

AIR WAR COLLEGE

AIR UNIVERSITY

OATH OF OFFICE:

CAN THE MILITARY DEFEND THE CONSTITUTION AGAINST  
DOMESTIC ENEMIES?

by

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## **BIOGRAPHY**

Colonel Thomas G. Sadlo was born in Rockville Centre, New York. He graduated from New Hyde Park Memorial High School in 1983 then attended Northwestern Preparatory School in Santa Barbara, California on a Falcon Foundation scholarship. He continued his education at the United States Air Force Academy, where he graduated in 1988 with a Bachelor of Science in Engineering and a regular Air Force commission.

Colonel Sadlo was assigned to the Directorate of Plans and Programs, Ogden Air Logistics Center, Hill AFB as a Logistics Plans Officer. After this he was assigned to the 50<sup>th</sup> Tactical Fighter Wing, Hahn AB, Germany where he worked in logistics readiness and helped deploy a squadron of F-16s to Operations DESERT SHIELD and STORM. From there Colonel Sadlo was assigned to Headquarters The United States Logistics Group, Ankara AS, Turkey where he was the sole logistics officer supporting Display Determination, NATO's second largest exercise. Colonel Sadlo also helped plan and execute Ankara's portion of Operation PROVIDE HOPE, then developed the Air Division's closure plan. Next he moved to the 374<sup>th</sup> Airlift Wing at Yokota AB, Japan where he cross-flowed into Supply and was nominated for the Lance P. Sijan Leadership award. Colonel Sadlo was selected into the Air Force Logistics Career Broadening Program at Hill AFB. Colonel Sadlo's performance earned him the Ogden Air Logistics Center Logistics Officer of the year and also the center's Lance P. Sijan Leadership award. This led to his selection to the center's highly classified Directorate of Specialized Management. Colonel Sadlo was then assigned to the Pentagon where he was the Air Force's Advanced Concept Technology Demonstrations program lead, then an executive officer to the Director of Command and Control. Colonel Sadlo was selected to attend the College of Naval Command and Staff at the Naval War College. Upon graduation he became the commander of the 375<sup>th</sup> Logistics Support Squadron, Scott AFB. Next he simultaneously commanded Scott's 375<sup>th</sup> Maintenance Operations Squadron and the 375<sup>th</sup> Maintenance Squadron. After retiring the C-9A Nightingale aircraft from the USAF inventory and inactivating his squadrons, Colonel Sadlo assumed command of the 31<sup>st</sup> Logistics Readiness Squadron (LRS), Aviano AB, Italy. During this tour he led his squadron to win USAFE's Deadalion, best large LRS in the command. His squadron's fuel flight won USAFE's "Golden Drum" best fuels flight two years in a row. Colonel Sadlo was also chosen USAFE's Logistics Readiness Field Grade Officer of the Year and also their General Thomas P. Gerrity Field Grade Officer Logistician of the Year.

Colonel Sadlo has deployed to Operation Iraqi Freedom twice; once as commander of the 447 ELRS at Sather AB, Baghdad International Airport and to Al Asad AB where he was the Operations Officer in the United States Navy's Base Command Group. He currently holds two Masters Degrees; one in Religion from Liberty University and one in National Security and Strategic Studies from the Naval War College. Prior to attending the Air War College, Colonel Sadlo served on the Air Staff's Directorate of Resource Integration, Deputy Chief of Staff for Logistics, Installations & Mission Support's staff as a Program Element Manager. In that duty he managed, budgeted and defended \$17.4B in war reserve, vehicle, transportation, support equipment and logistics programs.

Colonel Sadlo's interest in the oath of office was ignited while assigned to the Pentagon in 2000. At that time he began asking peers and mentors the question: "how does the military defend the Constitution against domestic enemies?" No one could provide a definitive answer.

## **Introduction**

I, (full name) having been appointed a (rank) in the United States Air Force, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic...<sup>1</sup>

Upon entering military service, Federal law requires every military member to publicly take the oath of office by swearing it to a senior ranking officer. The law also requires they sign a statement acknowledging they took the oath.<sup>2</sup> The oath specifically states the member will defend the Constitution of the United States against all enemies foreign and domestic, but do military members understand what this means? Since willfully taking an oath falsely is considered perjury,<sup>3</sup> it is important for every person taking the oath to know what they are swearing (or affirming) to do. Currently there is no explicit guidance explaining the oath's meaning or how to execute it.

It is important for military members to understand the oath and how to carry out their sworn duties. Yet the oath's wording raises several questions. What is an oath? What does it mean to support and defend the Constitution? Can military members actually do this? More specifically, can they defend it against domestic enemies and do they know who or what a domestic enemy is? If they cannot, why is it in their oath; or if they can, how do they defend it? Military members need to know the answers to these questions to ensure orders are lawful and are executed in a lawful manner.

## **Thesis**

This paper examines the portion of the military's oath whereby military members promise to support and defend the Constitution against domestic enemies. It clarifies what defending the Constitution against domestic enemies means and contends that in some situations U.S. military members cannot defend the literal United States Constitution against these

enemies. It provides information military members can use to interpret and execute their oath of office by answering the above questions and illustrating situations when the military can and cannot defend the Constitution against domestic enemies.

### **Military Oath of Office: An Exegesis**

The U.S. Constitution mandates all government officers take an oath of office.<sup>4</sup> Additionally, Congress detailed the administration of the oath in the first federal law which was passed on 1 June 1789.<sup>5</sup> In September 1789 the wording for every officer, Non-Commissioned Officer (NCO), and enlisted member's oath was specified by congressional statute. This statute stated that in addition to taking an oath to support the Constitution, military members would also state:

I, A.B. do solemnly swear or affirm (as the case may be) to bear true faith and allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whomsoever, and to observe and obey the orders of the President of the United States of America, and the orders of the officers appointed over me, according to the articles of war.<sup>6</sup>

Added to this, Congress, in May 1798, enacted legislation which made falsely swearing the oath punishable as perjury.<sup>7</sup>

But what is an oath? Title 5, United States Code, Section 3331 states the oath military members take is specifically an oath of office, not an oath of commission and not of loyalty.<sup>8</sup> Using the definitions the founding fathers may have used, specifically Samuel Johnson's "A Dictionary of the English Language", an oath is "an affirmation, negation, or promise, corroborated by the attestation of the Divine Being."<sup>9</sup> It further defines "oathbreaking" as "perjury."<sup>10</sup> Black's Law Dictionary confirms Johnson's definition of an oath and further delineates an oath of office as "an oath taken by a person about to enter into duties of public

office, by which the person promises to perform the duties of that office in good faith.”<sup>11</sup>

George Washington’s inaugural and farewell addresses show his dependence on the authority given by the “Almighty Being” to “enable every instrument employed in its administration to execute with success the functions allotted to his charge.”<sup>12</sup>

With the previous in mind, why did our founding fathers require an oath? Study of James Madison’s writings, as well as other historical writings provide no definitive answer as to why an oath is required, but research into pre-constitutional America shows oaths were used in the first settlements. These early loyalty oaths were brought in concept and practice from the English requirement for its citizens to swear loyalty to the king (or queen). Colonists swore loyalty oaths through the end of the Revolution, and following a brief pause were reinstated after the Revolution through the conclusion of World War II.<sup>13</sup>

The Continental Army used loyalty oaths to help maintain discipline during the Revolution. In these oaths they swore loyalty to the laws and members of the Continental Congress.<sup>14</sup> After the Revolutionary War many Americans did not agree with loyalty oaths; instead they agreed with Benjamin Franklin’s desire to take a “man’s word of honor instead of requiring his oath of loyalty.”<sup>15</sup> During the Constitutional Convention, the Virginia Plan provided the first reference to swearing an “oath to support the articles of Union.”<sup>16</sup> James Madison’s record of James Wilson’s sentiments suggests some members did not want an oath:

...he was never fond of oaths, considering them as a left-handed security only. A good government did not need them, and a bad government could not or ought not be supported. He said they might too much trammel the members of the existing government in case future alterations [in the Constitution] should be necessary.<sup>17</sup>

Ultimately the constitutional debate led to one oath's wording being specified in the Constitution, the Presidential oath of office; additionally, a general requirement for state and federal officers to take an oath to support the Constitution was included.<sup>18</sup>

A clue as to why the oath is required by the President is found in a New York Times article that described the timing of President Wilson's oath of office. This article reveals, according to Chief Justice John Marshall's letter to Secretary of State John Adams, the President could not execute his "executive power" until the oath was taken.<sup>19</sup> This line of reasoning is supported by the debates over the requirement for the oath found in the Annals of Congress, where Congressmen argued about the legality of requiring an oath as well as the need to take an oath to provide authority for the officer or judge to perform their duties.<sup>20</sup> The conclusion made by the first Congress is found in the United State's first law that required "...all officers appointed, or hereafter to be appointed under the authority of the United States, shall, before they act in their respective offices,"<sup>21</sup> take the following oath: "I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."<sup>22</sup> In the August 1789 act establishing the Department of War, Congress required each member take an oath "before he enters on the execution of his office or employment...well and faithfully to execute the trust committed to him."<sup>23</sup>

Based on this information and the formal definition of an oath as known and used by the founding fathers, one can conclude the oath of office was required to provide legal authority to carry out the duties of the office entered. Additionally, Justice Marshall provides the following opinion: "The oath of constitutional support requires an individual assuming public responsibilities to affirm...that he will endeavor to perform his public duties lawfully."<sup>24</sup>



## Support and Defend

The exegesis moves onto understanding what it means to “support the Constitution”. Using a dictionary from 1812<sup>25</sup>, the phrase “to support” is defined as: “1. To sustain; to prop; to bear up. 2. To endure any thing painful without being overcome. 3. To endure; to bear. 4. To sustain; to keep from fainting.”<sup>26</sup> In the 1972 Supreme Court case *Cole v. Richardson*, 405 U.S. 676, “support” was interpreted to mean “a commitment to abide by our constitutional system.”<sup>27</sup> “Constitution” means: “3. Corporeal frame...6. Established form of government; system of laws and customs. 7. Particular law; established usage; establishment; institution.”<sup>28</sup> Based on this information one can construe the phrase “support the Constitution” means to sustain the form of government established by the laws outlined by the Constitution. More specifically it means to sustain the republican form of government as declared in Article 4, Section 4 of the Constitution, as well as the laws prescribed by it. James Madison bears witness to this in his writings,<sup>29</sup> as does President George Washington in his inaugural speech<sup>30</sup> and in statements of Congressional members during their debates where, for example, Mr. Jackson stated the Constitution gives the legislature the power to pass a law.<sup>31</sup>

As stated earlier, Congress modified the oath for military personnel in September 1789. This modification was part of the act establishing troops in service to the U.S. There is no information in the Congressional record to reveal the cause for this modification but it is significant, given it places military members under the orders of the President, their commander-in-chief, and binds them to “bear true faith and allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whomsoever.”<sup>32</sup> In addition to supporting the Constitution first and foremost, this oath required military members to

serve the United States, and required them to defend the states against all who would seek to harm them. This is the first time the concept of defending the United States is used.

As a result of the Confederate States' secession and resulting Civil War, Congress modified the oath again in July 1862, when it passed the "Ironclad Test Oath" which introduced the words "I will support and defend the Constitution of the United States, against all enemies, foreign and domestic."<sup>33</sup> These words have remained in the oath ever since. This discussion demonstrates Congress has the authority and power to change the oath, but also shows per Article 6 of the Constitution the oath must at minimum contain "support the Constitution" and that Congress

*may superadd to this oath such other oath of office as its wisdom may require. It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law.<sup>34</sup>*

As a result military members must carry out the responsibilities defined by the current oath until Congress modifies it.

### **Who is a Domestic Enemy?**

Reviewing the Congressional debate surrounding this oath, some members voiced their concern about reinstating a loyalty oath. The important issue discussed was the context surrounding the words actually used. As a result of the Southern states' secession from the Union, the phrase "domestic enemies" was added as was the word "defend," but without providing a definition for a domestic enemy.

Samuel Johnson's dictionary from 1812 provides the following definitions for the words domestic, enemy, and defend. Domestic, from the Latin domesticus, means "1. Belonging to the house; not relating to things publick. 2. Private; done at home; not open. 3. Inhabiting the house;

not wild. 4. Not foreign...;”<sup>35</sup> an enemy is “1. A public foe. 2. A private opponent; an antagonist. 3. Any one who regards another with malevolence; not a friend.”<sup>36</sup> Finally, to defend means “1. To stand in defence of; to protect; to support. 2. To vindicate; to uphold; to assert; to maintain. 3. To fortify; to secure. 4. To prohibit; to forbid. 5. To maintain a place, or cause, against those that attack it.”<sup>37</sup>

Based on Johnson’s definition, the Civil War’s precedence, and the founding fathers’ words, one can deduce that the phrase “to support and defend the Constitution against all enemies...domestic” means to protect, fortify, and maintain the literal United States and its republican form of government; its constitutional laws and way of life from any person or persons who are members of or residents in the American “house” or family or who are “home-grown.”<sup>38</sup>

In light of the recent terrorist attacks upon the United States it is important to understand who or what a domestic enemy is. Military members need to know if the definition includes gangs, radical extremists, rioters, unlawful strikers/insurrectionists, and members of the federal government. The earliest use of the military in internal crises was the Whiskey Rebellion. Some later examples include the military use in defending civilians and territories against and suppression of Native American (Indian) attacks; and also during the Civil War when the southern states seceded from the Union. Additionally the military was used to suppress strikes and riots, and developed the “White Plan”<sup>39</sup> in the early 1900’s.

The Whiskey Rebellion provides a clear example of a domestic enemy in that the rebellion was caused over the whiskey tariff by “rebels” taking the law into their own hands and fighting against congressional authority. Using the military to defend against and suppress

Native American attacks may be seen by some as defending against a domestic enemy while others may call it genocide. Per the above definition the military defended American citizens and claimed territories from domestic enemies, namely a group seeking to harm the people and the government's rule of law respectively.

The northern states, except Maryland,<sup>40</sup> clearly saw the south's secession from the Union as an act of aggression against and rebellion towards the constitutionally formed U.S. government; the secession ripped the government and country in two. Use of military force was essential to maintain the U.S. government as originally constructed. Again, similar to the situation with the Indian Wars, southerners may have a different perspective towards the war for southern independence and their right to secede.

By looking further into the law for definitions of domestic enemies, Title 50 USC reveals chapter titles of: War and National Defense, insurrections (chapter 13), national security (chapter 15), internal security (chapter 23), and national emergencies (chapter 34), none of these define domestic enemies<sup>41</sup> and neither do any Joint Publications, specifically: 3-07.4, Joint Counterdrug Operations; 3-26, Counterterrorism; 3-27, Homeland Defense; 3-28, Civil Support; and 3-57, Civil-Military Operations.

While there is no clear definition of a domestic enemy, the Congressional record, the 1862 oath's loyalty section, and the above discussion lead one to deduce that a domestic enemy is any United States citizen or citizens who conspire to act or take action against the republican form of government as derived from the system of checks and balances prescribed in the legal document known as our Constitution.

## **Oath of Office Clarified**

Derived from the above exegesis the oath of office is clarified as follows: when military members take the oath of office, they do so to gain legal authority to carry out the duties of their office. The oath compels they a) commit to adhere to the American constitutional form and system of government and sustain these by obeying its laws; and b) defend, protect, fortify, and maintain the physical United States, its republican form of government, and its constitutional laws and way of life from any home-grown person or persons who threaten to overthrow, destroy, or nullify these things.

## **Use of Military Against Domestic Enemies**

This paper now transitions to answer the question how military members execute the “defend against domestic enemies” portion of the oath. An understanding of the Posse Comitatus Act must be covered first since it limits military use in domestic law enforcement. Prior to establishing the Posse Comitatus Act of 1878, U.S. Marshals called upon active duty military units to aid them and other law enforcement agents in carrying out law enforcement activities such as search and seizures, interrogations, and arrests (literally act as a sheriff’s posse.)<sup>42</sup>

Presidents have demonstrated their authority to use the military to enforce the laws of the land on several occasions,<sup>43</sup> such as the railway strike of 1877 (one year prior to the Posse Comitatus Act). Quoting Major General Hancock, “when the governor of a State has declared his inability to suppress an insurrection and has called upon the President... from that time commences a state not of peace but of war...”<sup>44</sup> In this case the Regular Army, not the militia,

was initially used to suppress an insurrection. The insurrection was a railway strike that expanded into related acts of violence across several states and disrupted rail travel and commerce. President Hayes' decision established the first "post-Civil War precedent by using regulars as the first resort."<sup>45</sup> This decision was made while Congress was in recess and during a time when there was disagreement within Congress as to the military's role in domestic issues. Congress resolved the issue by enacting the Posse Comitatus Act in 1878.

Another example, which occurred after the implementation of the Posse Comitatus Act, was in the Trans-Mississippi West where the Army was routinely used to enforce the law and provide protection.<sup>46</sup> Both this and the previously discussed example happened when the U.S. did not have a large standing army. State and civil governments have the responsibility to maintain law and order within their states, but the above cases involve the Regular Army doing so. The attitude of the military towards civilian leadership was clear in that they "followed the orders and mirrored the thoughts and attitudes of the public and leaders in the White House, cabinet, or War Department."<sup>47</sup> Consequently, it seemed normal for the military to intervene in domestic issues. The Posse Comitatus Act attempted to restore the concept the founding fathers had in regard to the fear of a large standing army.

Per Brian Molloy's paper on using the military to support civil law enforcement, the Governor of Puerto Rico used his Commonwealth's National Guard to restore order by defeating a "deadly domestic enemy"; "brutal drug gangs, individual drug-traffickers, and violent criminals."<sup>48</sup> There, the Governor considered drug gangs and traffickers, along with violent criminals, domestic enemies and used his National Guard in an active service status alongside his police forces to restore order.<sup>49</sup>

Other examples of using military in law enforcement matters include Presidents Eisenhower's and Kennedy's use of the military to enforce school desegregation in Arkansas and Alabama. Also, in 1963 President Kennedy sent active military units to Alabama during the civil rights marches to ensure citizens were not deprived of their constitutional rights.<sup>50</sup> Another example is found in a Department of Homeland Security report describing extremist groups as potential domestic terrorists.<sup>51</sup> These examples show the government viewing domestic issues in light of law enforcement vice military concerns. While not specifically stated in these examples, domestic enemies were citizens who opposed federal laws and restricted the constitutional rights of their fellow citizens. Yet, none of these examples use the term domestic enemy in their reporting and consequently reinforce the issue's ambiguity.

### **Defend the United States Constitution**

With this in mind the question of how the military can actually defend the U.S. Constitution against these enemies is discussed. Per the Constitution, Article 1, Section 8, Clause 14, the military derives its authority to act from congressional legislation.<sup>52</sup> Title 10 of the U.S. Code establishes the military's organization and powers. Chapter 15 focuses on the "Enforcement of the Laws to Restore Public Order"<sup>53</sup> whose sections 331, 332, and 333 provide the guidance for providing aid to state governments, using militia and armed forces to enforce federal authority, and using armed forces in major public emergencies and when there is interference with state and federal laws respectively.<sup>54</sup>

## Military's Mission

Joint Publication 1 (JP1), *Doctrine for the Armed Forces of the United States*, chapter 1 provides the purpose of U.S. military is to: “fight and win the Nation’s wars...the Armed Forces must ensure their adherence to U.S. values, constitutional principles, and standards for the profession of arms...”<sup>55</sup> JP1 goes on to state in chapter 2 that during domestic situations a department other than the DoD may be in charge of coordinating military actions.<sup>56</sup> While in chapter 3 it states the DoD’s first aim is to “Support and defend the Constitution of the United States against all enemies, foreign and domestic,”<sup>57</sup> it does not specify how it will execute the domestic element.

According to JP 3-27, the Department of Homeland Security is responsible for preventing, responding to, and recovering from domestic attacks.<sup>58</sup> This means, under most circumstances, DoD’s role is to support civil authorities. JP 3-27 states: “The Department of Defense contributes to homeland security through its military missions overseas, homeland defense, and support to civil authorities.”<sup>59</sup> It defines homeland security as: “a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.”<sup>60</sup> It also defines homeland defense as: “The protection of United States sovereignty, territory, domestic population, and critical defense infrastructure **against external** threats and aggression or **other threats as directed by the President.**”<sup>61</sup>

Chapter three of the American Bar Association’s book, *Homeland Security: Legal and Policy Issues*, provides insight into the military’s role in domestic security and defense.<sup>62</sup> While it does not address defending the Constitution against domestic enemies, it does highlight how



U.S. Northern Command works with federal agencies and non-governmental organizations involved in homeland security and defense issues. It confirms the military's major role in homeland security is to support civil agencies while leaving for further discussion the President's use of the military.<sup>63</sup> In almost all cases, the military will not defend the Constitution from domestic enemies. Instead, under current legislation, military members execute their oath by supporting civil authorities.<sup>64</sup>

### **Defend the “Literal” United States Constitution**

The more challenging question is; how does the military defend the literal Constitution from domestic enemies? In his farewell address, President Washington raised the possibility of constitutional enemies rising from within the federal government: “...ambitious and unprincipled men will be enabled to subvert the Power of the People, & to usurp for themselves the reins of Government; destroying afterwards the very engines which have lifted them to unjust dominion.”<sup>65</sup>

He also presented a dilemma by stating earlier in the same address: “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.”<sup>66</sup> Members of the military are subordinate to the federal government and are required to obey the laws and orders established by these agencies. There could be a circumstance where an order or law is unconstitutional, in which circumstance the military member could, and perhaps should, refuse to obey the order/law. However, such disobedience puts them at substantial risk if their assessment of the order/law is wrong.

Sir J.W. Hackett believed “A bad man cannot be...a good sailor or soldier, or Airman.”<sup>67</sup> That does not imply a bad man cannot be a politician. If war is the continuance of policy by other means, could a bad person advance a policy counter to the Constitution? This presents an ethical dilemma to the military member who must choose to support or not support the policy.

An illustration of the above would occur if a law was enacted that to some appeared constitutional while to others appeared to attack the Constitution. Military members are required to support the law or disobey it at their own peril. This is not a discussion on disagreements or dissent with policies and decision making as was the case in the revolt of the Admirals, the revolt of the Generals, and even with General MacArthur’s decision to disobey President Truman during the Korean War. In each of these cases the constitutionality of the order or law was not in question. Sir John Hackett observed in a 1970 address at the United States Air Force Academy that General MacArthur’s actions were “completely out of order.”<sup>68</sup> Professor Richard Kohn agrees with this when he states “the military’s job is to advise and then execute lawful orders.”<sup>69</sup>

Just because the President, the Congress, or the Attorney General says the policy, order, or law is constitutional does not necessarily mean it is. While the Attorney General (Office of Legal Counsel (OLC)) has quasi-judicial powers and is the final arbiter of constitutionality for matters addressed within the executive branch, the judicial branch can overrule OLC and is the ultimate authority on constitutionality of a law, policy, or order. Dr. Louis Fisher asserts “No single institution, including the judiciary, has the final say on the meaning of the Constitution,”<sup>70</sup> and suggests “it is true that the Court is the final ‘arbiter,’ but that voice is final only within the judiciary,”<sup>71</sup> constitutionality is defended in the courts of law, not through the military.

Military members are subject to the executive branch, its policies, and the Uniform Code of Military Justice. They cannot interpret the constitutionality of an order or refuse to carry out

an order until its constitutionality is established. While having constitutional rights, such as the freedom of speech, military members are restricted by the Uniform Code of Military Justice in the exercise of their rights and are restricted by policies and orders implemented by the executive branch and by congressional laws.<sup>72</sup>

While this is true, another ethical dilemma arises since most military members are citizens while at the same time federal employees. If military members are required to defend the Constitution and believe the Constitution is being attacked from within, as military members they are restricted by law as to what they can do. In light of this they cannot carry out their oath and defend the literal Constitution against domestic enemies.

### **Conclusion**

Upon consideration of the information reviewed and discussed, this paper concludes military members can support the United States' constitutional form of government and help civil authorities enforce the nation's laws. They can also defend the constitutional form of government against domestic enemies when ordered by the President to do so, but how they do so is not apparent. Nevertheless, the military cannot defend the literal Constitution against domestic enemies. The role of defending the literal Constitution falls to Congress, the President, and the Supreme Court. Without these branches performing their constitutionally mandated duties the literal Constitution is left defenseless.<sup>73</sup>

### **Recommendations**

Based on this conclusion there are several recommended actions which should be implemented. First, every person seeking entrance to or employment by the DoD should be required to take a course on the Constitution and the oath of office. They must understand what

the oath requires before taking it. For example, the United States Air Force's three commissioning sources (Reserve Officer Training Corps, Officer Training School, and the Academy) use a philosophical approach when discussing the oath and completely omit the oath's legal aspects.<sup>74</sup> Additionally the United States Air Force provides an online course but it is inadequate and is misleading in characterizing the oath as an oath of loyalty.<sup>75</sup> The course should focus on the military's role in government and, using exegetical references from the earliest congressional writings to include the Federalist Papers, provide insight into the founding fathers' concerns about a large standing army and its use.

Second, the oath of office should be modified. As discussed in this paper, the military supports but does not actually defend the Constitution from domestic enemies. The oath of office should be modified to refocus the oath on the military member supporting the Constitution as the Constitution requires. In accordance with law military members are subject to the lawful orders of the executive branch. Congress enacts laws for the executive branch, including the military, to execute or enforce. For this reason Congress must modify the law defining the oath to ensure the military can execute the oath.

Congress should consider using the following oath of office in the new law: "I, (full name) having been appointed a (rank) in the United States (state branch of service), do solemnly swear (or affirm) that I will support the Constitution of the United States, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations 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."

The oath is more than a philosophical statement. The oath is a defining principle of U.S. military behavior that has lost the founding fathers' intended purpose and so requires its execution to be clearly defined. Department of Defense joint publications and plans must define what domestic enemies are and clearly state how military members execute their oath of office. Until this happens, the oath of office will remain ambiguous.

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End Notes

<sup>1</sup> AF Form 133, Oath of Office (Military personnel) for Air Force officers.

<sup>2</sup> United States Air Force, *Air Force Instruction 36-2006: Oath of Office (Military Personnel) and Certificate of Commission*. Washington DC: HQ AFPC/DPPAO, 21 Nov 2002, incorporating Change 1, 12 Oct 2006. The requirement to certify taking the oath is required upon entering military service (active, reserve, and guard.)

<sup>3</sup> Peters, Richard, *The Public Statutes at Large of the United States of America, Volume 1*, Metcalf and Company, Cambridge, 1845, pg. 554. Chapter 36, Section 2 states: “And be it further enacted, That if any person shall willfully, absolutely and falsely swear or affirm, touching any matter or thing material to the point in question, whereto he or she shall be thus examined, every person so offending, and being thereof duly convicted shall be subjected, to the pains, penalties and disabilities, which by law are prescribed for the punishment of the crime of willful and corrupt perjury.”

<sup>4</sup> Ketchum, Ralph, *Selected Writings of James Madison*, Hackett Publishing Co, Inc., Indianapolis, 2006, pg. 375. Article 6, the United States Constitution states “...The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

<sup>5</sup> Peters, Richard, *The Public Statutes at Large of the United States of America, Volume 1*, Metcalf and Company, Cambridge, 1845, pg. 23-24. Statute 1, Chapter 1, Section 1 of the Laws of the United States declares: “Be it enacted by the Senate and [House of] Representatives of the United States of America in Congress assembled, That the oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit: “I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.” Section 4 states: “And be it further enacted, That all officers appointed, or hereafter to be appointed under the authority of the United State, shall, before they act in their respective offices, take the same oath or affirmation, which shall be administered by the person or persons who shall be authorized by law to administer to such officers their respective oaths of office, and such officers shall incur the same penalties in case of failure, as shall be imposed by law in case of failure in taking their respective oaths office.”

<sup>6</sup> *Ibid*, pg. 96. The military oath’s wording is part of the act “to recognize and adapt to the Constitution of the United States the establishment of the Troops raised under the Resolves of the United States Congress Assembled, and for other purposes therein mentioned.” pg. 95.

<sup>7</sup> *Ibid*, pg. 554. Chapter 36, Section 2 states: “And be it further enacted, That if any person shall willfully, absolutely and falsely swear or affirm, touching any matter or thing material to the point in question, whereto he or she shall be thus examined, every person so offending, and being thereof duly convicted shall be subjected, to the pains, penalties and disabilities, which by law are prescribed for the punishment of the crime of willful and corrupt perjury.”

<sup>8</sup> United States Congress, United States Code, 2006 Edition, Volume 1, pg. 887.

<sup>9</sup> Johnson, Samuel, *Dictionary of the English Language, 1812*, pg. 436. Available at: <http://books.google.com/books?id=Qw0TAAAYAAJ&printsec=frontcover&dq=dictionary#v=onepage&q=&f=false> (accessed 16 Nov 2009.) Note: I was not able to obtain a copy of a dictionary from the timeframe the Constitution was written. Dr. Johnson’s 1812 version was the earliest version available.

<sup>10</sup> *Ibid*.

<sup>11</sup> Garner, Bryan A. *Black’s Law Dictionary, 8<sup>th</sup> Edition*, 2004, pg. 1101. Other related oaths are an oath of allegiance which is “an oath by which one promises to maintain fidelity to a particular sovereign or government...most often administered to a high public officer, to a soldier or sailor, or to an alien applying for naturalization;” nonjudicial oaths “1. An oath taken out of court, esp. before an officer ex parte. – also termed *voluntary oath*. 2. See extrajudicial oath; an extrajudicial oath is “an oath that, although formally sworn, is taken outside a legal proceeding or outside the authority of law.” It goes on to state “Both the oath of office and the oath of allegiance are types of promissory oaths.” A promissory oath is “An oath that binds the party to observe a specified course of conduct in the future.”

<sup>12</sup> Gales, Joseph, *Debates and Proceedings in the Congress of the United States, Volume 1*, 1834, pg. 27 and the Department of Defense’s Liberty Day booklet, 2002, pg. i.

<sup>13</sup> Hyman, Harold M., *To Try Men’s Souls: Loyalty Tests in American History*, University of California Press, Berkeley, 1959. As the title suggests, this book covers the use of loyalty oaths throughout American History. Both Benjamin Franklin and George Washington swore loyalty to King George II, pg. 60.

<sup>14</sup> *Ibid*, pg. 73. “Under English law, every man in George Washington’s Continental forces was a traitor. Congress might placate its conservative conscience by claiming persistent loyalty to George III, but Washington had the

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immediate responsibility for maintaining discipline in his corps...His soldiers needed legal status from the legislators...In effect Congress had to place its need for the army's loyalty to itself above its official position of a primary loyalty to the king."

<sup>15</sup> Ibid, pg. 115.

<sup>16</sup> Rakove, Jack N., *James Madison Writings*, 1999, pg. 91.

<sup>17</sup> Hyman, Harold M., pg. 114.

<sup>18</sup> Ibid, pg. 114. The President's oath of office is found in Article 2, Section 1. The requirement for others to take an oath supporting The Constitution is found in Article 6

<sup>19</sup> The New York Times, Wilson to Take the Oath Sunday, 15 Nov 1916, as found at:

<http://query.nytimes.com/gst/abstract.html?res=9C00E3D7143BE633A25756C1A9679D946796D6CF> (accessed 5 Nov 2009.) This article discusses the time gap between when President Wilson resumed office and the time he took his oath. Chief Justice Marshall is quoted in the article discussing the same situation President Monroe was in on 4 Mar 1817.

<sup>20</sup> *Annals of Congress, The Debates and Proceedings of the Congress of the United States, First, Second and Third Congress*, Reel 1, pgs. 276-282.

<sup>21</sup> Peters, Richard, pg. 24.

<sup>22</sup> Ibid, pg. 23.

<sup>23</sup> Ibid, pg. 50.

<sup>24</sup> *Bond v. Floyd*, 385 U.S. 116 (1966) quotes Justice Marshall with this opinion in 401 U.S., at 192.

<sup>25</sup> I was not able to obtain a copy of a dictionary from the timeframe the Constitution was written. Dr. Johnson's 1812 version was the earliest version available.

<sup>26</sup> Johnson, Samuel, pg. 632.

<sup>27</sup> *Cole v. Richardson*, 405 U.S. 676

<sup>28</sup> Johnson, Samuel, pg. 133.

<sup>29</sup> Rakove, Jack N., *James Madison Writings*, 1999, pg. 71 James Madison states "6. The confederation is silent on this point and therefore by the second article the hands of the federal authority are tied. According to Republican Theory, right and power being both vested in the majority, are held to be synonymous..."

<sup>30</sup> Gales, Joseph, pg. 28.

<sup>31</sup> *Annals of Congress*, pg. 278.

<sup>32</sup> Peters, Richard, pg. 96

<sup>33</sup> Sanger, George P., *The Statutes at Large, Treaties, and Proclamations of the United States of America, vol 12*, pg. 502. This oath applied to "every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments...excepting the President..."

<sup>34</sup> Author unknown, *Article VI: Prior Debts, National Supremacy, and Oaths of Office*. Available at: <http://www.gpoaccess.gov/constitution/pdf/con009.pdf> pg. 943 (accessed 9 Sep 2009).

<sup>35</sup> Ibid, pgs. 195-196.

<sup>36</sup> Johnson, Samuel, pg. 216.

<sup>37</sup> Ibid, pg. 165.

<sup>38</sup> Joint Publication 3-26, *Counterterrorism*, pg II-16, defines "1. **Domestic or Indigenous**. These terrorists are "home-grown" and operate within and against their home country. They are frequently tied to extreme social or political factions within a particular society, and focus their efforts specifically on their nation's sociopolitical arena."

<sup>39</sup> Jensen, Joan M., *Army Surveillance in America: 1775-1980*, 1991, pg. 178. "The concept of a continuing war with an internal enemy composed of civilians who could no longer be trusted, even in peacetime, came from World War I and the Bolshevik revolution. It led to the development of War Plans White, contingency plans for a war at home. White stood for American civilians who might cause civil disturbances and possibly overthrow the government. Officers of the Military Intelligence Division usually identified these potential domestic enemies as radicals, Bolsheviks, or internationalists who renounced nationalism. In practice, these radicals might be IWW members, socialists, communists, anarchists, pacifists, or reformers wishing political change. They might even be people who defended the right of Americans to seek political change. They were civilians who wanted more political change than those who controlled the government were willing to consider. Or so MID thought."

<sup>40</sup> Maryland is, per the Mason-Dixon Line, a southern state, and was prevented from seceding by President Lincoln declaring martial law.

<sup>41</sup> Congress, Title 50 United States Code. Available at: [http://uscode.house.gov/download/title\\_50.shtml](http://uscode.house.gov/download/title_50.shtml), accessed 2 Dec 2009.

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<sup>42</sup> Jensen, Joan M., *Army Surveillance in America: 1775-1980*, 1991, pg. 19.

<sup>43</sup> Joint Publication 3-26, *Counterterrorism*, pgs v-13-14. “(2) In domestic situations, the Constitution, law, and DOD policy limit the scope and nature of military actions. The President has the authority to direct the use of the military **against terrorist groups and individuals in the United States** for other than law enforcement actions (i.e., national defense, emergency protection of life and property, and to restore order). The National Guard has a unique role in domestic military operations. Under control of the respective states, National Guard units in Title 32, United States Code (USC) and state active duty status can support a variety of tasks for HD and CS. In its maritime law enforcement role under DHS, the US Coast Guard (USCG), as a Service under DHS, has jurisdiction in both US waters and on the high seas as prescribed in law. Memoranda of agreements between DOD and DHS/USCG exists to facilitate the rapid transfer of forces between DOD and the USCG for support of homeland security, HD, and other defense operations. Therefore, the military response to extraordinary events that requires DOD CS will likely be a coordinated effort between the National Guard (in state active duty or Title 32, USC status), and the Armed Services (Title 10, and Title 14, USC).”

<sup>44</sup> Laurie, Clayton D. and Ronald H. Cole, *The role of Federal Military Forces in Domestic Disorders: 1877-1945*, 1954, pg. 29.

<sup>45</sup> *Ibid*, pg. 32. Prior to giving the order to use military forces, President Hayes was concerned about the troops’ view of potentially killing their fellow citizens just to defend property rights.

<sup>46</sup> *Ibid*, pg. 57. Secretary of War McCrary stated “in these regions the Army is the power chiefly relied upon by the law-abiding people for protection.”

<sup>47</sup> *Ibid*, pg. 4.

<sup>48</sup> Molloy, *Against all Enemies, Foreign and Domestic: Use of the Military in Civil Law Enforcement*, 1993. pg. 1.

<sup>49</sup> Per USC Title 32, the National Guard while under the command and control of the state’s governor are not subject to the Posse Comitatus Act. They become subject to the act when the President “federalizes” them at which time they fall under USC Title 10. While the PCA and associated DOD policy limits the use of the federalized military from directly participating in law enforcement, Congress has created some exceptions. For example, the Insurrection Act (10 USC 331-335) allows the military to be involved in law enforcement in support of state governments; to enforce federal authority; in major public emergencies; and when there is interference with state and federal laws. However, these uses of the military in law enforcement are still civil support and not homeland defense.

<sup>50</sup> Whitley, Joe D. and Lynne K. Kusman, *Homeland Security: Legal and Policy Issues*, Chapter 3, American Bar Association, Chicago, 2009, pg 54.

<sup>51</sup> Department of Homeland Security, IA-0257-09 Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment, 7 April 2009, found at:

[http://www.huffingtonpost.com/2009/04/14/homeland-security-report\\_n\\_186834.html](http://www.huffingtonpost.com/2009/04/14/homeland-security-report_n_186834.html), (accessed 6 Dec 2009).

<sup>52</sup> Congress has authority to legislate military activities within the bounds of the President’s Constitutional powers over the military.

<sup>53</sup> Congress, United States Code, 2006 Edition, Volume 4, pg. 680, 2008.

<sup>54</sup> *Ibid*, pgs. 680-681.

<sup>55</sup> Joint Pub 1, pg. I-10.

<sup>56</sup> *Ibid*, pg. II-1.

<sup>57</sup> *Ibid*, pg. III-1.

<sup>58</sup> Joint Publication 3-28, *Civil Support*, pg. I-2. “The Secretary of Homeland Security is responsible for ensuring the preparedness of the Nation to prevent, respond to, and recover from threatened and actual domestic terrorist attacks, non-terrorist security threats (e.g., drug and migrant smuggling), major disasters, and other emergencies.”

<sup>59</sup> Joint Publication 3-27, *Homeland Defense*, pg. GL-8

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*. The other threats also include domestic emergencies which JP 3-27 defines as: “Emergencies affecting the public welfare and occurring within the 50 states, District of Columbia, Commonwealth of Puerto Rico, US possessions and territories, or any political subdivision thereof, as a result of enemy attack, **insurrection, civil disturbance**, earthquake, fire, flood, or other public disasters or equivalent emergencies that endanger life and property or disrupt the usual process of government. Domestic emergencies include civil defense emergencies, **civil disturbances**, major disasters, and natural disasters.” (emphasis added) In addition JP 3-28 states that: “One of the key objectives of the Department of Defense Strategy for Homeland Defense and Civil Support is to support civil authorities in minimizing the damage and recovering **from domestic chemical, biological, radiological, nuclear, and high-yield explosive (CBRNE) mass casualty attacks**. The strategy affirms DOD’s primary responsibility for protecting the US homeland from attack, and establishes that the second priority is to support civil authorities in



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minimizing the damage and recovering from domestic CBRNE mass casualty attacks.”(emphasis added) “(1) **Civil Disturbance Operations.** The President has the authority to deploy troops within the United States to enforce the laws. The Enforcement of the Laws to Restore Public Order, Chapter 15 of Title 10 USC (formerly Insurrection Act) authorizes the President to employ the Armed Forces of the US, including the NG, within the United States to restore order or enforce federal law after a major public emergency (e.g., natural disaster, serious public health emergency, or terrorist attack) when requested by the state governor or when the President determines that the authorities of the state are incapable of maintaining public order. The President normally executes his authority by ordering the dispersal of those obstructing the enforcement of the laws. **The President may act unilaterally to suppress an insurrection or domestic violation** without the request or authority of the state/governor and to exercise his “major public emergencies” authority to direct the SecDef to provide supplies, services, and equipment necessary for the immediate preservation of life and property.”(emphasis added)

<sup>62</sup> Whitley, Joe D. and Lynne K. Kusman, *Homeland Security: Legal and Policy Issues*, Chapter 3, American Bar Association, Chicago, 2009, pgs 43-58.

<sup>63</sup> Ibid.

<sup>64</sup> While the Posse Comitatus Act and associated DoD policy limits the use of the federalized military from directly participating in law enforcement, Congress has created some exceptions. For example, the Insurrection Act (10 USC 331-335) allows the military to be involved in law enforcement in support of state governments; to enforce federal authority; in major public emergencies; and when there is interference with state and federal laws. However, these uses of the military in law enforcement are still civil support and not homeland defense.

<sup>65</sup> Washington, George, Farewell Address, 19 September 1796. Available at:

<http://gwpapers.virginia.edu/documents/farewell/transcript.html> (accessed 5 Dec 2009) an excerpt states “All obstructions to the execution of the Laws, all combinations and Associations, under whatever plausible character, with the real design to direct, controul counteract, or awe the regular deliberation and action of the Constituted authorities are destructive of this fundamental principle and of fatal tendency. They serve to Organize faction, to give it an artificial and extraordinary force--to put in the place of the delegated will of the Nation, the will of a party; often a small but artful and enterprising minority of the Community; and, according to the alternate triumphs of different parties, to make the public Administration the Mirror of the ill concerted and incongruous projects of faction, rather than the Organ of consistent and wholesome plans digested by common councils and modified by mutual interests. However combinations or Associations of the above description may now & then answer popular ends, **they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious and unprincipled men will be enabled to subvert the Power of the People, & to usurp for themselves the reins of Government; destroying afterwards the very engines which have lifted them to unjust dominion.**”

(emphasis added)

<sup>66</sup> Ibid. “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.”

<sup>67</sup> Hackett, Sir John W, *The Military in the Service of the State*, AU-24, Concepts for Air Force Leadership, 2008, pg. 89.

<sup>68</sup> Hackett, Sir John W, pg. 89. “MacArthur’s insistence upon his right as an individual to determine for himself the legitimacy of the executive’s position, no less than his claim of the right as a military commander to modify national policies, can never be seen in any other way than as completely out of order.”

<sup>69</sup> Snider, Don M., *Dissent and Strategic Leadership of the Military Professions*, The Strategic Studies Institute of the U.S. Army War College Publication 849, Carlisle, US Army War College, February 2008, pg. 1.

<sup>70</sup> Fisher, Louis, *Interpreting the Constitution: More than What the Supreme Court Says, Extensions*, Fall 2008. Available at: <http://www.loc.gov/law/help/usconlaw/pdf/Extensions.fisher.pdf>, (accessed 9 Sep 2009).

<sup>71</sup> Ibid.

<sup>72</sup> An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime. (United States, Joint Service Committee on Military Justice Manual for Courts-Martial, Article 92. 2008 ed. Washington, D.C.: U.S.G.P.O., 2008. pg A2-26.) The courts “recognize...the right to challenge the validity of a regulation or order with respect to a superior source of law” (for example the Constitution) (United States v. New, No. 99-0640, Crim. App. No. 9600263, the Court of Appeals for the Armed Force stated “The test for assessing the lawfulness of an order under Article 92 comes from paragraph 14c(2)(a)(iii), Part IV, Manual for Courts-Martial, United States (1995 ed.) which states in pertinent part: The order must relate to

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military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order." (emphasis added) They also stated: "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. Such an inference does not apply to a patently illegal order, such as one that directs the commission of a crime." In *United States v Kisala*, No. 04-0246, LEXSEE 64 M.J. 50, they stated in addition to their statement in the New case, that "Fundamental to an effective armed force is the obligation of obedience to lawful orders. Reflecting the authority of this principle, an order is presumed to be lawful, and a subordinate disobeys an order at his own peril. However, a service member may challenge the lawfulness of an order at the time it is given or in later disciplinary proceedings.") At the same time, "The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." (U.S. vs. New)

<sup>73</sup> Bennett, William J., *Our Sacred Honor: Words of Advice from the Founders in Stories, Letters, Poems, and Speeches*, 1997, Simon & Schuster, New York, 1997, pg. 370. The entire letter quoted in this book states: "While our country remains untainted with the principles and manners which are now producing desolation in so many parts of the world; while she continues sincere, and incapable of insidious and impious policy, we shall have the strongest reason to rejoice in the local destination assigned us by Providence. But should the people of America once become capable of that deep simulation towards one another and towards foreign nations, which assumes the language of justice and moderation while it is practicing iniquity and extravagance, and displays in the most captivating manner the charming pictures of candor, frankness, and sincerity, while it is rioting in rapine and insolence, this country will be the most miserable habitation in the world; because we have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

<sup>74</sup> Information was provided by e-mail on 19 Jan 2010 from sources at the United States Air Force Academy and OTS at Maxwell AFB, and on 20 Jan 2010 by a ROTC regional office representative. Each of these commissioning sources use Colonel Orwyn Sampson's article: [The Military Oath of Office](#), USAF Academy Journal of Professional Military Ethics, September 1981. The OTS lesson plan for the Oath of Office lecture is posted on the Holm Center Intranet, under the curriculum tab for OTS, (Profession of Arms lesson plan PA-37). The Holm Center Intranet link is: <https://hq.afboats.af.mil> (accessed 19 Jan 2010).

<sup>75</sup> The U.S. Constitution Course is available on the USAF's Advanced Distributed Learning Service (ADLS).

Available at:

[https://golearn.csd.disa.mil/kc/main/kc\\_frame.asp?blnWhatsNew=True&strLastLog=TO\\_DATE\('11/03/2008%2011:18%20',%20MM/DD/YYYY%20HH:MI%20AM'\)](https://golearn.csd.disa.mil/kc/main/kc_frame.asp?blnWhatsNew=True&strLastLog=TO_DATE('11/03/2008%2011:18%20',%20MM/DD/YYYY%20HH:MI%20AM')) (accessed 5 Feb 2010).

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