitutional and therefore unenforceable in South Carolina.”¹ The state went further by claiming that “any congressional effort to apply force would be ‘inconsistent with the longer continuance of South Carolina in the Union.’”² Compromise legislation quickly enacted at the federal level diffused the tariff issue but, more importantly, it left the real issue – the constitutional legality of nullification and secession – unanswered.

Thus, like a weed in a well-cultivated garden, the seed of conflict was present in the Constitution at its inception. It had grown unchecked since ratification because Americans remained unwilling or unable to strike at its root with a constitutional resolution of the issue. Absent a clarification of state versus federal power, slavery simply provided the conditions that allowed the conflict to blossom into full-scale civil war.

Competing Arguments

The challenge of states’ rights was, of course, a complicated constitutional issue and both sides had compelling arguments to defend their positions. Essentially, the issue came to this: what is the recourse of a state or minority group of states when in fundamental disagreement with the majority of states in the Union?

Daniel Webster had answered that question for Union supporters when he outlined three propositions regarding secession.

(1) The Constitution is not a compact of states but an instrument of government created by the people; (2) a state cannot secede without precipitating a revolution; [and] (3) the Constitution is the supreme law of the land, to be interpreted by

Congress or the Supreme Court [i.e., not by the states].³

As to his first point, Webster argued that “as to certain purposes [e.g., making war, regulating commerce, etc.], the people of the United States are one people.”⁴ As one people they lived under two governments, both of which they created, one federal the other state. Webster believed that the state had little standing in the relationship between the people and their federal government. He recognized no evidence supporting the concept of the Constitution as a compact of states, citing the Preamble’s “We, the people,…” in support of his argument. Webster’s second proposition flows directly from the first; and his third simply denies states authority to participate in issues that he perceived as arising between the people and their federal government. Perhaps not surprisingly, given his nationalist leanings, no less than the “Father of the Constitution,” James Madison, agreed that Webster’s argument was justified by history.⁵

Perhaps because the victors are often the authors of history, the constitutional basis for secession is less widely understood. After the war, however, the Confederacy’s president, Jefferson Davis, authored *The Rise and Fall of the Confederate Government* in which he eloquently defends the Southern cause. He began with a subtle appeal to natural rights by drawing a comparison between Southern secession and the original colonies’ Declaration of Independence from Great Britain. But he quickly moved to his central argument where he contends that the South had a legal (constitutional) right to secede. His argument focused on two principal points.

First, Davis noted that the individual American colonies established themselves as independent, sovereign states through the Declaration of Independence and their subsequent war with Great Britain.⁶ He argued that that sovereignty was maintained even through their “unification” in 1778 with the adoption of the Articles of Confederation by eleven of the states

(the two remaining states ratified the Articles over the next three years).⁷ The Articles, in fact, explicitly state that “each State retains its sovereignty, freedom, and independence and every power jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.”⁸ Davis further noted that the Articles themselves were formally entitled the “Articles of Confederation and Perpetual Union between the States,” and the claim to perpetuity was further emphasized in Article XIII with the explicit statement that “the union shall be perpetual.” But, as Davis noted, the union agreed to by the Articles was not, in fact, perpetual. Just nine years later, state delegates, acting in a congress of the United States, authored a Constitution, Article VII of which stated: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.” By this act, then, nine states could withdraw from the “perpetual” union and form a new, separate union regardless of the desires of the remaining four states. Further, *the actions of the majority of the states did not bind the minority but bound only those members of the majority*. With this argument, Davis effectively demonstrated that our nation’s founders clearly recognized the sovereignty of each state and the right of each to act independently.

Davis’ second argument focused on the sovereignty of the people and the manner in which that sovereignty was expressed. His argument was directed primarily at the assertions of Daniel Webster who claimed:

There is no language in the whole Constitution applicable to a confederation of States. If the States be parties, as States, what are their rights, and what their respective covenants and stipulations?...in the Constitution, it is the people who speak and not the States. The people ordain the Constitution, and therein address themselves to the States and to the Legislatures of the States...⁹

Davis responded by noting that the people of the United States “do not speak, never have spoken, and never can speak, in their sovereign capacity (without a subversion of our whole system),

otherwise than as the people of states.”¹⁰ Essentially, Davis pointed out that for Webster’s argument to be correct ratification of the Constitution would have to have been accomplished by national referendum, rather than state-by-state ratification. This clear distinction between the people of the states and the people of the nation is critical, for if the States are the only means by which the people express their sovereign will at the federal level, then those states must be able to act on that will.

Daniel Webster was not blind to American history or to the manner in which the union had been formed. Rather, he believed that history less important than “how the government under the Constitution had later operated.” Consistent with the tariff issue described above, Webster noted that:

From its first session...Congress had passed statutes supreme over those of the states and affecting the people directly [i.e., state enforcement was not necessary]. Though some laws had provoked complaints and threats, prevailing sentiment had always rejected a state’s right to judge whether those measures were constitutional.¹¹

The Supreme Court had established itself as the arbiter of constitutional issues. Thus, to Webster, the concept of state nullification of federal laws, or worse, secession, was simply revolutionary.

Supporters of both the Union and Confederate causes make compelling arguments for their positions and constitutional scholars are unlikely to ever agree over which is the most sound. The purpose of this paper is not to add support to the argument of either side. Rather, the preceding discussion is to demonstrate that both sides demonstrated a legitimate constitutional basis for their position.

In essence, the experience of the civil war demonstrates that the Constitution failed to provide clear guidelines regarding state sovereignty. This ambiguity left officers of the era with

the responsibility of assessing which side was more constitutionally correct. In summary, the fundamental disagreement between North and South was constitutional in nature.

Status of Issue Today

Remarkably, despite four bloody years of civil war, untold misery, and more than 600,000 men dead, the issue of states' rights has never been settled constitutionally. This is not to say that a determination on the issue was not made by the North's victory; clearly, secession is no longer commonly accepted as a right enjoyed by states, just as slavery is no longer accepted by society. Rather, it makes a distinction between a settlement made by what Wesley Allen Riddle, an assistant professor of history at the US Military Academy, calls "the Tribunal of Arms" and a settlement that has been constitutionally validated. It is ironic that the more indirect cause of conflict, slavery, did receive a constitutional validation with ratification of the 13th Amendment while an effort to confront the more direct cause was neglected.¹² The absence of a constitutional resolution means that the seed of conflict remains, and should it again germinate, the military officer is left without constitutional guidance as to his responsibility under the oath of office. The dilemma posed by the unresolved constitutional question of state sovereignty can be generalized to any controversial constitutional issue that has been "settled" but not validated through constitutional action or, more specifically, constitutional amendment (for example: abortion, the role of the federal government in education, issues of church-state separation, etc.).

Equally problematic has been the attempt over the past several decades to misrepresent the "living" nature of the Constitution. Traditionally, referring to the Constitution as a "living document" simply referred to our ability to modify our government in response to a changing world. More recently, however, the term has been claimed to imply that the Constitution is

inherently flexible, allowing new rights to be granted and new federal powers established without an actual change to the document itself. In light of the above discussion, which acknowledges constitutional ambiguities, this current trend can only be viewed as dangerous, threatening even those firm constitutional moorings historically available to the officer. If, indeed, the Constitution can be “re-interpreted,” then the officer is bound only to his personal interpretation of every constitutional principle – and the oath becomes meaningless.

Notes

¹ Baxter, 209.

² Ibid.

³ Ibid, 215.

⁴ Ibid, 216.

⁵ Ibid, 217-218.

⁶ Jefferson Davis, *The Rise and Fall of the Confederate Government*, Collier, 1961, p 64.

⁷ Ibid.

⁸ Article II, *The Articles of Confederation*, online at www.public.csusm.edu/public/guests/history/docs/artcon.html

⁹ Davis, 91.

¹⁰ Ibid.

¹¹ Baxter, 218.

¹² Wesley Allen Riddle, “Secession and the Moral Compact,” speech delivered at the Ludwig von Mises Institute, “Secession, State, and Economy” Conference, College of Charleston, Charleston, South Carolina, April 7-9, 1995.

Part 4

Conclusion

...whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government...

—The Declaration of Independence

This paper has developed two domestic challenges to the oath of office taken by United States military officers. It is unclear whether either challenge will one day confront officers who today serve on active duty. However, as demonstrated, history certainly indicates we are not immune from these challenges. The question, then, is not whether these crises will arise, but whether we are prepared to meet them.

Based on the discussions in the preceding sections, there are several guidelines that the military officer might use to ensure an appropriate response to revolutionary challenges. First, since the acceptance of natural rights is implicit in our Constitution, and inherent in the concept of natural law is the belief in its superiority over man-made law, a revolution undertaken in defense of the natural rights of a minority is a legitimate revolution in every sense. The officer, therefore, cannot claim loyalty to a man-made constitution as his rationale for opposing the God-given, or natural, rights pursued by that rebellion. Lincoln's reference to an "oath registered in heaven" to justify his actions would likely carry little weight in heaven's divine court had it been used to justify the abuse of rights granted by God Himself.

Second, in contrast, revolutionary activity undertaken outside of the authority granted by natural law – that is, a revolution whose aim is not principally the protection of natural rights – must be viewed from the framework provided by the Constitution. At its foundation, the matter is a simple one: does the revolution seek to maintain or reestablish government consistent with our existing Constitution? Or, does it pursue a government guided by other principles? The latter is the specific “domestic enemy” envisioned by the oath of office; and the officer’s responsibility, consistent with that oath, is to oppose the revolution. Yet, implicit in the former question is the proposition that the existing government no longer functions within constitutional guidelines. In this case, the officer’s obligation is not (and never was) the defense of an “unconstitutional” government but rather an obligation to support the revolution in reestablishing constitutional government.

Third, the question of constitutional ambiguity suggests that officers oppose attempts to resolve constitutional issues through judicial or legislative interpretation rather than amendment. It further proposes opposition to efforts that seek to blur clear constitutional principles and weaken the moorings to which an officer’s loyalty is bound. Such actions frustrate and provide legitimacy to those who oppose the interpretation and only serve to enhance the likelihood of conflict.

Finally, each of the above recommendations is based upon an officer corps that has a comprehensive understanding of the document to which their allegiance is sworn. Armed with such understanding, the primacy of natural law in our constitutional system will be understood and obeyed, revolutions will be properly judged by that light, and the response of officers will be deemed morally and legally correct. Ultimately, should a constitutional crisis once again

threaten our nation, the officer's loyalty to the Constitution will be completely dependent on his understanding of that document.

Bibliography

- Baxter, Maurice G., *One and Inseparable: Daniel Webster and the Union*, Harvard, Cambridge, Massachusetts, 1984.
- Blackstone, William, Sir, *Commentaries on the Laws of England: in Four Books; with an Analysis of the Work*, Lippincott, Philadelphia, 1903.
- Davis, Jefferson, *The Rise and Fall of the Confederate Government*, Collier, Gloucester, Massachusetts, 1971.
- DeToqueville, Alexis. *Democracy in America*, Richard Hefner, ed., Mentor, New York, 1984.
- Dunlap, Charles Jr., "The Origins of the American Military Coup of 2012," USAF Air War College research paper, online @ www.dtic.mil/doctrine/jel/research_pubs/p087.pdf
- Farwell, Byron, *Stonewall: A Biography of General Thomas J. Jackson*, W. W. Norton & Co, New York, 1992.
- Freeman, Douglas Southall, *R. E. Lee: A Biography*, Scribner, New York, 1934.
- Graber, Mark A., "Conflicting Representations: Lani Guinier and James Madison on Electoral Systems," *Constitutional Commentary*, Winter 96, Vol 13, Issue 3.
- Grant, Ulysses S., *Ulysses S. Grant: Warrior and Statesman*, William Morrow & Co., New York, 1969.
- Hart, B. H. Liddel, *Sherman: Soldier, Realist, American*, Dodd, Mead, & Co, New York, 1930.
- Kurland, Philip B. and Lerner, Ralph, *The Founders Constitution*, University of Chicago Press, Chicago, 1987.
- Levy, Leonard W. et al, *Encyclopedia of the American Constitution*, Macmillan, New York, 1986.
- Lewis, Lloyd, *Sherman: Fighting Prophet*, University of Nebraska Press, Lincoln, Nebraska, 1932.
- Locke, John, *Two Treatises of Government*, Thomas Cook, ed., Hafner, New York, 1947.
- Markman, Steven, "Minority Rules," *National Review*, March 21, 1994, Vol 46, Issue 5.
- Nolan, Alan T., *Lee Considered: General Robert E. Lee and Civil War History*, University of North Carolina Press, Chapel Hill, 1991.
- Otto, Jean H., "Anatomy of the First Amendment and a Look at its Interpretation," *Social Education*, October 1990, Vol 54, Issue 6.
- Riddle, Wesley Allen, "Secession and the Moral Compact: Returning Power to the States or the People," speech delivered at the Ludwig von Mises Institute, "Secession, State, and Economy" Conference, College of Charleston, Charleston, South Carolina, April 7-9, 1995.
- Sheridan, P. H., *Personal Memoirs of P. H. Sheridan*, Charles Webster & Co., New York, 1888.
- Taylor, John M., *Duty Faithfully Performed: Robert E. Lee and His Critics*, Brassey's, Dulles, Virginia, 1999.
- Toner, James H., *The American Military Ethic*, Praeger, New York, 1992.
- Williams, David C., "The Constitutional Right to 'Conservative' Revolution," *Harvard Civil Rights-Civil Liberties Law Review*, 1997, Vol 32, Issue 2.