

Thinking About the Unthinkable

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By Stuart H. Loory

COLUMBUS, Ohio — Our military leaders spend untold hours directing contingency planning for almost every conceivable threat to the nation's security both from within and without. Some of the threats are real. Most, though possible, are highly unlikely.

In the realm of the unlikely but nonetheless possible is one threat to which the military men have given no attention. Perhaps the time has come for them to consider this scenario:

Articles of impeachment are voted against the President of the United States by the House of Representatives. The President refuses to recognize the indictment because it does not, in his judgment, meet the constitutional definition of impeachment. He feels the impeachment is for political reasons and not for criminal reasons covered by the constitutional clause dealing with treason, bribery or other high crimes or misdemeanors.

He calls the Joint Chiefs of Staff into session. "Gentlemen," he tells the generals, "we face a grave constitutional crisis. Well-meaning but misguided men, out to get me for political reasons, are subverting the Constitution and threatening ruin for the nation. We cannot allow that to happen."

He orders a world-wide alert of American troops, telling the generals there is a threat that our enemies abroad may try to take advantage of the situation. He orders two or three crack battalions of paratroops into



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Washington, noting that there is a threat to domestic order and that the Government must be protected and must continue to function during this time of crisis.

The threat that those troops would represent, patrolling Pennsylvania Avenue, is obvious. The ability of the Senate to try the President in such an emotionally charged atmosphere would be as seriously impaired as would a common jury's if the accused were holding a shotgun in a courtroom murder trial.

The nation would be a step short of facing a coup d'état.

How would the military react in such a situation? In our system of military subordination to civilian authority, there is almost no precedent. The military was involved in the impeachment of Andrew Johnson and it was, in fact, the refusal of the military to accede to Mr. Johnson's wishes that set in motion the train of events that led to his indictment by the House.

But much has happened since the Reconstruction days. Today our military leaders quickly and unquestioningly follow the orders of their civilian masters and they are working hard to re-establish a system within the services in which orders from superiors are as quickly obeyed by subordinates.

Must this be the case?

No.

Military men are compelled, by the Uniform Code of Military Justice, to obey only legal orders. The problem, of course, is to define legality. One good standard is to consider the source of the orders. The rationale in recent years for various questionable acts has been this: "We were only following orders."

Since Mylai, the Army, in particular, has been doing a commendable job of training its men to understand that since the Nuremberg war crimes trials a soldier need not always follow orders. In films, slide shows and lectures, men at all levels in the chain of

command are educated to battlefield situations in which they might conceivably be asked to commit atrocities by their superiors and are told they need not—should not—carry out the orders.

No similar lectures are given, even at the Army War College, on how to react to what might be called orders to carry out "political atrocities."

I discussed this situation recently with a colonel who is a student at the Army War College. How, I asked him, should the Joint Chiefs react to Presidential orders of the type indicated in this scenario.

The colonel's speculation was that the Joint Chiefs would seek legal advice from their own counsel and from the civilian counsel in the Defense Department. Such a procedure could take days or weeks. The President would want immediate action. And he could take steps, through replacing dilatory officers with others, to get it.

The problem, in brief, is not legal and susceptible to institutional solution. It is moral and must be solved personally by individuals.

President Nixon, in dealing with his crises during the past year, has made statements showing he is capable of personal solutions to protect, as he puts it, the Presidency. Last summer he indicated he would obey only a "definitive" opinion of the Supreme Court in determining whether to turn over tapes to investigators, leaving open the possibility of defying the Court. Earlier this year, he said at a news conference that he could only be impeached for "criminal" acts, indicating he might refuse to recognize impeachment.

Other public servants, including military men, have the duty to make similar personal judgments to protect the Constitution. In times of crisis, when emotions are sometimes more controlling than established rules of procedure, legality get short shrift.

Thus, Gen. Alexander M. Haig, Jr., during last fall's so-called Saturday

night massacre, ordered Deputy Attorney General William D. Ruckelshaus to fire Archibald Cox with these words: "Your Commander-in-Chief has given you an order."

The President, of course, was not Commander-in-Chief to either Mr. Haig or Mr. Ruckelshaus. He is Commander-in-Chief only of the armed forces and the remark is revealing in its indication of how the Constitution can be so easily set aside.

In some cases, the President may not even be Commander-in-Chief to the military. Every military leader must decide for himself when this is the case. He must do his own personal contingency planning and be prepared to put his career on the line to protect the nation from constitutional threat. He should start by remembering that he is sworn to uphold the Constitution and not the President.

Stuart H. Loory, Kiplinger Professor of Public Affairs Reporting at Ohio State University, is author of "Defeated: Inside America's Military Machine."
