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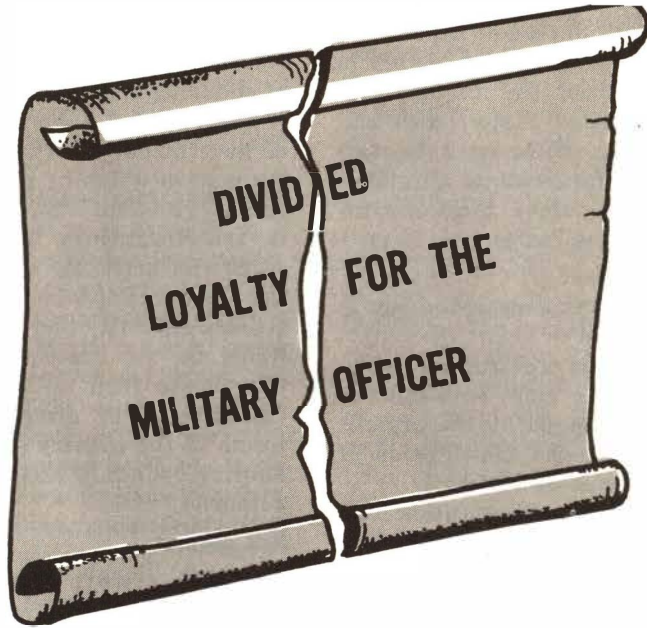
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October 64



Lieutenant Colonel Thomas H. Reese, *United States Army*

**A** LITTLE more than 100 years ago, divided loyalty played a prominent part in the life of the professional soldier who was a native of one of the Southern States. He was forced during our Civil War to choose between loyalty to his state and loyalty to the Federal Government. Records reveal that the Confederate States of America commissioned 460 general officers, of whom 181 (39.3 percent) had been officers of the US Army. There were 286 officers—including 187 graduates of the US Military Academy—who left the US Army and joined the Confederacy after 1 November 1860.

The ending of the Civil War, however, did not lay to rest all questions of divided loyalty. The problem in the next century was only to become more sophisticated and a great deal less apparent to the casual observer.

The second day of August in 1934 was a "black day" in the history of the officer corps of the German armed forces. On that day, pursuant to the orders of Adolf Hitler as given to Minister of War Werner von Blomberg, German officers took a new oath of allegiance, an oath not to their country, not to the Constitution of their country, but to an individual who had become the head of their nation.



## DIVIDED LOYALTY

History has spoken of the German officer corps of 1934-45 and the words are not pleasant to read or hear.

To assure that no similar history is ever written about the military officers of the United States, each and every American officer must be constantly aware of his oath of allegiance to support and defend the Constitution of the United States.

### Basis of Requirement

But what does this mean and how is it accomplished?

The basis of the requirement for an oath of allegiance must be sought in law, for it is implied by the organic law of the land—the Constitution of the United States of America.

But what does the Constitution have to do with an officer's oath?

In feudal times it was the lot of the vassal to render unto the lord of the land all services, services founded on the right to govern and the duty to obey. The bond was broken only by death. Thus, the allegiance of the vassal was to the land, for allegiance ran with the land forever. The same was true of fealty to the King.

Time passed and our ancestors came to this country. The colonies were formed and for many years in this new land each of our forefathers maintained allegiance to the King of Eng-

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*Lieutenant Colonel Thomas H. Reese is Deputy Staff Judge Advocate, Headquarters Field Command, Defense Atomic Support Agency, Sandia Base, Albuquerque, New Mexico. A 1963 graduate of the United States Army War College, he has held various assignments including duty as Chief, Military Justice Division, and Deputy Army Staff Judge Advocate with Headquarters 7th Army, Europe. He is the author of "An Officer's Oath" which appeared in the January 1964 issue of the MILITARY REVIEW.*

land, because they had been born subject to his jurisdiction. Then, in 1776 these colonies dared to become free and independent states and the theory of enduring allegiance was cast adrift.

They created a constitutional form of government in order to safeguard the powers which by nature they possessed. It is this Constitution which is the framework that limits the scope and authority of any officer of the Government who purports to derive his authority therefrom. But what would be the consequences if those who derive their authority from the Constitution to direct the military forces of the country step outside the limiting bounds of their constitutional authority?

### New Concept

General Douglas MacArthur, upon his return from Korea in 1951, said:

*I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance or loyalty to those who temporarily exercise the authority of the executive branch of the government, rather than to the country and its Constitution which they are sworn to defend.*

*No proposition could be more dangerous. None could cast greater doubt upon the integrity of the armed services.*

*For its application would at once convert them from their traditional and constitutional role as the instrument for the defense of the Republic into something partaking of the nature of a pretorian guard, owing sole allegiance to the political master of the hour.*

It has been asserted, without amplification, in an article by Lieutenant Commander Robert R. Monroe, United States Navy, that ". . . the philosophy

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and logic behind this statement will not stand up under close analysis. . . ."<sup>1</sup> Others, however, do not agree with Commander Monroe. For example, Professor Morris Janowitz, a World War II veteran, educator, and Department of Defense consultant, asserts:

*Personal allegiance, as a component of honor, has had to be changed to fit the growth of bureaucratic organization. The American constitutional system, in order to assure civil supremacy, requires that the military swear allegiance to 'support and defend the constitution.' The organic law has transformed allegiance to a person to allegiance to a formal position—moreover one filled by a civilian—the President, as Commander-in-Chief. Military officers make a point of their allegiance to the Commander-in-Chief, and this act embodies allegiance to a person as well as to an office.*

### Theory of Abrogation

If Professor Janowitz is correct in his analysis, then the statement of General MacArthur is of great moment; but if he is wrong, then, perhaps, Commander Monroe's assertion is true.

While the Janowitz theory may be accepted by some of the officer corps, the biggest majority have not, in my opinion, abrogated their sworn oath to the Constitution. If the Janowitz proposition is correct, though, American officers, like the Nazi officers of 1934, would, to all intents and purposes, be swearing allegiance to an individual who had become for the moment the President of the United States.

This theory of abrogation of fealty to an individual is, perhaps, supportable in the world of fiction for a few

officers, but, in reality, the fictional theory is unacceptable. The officer corps of the US Armed Forces has accepted, as the yardstick of fealty, the Constitution of the United States of America.

### Exclusive Responsibility

So that I am not misunderstood, let me add that, in my opinion, the members of the officer corps fully realize that their exclusive responsibility is to the President, as Commander in Chief, for the successful operation of the Armed Forces in peace or in the full spectrum of war. The President, by reason of the Constitution, commands the Nation's forces, and the doctrine of command is accepted by the military.

Additionally, the officer corps of the Armed Forces of the United States realizes the responsibility that devolves upon the Commander in Chief to achieve the national objectives and purposes of this country. As General Eisenhower said: "Give military leaders a lucid explanation of the nation's policies, and they will, with rare, and easily controlled exceptions, loyally perform."

But what is the situation if this explanation is not lucid or in any sense satisfying? The officer who takes an oath to defend the Constitution must permit the Constitution—with its provided checks and balances—to operate. Under the provisions of the Constitution, the Congress and the courts, not the military, are given the authority to review the acts of the President.

Accordingly, the military officer like his civilian counterpart is accountable to the law as it is judicially determined to be. Perhaps it has been most clearly stated by Samuel F. Miller, Justice of the Supreme Court of the United States:

<sup>1</sup> Lieutenant Commander Robert R. Monroe, "Limited War and Political Conflict," *Military Review*, Oct 1962, p 7.



## DIVIDED LOYALTY

*It [the law] is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.*

Professor Charles Fairman of the Harvard University Law School in a study concerned with the problem of government after a nuclear attack noted:

*A commander who understands that it may be his duty to break the law, looking for justification to the political judgment of his contemporaries, is likely to be a reckless and arbitrary man. It sounds like Caesar who, seeking to keep within the constitution while fearful of prosecution on a charge of unconstitutional acts, finally crossed the Rubicon, and looked to his contemporaries and to history. That is wholly foreign to our notions.*

As the powers granted to the Congress and the President of the United States to wage war or maintain peace are constitutional grants, the actions of officers of the Armed Forces of this country must be in conformity with the Constitution. This, standing alone, is a truism. The problem is that conformity or nonconformity with the provisions of the Constitution is determined after the act by the courts and not the executive authorities who may have ordered the act.

### International Commands

While the Constitution solves problems involving divided loyalty on the national level, does it also solve similar problems in the international sphere?

Suppose, for example, that a United Nations military force has been

created and an officer of the Armed Forces of the United States has been assigned to duty with that force. To whom does he owe basic allegiance, to the United States, or to the United Nations? Which way might the tug and pull sway him?

Allegiance is normally defined in terms of the bond of duty and fealty which binds an individual to his nation or government and which, in turn, confers upon him the status of a national. It has traditionally been linked solely with the ties of nationality. As such, allegiance could have no application to the relationships between individuals and international organizations. There could be no conflicts of allegiance in the traditional sense.

### Conflicts of Interest

In reality, however, there could be conflicts of interests between the policies of the international command and the policies of an officer's own country. Suppose that the US officer mentioned here is the commander of the force. Could he face a conflict of interest between the United Nations and the United States, a conflict which might come about because international organizations such as the United Nations—although created by their member-states—lead lives of their own?

The judgments of this new personality need not always coincide with the judgment of all of its members. Military actions, for example, undertaken by the United Nations with no original objection by the United States, might develop new and unforeseen difficulties and complications, particularly if the General Assembly were to recommend military action.

A Department of the Army publication concerning civil affairs operations contains this quotation:

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. . . he [the United States commander serving under a combined command] brings to the attention of appropriate authority those policies or actions in the field of CA [civil affairs] operations that are believed to be contrary or prejudicial to international law, United States law, United States national interest, United States war objectives, or the postwar international position of the United States.<sup>2</sup>

This policy, although expressly applicable only to civil affairs operations, is useful in any conflict of interest situation that may be faced by a US commander.

The US commander need not take any action contrary to that taken by the combined command. Therefore, loyalty to the combined command is not breached and loyalty to the United States is not violated—if the commander notifies an appropriate US authority that, in his judgment, certain actions of the combined command are against the interests of the United States. In the latter situation, the appropriate US authority can take whatever action is deemed necessary under the circumstances, including, perhaps, the recall of the US commander if it were felt that he might become involved in an action incompatible with the interests of the United States.

#### **Power of Recall**

A series of regulations for a United Nations Emergency Force, issued by the Secretary General of the United Nations on 20 February 1957, do not speak of allegiance or call for any oath couched in such terms. They do emphasize the international chain of command and certain obligations the members of this force bear to it alone.

And while the President of the

<sup>2</sup> Field Manual 41-10, *Civil Affairs Operations*, 14 May 1962, p 43.

United States may not have the power as Commander in Chief of the Armed Forces of the United States to dictate the conduct of a US officer in his capacity as a member of an international command, he does have the power of recall. Therefore, any US officer in an international command who finds that his oath conflicts with his duties as an international commander may have his difficulty resolved by the President. Undoubtedly, recall would be the proper step.

Although the control exercised by the President over a US international commander seems fairly clear, there appears to be no control by our courts over such a commander.

#### **Degree of Control**

Today, it seems likely that if an officer of the Armed Forces of the United States acting as an international commander violated that portion of his oath about supporting and defending the Constitution, the courts are, as of now, powerless. This, of course, raises the question—may a US officer do something as an international commander that he could not do as a national commander?

Our courts may hold a military officer accountable for what he does as a national commander. It is apparent, though, that the courts, as yet, have no such complete control over him as an international commander.

Some, perhaps, will say that an international commander has new duties, new responsibilities, and new loyalties, and that a national commander has only old duties, old responsibilities, and old loyalties. Obviously, when given an international assignment, any individual is automatically put in the unenviable position of possibly betraying the interest of one command or the other, regardless of



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the decision he makes. It is realized, though, that if a commander is wearing two hats, then it would depend upon which hat he was wearing when he acted.

The final determination, of course, rests with each individual as he seeks to answer the questions which each contending force will put to him, questions faced in a different context by Robert E. Lee and George Thomas 100 years ago—"Are you with us or against us?" "Where is your first loyalty?"

The question of loyalties, whether unsure or divided, has and will continue to be the concern of any US officer who respects the honor of his oath. Our forefathers carved out of the wilderness of a new land a great Nation and gave to us "the most wonderful instrument ever drawn by the hand of man."

Commenting upon the organization of the Government, George Washington in his farewell address said:

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An Army officer is, above all else, a patriot. From the moment he is commissioned, he incurs an obligation which remains with him throughout his military life—to cherish and protect his country and to develop within himself that capacity and strength which will enable him to serve his fellow Americans with wisdom, diligence and patriotic conviction.

*Major General Benjamin H. Pochyla*

*The basis of our political systems is the right of the people to make and to alter their Constitutions of Government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all. The very idea of the power and the right of the People to establish Government presupposes the duty of every individual to obey the established Government.*

In this same concept, an individual only becomes an officer of the United States of America by voluntarily subscribing his oath to support and defend the Constitution. The declaration in words is simply what was already a fact of citizenship.

The words of the oath have changed, but the principle laid down in the Constitution imposes an obligation that neither bureaucracy nor law can change. The first allegiance of all Americans can only be to the Constitution, "the law for rulers and people, equally in war and in peace."

