WAS SECESSION LEGAL UNDER THE CONSTITUTION?

The premise long held among Confederate partisans is that secession by a state or states is legal under the US Constitution, or rather, it is not unconstitutional. A prominent TVCWRT member recently presented an interesting challenge to the Little Round Table in saying "the burden of proof showing it to be [unconstitutional] is on those who say it is." As the ancient wisdom of logic goes, we cannot prove a negative, i.e., that secession is unconstitutional. We can, however, falsify an assumed positive premise if we find a contradiction to it. This is known in classical logic as proof by contradiction or *reductio ad absurdum.* By this method, a premise is falsified by showing that its logical consequence is absurd or contradictory. In this analysis I will point out contradictions sufficient to prove conclusively that the aforesaid premise is false.

We will start by assuming the premise is true—that US States can secede under the protection of the 10th Amendment of the Constitution. Straightaway, this can rightfully be called the first contradiction: refuting the US Constitution and retaining its protection.

Continuing, let us examine the strength of the premise that the US Constitution contains an escape clause. The Constitution does not say that states can secede. Supposed permission is inferred from words unspoken in the 10th Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Inherent to the interpretation of an escape clause in the 10th Amendment is that the pact between the states, unanimously endorsed by all, was never intended to be permanent. On that point, we can find a contradiction in the Preamble where it says one of the goals of the Constitution is to *"secure the blessings of liberty to ourselves and our posterity."* Here, the key word is *posterity*. It means future generations. If permanence were not intended, the framers would have left the word out. So, there we have a second major contradiction; permanence was indeed a part of the agreement to stay together under a stronger central government.

The framers of the Constitution realized that within a single decade, the original charter, the *Articles of Confederation and Perpetual Union between the states of [those named]*, was failing to live up to the promise of long-term security. For example, under the original confederation, Congress had no power to levy duties, to tax individuals directly, to regulate interstate commerce, or to provide for the common defense—especially since some of the states refused to pay for the necessary funding of the central government. It further meant that, among other things, Congress was unable to stop rival states from adopting discriminatory and retaliatory trade practices against each other, such as imposing their own excises and tariffs upon each other.

When enacted, the US Constitution did not negate or nullify the original Articles of Confederation, it only sought to improve upon them for the purpose of strengthening the bond between the states and protecting all equally against foreign and domestic enemies. In fact,

many individual articles and clauses were transposed directly into the Constitution almost word-for-word. These pertained to many familiar things such as: mutual defense, the Bill of Rights, property rights, and several prohibitions against individual states acting as if they had supreme authority. This brings us to Article VI, Clause 2:

> *"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."*

This clause, known by legal scholars as "the supremacy clause," was a response to problems with the original Articles of Confederation that loosely governed the 13 states from 1781 to 1789. The original charter conspicuously lacked any provision declaring Federal law to be superior to state law. This clause of the Constitution stipulates that Federal laws have supremacy over any and all state laws. If ever they are in conflict, Federal law must prevail. Hence, Article VI, Clause 2 completely negates any theories that states can overrule Federal laws or to unilaterally assume a higher authority to nullify the Constitutional pact. Interestingly enough, there was a matching clause in the CSA Constitution that was identical in all of its intents and purposes.

Perhaps a greater concern to the states was the possibility of failing to guarantee a republican form of government in perpetuity. On that matter we have Article IV, Section 4:

> *"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."*

This clause guaranteeing a republican form of government to all states is backed by a promise of protection to all against invasion and domestic violence. The framers, in recognizing the potentially sudden nature of such threats, realized that the legislature may not be able to act swiftly enough to suppress them. In light of possible situational urgencies this clause added the provision for the President to act against domestic violence when the legislature is not in session. In answer to those who would say the president had no Constitutional powers to act against violence, we have here yet another contradiction. President Lincoln did indeed have the Constitutional authority under Article IV, Section 4 to act swiftly against threats to Federal authority over public property.

Also, contradictory to the belief of Confederate partisans, Lincoln did not invoke war powers in the early moments of armed conflict. Lincoln's first act of war was days later in declaring the blockade by the US Navy against the states by then in open rebellion and after the Confederate government made its own *de facto* declaration of war—calling up privateers. Given the ambiguity of whether Ft. Sumter started an actual war, he was within his rights to act against an insurrection. In that matter, he merely called upon states to voluntarily lend state militia for 90

days to suppress the rebellion until Congress could meet again and act accordingly. By this we can also see a republican form of government in action—loyal states ceded power to the president by their consent and, by extension, the consent of their citizens.

In addition to Article IV, Section 4 (Executive powers), we have Article I, Section 8, Clause 11 (Congressional war powers) and Article II, Section 2 (President as C-in-C of military and militia when activated), which affirm the joint responsibility of the Congress and the President to protect the republic. Collectively, these three Articles grant war powers to the President and they have been backed by the Supreme Court [see Prize Cases, 1863 and Texas v White, 1869]. With regard to preserving our form of government, we may add Article II, Section 1, Clause 7, the presidential oath to preserve, protect and defend the Constitution of the United States. In addition, Article VI, Section 3 stipulates similar oaths for all elected government officials, state and Federal.

We may revisit any of the above contradictions later, but first, let's make sure we have all read the entire 10th Amendment with all its nuances. I repeat it here for your quick review:

> *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

The strength of the premise of Constitutional permission to dissolve the Union lies in the first, third and fourth parts of the single sentence stated above. Conveniently ignored by adherents of secession, however, is the second clause of the sentence, *"nor prohibited by it to the states."*

It expressly prohibits states from exercising powers given to the central government and from assuming powers that states were never intended to have. In various parts, Section 10 also stipulates actions that states may not take without the consent of Congress. By these prohibitions, states are expressly made subordinate to the central government. This directly contradicts "States' Rights" purists who hold the opposite point of view, that the Federal government was subordinate to the states. Upon examining Section 10 prohibitions more specifically, we see that Clause 1 states:

> *"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money… [etc.]"*

Of particular note, it forbids confederacies with other states and countries. In contradiction to many states' rights assumptions, if a state or states cannot do the things prohibited by this clause, they are not sovereign entities.

In Section 10, Clause 2, we can find another refutation of state sovereignty:

> *"… any imposts or duties by the states on imports and exports shall be for the use of the treasury of the United States."*

Section 10, Clause 3 further restricts state autonomy with this prohibition:

> *"No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in a war, unless actually invaded, or in such imminent danger as will not admit of delay."*

Clause 3 is somewhat repetitious to Clause 1 in forbidding compacts with other states or nations, but it also forbids states to engage in war unless in imminent danger. Was South Carolina in imminent danger when she fired upon US Ships attempting to give relief to besieged US Troops in a US Fort on US property? Not really. The first confrontation with the US government in December 1860 was a completely unilateral action by South Carolina attempting to prove a point—and the point was state sovereignty, or rather, rejection of US authority. Her act was not an act of the Civil War (or "the War Between the States," or "the war between the USA and the CSA"). In fact, at that time there was no compact with other states at all and, in fact, there was not yet a new government known as the Confederate States of America. The United States was not invading the soil of South Carolina; it was acting to preserve its legal ownership of Ft. Sumter. A similar situation was developing at Ft. Pickens at Pensacola, FL.

If we take a broader view in looking for more contradictions, we find them in the policies and decisions made by other nation-states. Not one outside power in the world granted formal recognition to the CSA as a legitimate government. Official recognition requires at the very least formal declarations and the exchange of diplomats, if not lasting trade agreements. In contrast, they maintained diplomatic relations and trade with the US government and recognized its right to resist what they regarded as an internal insurrection.

To summarize, I have presented numerous contradictions to the premise of legal separation of states under the protection of the Constitution. In short, the legality of dissolution under domestic (Constitutional) law does not exist. In fact, it is pointless to try to place the Southern independence movement under the umbrella of US law. The United States was not the ruler of the world. The Confederate States, like all organized populations in the world, had the human right to have their own form of government by consent of the governed. As the US Declaration of Independence says, it is a self-evident truth. Look there instead because you simply won't find consent to secede in the Constitution.

Completely aware of this, the leader of the states in insurrection, Jefferson Davis, sought a higher legality—the right to exist independently among the world's nations according to international law. He accepted the reality that the states he represented would have to fight for their independence together as one nation, which they did—and lost. If there is any meaning at all to the "Lost Cause," this is it.

Yours respectfully,
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