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THE POLITICAL GENIUS OF MAN has failed to solve one ancient and basic problem of politics. Briefly stated, it is as follows: What shall be the proper division of authority among governments? How much authority shall be given to a central government and how much shall be left to local or state governments? In the awakening hours of recorded history man faced this problem. It is found in the history of Sumeria, Egypt, Babylonia, Assyria and Persia. And within this century the imbalance of governmental authority played a dominant role in the collapse of the Chinese Dynastic System, the fall of the Ottoman Empire, the eclipse of the Tsarist regime, and the Mexican Revolution.

The position taken recently by the Governor of Arkansas points up the difficulty of the problem. The issue as he presented it, was as follows: Integration as opposed to segregation; government by injunction; intervention of federal troops within a state; and, importation of a federal judge. In fact, none of these is the issue. Correctly stated, the Arkansas situation posed this question: Shall we maintain a federal system of law or shall one man be allowed to alter the law by other than constitutional procedure?

When we were part of the British Empire the same problem was present and the inability of British statesmen to handle the distribution of governmental authority was one of the main reasons for the independence movement of the Thirteen Colonies. As an ardent British imperialist, Benjamin Franklin presented telling arguments at the Albany Conference in 1754 and in London before the members of the British Parliament. Failing to persuade either his fellow colonists or the leaders of state in London of the proper division of governmental authority events evolved until our Independence Movement became final. Being successful in freeing themselves from British control, the people of the independent states were confronted with the same problem as before. Now the issue was the division of governmental authority between the independent states and the central government at Philadelphia.

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Under the Articles of Confederation, the Central Government had no authority to deal with national problems in a national way. Congress could enact laws but could not enforce them; there was no central executive; there was no uniform system of currency; there was no uniform control over commerce; and there was no uniform judicial system in operation. These inadequacies caused a movement to change the Articles of Confederation, leading to the adoption of the Constitution of 1789.

In 1786, in Massachusetts, Shays lead a revolt of farmers against the state assembly which was dominated by commercial creditors. The farmers made the error of attacking the national arsenal at Springfield. The militia was called to end the revolt. The strife complained of by Shays' adherents was prevalent in the United States. A strong central government was the answer.

Inspired by the fear of Shays Rebellion, the delegates at Philadelphia assigned to Congress in the Constitution the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." [1] All that was needed was an enabling act to implement this provision.

On May 2, 1792, Congress provided an enabling act which gave the Washington Administration the authority to suppress the Whiskey Rebellion of 1794. This occasioned the first instance of the use of federal troops to suppress an internal insurrection. This act was repealed. Subsequently, February 28, 1795, Congress enacted legislation upon which all future use of federal troops used in this manner has been predicated:

> An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions.
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> Sec. 2. And be it further enacted, that whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the President of the United States to call for the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed.
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> Sec. 3. Provided, always, and be it further enacted, that whenever it may be necessary, in the judgment of the President to use the military force hereby directed to be called forth, the President shall forthwith, by proclamation, com-

[1] Article 1, Section 8.

> mand such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.[2]

During the War of 1812, the government relied in part upon the militia of the several states. Pursuant to the act of 1795, the President issued a call for the militia. Some states cooperated, others refused. Non-cooperating states said there was no insurrection, no invasion, and no laws were being obstructed. Consequently, the federal government had no right to call the state militia. The general Court of Massachusetts contended that only the states had the power to decide whether or not conditions existed justifying the use of state militia by the federal government.[3]

By 1827, the issue reached the United States Supreme Court. Mr. Justice Storey, speaking for the Court, held that the authority to decide whether the exigencies contemplated in the Constitution had arisen was vested by the Constitution and the statutes exclusively in the President, whose decision is conclusive upon all persons.[4]

And there the question rested during the years between 1827 and the election of President Abraham Lincoln in the fall of 1860. Southern state leaders had announced that if a president were elected which represented the North and Northeast that Southern states would withdraw from the Union. Consequently, the election of Lincoln gave impetus to the secession movement. Lincoln's position was clearly stated in his first inaugural address, March 4, 1861.

> I hold that in contemplation of universal law and of the Constitution the Union of these states is perpetual . . . The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen states expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787, one of the declared objects for ordaining and es-

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2 Public Statutes at Large, Volume 1, page 264 gives the text of the act of 1792, and pages 424-425, the text of the act of 1795.

"First and last, between 1917 and 1922 soldiers were sent into states . . . more than thirty times, the majority of the instances being occasioned by labor troubles." See Edward S. Corwin, The President Office and Powers, 1797-1948 (New York University Press, 1948). See especially pages 160-170 on "Military Power In Law Enforcement President Versus Congress."

3 Herman v. Ames, State Documents on Federal Relations, 1906, No. 2, 13-15.

4 Martin v. Mott, 12 Wheaton 19 (1827).

tablishing the Constitution was "to form a more perfect Union." [5]

Under mandate of the Constitution, the President has this responsibility: "He shall take care that the laws be faithfully executed. . . ." [6] Upon the Congress the authority was placed "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." [7] In both references the prime emphasis is upon the word "law." Not until 1890 did the United States Supreme Court pronounce upon the meaning of this word. Until that time the term "law" had meant the Constitution, Acts of Congress, treaties, rules, ordinances and regulations of the President. In the case *In re Neagle*,[8] the Supreme Court gave the most expansive definition of the word "law."

By direction of the Attorney General of the United States, David Neagle, Deputy Marshal of the United States, was appointed to accompany Supreme Court Justice Field while on circuit in California. There was ample reason to believe that Justice Field would be assaulted by one Terry unless precautions were taken. Neagle was given full authority to protect the Justice and in so doing it was necessary to kill Terry. California authorities arrested Neagle for murder. In time Neagle's petition for a writ of habeas corpus reached the Supreme Court. California authorities argued that since there was no Act of Congress, or Constitutional provision permitting the President through the Attorney General to appoint a deputy marshal to operate in the capacity that Neagle did, no such authority existed for his action; consequently, Neagle was guilty of murder. The Supreme Court stated the following:

> While there is no express statute authorizing the appointment of a deputy marshal or any other officer to attend a judge of the Supreme Court when traveling in his circuit, and to protect him against assaults or other injury, the general obligation imposed upon the President of the United States by the Constitution to see that the laws be faithfully executed, and that the means placed in his hands, both by the Constitution and the laws of the United States to enable him to do this, impose upon the Executive department the duty of protecting a justice or judge of any of the courts of

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[5] VII Messages and Papers of the Presidents 3208.

[6] Article 11, Section 6.

[7] Article 1, Section 8.

[8] 135 U. S. 1 (1890).

> the United States when there is reason to believe that he will be in personal danger while executing the duties of his office. . . .

And the Court continued by saying the President's duty is not confined "to enforcement of Acts of Congress or of treaties of the United States according to their express terms" but included "the rights and obligations growing out of the Constitution itself, our international relations and all the protection implied by the nature of the government under the Constitution."

The meaning of "law" was expanded in the Neagle case, but *In re Debs*[9] dilated this word even more while also enlarging the power at the President's command to enforce the "law."

In the great Pullman strike of 1894, Eugene V. Debs, the leader of the strikers, caused the disruption of the flow of interstate mail. To forestall further stoppage of the mail, a federal court in Illinois issued an injunction against Debs and the strikers, commanding them to cease such activities as would prevent the flow of mail through interstate commerce. Faced with the injunction, Debs and the strikers ignored the order. Rioting ensued which caused President Grover Cleveland to send troops into the State of Illinois to restore order, to enforce the injunction as well as to prevent further obstruction of the laws of the United States. Despite the protestations of Governor Altgelt of Illinois, order was restored within Illinois by federal troops. The ensuing imprisonment of Debs for violation of the injunction resulted in the far reaching decision in 1895 by the Supreme Court on the authority of the President to use the power of his office to enforce federal law.

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

Clearly this decision expands the coverage of protection to "all rights entrusted by the Constitution to its care." And should events require, "the army of the nation, and all its militia," are available to enforce the Constitution.

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[9] 185 U. S. 564 (1895).

What is the position of the Supreme Court if an order or injunction is issued by a court and subsequently violated while still in force without a review by the court making the order or by the Supreme Court? While an order is in force by any court, its authority is continuous until the same has been withdrawn, reversed upon rehearing by the same court or by a reviewing court and this is true even though the original order is subsequently held to be invalid. This position is clearly stated in several cases.

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent and what the Constitution calls the "judicial power of the United States" would be a mere mockery.[10]

In 1947, the Supreme Court issued a no strike injunction against John L. Lewis and the United Mine Workers when the nation's mines were under governmental control. Upon issuance of the order, Lewis and the Mine Workers violated the order of the court. A concurring decision written by Mr. Justice Frankfurter states the following:

> If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. The legal process is subject to democratic control by defined, orderly ways which themselves are a part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this court be of defiance.[11]

In this case, the Supreme Court fined Lewis $10,000 and the United Mine Workers $700,000 for the violation of the injunction.

From some sources, it has been argued that the executive was deprived of his power to enforce federal laws by the use of either troops or the militia by the Posse Comitatus Act of 1956, and the Civil Rights Act of 1957. Nothing could more patently show ignorance of the facts than such a conclusion. The following is a complete statement of the Posse Comitatus Act of 1956.

> Sec. 1385. Use of Army and Air Force as posse comitatus.
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> Whoever, except in cases and under circumstances expressly authorized by the Constitution or act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be

[10] Gompers v. Buch Stove and Range Company, 221 U. S. 418, 450 (1911).

[11] United States v. United Mine Workers of America, 330 U. S. 258 (1947).

> fined not more than $10,000 or imprisoned not more than 2 years, or both. This section does not apply in Alaska.[12]

As stated, the exceptions within this act clearly authorize the use of the Army and Air Force to enforce the laws of the nation because such is predicated upon the Constitution and enactments by Congress as well as by decisions of the Supreme Court. The illegality is present only when such forces are used without the authority of the Constitution or acts of Congress.

Conflicting emotions over the Civil Rights Act of 1957, have produced little examination of the act. The first portion of the act states that in cases of criminal contempt the punishment shall be either a fine or imprisonment, or both. When the defendant is a natural person, the fine shall not exceed $1,000, nor shall the imprisonment exceed six months. In such proceedings, at the discretion of the trial judge, the case may be with or without a jury. If the case is heard by a judge without a jury and the sentence upon conviction is a fine in excess of $300.00 or imprisonment for a term in excess of 45 days, the accused, upon demand, is entitled to a trial de novo before a jury, which shall conform to the practice in other criminal cases. However, notice the following provisions:

> This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.
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> Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations, any lawful writ, process, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.[13]

When the Governor of Arkansas sought to defy the order of the federal court in Arkansas, he placed himself in the same position as John L. Lewis in the United Mine Workers' case. When the Governor said he could not allow his discretion to be circumvented by that of the Federal Judge, he was vaulting himself above the United States Supreme Court and the Presi-

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12 United States Statutes at Large, 84th Congress, 2nd Session, 1956. Volume 70A. Title 10 & Title 32 of United States Code, p. 626.

13 Civil Rights Act of 1957, Approved September 7, 1957, Public Law 85-315; Statute 634.

dent of the United States. When the Supreme Court ruled against segregation that decision became the law of the land to be enforced by the federal courts and there is no issue of "importation" of a foreign judge into Arkansas. When the order was defied, when troops were sent to the scene to carry out its enforcement and to suppress the nascent forces obstructing the laws of the nation, all proceeded in conformity with the precedent of revered statutes and decisions of the Supreme Court. The question posed was that of sustaining a federal system of law or its disruption with the chaos and tyranny that would follow in its wake if any man can make himself a judge of the validity of laws and by his own act of disobedience set them aside. What the future will disclose as a result of these recent events remains safely concealed within the womb of time.