

THE CRIMINAL PROCESS DURING CIVIL DISORDERS†

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In a government framed for durable liberty, no less regard must be paid to giving the magistrate a proper degree of authority to make and execute the laws with rigor than to guarding against encroachments

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

C. CLODE, *THE MILITARY FORCES OF THE CROWN* (2 vol. 1869) [hereinafter cited as CLODE];

E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS 1787-1957* (4th ed. 1957) [hereinafter cited as CORWIN];

C. DOWELL, *MILITARY AID TO THE CIVIL POWER* (Kavass & Sprudz eds. 1972) [hereinafter cited as MILITARY AID];

C. FAIRMAN, *THE LAW OF MARTIAL RULE* (2d ed. 1943) [hereinafter cited as FAIRMAN] (the second edition is used because of the general unavailability of the 1939 edition);

M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1911) [hereinafter cited as FARRAND];

R. HIGHAM, ED., *BAYONETS IN THE STREETS, THE USE OF TROOPS IN CIVIL DISTURBANCES* (1969) [hereinafter cited as BAYONETS];

R. RANKIN, *WHEN CIVIL LAW FAILS* (1939) [hereinafter cited as RANKIN];

L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* (4 vol. 1948-68) [hereinafter cited as RADZINOWICZ];

B. RICH, *THE PRESIDENTS AND CIVIL DISORDERS* (1941) [hereinafter cited as RICH];

F. WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) [hereinafter cited as WIENER];

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter cited as CIVIL DISORDERS REPORT] (the Commission will be referred to as the Riot Commission);

TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, Final Report of the National Commission on the Causes and Prevention of Violence (Bantam ed. 1970)

upon the rights of the community. As too much power leads to despotism, too little leads to anarchy, and both eventually to the ruin of the people.¹

I. INTRODUCTION: CIVIL DISORDERS IN THE SIXTIES

During the last decade, our nation has experienced civil disorders with a frequency and intensity that is unique to the American experience. In the cities, on university campuses, and in prisons, large scale disorders posed formidable challenges to the institutions of government.² Although most will be familiar with these disorders, a brief review will help to put the general problems in perspective.

[hereinafter cited as VIOLENCE COMMISSION REPORT] (the Commission will be referred to as the Violence Commission);

REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS, The Judicial Conference of the District of Columbia Circuit (1973) [hereinafter cited as 1973 D.C. REPORT];

RIOTS, CIVIL AND CRIMINAL DISORDERS, *Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 90th Cong., 1st Sess. (1967) [hereinafter cited as 1967 HEARINGS];

Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971) [hereinafter cited as Engdahl I];

Engdahl, *Due Process Forbids Soldiers in Civil Disorders*, AMERICAN REPORT, November 12, 1971, reprinted in P. DAVIES, *THE TRUTH ABOUT KENT STATE* 212 (1973) [hereinafter cited as Engdahl II];

Engdahl, *A Comprehensive Study of the Use of Military Troops in Civil Disorders with Proposals for Legislative Reform*, 43 U. COLO. L. REV. 399 (1972) [hereinafter cited as Engdahl III];

Engdahl, *The Legal Background and Aftermath of the Kent State Tragedy*, 22 CLEV. ST. L. REV. 3 (1973) [hereinafter cited as Engdahl IV];

Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 IND. L.J. 581 (1974) [hereinafter cited as Engdahl V];

Comment, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290 (1965) [hereinafter cited as *Governors' Emergency Powers*];

Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638 (1968) [hereinafter cited as *Riot Control and Federal Troops*];

Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130 (1973) [hereinafter cited as *Presidential Authority*].

1. A. HAMILTON, *The Continentalist*, July 12, 1781, II *THE PAPERS OF ALEXANDER HAMILTON* 651 (H. Syrett and J. Cooke eds. 1961), quoted in C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 21 (1964).

2. See generally J. BASKIN, J. HARTWAG, R. LEWIS & L. MCCULLOUGH, JR., *RACE RELATED CIVIL DISORDERS, 1967-1969* (Lemberg Center for the Study of Violence, Report No. 1, 1971); L. BOEHME, *CARTE BLANC FOR CHAOS* (1970); D. BOESEL & P. ROSSI, *CITIES UNDER SIEGE* (1971); J. BOSKIN, *URBAN RACIAL VIOLENCE IN THE TWENTIETH CENTURY* (1969); D. BOWEN & L. MASOTTI, *CIVIL VIOLENCE: A THEORETICAL OVERVIEW* (1968); R. CONANT, *THE PROSPECTS FOR REVOLUTION* (1971); R. FOGELSON, *VIOLENCE AS PROTEST: A STUDY OF RIOTS AND GHETTOS* (1971); J. MITCHELL, *RACE RIOTS IN BLACK AND WHITE* (1970); A. MONTE & G. LEINWAND, *RIOTS* (1970); *RIOTS AND REBELLIONS* (L. Masotti & D. Bowen eds. 1968); *VIOLENCE AND RIOTS IN URBAN AMERICA* (R. Allen & C. Adair eds. 1969); G. WILLS, *THE SECOND CIVIL WAR* (1968).

In 1963, serious disorders involving whites and blacks took place in Birmingham, Savannah, Cambridge, Chicago, and Philadelphia.³ In 1964, civil rights demonstrators were attacked in St. Augustine, and blacks rioted in Jacksonville, New York, Rochester, Jersey City, Elizabeth, Paterson, Chicago, and Philadelphia.⁴ In 1965, the march on Selma and the attack on blacks by whites in Bogalusa, Louisiana, were soon overshadowed by the Watts riot in Los Angeles, in which thirty-four persons were killed, hundreds injured, almost 4,000 persons arrested, and damage estimated at approximately \$35 million.⁵ Violence erupted in Los Angeles again in early 1966, to be followed by forty-two other disorders and riots—the most serious of which occurred in Cleveland where four were killed and in Chicago where three were killed, scores of civilians and police were injured, and 533 persons were arrested before order was restored.⁶

The tempo accelerated in 1967. The Riot Commission listed 164 disorders during that year, eight of which were defined as “major”—characterized as involving many fires, looting, reports of sniping, violence lasting more than two days, sizeable crowds, and the use of National Guard or federal forces, in addition to other control forces.⁷ In Detroit alone, 7,200 persons were arrested, and 43 persons were killed.⁸ Thirty-three other disorders were described as “serious”—characterized by isolated looting, some fires, some rock throwing, violence lasting between one and two days, only one sizeable crowd and many small groups, the use of state police, and generally not National Guard or federal forces.⁹ The remaining disorders were regarded as “minor.”¹⁰

The ink was not yet dry on the report of the Riot Commission before the murder of Dr. Martin Luther King, Jr. sparked a new wave of major disturbances throughout the country in the spring of 1968.¹¹ Similar disturbances were reported in 1969 and 1970, though

3. CIVIL DISORDERS REPORT 19.

4. *Id.* at 19-20.

5. *Id.* at 20.

6. *Id.* at 21.

7. *Id.* at 65.

8. *Id.* at 60. See 1967 HEARINGS, pt. 5, at 1206 (1968); R. ALLEN & C. ADAIR, *supra* note 2, at 153-90 (1969); J. BOSKIN, *supra* note 2, at 126-39 (1969). See generally W. HEAPS, RIOTS, USA: 1765-1965 (1966); J. HERSEY, THE ALGIERS MOTEL INCIDENT (1968).

9. CIVIL DISORDERS REPORT 65.

10. *Id.*

11. It is reported that between 1965 and mid-1968 there were 166 riots and major civil disturbances “in which 189 persons were killed, including 16 law enforcement officers. There were 7,615 injuries reported, of which 1,817 were suffered by police and

on a considerably reduced scale, and violence has occurred spasmodically more recently.¹²

These civil disorders were primarily racial in character, the typical rioter being a late teenage or young adult black.¹³ Beginning in the middle sixties, however, violence had also flared on the college campuses. At some universities there were mass violations of law reaching riot proportions.¹⁴ On many more campuses, there was violence by smaller groups of students ranging from taking over or blowing up buildings, to arson, kidnapping, destruction of personal property, assaults, and other unlawful conduct which required response by local law enforcement agencies, and on several occasions resulted in the use of state police and the National Guard.¹⁵ During the month of May, 1970, alone (the period of the Cambodian invasion), National Guardsmen were activated on twenty-four separate occasions at twenty-one universities in sixteen states.¹⁶ These incidents were generally more localized and less destructive to persons outside the university community than the earlier disturbances. The causes or asserted rea-

other municipal officials [and] . . . property damage totaling at least \$158 million." 1967 HEARINGS, pt. 15, at 2950 (1969). The riot which took place in Washington, D.C., is examined in W. DOBROVIR, *JUSTICE IN TIME OF CRISIS* (1969). See also B. GILBERT, *TEN BLOCKS FROM THE WHITE HOUSE* (1968).

12. Riots took place, for example, during 1974 in Boston after a federal district judge ordered busing as a means of desegregating the schools, *N.Y. Times*, Oct. 9, 1974, at 1, col. 2, and at least 47 persons were injured in racial rioting in Newark. *Id.*, Sept. 3, 1974, at 1, col. 8. There was also rioting in Augusta, Georgia, in 1970, requiring National Guard assistance, in which four were killed and 20 injured. *Id.*, May 12, 1970, at 1, col. 1.

13. It has, however, been pointed out that there was substantial white participation in the Detroit riot. Corsi, *Detroit 1967: Racial Violence or Class Warfare*, 45 *J. URBAN L.* 641, 658-61 (1968); see Grimshaw, *Changing Patterns of Racial Violence in the United States*, 40 *NOTRE DAME LAW.* 534 (1965).

14. See *CAMPUS UNREST: DIALOGUE OF DESTRUCTION* (R. Kobetz & R. Hamm eds. 1970); R. CONANT, *supra* note 2, at 175-76; *CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES OF COLUMBIA UNIVERSITY IN APRIL AND MAY, 1968* (The Cox Commission Report); *PRESIDENT'S COMMISSION ON CAMPUS UNREST* (1970). See generally S. REP. NO. 42, 92nd Cong., 1st Sess. (1971); *1967 Hearings*, pts. 20-23 (1969).

15. Well publicized examples include the use of state police at Orangeburg State University, South Carolina, in 1968, J. NELSON & J. BASS, *THE ORANGEBURG MASSACRE* (1970); the use of state police at Jackson State University, and the National Guard at Kent State University, in 1970, *THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 7-69* (1970) (The Scranton Commission Report); P. DAVIES, *THE TRUTH ABOUT KENT STATE* (1973); and the intervention of sheriffs at Southern University, in 1972, *id.* at 205-12. For an analysis of the legislative response to these disorders, see Note, *State Legislative Response to Campus Disorders: An Analytical Compendium*, 10 *HOUSTON L. REV.* 930 (1973). The National Guard was, for example, used on 24 occasions, at 21 universities in 16 states in May, 1970, alone. 116 *CONG. REC.* 27,339 (1970).

16. ENGBAHL II 212.

sons for all of the campus disturbances were, however, quite different from those underlying the urban riots,¹⁷ and the participants were both whites and blacks of student age.

There were also other types of disorders. Large-scale disruptions of a less violent nature took place at the Democratic Party National Convention in Chicago in 1968¹⁸ and the Republican Party National Convention in Miami in both 1968¹⁹ and 1972.²⁰ Disturbances spread to the prisons as well, with at least seventy-five disruptions reported between 1960 and 1970.²¹ Finally, a unique disorder occurred in the spring of 1971, as anti-war protests hit their peak, when efforts designed to focus national attention upon the continuing United States military presence in Southeast Asia culminated in a massive confrontation with police, supported by military forces, in the District of Columbia. Most of the participants undoubtedly intended to demonstrate peacefully, but some clearly intended to prevent the national Capitol from functioning effectively, hopefully without injury to persons and property. The confrontation produced peaceful violations of law on a massive scale. Almost 13,000 arrests took place during the first three days of May, with over half of this number occurring on May 1.²²

Although the "long hot summers" of the middle sixties, and the explosive campuses which characterized the last years of the decade, seem to have cooled, few would suggest that the underlying causes have disappeared.²³ Thoughtful observers may differ upon whether

17. See Hopkins & Myers, *Governmental Response to Campus Unrest*, 22 CASE W. RES. L. REV. 408 (1971).

18. See RIGHTS IN CONFLICT (Bantam ed. 1968) (a special investigation report to the National Commission on the Causes and Prevention of Violence, directed by Daniel Walker).

19. See MIAMI REPORT (1968) (a special investigation report to the National Commission on the Causes and Prevention of Violence, directed by Louis J. Hector and Paul L.E. Helliwell).

20. See N.Y. Times, Aug. 24, 1972, at 1, col. 7; *id.*, Aug. 23, 1972, at 1, col. 7.

21. See PRISONS, PROTESTS AND POLITICS (B. Atkins & H. Glick eds. 1972); ATTICA (The Official Report of the New York State Special Commission on Attica 1972).

22. The disturbance is described in *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973), and in *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

23. This sentiment was expressed several years ago by columnist Tom Wicker:

So those who may be tempted to think one cooler summer means the corner has been turned and the need for action is past are flirting tragically with something worse than the fire next time. N.Y. Times, Sept. 9, 1969, at 46, col. 8.

The underlying causes have themselves attracted considerable attention. The National Commission concluded that "white racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II," and

the present period of comparative calm means that the mood of the country has changed or only that we are in the eye of a hurricane. The character of most of the disorders—racial violence in the cities, Viet Nam protests, opposition by students to their exclusion from policy-making in the universities—do indeed suggest origins in the peculiar problems of American Society, but it may be unwise to ignore the fact that, after two decades of comparative calm, civil violence also increased dramatically in the other industrial nations of the West during the decade of the sixties.²⁴ One thoughtful commentator has noted that the contradiction between the promised fulfillments and secret frustrations of citizens in mass society, and between formal democracy and the unavoidable realities of pluralist decision-making, may make legitimacy impossible for any government in an advanced society. Inflation, unemployment, preoccupation with wants that would previously have been satisfied by economic growth, the reservations of the young about power politics and the wisdom of growth, combine to create conditions where civil violence is likely if not inevitable.²⁵ Re-

recommended "a commitment to national action on an unprecedented scale" to deal with the problems of the cities. CIVIL DISORDERS REPORT 4. A recent study of the reports of nine riot commissions during the period 1919-1970 (including the CIVIL DISORDERS REPORT, 1965 Governor's Commission on the Los Angeles Riots (McCone Commission-Watts), the 1968 New Jersey Governor's Select Commission on Civil Disorders, the 1968 Chicago Riot Study Committee (Austin Report), the 1969 VIOLENCE COMMISSION REPORT, and the 1970 National Commission on Campus Unrest (Scranton Commission Report)), concludes that

[r]ecommendations aimed at eliminating the underlying causes of riots have not varied much since 1919—more and better educational facilities, equal job opportunities, integrated recreation, more responsible news reporting, better police-community relations, more efficient transportation services, better political representation, more public housing, more federal funding for urban programs, etc. . . . [but] have had minimal success in achieving the implementation of their reform recommendations. A. PLATT, *THE POLITICS OF RIOT COMMISSIONS 1919-1970* at 40, 43-44 (1971).

See also Comment, *Through the Looking Glass—Fifty Years Later*, 46 J. URBAN L. 790 (1969) (comparing reports of Chicago riot of 1919 and CIVIL DISORDERS REPORT). In addition, it is clear that civil disorders are only one form of civil violence which in many forms has been an American problem throughout our history. See O. DEMARIS, *AMERICA THE VIOLENT* (1970); R. HOFSTADTER & M. WALLACE, *AMERICAN VIOLENCE: A DOCUMENTARY HISTORY* (1970); I. SLOAN, *OUR VIOLENT PAST* (1970); VIOLENCE COMMISSION REPORT 1-15; VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES (G.P.O. 1969) (a Task Force Report to the National Commission on the Causes and Prevention of Violence, directed by H. Graham and T. Gurr).

24. Duchene, *The Scope of Civil Violence*, in *CIVIL VIOLENCE AND THE INTERNATIONAL SYSTEM*, Part I (Adelphi Paper No. 82, The International Institute for Strategic Studies 1971). "Civil violence" may be defined in this context as any private political violence which aims to influence or overthrow a government, including everything short of violence by criminals at one end of the spectrum and full scale war between states at the other.

25. *Id.*

spectable, but by no means unchallenged, theory asserts that revolution is more likely to occur when a prolonged period of rising expectations and rising gratification is followed by a sharp reversal, intolerably widening the gap between expectation and fulfillment.²⁶ Rioting of the kind experienced in America during the sixties has been viewed by others as a serious and dramatic form of social protest, a potential "catalyst for organizing a radical movement aimed at the transformation of American institutions rather than inclusion into them."²⁷ It is not necessary, however, to forecast either revolutions or "transformations" to accept the proposition that in many, if not most, cases people resort to collective violence because they are dissatisfied, and become dissatisfied because their achievements and capabilities in some way have fallen below their aspirations, creating a sense of "relative deprivation" which is felt to have no cure short of violence.²⁸ Absent major redistributions of wealth and political power, such feelings seem likely to continue and may deepen with increases in population and a slowdown of economic growth.

Regardless of the underlying causes of civil disturbance, the present period of comparative tranquility provides us an opportunity to examine our system for administering justice during the emergency conditions occasioned by massive civil disorder. It is the purpose of this Article, therefore, to examine the manner in which the civilian institutions of justice should operate when faced with major disorder, the circumstances under which troops may be used to assist civilian authorities in restoring order, and the powers of troops and police under emergency conditions. It is our thesis that the purposes of the criminal process during times of civil emergency have not been generally un-

26. See J. DAVIES, *WHEN MEN REVOLT AND WHY* (1971); T. GURR, *WHY MEN REBELL* 3-91, 317-59 (1970); Davies, *The J-Curve of Rising and Declining Satisfaction as a Cause of Some Great Revolutions and a Contained Rebellion*, in *VIOLENCE IN AMERICA*, *supra* note 23, at 547; Feierabend, Feierabend & Nesvold, *Social Change and Political Violence: Cross-National Patterns*, in *VIOLENCE IN AMERICA*, *supra* note 23, at 497; Davies, *Towards a Theory of Revolution*, 27 *AM. SOC. REV.* 5 (1962).

27. PLATT, *supra* note 23, at 46; cf. W. DOUGLAS, *POINTS OF REBELLION* (1970).

28. See authorities cited in note 26 *supra*; Huntington, *Civil Violence and the Process of Development*, in *CIVIL VIOLENCE AND THE INTERNATIONAL SYSTEM*, Part II (Adelphi Paper No. 83, The International Institute for Strategic Studies 1971). Others tend to attribute civil disturbance less to psychological and socio-economic causes, than to "shared cultural assumptions about the nature and power of law and the relation of the individual and group to them." Grimsted, *Rioting in its Jacksonian Setting*, 77 *AM. HIS. REV.* 361 (1972). This theory provides no better basis for optimism. There is, however, little reason for predicting that internal warfare will harass cities indefinitely. Compare Rigg, *Made in U.S.A.*, *ARMY*, Jan., 1968, at 24, with *A Military Solution to Revolt in Our Cities*, *NEW REPUBLIC*, Jan. 27, 1968, at 11.

derstood and that a proper understanding dictates the conclusion that broader powers of arrest, search, and detention be entrusted to police and courts. Our thesis will also suggest that military forces may be appropriately used in support of civilian police where the disorder is of a magnitude which is beyond the latter's power to quell; but that, when so utilized, the powers of the military should be no greater than those that may be exercised by the civilian police.

In limiting our objectives to a study of permissible riot control techniques, we in no way deprecate the importance of understanding and, where possible, dealing effectively with the underlying causes of civil disorder. We also reject the notion that there is anything inconsistent in developing a capacity to maintain order while simultaneously engaging in political and social reform.²⁹ While a society's prompt

29. The proposition that adequate provision for the maintenance of order is antithetical to reform has received considerable publicity:

[w]e question the conventional two-pronged approach to contemporary American protest. An approach which gives equal emphasis to force and reform fails to measure the anticipated consequences of employing force; and it fails to appreciate the political significance of protest. If American society concentrates on the development of more sophisticated control techniques, it will move itself into a destructive and self-defeating position. A democratic society cannot depend upon force as its recurrent answer to long-standing and legitimate grievances. This nation cannot have it both ways: either it will carry through a firm commitment to massive and widespread political and social reform, or it will develop into a society of garrison cities where order is enforced without due process of law and without the consent of the governed. *THE POLITICS OF PROTEST* 346 (Bantam ed. 1969) (Task Force Report to the National Commission on the Causes and Prevention of Violence, directed by Jerome H. Skolnick).

The Commission made it clear, however, that these views were the independent views of scholars, not necessarily those of the Commission. *VIOLENCE COMMISSION REPORT* appendix 4 (preface). Of course, no responsible person has urged "equal emphasis" upon reform and "control" in the sense of equal allocation of human and material resources. An acceptable level of order may be maintained at a relatively minor cost as compared to that which is needed for fundamental reform. There is no need for a society of garrison cities and action inconsistent with what we understand to be due process of law. Although it may be true that society cannot depend upon force as its answer to longstanding and legitimate grievances, it may require order and time for a democratic society to evaluate which grievances are legitimate, how they should be alleviated, and over what period of time reform should be instituted. Inability to maintain order means either anarchy or an acceptance of whatever demands are asserted by militants.

The Report does not maintain that every demand of a protest group should be met, but suggests that a distinction be drawn between demands and underlying grievances and that the grievances be considered on their merits. *Id.* at 344. Obviously, this approach is proper, but certainly it is vital to decide (a) who will determine which underlying grievances are legitimate, (b) what should be done about them, and (c) under what conditions these decisions will be made. A society without the capacity for maintaining order may have delegated these decisions to the militants rather than its elected representatives.

The Report itself acknowledges that "law enforcement should be taken seriously."

response to legitimate grievances may lessen the need for effective techniques of maintaining order, the greater the lag in reform, the more important the capacity to maintain order may become for the average citizen.

The literature dealing with the maintenance of order during civil disorders is substantial, and proposals run the gamut from arguments that effective use of force may be counter-productive³⁰ to suggestions that governors "must learn to smother incipient disorder at the outset, . . . and not to delay calling out the Guard. . . ,"³¹ and to a proposal for a statute authorizing preventive detention of "domestic insurrectionists" accompanied by suspension of the writ of habeas corpus.³² Although systematic examination of every proposal is beyond the purview of this Article, it is appropriate to consider the approach of the major public commissions which have considered the problem.

II. A NEEDED ALTERNATIVE TO THE RIOT COMMISSION'S MODEL OF THE CRIMINAL PROCESS IN CIVIL DISORDERS

A. *The Riot Commission Model*

The disorders of the sixties differed in size, motivation, intensity,

This means that "policing should take place within the framework of due process of law, using minimum force required for the establishment of order," and that "when actual crimes are committed, suspects should be arrested, charged and tried in a court of law, not beaten in the streets." *Id.* at 344. Elsewhere, however, it is made clear that this result should be accomplished through the "reduction and reformation of control," and not through "the introduction of more and better armed police," "sophisticated weaponry," or the development of "nonlethal weapons," which will be viewed with hostility. *Id.* at 344-45, 241-92. Our reservations about the automatic trial of offenders will be discussed in Part II of this essay, see material following note 44 *infra*, but the use of minimum force and behavior consistent with due process to effect arrests of law breakers are clearly appropriate goals. We are troubled as to how these arrests are to be accomplished in the usual riot situation without the introduction of more and different kinds of force than are normally available.

We have no quarrel with the proposition that American society has done too little to alleviate real grievances of many of its citizens and that primary emphasis should be devoted to major reforms. Our position is that efforts designed to assure society's capacity to maintain order should take place simultaneously with those reforms. We recognize the danger that the effective use of force may antagonize dissidents who would have preferred that their demands be accepted as valid grievances and that society immediately yield to their proposals for reform. The alienation of such persons may be the price of order, and, if so, we are prepared to pay it.

30. See note 29 *supra*.

31. Wiener, *Martial Law Today*, 49 *MIL. L. REV.* 89 (1970); 55 *A.B.A.J.* 723 (1969).

32. Flittie, *The Detention of Insurrectionists: A Time to Reconsider*, 27 *SW. L.J.* 745 (1973); *cf.* Wiener, *Helping to Cool the Long Hot Summers*, 53 *A.B.A.J.* 713 (1967).

duration and effect. Some were minor by any definition—a few fires or broken windows, violence in which only a small number of people participated for a period lasting generally less than one day, and the use, in most cases, of local police or police from a neighboring community.³³ These disturbances, while serious, could be handled by existing institutions, administering justice according to routine procedures with relatively minor inconvenience and modification. Our system of administering justice, however, has been unable to respond as effectively to disorders of greater gravity, which have escalated beyond local police capability and required the use of state or federal forces to restore order.

In response to both types of civil disturbance, the Riot Commission proposed a model for the operation of the criminal process which rings familiar to most observers of the "criminal law revolution." In substance, the Commission's model restates the rights of a person accused of crime in a non-emergency situation, adding other safeguards not yet reflected in either legislative or decisional law. The Commission envisaged few changes in the normal operation of the criminal process, recommending the enactment of a few additional criminal statutes, better planning, more facilities, and better training and equipment for more personnel.³⁴ The goals of the criminal process were described as being threefold:

33. CIVIL DISORDERS REPORT 65.

34. The Commission postulated that the first priority in any riot is to enforce the law. Although it recognized that this "may require clearing the streets and preventing persons from entering or leaving the riot area," *id.* at 182-84, it eschewed any recommendation for "preventive arrests," *id.* at 186, and urged that persons in a riot area should be permitted to "move on" or "out". *Id.* at 189. It also recommended legislation to permit disorder areas to be sealed off immediately, to enable local officials to impose curfews, and to use a summons as an alternative to arrest for "minor violations." *Id.* at 189, 290.

It proposed that arrestees should be promptly screened so that they can be treated individually, with most minor offenders released with a summons to appear in the future. *Id.* at 190. Even where persons have been arrested for felonies against property, such as burglary and looting, the Commission recommended prompt release upon a summons where the arrestees "have solid roots in the community" and "no serious criminal record." *Id.* Additional safeguards to the public might result, it said, from legislation providing "more severe penalties for those who commit new violations while awaiting their court appearance." *Id.* It was also suggested that defense lawyers might profitably be used in the screening process. *Id.* at 191.

Bail hearings, the Commission said, should be arranged as quickly as "is consistent with individualized attention," with additional judicial manpower gleaned from other local courts, out-of-town judges, and specially deputized prosecutors and private attorneys. *Id.* at 191-92. The arrestee, furthermore, should be represented by counsel, and the judge should ascertain the relevant facts of his background, age, living arrangements, employment, and past record. The Commission opposed preventive detention either di-

rectly, *id.* at 186-87, or indirectly by setting bail in amounts beyond the reach of offenders, concluding that the purposes of bail in our system "have always been to prevent confinement before conviction and to ensure appearance of the accused in court," not to deter future crime. *Id.* at 192. It also recommended special procedures for expedited bail review by higher courts so that a defendant's rights would not be lost by default. *Id.*

The Commission recognized that some rioters, if released, will commit new acts of violence, but suggested alternative permissible restrictions to limit the risk that a dangerous offender might rejoin the riot: release on the condition of third party custody; forbidding access to certain areas or at certain times; part-time release with a requirement to spend nights in jail; use of surety or peace bonds on a selective basis; and prompt trial.

The Commission's proposals concerning the role of counsel went considerably beyond existing law in non-emergency situations:

The right to counsel is a right to effective counsel. An emergency plan should provide that counsel be available at the station house to participate in the charging and screening operations, to provide information for station-house summons and release officers and to guard against allegations of brutality or fraudulent evidence. All accused persons who are not released during post-arrest processing should be represented at the bail hearing, whether or not local law provides this as a matter of right. During any detention period, defense counsel must be able to interview prisoners individually at the detention center and privacy must be provided for these lawyer-client consultations. *Id.* at 192.

It acknowledged that new sources of manpower and different facilities might be required to accomplish these objectives. *Id.* at 193.

In addition, the Commission recommended that plea negotiations, preliminary examination, and trials be postponed until the riot is over in all but the most minor cases, except where a released defendant poses a present danger to the community in which case he should be tried promptly. Thus, judicial manpower should be used primarily for bail hearings, and "arraignment" for those not released at the station house. Sentencing, in the opinion of the Commission, "is often best deferred until the heat of the riot has subsided, unless it involves only a routine fine which the defendant can afford." *Id.* After the riot, the legal system will still be faced with "proceedings to litigate and compensate for injustices—false arrests, physical abuse, property damage—committed under the stress of riot, actions to expunge arrest records acquired without probable cause; restitution policies to encourage looters to surrender goods." *Id.*

The Commission recognized that some disorders will often exceed the capability of local police forces and that because of the limited number, geographical dispersal, and limited prior experience of state police, primary reliance for state backup forces will rest with the National Guard. *Id.* at 274. It discussed the strength of state Guards; the quality of Guard officers; the small number of black Guardsmen; the Guard's training and equipment; the need for coordinated planning; and the need for a clear chain of command when the Guard and the police operate together. *Id.* at 274-78. The Commission did not, however, discuss the powers of the Guard when mobilized in an emergency, except (1) to note that "in absence of martial law, only seven states have laws granting National Guard troops the powers of peace officers," *id.* at 291, apparently referring to the problems which arose in the Detroit riot when National Guardsmen could not make arrests (or thought that they could not make arrests); and (2) to suggest that states make whatever changes may be necessary to ensure that individual Guardsmen are protected against legal liability when acting pursuant to the valid orders of their supervisors. *Id.*

The Commission recommended that no attempt be made to utilize forces from nearby states pursuant to mutual assistance agreements, but that states rely upon federal forces if state forces prove inadequate. *Id.* at 285. It apparently viewed 18 U.S.C. §

1. To ensure the apprehension and conviction of violators;
2. To ensure that they are subjected to criminal processes and to provide "just but compassionate disposition of inadvertent, casual or minor offenders;" and
3. To provide prompt and fair judicial hearings for arrestees.³⁵

The Violence Commission did little more than stamp its imprimatur on the Riot Commission's recommendations,³⁶ and a similar approach was followed in 1973 by the District of Columbia Committee on the Administration of Justice Under Emergency Conditions, which premised its recommendations in large part upon the conclusion that "the criminal justice process should have as nearly as possible the same impact on arrested persons and the community during an emergency

331 (1970) as the sole basis for federal intervention. *Id.* at 287. The likelihood that 18 U.S.C. §§ 332, 333 (1970) might also be used as a basis for intervention is discussed at notes 89-99 *infra* and accompanying text. In addition to the statutory and constitutional language requiring a state request, it added an additional requirement that the disorder be beyond the control capacities of state and local authorities before federal assistance should be rendered, which appears to have been the long-standing practice. CIVIL DISORDERS REPORT 287-88. It recommended that 10 U.S.C. § 331 (1970) be amended to reflect this requirement, the basis of which was said to be constitutional policy, legislative history, and presidential precedent. CIVIL DISORDERS REPORT 287-88. There is no mention of whether federal troops, when ordered into a riot area to protect a state against "domestic violence," have the same, less, or greater power than local police.

35. CIVIL DISORDERS REPORT 184.

36. VIOLENCE COMMISSION REPORT 58-65. "The National Advisory Commission on Civil Disorders has provided excellent, detailed prescriptions for improving police practices, especially in handling urban riots." *Id.* at 65. Two of its Task Forces discussed the matter in greater detail. For the approach of the Task Force on Violent Aspects of Protest, see note 29 *supra*. A staff report, LAW AND ORDER RECONSIDERED 339, 365 (1969) (prepared by J. Campbell, J. Sahed, and D. Strong), discussed official responses to mass disorder in greater detail, but offered little new insight. One chapter expressed concern that local law enforcement agencies had lagged behind the National Guard and the Army in implementing the Riot Commission recommendations and that the two major problems—adequate numbers of trained manpower and adequate communications—were unsolved. *Id.* at 330. The next chapter expressed concern that placing primary reliance on poorly trained police forces to prevent and control outbreaks of group disorder has an adverse effect on individuals and groups by intimidating some from exercising first amendment rights of group association and polarizing attitudes among others. *Id.* at 334-40. It advocated that riot forces respond to intense provocation in a restrained manner, develop an effective intelligence system, and avoid stern repressive measures. *Id.* at 351-61. It recommended a statute empowering the federal government to seek "judicial redress" for unlawful interference with first amendment rights and authorizing an "agency of the government" to investigate the extent to which first amendment rights are secured. *Id.* at 360. The Violence Commission adopted the recommendation. VIOLENCE COMMISSION REPORT 67. Without challenging the desirability of keeping open the channels of peaceful protests, the recommendation does not appear to strike at the heart of the problem faced by a city experiencing a violent disturbance.

as under normal circumstances.”³⁷

These reports (which we shall collectively characterize as following the “Riot Commission” approach) clearly articulate a high

37. 1973 D.C. REPORT 5. See also Greene, *A Judge's View of The Riots*, 35 D.C.B.J. 24 (1968). The second premise of the Committee was that the criminal justice system should be used as a means of maintaining and restoring order during an emergency only after other available alternatives have been exhausted. *Id.* Its third premise was that public officials should exercise judgment and discretion as promptly and fully as possible to divert from post-arrest stages of the criminal justice system all persons who either “should not or need not” continue to encumber an already burdened process. 1973 D.C. REPORT 6-7. We do not quarrel with these conclusions, although we may differ as to the best way to implement them. The Committee recognized “that an emergency involving large numbers of persons may entail some conditions varying from those experienced by arrestees under normal circumstances,” *id.* at 5, a modest concession to pragmatism. In addition to the normal recommendations that all agencies involved in the administration of justice plan for emergencies, coordinate their efforts, and revise their present procedures and provide the necessary training, the Committee recommended: (1) The *police* should (a) act in ways “aimed at averting disruption”; (b) give preference to “non-arrest methods of crowd control” over arrest when consistent with personal safety and protection of property; (c) arrest only on probable cause; and (d) dispense with documentation of the circumstances of arrest only where “but for suspension of the requirement, loss of life or serious bodily harm would result” (assuming the constitutionality of such a practice). *Id.* at 12-15. (2) The *military* should be used only when necessary to assure the orderly exercise of first amendment rights, to preserve or restore order or to facilitate compliance with police procedures. The District of Columbia National Guard should first be deputized as special police officers under the command of the Police Chief, then federalized and reinforced by regular troops if the disorder becomes aggravated, and only if none of these steps can cope with the disorder should “martial law” be invoked. Regular troops should be used only after the President has made “the specific findings required by 10 U.S.C. §§ 331-334” (discussed at notes 78-103 *infra*). The Committee recommended that the arrest-making authority of the District of Columbia National Guard should “not be diminished by federalization,” but did not recommend that regular military personnel be given explicit authority to make arrests or that they make arrests. 1973 D.C. REPORT 19-23. (3) The *prosecutors* should (a) review arrest information at the earliest possible point and order the release of any defendant where no adequate evidence of guilt exists as soon as possible and “in no event more than three hours after the person’s arrival at a detention facility”; (b) refrain from photographing and fingerprinting arrested persons where subsequent prosecution of a defendant is doubtful; and (c) use the normal standards in determining whether to prosecute. *Id.* at 30-37. The Committee recommended that collateral schedules—that is, settling collateral for certain minor offenses and permitting forfeitures thereof in lieu of court appearance—should not be revised “based on findings concerning the imminence or existence of a particular emergency.” *Id.* at 46. Pretrial release should continue as usual, and the courts should not set any pretrial release conditions that would bar a defendant generally from “participating in an activity which may fall within the protections of the First Amendment.” *Id.* at 43. The courts were admonished to use “such judicial screening devices as the request for a proffer of prosecutorial merit at the time of initial court appearance and/or the holding of prompt probable cause hearings in selected, representative cases,” and that “the test case is encouraged as a method of resolving cases based on similar facts.” *Id.* at 47-50.

level of procedural protection to those engaged in a disorder. Indeed, when evaluated as a whole, it is difficult to avoid the conclusion that, except perhaps for inciters, snipers, and arsonists, the model proposed by the Riot Commission is at least as concerned with assuring the imposition of the least possible inconvenience to the rioter as it is with the prompt restoration of order in a strife-torn city.

Not surprisingly, the performances of police, Guardsmen, courts, and counsel in civil disorders have not received high marks when compared with this model of the criminal process.³⁸ People in areas of civil disorder have been arrested under circumstances where no statutory authority justified an arrest and where there was no probable cause;³⁹ there has been little use of the "summons" in lieu of arrest procedure in riot situations; police have dispensed with normal field arrest procedures; roadblocks have been set up without statutory authorization; arrestees who could be released at the station house without danger to anyone have been detained; preventive detention, usually in the form of a bond beyond the capacity of a defendant to meet, has been utilized; counsel has not been made available at many stages of the process, nor in the numbers recommended; searches have been conducted without a warrant under circumstances which would probably have been unlawful in non-emergency situations; people have been booked and charged in the absence of any evidence of guilt; many arrested defendants have been released without trial, often because no attempt was made to collect and retain sufficient evidence to make a prima facie case before or after the arrest; others have forfeited collateral when no case against them could be proved; permission to forfeit collateral of a minor amount in lieu of appearance for trial has been revoked where there was reason to believe that the defendant would return to the disruption; and collateral schedules have been revised upwards during emergencies.⁴⁰

38. In the words of the Commission, "[i]n the summer of 1967, these goals too often were disregarded or unattainable." CIVIL DISORDERS REPORT 184.

39. Thus, in *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973), the court noted that "[p]laintiffs have presented evidence that many persons were deprived of their liberty without a scintilla of evidence tending to show that they had committed an offense." *Id.* at 950.

40. See, e.g., *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); L. BERSON, CASE STUDY OF A RIOT: THE PHILADELPHIA STORY (1966); W. DOBROVIR, *supra* note 11; T. HAYDEN, REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE (1967); Dodds & Dempsey, *Civil Disorders: The Impact of Mass Arrests*, 35 BROOKLYN L. REV. 355 (1969); Ginsburg & Starkman, *Civil Disturbances, Mass Processing and Misdemeanants:*

This is not to suggest that those practices which violated the law were justifiable. The police and courts in a free society have an obligation to observe the law scrupulously, even if it is unwise or interferes with the accomplishment of objectives which they regard as more important than technical compliance with procedural niceties. While not justifiable, some of the practices are understandable as products of frustration engendered by the inability of police and courts, at least with the techniques lawfully available, to perform the tasks expected of them by most citizens in the community. This particular excuse is frequently couched in rhetoric about "handcuffing the police," and has been voiced repeatedly in opposition to many of the restrictions that have been placed on police powers during the last two decades, particularly in the context of civil disorders.

We do not propose that the police should be permitted to engage in all of the practices which they have employed in the past. No society should permit the overreaction that has characterized some police and judicial behavior. But we think that some police and judicial responses which are not now lawful may withstand constitutional scrutiny if authorized by statute and justified by policy considerations. Authorizing these techniques may well constitute better protection from other less defensible practices than admonitions that the police and courts should function "as nearly as possible as under normal circumstances."

B. *A Different Model*

In our judgment, the approach of the Riot Commission is basically incorrect. The model constructed is neither realistic nor theoretically sound. Any attempt to ignore the fundamentally different nature of civil disorders from ordinary crime in non-emergency situations is doomed to failure. A massive civil disorder should be recognized as a phenomenon justifying a different response by the criminal process.

Our point of theoretical difference results from a fundamental disagreement over the purposes of the system for the administration of criminal justice during a civil disorder. In the judgment of the Commission, "a primary function of criminal justice in a riot situation is to

Rights, Remedies and Realities, 61 J. CRIM. L.C. & P.S. 39 (1970); Sengstock, *Riots and Mass Criminal Justice: The Collapse of the Bill of Rights*, 26 THE LEGAL AID BRIEF CASE 201 (1968); *Criminal Justice in Extremis: Administration of Justice During the April 1968 Chicago Disorder*, 36 U. CHI. L. REV. 455 (1969); Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorders of July 1967*, 66 MICH. L. REV. 1542 (1968); Comment, *infra* note 47.

effectively apprehend, prosecute, and punish the purposeful inciters to riot and assure the community at large—rioters and non-rioters alike—that law violators will be prosecuted and sentenced according to an ordered system of justice;⁴¹ or, put in a slightly different tone, “[i]n any riot, the first priority is to enforce the law.”⁴² We agree that the usual purposes of the criminal process are to investigate crime, apprehend suspected violators, adjudicate guilt, and, where appropriate, to impose sanctions, and that all stages of this process should be arranged according to “an ordered system of justice.” In addition, the system should operate in a manner which will deter the commission of crime. We do not differ substantially with the Commission concerning the essential ingredients of such a system as reflected in its recommendations. We do, however, disagree that this is *the* or *a* primary function of a system for the administration of justice in an urban riot. We view the primary purposes of the criminal process during a civil disorder to be:

1. The preservation or restoration of order;
2. The prevention or limitation of crimes against persons or property; and
3. The maintenance or restoration of the orderly function of government.⁴³

41. CIVIL DISORDERS REPORT 186. The Commission stated the specific function of the system as follows:

The goals of criminal justice under conditions of civil disorder are basic:

To ensure the apprehension and subsequent conviction of those who riot, incite to riot or have committed acts of physical violence or caused substantial property damage.

To ensure that law violators are subjected to criminal process and that disposition of their cases is commensurate with the severity of the offense; to provide, at the same time, for just but compassionate disposition of inadvertent, casual, or minor offenders.

To provide prompt, fair judicial hearings for arrested persons under conditions which do not aggravate grievances within the affected areas. *Id.* at 184.

42. *Id.* at 189. See also Ducharme & Eickholt, *State Riot Laws: A Proposal*, 45 J. URBAN L. 713 (1968). “Once rioters are captured and the commotion is quelled, those who have broken the law should be punished and the law should be such that this is a feasible end, even when thousands find themselves charged with crime at the same time and the courts are overcrowded.” *Id.* at 732.

43. See R. CONANT, *supra* note 2, at 159:

Enforcement procedures in response to civil protest should be governed by policies of restraint which effectively maintain public order, protect non-participating persons and property, and prevent gross disruption of normal community activity.

This is the way in which the system frequently functions. Thus, it has been observed that ordinary police activity related to investigation and apprehension of suspected criminals is supplanted in a riot by action aimed directly at the broader goal of suppressing violence and protecting lives and property. Note, *Riot Control and the Fourth Amendment*, 81 HARV. L. REV. 625, 626 (1968); cf. *ABA Project on Standards for Criminal Justice, Standards Relating to the Urban Police Function* § 2.2.

The apprehension and conviction of serious offenders and the disposition of cases involving minor offenders is, at best, a secondary purpose.

Unlike its function in non-emergency periods, the criminal process in emergency situations is not primarily punitive, deterrent, rehabilitative, or retributive. Rather, it is preventive and restorative. In accomplishing its primary goals, offenses will undoubtedly be discovered and offenders taken into custody. Such offenders should be screened by normal standards and released promptly if there are adequate assurances that they will return for trial, *and* if it appears that they will not resume the conduct which occasioned their arrest nor commit more serious offenses. Otherwise, the paramount necessity for restoring and maintaining order and of protecting life and property should prevail over the arrestees' understandable desire for immediate release. The powers of police in some other areas should also be expanded, for the same reasons, during the period of the emergency.⁴⁴ Prosecutions should be conducted after the emergency has ended. Prosecutors should exercise their discretion and decline to prosecute persons when the disorder is over, unless some valid purpose of the criminal process will be served by prosecution. No attempt should be made to prosecute everyone whose guilt can be proved.

In practice, we do not think that the Riot Commission model will achieve its object of restoring order with a minimum of violence. The notion that massive control forces can be brought into action immediately and that thousands of persons involved in a disorder can be arrested, booked, provided counsel, have their cases screened by prosecution, and be released on bond, just as a single citizen suspected of criminal activity in non-emergency conditions is treated, ignores the experience of recent years. Those who endorse the Commission's approach admit it was not possible in 1967, but believe it could be done in the future by providing greater resources, better training, coordination, and planning. The success of the Riot Commission model, by its own admission, depends upon supplying more, better-trained, and better-equipped personnel, and an effective intelligence system, together with better facilities and more comprehensive planning.⁴⁵ Con-

44. A discussion of the powers that we think law enforcement personnel should possess during the period of the emergency will be the subject of Part II of this essay, which shall appear in issue No. 5 of the 1975 DUKE LAW JOURNAL.

45. CIVIL DISORDERS REPORT 267-91. The importance of contingency planning is particularly emphasized in the literature. See FEDERAL BUREAU OF INVESTIGATION, PREVENTION AND CONTROL OF MOBS AND RIOTS (1967); Friedman, *Contingency Planning for the Administration of Justice During Civil Disorder and Mass Arrest*, 18 AM. U.L.

siderable strides have been made in this direction,⁴⁶ in part because of the emphasis on civil disorders reflected in Law Enforcement Assistance Administration grants to states and local communities. Experience has shown, however, that most, if not all, communities will not support police and the courts at manpower levels where they will be adequate to deal effectively with mass disorders.⁴⁷ Even if the community could afford the requisite manpower, it is doubtful if it would or should be willing to do so in view of the comparative rarity of civil disorders and the other pressing needs of the community, not the least of which involve the daily operation of the criminal justice process. In addition, regardless of monetary considerations, few people would want the implicit threat to civil liberties, which would accompany a daily

REV. 77 (1968); Momboisse, *Riot Prevention and Survival*, 45 CHL-KENT L. REV. 143 (1968); *Report of the Special Committee on Criminal Law Problems in Civil Disorders*, 6 AM. CRIM. L.Q. 58 (1968); R. SMITH & R. KOBETZ, *GUIDELINES FOR CIVIL DISORDERS AND MOBILIZATION PLANNING* (1968); UNITED STATES ARMY, *CIVIL DISTURBANCES AND DISASTERS* (1968).

46. See J. COATES, *SOME NEW APPROACHES TO RIOT, MOB AND CROWD CONTROL* (Institute of Defense Analysis, 1968); G. WILLS, *supra* note 2, quoted in PLATT, *supra* note 23, at 43; Myers, *Putting Out the Fires Next Time*, FORTUNE, January, 1968, at 174. There are also several statutory provisions that have been created to deal with the problem. See, e.g., ARK. STAT. ANN. § 11-941 (Supp. 1973); DEL. CODE ANN. tit. 20, § 3126 (Supp. 1970); FLA. STAT. ANN. § 870.045 (Supp. 1974); KAN. STAT. ANN. § 48-1801 (Supp., 1973); LA. REV. STAT. ANN. § 14:329.6 (1974); MD. ANN. CODE art. 41, § 15B (1971); MICH. COMP. LAWS § 10.31 (1967); MISS. CODE ANN. § 14-17-1 (1972); N.M. STAT. ANN. § 40A-20-4.3 (1972); N.C. GEN. STAT. § 127-9 (1964); OKLA. STAT. ANN. tit. 21, § 1321.4 (Supp. 1971); TENN. CODE ANN. § 7-112 (1973); TEX. REV. CIV. STAT. art. 5890e, § 3 (Supp. 1974); WASH. REV. CODE, § 43.06.220 (1970); W. VA. CODE ANN. § 61-6-1a (Supp. 1970).

In 1970, however, the Violence Commission concluded that "despite notable progress since the Commission [Riot Commission] issued its report in March 1968, many police departments in American cities are still ill-prepared to handle riots and other civil disorders;" and that in a survey of 16 major cities, its Task Force on Law and Law Enforcement found that "few had adequate plans for dealing with disorders and effective planning staffs were rare." VIOLENCE COMMISSION REPORT 65. See *Law and Order Reconsidered*, *supra* note 36, at 311-14, 330-33. There is no reason to believe that matters have changed significantly during the period of comparative calm which has followed. Probably no city has given more thoughtful consideration to the problems, or had more resources available to deal with them, than Washington, D.C. See 1973 D.C. REPORT 51-79 (discussing the level of implementation of the recommendations of the REPORT OF THE DISTRICT OF COLUMBIA COMMITTEE ON THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS (1968)). Its inability to cope with the 1971 May Day disorders without either deviating from the "business as usual model" or permitting the disruption of the normal functioning of the city seems clear. See *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

47. CIVIL DISORDERS REPORT 267-74; see Comment, *Contingency Profile on the Administration of Justice Under Emergency Conditions in Kansas City, Missouri*, 39 U.M.K.C.L. REV. 408 (1971).

level of police power and intelligence gathering which would be adequate to deal with a Detroit or Newark riot or a Washington May Day. The most that can be expected is the addition of a "Tactical Squad" of specialists, the training and equipping of larger numbers of regular police, and planning for the more efficient use of existing personnel.

Practical problems of an extremely difficult nature are also presented to the courts and to counsel by a civil disorder. The Riot Commission concentrated upon the immediate problem of processing those arrested during the disorder—booking, appointment of counsel, setting of bond, plea bargaining, disposition by trial, plea of guilty, or dismissal of prosecution.⁴⁸ These problems are staggering in a large disturbance because of the finite number of judges (even when the assistance of other judges is sought), prosecutors, and public defenders, and the relatively few practicing lawyers who have sufficient experience in the criminal process to function effectively. The problem may be exacerbated if the spirit of public service which motivates a private practitioner to enter a riot area to defend a participant in a civil disorder dissipates after his first experience with the process and his client, leaving fewer counsel available for future disorders.⁴⁹ If defense counsel must be present at each stage of the proceeding, and if there are not enough defense counsel available, it is clear that the process will jam quickly.

The unlikelihood that there will ever be the judicial or legal manpower required to implement the Riot Commission's model during an emergency is not the only problem. The Riot Commission failed to deal with the equally significant problem of the impact upon the system in the post-emergency period. Assuming that the primary purpose of the system continues to be the efficient apprehension and prosecution of offenders, the aftermath of an urban riot will leave the courts and counsel with hundreds or thousands of additional cases. The input of such an unmanageable number of cases will wreck efforts at reducing docket delay by courts and counsel. Not only will the disposition or trial of these cases be delayed, but the trial of ordinary street crimes, which will continue to occur, will be set back by weeks or months. It seems clear that insufficient attention has been devoted to the impact of large-scale disorders on our system for the administra-

48. See CIVIL DISORDERS REPORT 274.

49. See *id.* at 267-88. In the District of Columbia, the Judicial Conference Committee recommended that the Public Defender Service be authorized to "coordinate and furnish representation." One of the tasks of the Public Defender will be to maintain and update a roster of volunteer attorneys. 1973 D.C. REPORT 38.

tion of justice after the riot is over, aside from recommendations that courts "ought to encourage the prosecutor" to agree to the use of test cases as a means of limiting the number of trials.⁵⁰

In a society where the rights of a defendant in criminal process are minimal, a state may be able to function effectively in an emergency with no new powers. If, however, the criminal process under normal conditions accords a high level of protection to its citizens who are accused of derelictions, which we favor, the need for greater powers in the state in emergency conditions becomes more important. There are three possibilities: the state can attempt to deal with the emergency with less than the powers which it needs; it can treat all citizens the same in an emergency as it does in normal conditions, and redefine the citizen's rights under normal conditions in such a manner as to present no insurmountable problem in an emergency; or it can limit the citizen's rights in an emergency but leave them unaffected in non-emergency conditions. We do not think any society will accept the first alternative. The second is what we suspect will result if the approach of the Riot Commission is accepted. We favor the third.

Failure to respond realistically to the legal problems created by a civil disorder may result in a diminution of civil liberties not only during the brief period of an emergency, but permanently. It is not a question of denying that the Constitution and its guarantees are applicable to all citizens at all times or granting a defendant during a civil disorder less than his full measure of rights. Instead, it is a recognition that certain rights which are basic to the routine administration of justice do not exist in the same form and to the same extent in an emergency caused by a serious domestic disorder. To insist that a citizen has the exact rights in an urban riot that he has in non-emergency situations provides a tempting opportunity to redefine the rights of all defendants in terms of the minimum which a state can realistically provide in the riot context.

Many judges will strive to reach a result in particular cases which will provide the protection and order that is needed and wanted by the communities in which they sit. In times of stress they will legitimate as many measures that appear necessary as their consciences will permit. If it is necessary to find that a dangerous offender will flee the jurisdiction if released on recognizance in order to justify his detention

50. 1973 D.C. REPORT 106. The Committee recognized the possible disadvantage to the prosecutor which might result from the application of collateral estoppel; and suggested that it might be appropriate to allow litigation of more than one case, applying the doctrine of collateral estoppel if, as a result, "there is a clear cut rejection of the government's position." *Id.*

during an emergency, many will do so, rather than ordering his release and further endangering the community. If it is necessary to stretch "probable cause," or narrow the degree of particularity required in the description of premises to be searched, many will do so in response to the emergency. If these actions are characterized and justified as products of a temporary emergency situation, the rights of the individuals affected have been limited to an extent not permissible in non-emergency conditions, but the precedential value of the decisions is limited to crisis conditions. If, however, the standards governing judicial conduct are assumed to be the same in the riot as they are in ordinary circumstances, the precedential impact may be felt by future defendants in non-emergency situations.

We think it far better to recognize candidly that a major urban riot may permit extraordinary limitations upon individual rights, but that this power should exist only during the emergency. We should not expect a judge to return an arrested sniper to a riot area because his community ties indicate the unlikelihood of flight; but a decision to detain him until the disturbance is quelled, because of fear of immediate future misconduct, should not become the basis for justifying denial of pretrial release upon grounds of dangerousness, or for requiring bond beyond the defendant's capability, in routine prosecutions for crimes of violence in non-emergency situations. Unless the riot situation is recognized as *sui generis*, the danger of erosion of civil liberties is quite real.

We also think it is much wiser to determine the precise extent to which civil liberties are to be limited, and under what conditions, by legislative enactments following public debate, rather than by the "low visibility" decisions of police or judges. A strong case should be required for a grant of any power that may be used to limit freedom. If the people, through their representatives, do not think that the incremental protection they may receive justifies the threatened loss of liberty, they should be able to deny the authority effectively. The powers entrusted to the police should be stated with as much precision as is possible. There is much to be said for the view that a totally effective police force is inconsistent with the degree of liberty which free men require. A decision by a legislature to deny certain powers to the police or courts would reflect a strong public policy that the correlative rights of the citizens are entitled to judicial protection regardless of the extent of the emergency.

We recognize that any decision to permit police and courts to exercise powers in an emergency which they do not possess in normal

conditions will occasion outcries that we are sacrificing the rule of law in the name of order,⁵¹ and that civil liberties need greater protection in emergencies than during normal conditions.⁵² We do not underestimate the force of such contentions. There is a real threat to civil liberties whenever the state is permitted to deviate from normal procedures, and there is a tendency of all governments to find emergencies to justify such deviations. Protection against such abuse must be included in any model of criminal justice in riot conditions and we have attempted to make provisions for such safeguards.⁵³ Recognizing these dangers does not mean, however, that some emergencies are not real or that unusual powers are unnecessary to deal with them in a society which maximizes liberty under normal conditions.

We also think that the danger of massive violence is lessened if the police and courts have greater powers. Despite arguments that swift and effective use of available manpower may be undesirable,⁵⁴ it seems likely that the usual response will be acceptance of the advice of the Federal Bureau of Investigation to prevent the spread of riots by "an impressive display of police power and resolve . . . to promptly overcome resistance."⁵⁵ But containment and dispersal do not necessarily require massive firepower.⁵⁶ Enlarged search powers may permit early seizure of ammunition caches, removing the justification or excuse for the use of deadly force; detention of concededly dangerous leaders of disorders both reduces provocation and removes leadership from rioters; and limiting access to a riot area contains a conflagration and reduces the need to use force against dissidents in the contained area.

Some of the proposals that we shall make for increasing police powers in emergencies raise no significant constitutional questions, except for the general assertion that the equal protection clause is violated whenever a defendant in an emergency is treated differently from

51. See CIVIL DISORDERS REPORT 171.

52. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866). See also, *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946).

53. These safeguards will be considered in Part II of this essay. See note 44 *supra*.

54. See note 29 *supra*.

55. Federal Bureau of Investigation, PREVENTION AND CONTROL OF MOBS AND RIOTS 87 (1967). There is thoughtful theory supporting such an approach. M. JANOWITZ, SOCIAL CONTROL OF ESCALATED RIOTS 33 (1968); N. SMELSER, THEORY OF COLLECTIVE BEHAVIOR 262 (1963).

56. McGee, *Arrests in Civil Disturbances: Reflections on the Use of Deadly Force in Riots*, 22 RUTGERS L. REV. 716 (1968). See also Note, *Kill or Be Killed?: Use of Deadly Force in the Riot Situation*, 56 CALIF. L. REV. 829 (1965).

a defendant in a non-emergency situation.⁵⁷ Other proposals, such as limited area searches and limited detention of persons validly arrested, pose more serious problems. We shall argue that the Constitution is sufficiently flexible to permit such procedures. The major premise upon which we rely is that existing constitutional law permits the state to exercise broader powers by calling upon its military arm for assistance if it is unable to maintain order through the use of its police and courts. Under such circumstances, it is our understanding that the military forces called to the aid of the civil power can take any action reasonably believed to be necessary, so long as the action taken directly relates to the suppression of the disorder. If we are correct in this understanding of the precedents, we see no reason why narrower powers, subject to precise legislative definition, may not be entrusted to civilian authorities. To hold otherwise is to provide a clear incentive to use troops against rioters, a result presumably not sought by most. Furthermore, if civilian authorities may be constitutionally authorized to take such actions as may be necessary to deal with civil disorders, it seems appropriate that the legislature should determine what powers should be entrusted to them and limit the powers of the military to those granted to the civilian authorities.

In summary, we believe that additional powers not normally permitted in the criminal process should be granted to police and courts; that support for the constitutionality of such action can be found in the precedents dealing with military powers in civil disorders; and that once a decision is made concerning what powers are appropriate and permissible, the legislative mandate should be applied equally to military and civilian authorities. Concededly, our position is predicated in substantial measure on our understanding of what powers military forces may exercise when ordered to assist civilian authorities in the restoration of order. If we misunderstand the scope of the military's power, some of our proposals stand upon shakier ground, although not necessarily on quicksand. We shall proceed, therefore, to a discussion of the legal basis for the use of the military, the precedents dealing with their powers when called to the aid of civilian institutions of government, and some recent attacks upon the constitutionality of the use of troops in civil disorders.

57. Presumably, increased authority to police during massive civil disorders can be justified whether a "compelling state interest" or a "rational relationship to a legitimate state purpose" or some new formulation is utilized. See generally Gunther, *Foreword: In Search of Evolving Doctrine On a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

III. THE USE OF MILITARY FORCES IN CIVIL DISORDERS

During the period between January, 1968, and May, 1970, National Guard troops were called out in response to civil disorders on some 342 occasions.⁵⁸ Regular troops were utilized in civil disorders⁵⁹ in Detroit in 1967,⁶⁰ in Illinois⁶¹ and Maryland in 1968,⁶² and in the District of Columbia in 1968 and 1971.⁶³ Regular troops were prepositioned for potential use on several other occasions.⁶⁴

At first blush, the use of military force to quell disorders by civilian citizens seems extraordinary in a nation where the subordination of the military to civilian authority has been a hallmark of constitutionalism.⁶⁵ But authority for the use of troops is found in state and

58. 116 CONG. REC. 27,339 (1970).

59. We shall not discuss the use of army personnel to serve as guards on air carriers in 1970, or to process and deliver mail during a postal strike in 1970 under the questionable authority of the Economy Act of 1932, 31 U.S.C. § 686 (1970). See *Presidential Authority* 144-45. Nor do we include the isolated incident of the use of Marines in a 1973 sniping incident in New Orleans. *Id.* at 131.

60. Exec. Order No. 11,364, 3 C.F.R. 309 (1967 comp.).

61. Exec. Order No. 11,404, 3 C.F.R. 108 (1968 comp.).

62. Exec. Order No. 11,405, 3 C.F.R. 109 (1968 comp.).

63. Exec. Order No. 11,403, 3 C.F.R. 107 (1968 comp.); 1973 D.C. REPORT 19, 146. To these could be added the use of troops at the Pentagon in an antiwar disturbance in 1967. See ANNUAL REPORT OF THE SECRETARY OF THE ARMY FISCAL YEAR 1968, at 156.

64. See R. CLARK, *CRIME IN AMERICA* 275 (1970). Troops have been detailed to assist the secret service in protecting the President, Vice President, and major candidates for those offices pursuant to H.R.J. RES. 1292, 82 Stat. 170 (1968). On this basis, troops were detailed to assist the Secret Service at the Democratic National Convention of 1968, the 1972 Democratic and Republican National Conventions, on three occasions to provide protection for the President at the White House, and at both of President Nixon's inaugurations. *Presidential Authority* 146 n.144. On occasion, the purpose for the detailment was for covert activities, a subject that is beyond the scope of this Article. See *Hearings on Federal Data Banks, Computers and the Bill of Rights, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. 1293, 1751*. See also Baskir, *Reflections on the Senate Investigation of Army Surveillance*, 49 IND. L.J. 618 (1974); Christie, *Government Surveillance and Individual Freedom: A Proposed Statutory Response to Laird v. Tatum and the Broader Problem of Government Surveillance of the Individual*, 47 N.Y.U.L. REV. 871-72 (1972).

65. A common provision of revolutionary constitutions was a clause declaring that the military should be at all times in strict subordination to the civil power. See, e.g., DECLARATION OF RIGHTS AND FUNDAMENTAL LIBERTIES OF DELAWARE art. 20 (1776), 2 W. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 199 (1973); MD. CONST. art. XXVII (1776), 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 1688 (1909); N.H. CONST. art. XXVI (1784), 4 F. THORPE, *supra* at 2456; N.C. CONST. art. XVII (1776), 5 F. THORPE, *supra* at 2788; VA. CONST. § 13 (1776), 7 F. THORPE, *supra* at 3814. Provisions for subordination of the military power to the civil power are found in all constitutions except that of New York. *Governors' Emergency Powers* 294. The exact meaning of the subordination provisions is unclear, since

federal constitutions and statutes, and the history of their use in civil disorders antedates the Constitution,⁶⁶ as will be shown by a brief description of the authority of governors and the President to use troops in domestic disorders.

demands for civilian control in the sense of seventeenth and eighteenth century usage were frequently designed to maximize legislative control over the military rather than civilian control per se. See S. HUNTINGTON, *THE SOLDIER AND THE STATE* 81 (1959). See also *O'Callahan v. Parker*, 395 U.S. 258, 276 (1969) (Harlan, J., dissenting). It is interesting to note that such a provision was not expressly included in the Constitution of the United States. However, the principle has found expression in judicial prohibitions against the military trial of civilians who accompany the armed forces abroad in time of peace, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957), military trial of civilians for offenses committed while they were members of the armed forces, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and military jurisdiction over soldiers for "non-service connected offenses" committed within the United States. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The most famous invocation of the principle decreed that civilians may not be tried by military authorities within the United States except when actual invasion or insurrection has closed the courts or rendered them inoperative. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See note 187 *infra*. The authority of a military commission to try a citizen offender against the laws of war where he entered the country as a saboteur has been sustained despite the presence of open, operating civilian courts. *Ex parte Quirin*, 317 U.S. 1 (1942). Frederick Bernays Wiener, the leading authority on the history of Anglo-American opposition to the military trials of civilians, *CIVILIANS UNDER MILITARY JUSTICE* (1967), is also the author of one of the authoritative works supporting the constitutionality of the use of military force to quell civil disorders when civilian institutions prove inadequate to accomplish the task. WIENER.

66. The classic works include FAIRMAN, RANKIN, RICH, and WIENER. See also U.S. ADJUTANT GENERAL, *FEDERAL AID IN DOMESTIC DISTURBANCES*, S. DOC. NO. 209, 57th Cong., 2d Sess. 315 (1903); *MILITARY AID* (this text of The General Service Schools, Ft. Leavenworth, was published in 1925); M. Reichley, *Federal Military Intervention in Civil Disturbances* (unpublished thesis, Georgetown University, 1939); *MILITARY ADMINISTRATIVE LAW HANDBOOK*, U.S. DEP'T OF THE ARMY PAMPHLET No. 27-21, ch. 7 (1973).

A deliberate attempt will be made to avoid use of the phrase "martial law" in this essay whenever possible for several reasons. First, it adds little to understanding the issues of (a) when troops may be used, (b) how they should function when they are used, and (c) what powers they should possess to accomplish their function. Second, the early use of the term tended to confuse several quite different concepts: military law, martial law, and military government. Thus, the *military* law which governs those in actual military service has sometimes been referred to as *martial* law, see FAIRMAN 38-40, WIENER 6-7, as has *military* jurisdiction resulting from *military* government in occupied hostile territory in time of war. See also Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1258-59 (1942); Holdsworth, *Martial Law Historically Considered*, 18 THE L.Q. REV. 117, 119-32 (1902). Third, when applied to the use of troops in rebellions, insurrections, or domestic violence, the term "martial law" may mean the total replacement of civilian institutions, including the trial of civilians, sometimes denominated as "punitive," "absolute," or "complete" martial law; or it may denote the use of troops to restore order, with the trial of offenders to be accomplished, if at all, by civilian courts, sometimes referred to as "qualified," "preventive," or "limited" martial law. See WIENER 11-13. The differentiation has been

A. *The Use of Military Forces By the States*

The twentieth century has provided numerous examples of the use of the National Guard by the states, acting through their gover-

reflected in state statutory law. See, e.g., WASH. REV. CODE ANN. § 38.08.030 (1964) (where provision is made for "complete" and "limited" martial law). The unqualified genus "martial law" is used sometimes to embrace both the "punitive" and "qualified" species, as when it is defined as "the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of *some or all* civil agencies". WIENER 10. The concept of "martial rule" used by Fairman is analogous, but is perhaps more exact in that it does not suggest the propriety of the conduct. WIENER 9.

In common usage, most people probably regard "martial law" as the substitution of military for civilian rule, including the punishment or trial of offenders or at least "a suspension of major civil functions," 1973 D.C. REPORT 145, though others have argued that "[m]artial law, as understood by Americans generally is simply the calling out of the militia to aid the police." Ballantine, *Military Dictatorship in California and West Virginia*, 1 CALIF. L. REV. 413, 419 (1913). In the sense of a total or major suspension of civil functions or the trial of civilians, martial law is not likely to exist in our lifetimes and apparently could not exist without violating the Constitution, as long as the civil courts are open and operating, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a condition that seems certain to exist in the foreseeable future, absent a nuclear holocaust. See Fairman, *Government Under Law in Time of Crisis*, in GOVERNMENT UNDER LAW 232-86 (A. Sutherland ed. 1956).

The older authorities attempt to distinguish between military aid to civilian government and the use of military forces to carry out some of the functions of civil government. FAIRMAN 30-38; R. RANKIN & W. DALLMAYER, *FREEDOM AND EMERGENCY POWERS IN THE COLD WAR* 59-60 (1964); Note, *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1321 (1972). Compare 2 CLODE ch. XVII (The Action of the Military in Aid of the Civil Power) with *id.* ch. XVIII (The Employment of the Military in the Restoration of the Civil Power). Thus, military aid to the civil power has been distinguished from martial law on the ground that when military forces are employed in the suppression of civil disorder, they act under statutory authority, while in martial law situations, they act under the "unwritten law of necessity." MILITARY AID 202. But more than thirty years ago, Colonel Wiener questioned whether aid to civil authorities could properly be regarded as a category distinct from martial law, or whether the distinction assisted discussion of the problem. WIENER 8. He chose to subsume the category under a broad definition of "martial law," viewing martial law to include the use of military power in aid of the civil authority where (a) conditions may require some military assistance; (b) the military in effect temporarily controls the entire situation, superseding for the time being the executive functions of the local government, or (c) troops take over every civil function including the administration of justice. WIENER 160. He would exclude from the definition of "martial law" the calling out of troops which are not actually used. *Id.* We are not concerned with the latter, except to recognize that this preparatory step is probably effectively beyond judicial review, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Alabama v. United States*, 373 U.S. 545 (1963), but may have substantial impact upon the behavior of rioters and police. R. CLARK, *supra* note 64, at 187. As previously indicated, we think it unlikely that (c) will arise. We are concerned with (a) and (b), appreciating that it is unlikely that military forces will assert that they are superseding local authority and that the boundaries between the two categories may be quite indistinct, depending in practice upon the extent to which a community desires to use military force and the de facto relationship between civilian and military leader-

nors, to quell domestic disturbances. Troops have been used to quell labor disputes,⁶⁷ urban riots,⁶⁸ campus disorders,⁶⁹ resistance to racial integration,⁷⁰ and a variety of other situations, sometimes bordering

ship in the disorder area. See CORWIN 139:

It should be added at once, nevertheless, that the subject [martial law] is one in which the record of actual practice fails often to support the niceties of theory. Thus, the employment of the military arm in the enforcement of the civil law does not invariably, or even usually, involve martial law in the strict sense, for . . . soldiers are often placed simply at the disposal and direction of civil authorities as a kind of supplementary police or *posse comitatus*; on the other hand, by reason of the discretion that civil authorities are apt to vest in the military in any emergency requiring its assistance, the line between such an employment of the military and a regime of martial law is frequently any but a hard and fast one. And partly because of these ambiguities the conception itself of martial law today bifurcates into two conceptions, one of which shades off into *military government* and the other into the situation just described, in which the civil authority remains theoretically in control although dependent on military aid.

Even authorities which attempt to draw a clear distinction between military aid to the civil power and martial law appear to recognize that the powers of the military are the same in each case where the civil power has not been supplanted *in toto*. See MILITARY AID 213 (where the military is said to have the power to "use the customary and necessary measures for the discharge of the duty" and are authorized to use "all means which are necessary to that end," in providing aid to the civil power), while the propriety of the use of force in martial law situations is said to be determined by its "necessity." *Id.* at 234.

We think it more appropriate to narrow the issue to the powers which the military may exercise in the situations identified as (a) and (b) above, rather than to use the more ambiguous phrase, "martial law." In determining these issues we will of necessity rely on precedents whose rationale is often couched in "martial law" terminology.

67. See, e.g., *United States ex rel. Palmer v. Adams*, 26 F.2d 141 (D. Colo.), *appeal dismissed*, 29 F.2d 541 (8th Cir. 1928); *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn. 1934); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903); *Ex parte Lavinder*, 88 W. Va. 713, 108 S.E. 428 (1921). See generally FAIRMAN 26; RANKIN 65-84; WIENER 88-94. The turbulent years of 1881 to 1903, 1916, 1919, and the late 1930's marked the greatest use of military force for this purpose. Clendenen, *Super Police: The National Guard as a Law-Enforcement Agency in the Twentieth Century*, in BAYONETS 85; Hill, *The National Guard in Civil Disorders: Historical Precedents*, in BAYONETS 61, 79-80; Taft, *Violence in American Labor Disputes*, 364 ANNALS 127 (1966); Comment, *Constitutional Law—Fourteenth Amendment—Martial Rule in Labor Disputes*, 1938 WIS. L. REV. 314.

68. See, e.g., *Johnson v. State*, 8 Md. App. 28, 257 A.2d 756 (Ct. Spec. App. 1969). See generally Clendenen, *supra* note 67, at 101-08; Wiener, *Martial Law Today*, *supra* note 31; MILITARY SUPPORT OF LAW ENFORCEMENT DURING CIVIL DISTURBANCE, A REPORT CONCERNING THE CALIFORNIA NATIONAL GUARD'S PART IN SUPPRESSING THE LOS ANGELES RIOT—AUGUST, 1965; *Riot Control and Federal Troops* 638.

69. See, e.g., *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974); *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971). See also *Symposium, Kent State 1970—Legal Background and Implications*, 22 CLEV. ST. L. REV. 1 (1973); Comment, *The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations*, 59 KY. L.J. 547 (1970). See PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970).

70. See, e.g., *Faubus v. United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958); *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957), *rev'd*, 257 F.2d

on the bizarre.⁷¹ The troops are normally utilized pursuant to statutory provisions which authorize the governor to call out the militia in the event of invasion, insurrection, riot, domestic violence, or other circumstances endangering the rights, lives, or property of the citizenry.⁷² Few restrictions upon the use of military forces appear in the

33 (8th Cir.), *aff'd sub nom. Faubus v. Aaron*, 358 U.S. 1 (1958). See also 41 Op. ATT'Y GEN. 313 (1957); Wiener, *Martial Law Today*, *supra* note 31.

71. The troops have been called out, for example, to move a county seat location, *Fluke v. Canton*, 31 Okla. 718, 123 P. 1049 (1912); to enforce prohibition, *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); to enforce oil production limitations, *Constantin v. Smith*, 57 F.2d 227 (E.D. Tex.), *aff'd sub nom. Sterling v. Constantin*, 287 U.S. 378 (1932); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933); to stop horse racing, *Narragansett Racing Ass'n v. Kiernan*, 59 R.I. 79, 194 A. 49 (1937); to prevent federal dam construction, *Phillips v. United States*, 312 U.S. 246 (1941); to remove highway commissioners, *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935). Most of the cases cited in notes 67-71 are discussed in WIENER. Fortunately, there are no recent examples of this nature. There can be little doubt that some governors have abused their powers.

72. A typical statute provides:

When it is necessary to use any military force for public defense against foreign or domestic violence, as to provide for the protection of the lives or property of the people of this State, or in times of imminent danger of foreign or domestic violence, epidemic or breach of the public peace, or imminent danger to the lives or property of the people of the State, the Governor as Commander-in-Chief, shall have power according to the emergency to call out [the militia] DEL. CODE ANN. tit. 20, § 171 (1953).

See also ALA. CODE tit. 35, § 61 (1959); ALASKA STAT. § 26.05.070 (1970); ARIZ. STAT. ANN. § 26-172 (Supp. 1973); ARK. STAT. ANN. § 11-106 (Supp. 1973); CAL. MIL. & VET. CODE § 143 (West 1955); COLO. REV. STAT. ANN. § 94-1-4 (1964); CONN. GEN. STAT. ANN. § 27-16 (1960); DEL. CODE ANN. tit. 20, § 171 (1953); D.C. CODE ANN. § 39-603 (1968); FLA. STAT. ANN. § 14.022 (1961); GA. CODE ANN. § 86-106 (1971); HAWAII REV. STAT. § 121-30 (Supp. 1973); IDAHO CODE § 46-601 (Supp. 1974); ILL. REV. STAT. ch. 129, § 220.83 (Supp. 1974); IND. STAT. ANN. § 10-2-4-4 (1973); IOWA CODE ANN. § 29A.7 (1967); KAN. STAT. ANN. § 48-238 (1964); KY. REV. STAT. ANN. § 37.240 (1974); LA. REV. STAT. ANN. § 29.28 (1974); ME. REV. STAT. ANN. tit. 37-A, § 201 (Supp. 1973); MD. ANN. CODE art. 65, § 8 (1972); MASS. ANN. LAWS ch. 33, § 41 (1973); MICH. COMP. LAWS ANN. § 32.551 (Supp. 1974); MINN. STAT. ANN. § 190.02 (1962); MISS. CODE ANN. § 33-7-301 (1972); MO. ANN. STAT. § 41.480 (1969); NEB. REV. STAT. § 55-117 (1974); NEV. REV. STAT. § 412.122 (1973); N.H. REV. STAT. ANN. § 110-A:6 (1964); N.J. STAT. ANN. § 38A:2-4 (1968); N.M. STAT. ANN. § 9-1-8 (1974); N.Y. MIL. LAW § 6 (McKinney 1953); N.C. GEN. STAT. § 127-9 (1964); N.D. CENT. CODE § 37-01-04 (1972); OHIO REV. CODE ANN. § 5923.22 (Page 1970); OKLA. STAT. ANN. tit. 44, § 72 (1954); ORE. REV. STAT. § 399.065(1) (1971); PA. STAT. ANN. tit. 51, § 1-311 (1969); R.I. GEN. LAWS ANN. § 30-2-6 (1969); S.C. CODE ANN. § 44-114 (Supp. 1973); S.D. COMP. LAWS ANN. § 33-2-6 (1967); TENN. CODE ANN. § 7-106(a) (1973); TEX. REV. CIV. STAT. art. 5783 § 2 (Supp. 1975); UTAH CODE ANN. § 39-1-5 (1970); VT. STAT. ANN. tit. 20 § 601 (Supp. 1974); VA. CODE ANN. § 44-75 (1970); WASH. REV. CODE ANN. § 38.08.040 (1964); W. VA. CODE ANN. § 15-1D-1 (1972); WIS. STAT. ANN. § 21.11 (1972); WYO. STAT. § 19-78.23 (Supp. 1973). In thirty-five states these statutes were enacted pursuant to constitutional provisions which explicitly authorize the governor to call out state national guards to enforce the laws, suppress insurrections, and repel invasion. The provisions are collected in *Governors' Emergency Powers* 292. Slight variations in language include alternative

state constitutions. The constitutions of seven states do provide that only those in the active service of the militia may be punished under martial law,⁷³ nineteen states declare that the operation of the laws

phrases "to enforce the laws" or the addition of language "to suppress riots" or "preserve public peace," but the language variations are of little consequence in view of the breadth of the concept "to enforce the laws." *Id.* Only Tennessee precludes a governor from calling the militia into service, and there it is permitted if the legislature declares that the public safety requires it. TENN. CODE ANN. § 7-106(a) (1973). The constitutional power to call out the National Guard has been implied from other powers conferred upon the governor by state constitutions (chief executive officer of state; commander-in-chief of military forces; obligation to enforce the laws) in the remaining states. *Governors' Emergency Powers* 292. Each has enacted statutory authorization. *Id.*

What constitutes the state "militia" is a proposition which is subject to some confusion. In addition to the unfederalized National Guard, it usually consists of "unorganized" militia. See IDAHO CODE § 46-103 (Supp. 1974); IOWA CODE ANN. § 29A.6 (1973); MICH. COMP. LAWS ANN. § 32.509 (Supp. 1974); NEV. REV. STAT. § 412.026 (1973); N.Y. MIL. LAW § 2 (McKinney Supp. 1975); PA. STAT. ANN. tit. 51, § 1-202 (1969); S.D. COMP. LAWS ANN. § 33-2-2 (1969). Some states provide for other classes. See HAWAII REV. STAT. § 121-1 (Supp. 1973); J. HILL, *THE MINUTE MAN IN PEACE AND WAR* (1964).

The use of troops may be accompanied by a proclamation of martial law, sometimes authorized specifically by statute. A typical provision provides:

In case of war, invasion, rebellion, insurrection, riot, tumult, public calamity or catastrophe, or other emergency, or imminent danger thereof, or resistance to the laws of this state or the United States, the governor may, if in his judgment the maintenance of law and order and the protection of person and property will thereby be promoted, by proclamation, declare the state or any part thereof to be under martial law. R.I. GEN. LAWS ANN. § 30-205 (1969).

See also ALASKA STAT. § 26.05.090 (1970); ALASKA CONST. art. III, § 20 (1962); GA. CODE ANN. § 86-107 (1971); IDAHO CODE § 46-602 (Supp. 1974); IOWA CODE ANN. § 29A-45 (1967); MD. ANN. CODE art. 65, § 8 (1968); MICH. COMP. LAWS ANN. § 32.505(j) (Supp. 1974); MO. ANN. STAT. § 41.480(1) (1969); NEV. REV. STAT. § 412.122(4) (1973); N.J. STAT. ANN. § 38A:2-3 (1968); N.M. STAT. ANN. § 9-1-7 (1974); N.Y. MIL. LAW § 9 (McKinney 1953); OHIO REV. CODE ANN. § 5923.231 (Page Supp. 1970); OKLA. STAT. ANN. tit. 44, § 211 (1953); ORE. REV. STAT. § 399.065 (3) (1971); S.C. CONST. art. I, § 27 (1962); TENN. CODE ANN. § 7-112 (1973); UTAH CODE ANN. § 39-1-8 (1970); WASH. REV. CODE ANN. § 38.08.030 (1964); W. VA. CODE ANN. § 15-1D-14 (1972).

Despite occasional references to "the extreme steps of declaring martial law," 1973 D.C. REPORT 147, or comments that "there was no declaration of martial law," *Sullivan v. Murphy*, 478 F.2d 938, 959 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973), it appears that the presence or absence of an actual proclamation has no effect on the powers of the troops employed if a state of "martial law" in fact exists. WIENER 19-20; 8 OP. ATT'Y GEN. 365, 374 (1856); Note, *Developments in the Law, supra* note 66, at 1322. *Contra*, United States *ex rel. Palmer v. Adams*, 26 F.2d 141 (D. Colo.), *appeal dismissed*, 29 F.2d 541 (8th Cir. 1928). Thus, the frequently quoted reply of the Secretary of War to a suggestion that martial law be declared in Colorado in 1914 seems an accurate statement of the law: "I do not know of anything that you can not do under existing circumstances that you could do any better if there was a written proclamation of martial law posted in your district." U.S. ADJUTANT GENERAL, *FEDERAL AID IN DOMESTIC DISTURBANCES*, S. DOC. No. 209, 57th Cong., 2d Sess., 315 (1903).

73. *Governors' Emergency Powers* 293. There appear to be no cases interpreting the phrase. It seems likely that "martial" was used in the sense of "military law." See

may be suspended only by the legislature,⁷⁴ and all states except New York declare that the military power shall be subordinate to the civil power.⁷⁵ Neither constitutional nor statutory provisions define what procedures and degrees of force are appropriate to particular emergency conditions, and most do not deal with the relationship between the National Guard and local civil authorities.⁷⁶ The only effective limitations upon the use of military forces in most states are those imposed by the Federal Constitution.⁷⁷

B. *The Use of Military Forces by the President*

Important though the power of the state executive to use force to restore order in times of civil disturbance may be, a potentially more significant, but rarely exercised, power is that which lies in the President to intervene in civil disorders in the states.⁷⁸

note 66 *supra*. Certainly it reflects the clear mandate that civilians should not be tried or summarily punished by military commanders, courts-martial, or commissions. See FAIRMAN 19-49; WIENER 6-15.

74. *Governors' Emergency Powers* 293. These provisions seem designed to provide legislative protection against the usurpation of powers by governors, rather than civilian limitations upon the use of the military. See RANKIN 85-113.

75. *Governors' Emergency Powers* 294. With the exception of *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911), and *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924), the state and federal courts have not interpreted these provisions as limiting the use or powers of the troops. Some courts have ignored the provisions. Others have found the necessary subordination in the control of the governor, the chief civil officer of the state, over the troops. In *re Moyer*, 35 Colo. 154, 159, 85 P. 190, 193 (1905); *Ex parte McDonald*, 49 Mont. 454, 462, 143 P. 947, 949-50 (1914). See FAIRMAN 97-98; *Governors' Emergency Powers* 296.

76. *Governors' Emergency Powers* 297.

77. See notes 146-209 *infra* and accompanying text.

78. Attorney General Cushing referred to this as the "gravest and the most critical of all emergencies possible to occur in the relations between the United States and the respective States. . . ." 8 OP. ATT'Y GEN. 8, 14 (1856). Prior to the use of troops in Baltimore and Chicago in 1968, federal troops had not been used in state civil disorders since 1943. CIVIL DISORDERS REPORT 279, 292-93. See generally *Federal Aid in Domestic Disturbances*, S. Doc. No. 263, 67th Cong., 2d Sess. 11 (1922); Coakley, *Federal Use of Militia and the National Guard in Civil Disturbances: The Whiskey Rebellion to Little Rock*, in BAYONETS 17; W. SCHLOTTERBACK & A. MANSINNE, *THE ROLE OF THE DEPARTMENT OF DEFENSE IN CIVIL DISTURBANCES* (1970); Crum, *The National Guard and Riot Control: The Need for Revision*, 45 J. URBAN L. 863 (1968); Gartland & Chikota, *When Will the Troops Come Marching In?: A Comment on the Historical Use of Federal Troops to Quell Domestic Violence*, 45 J. URBAN L. 881 (1968); Poe, *The Use of Federal Troops to Suppress Domestic Violence*, 54 A.B.A.J. 168 (1968); Sultan & Howard, *The Efficient Use of Military Forces to Control Riots: Some Proposals for Congressional Action*, 45 J. URBAN L. 849 (1968); Wiener, *Martial Law Today*, *supra* note 31; Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 414; Comment, *Martial Law*, 42 S. CAL. L. REV. 546 (1969); *Riot Control and Federal Troops*.

1. *Statutory Authority.* Congress has specifically authorized the use of troops by the President in several situations. Under 10 U.S.C. § 331, which implements the guaranty clause of the Constitution,⁷⁹ the President may use the armed forces to suppress an "insurrection" when there is a request from a state legislature, or by a state governor if the legislature cannot be convened.⁸⁰ In practice, presidents have apparently exercised their discretion to use federal troops only when it has become clear that a disorder is beyond the capability of state and local authorities.⁸¹ Section 331 authorizes the use of

The Presidential understanding of when troops may be used in state civil disturbances is set forth in 32 C.F.R., pts. 215, 501 (1974). See also Department of Defense Directive 3025.12, Employment of Military Resources in the Event of Civil Disturbances (1971); *Engdahl V.*

79. U.S. CONST. art. IV, § 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."

80. 10 U.S.C. § 331 (1970):

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

The current statute is derived from the Act of Feb. 28, 1795, ch. 36, 1 Stat. 424, which authorized the use of the militia, and the Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, which authorized the President to use the army where use of the militia had been previously sanctioned. These statutes, and a predecessor statute, the Act of May 2, 1792, ch. 28, 1 Stat. 264, are discussed at notes 340-47 *infra* and accompanying text. The instances in which section 331 has been invoked are collected in CIVIL DISORDERS REPORT 292-93; 1967 HEARINGS 5645, 5670-72. See also Gartland & Chikota, *supra* note 78; Murray, *Civil Disturbance, Justifiable Homicide, and Military Law*, 54 MIL. L. REV. 129, 131-32 (1971).

81. The statute provides that "the President *may*" call out the troops. 10 U.S.C. § 331 (1970) (emphasis added). See generally RICH 190-92; *Riot Control and Federal Troops* 640-43. Thus, even if a proper request is made, the President is said to have complete discretion in deciding whether to actually call out the troops. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). Presidents have, in fact, decided not to heed such requests. RICH 190-93. The language of the guaranty clause that the United States "shall protect each of them . . . against domestic violence" has not been interpreted to impose a mandatory duty upon the President to intervene. See *Riot Control and Federal Troops* 645. See also 8 OP. ATT'Y GEN. 8, 15 (1856); H.R. REP. No. 472, 90th Cong., 1st Sess. 5-6 (1967); CIVIL DISORDERS REPORT 287-88. Although this issue has received no small amount of attention, it is in all likelihood no more than an excuse for the President not to provide assistance. See RICH 191-92. An example is provided by the events in Detroit in July, 1967, when Governor Romney requested aid and President Johnson procrastinated. See Poe, *supra* note 78, at 169.

An even more vivid example of the confusion that can arise in such situations is provided by the events which occurred during the school desegregation disorders in Boston in 1974. When it became apparent that the conditions for riot were ripe, the Mayor asked the federal district judge for marshals to enforce its desegregation order, N.Y. Times, Oct. 9, 1974, at 1, col. 2, stating that it was up to the court to implement its

troops to suppress an "insurrection," while the guaranty clause itself speaks in terms of "domestic violence."⁸² If an insurrection is defined as "a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof,"⁸³ or even as "an uprising against civil or political authority,"⁸⁴ it is doubtful if there have been many "insurrections" in the past, or whether there will be many in the future.⁸⁵ Presidents

order. *Id.* at 22, col. 2. The court denied the request, *id.*, Oct. 10, 1974, at 1, col. 5. The confusion over the marshals was not clarified by the statement of President Ford that the use of marshals was a question for resolution by the district court, *id.* at 55, col. 4, inasmuch as they are under the direction of the Attorney General, 28 U.S.C. § 561 (1970). Although it denied the request for marshals, the court ordered that force should be used if necessary to enforce its order and quell riotous conditions. It seems to have recognized that the conditions might escalate to a point justifying a request for federal troops. N.Y. Times, Oct. 10, 1974, at 54, col. 4. The Mayor then proclaimed that he would not ask for the National Guard, and that if the Guard were sent in by the Governor, he would not deploy them in the city. *Id.*, Oct. 11, 1974, at 46, col. 2. In response to a further deterioration in the situation, the Governor, without consulting the Mayor, alerted the National Guard and then requested President Ford to send in federal troops, which the White House said would be available "only . . . as a last resort." *Id.*, Oct. 16, 1974, at 1, col. 4. The mobilization of the Guard, in the face of the Mayor's earlier statement that he would refuse to deploy them, succeeded in producing a "political dispute" between the Mayor and the Governor. *Id.*, Oct. 17, 1974, at 24, col. 1. The Pentagon then got its finger into the pie and placed the 82d Airborne, at Fort Bragg, North Carolina, on alert. *Id.* at 24, col. 1.

This sequence of events reflects a situation involving a publicly unpopular court order, a touchy political situation, and the relationships of a Democratic Mayor, a Republican Governor, and a Republican President, none of whom apparently was eager to assume responsibility. It presents an interesting political situation but does not facilitate a great deal of confidence in the orderly response of governmental institutions to civil disturbance.

The legal difficulties, which reflect the political difficulties, in both Detroit in 1967, and Boston in 1974, are considered at note 206 *supra*.

82. U.S. CONST. art. 4, § 4.

83. See *Hornie Ins. Co. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) (an insurance case).

84. See *In re Charge to Grand Jury*, 62 F. 828 (N.D. Ill. 1894); *Spruill v. North Carolina Mutual Life Ins. Co.*, 46 N.C. 126 (1853); *County of Allegheny v. Gibson's Son & Co.*, 90 Pa. 397 (1879). See generally R. CONANT, *supra* note 2, at 51-63.

85. *But see Valdez v. Black*, 446 F.2d 1071 (10th Cir. 1971), *cert. denied*, 405 U.S. 963 (1972), where a group of Spanish speaking Americans attempted to take control of a county government in New Mexico. See note 203 *infra*. The question, of course, depends upon the definition of insurrection. If the definition depends upon the size and intensity of the disorder, a result will be reached which is different from the outcome under a definition depending upon the motives of the insurgents (or rioters). One student of the problem has concluded that an "insurrection" or "rebellion" justifying the use of troops has occurred only five times in American history: the Civil War, Shay's Rebellion, the Whiskey Rebellion, the Dorr Rebellion, and the 1855 Civil War in the Kansas Territory. *Engdahl III* 405. Although asserting that the use of verbal labels such as "insurrection" is "dangerous" because they can "easily be misconstrued and misapplied," Professor Engdahl apparently defines insurrection as "armed assaults on the

have, however, intervened upon state request in situations other than political uprisings,⁸⁶ and in 1967, Attorney General Clark interpreted the statute to justify federal intervention upon state request where there is a situation of "serious domestic violence."⁸⁷ His interpretation has received the approval of the Riot Commission, which also recommended that the statute be amended to remove any lingering doubts.⁸⁸

established organs of government—a far different thing from mere riot, tumultuous, lawlessness, or civil disorder." *Id.* See also *Engdahl V* 584-87. He would apparently preclude the use of troops, as distinguished from members of a *posse comitatus*, even in circumstances meeting his definition of "insurrection" unless the courts were closed. *Engdahl III* 405. But cf. *Engdahl IV* 11-12, and note 195 *infra*. If this were the law, a well-informed insurgent group would be well advised to seize power centers, transport centers, communications, and bridges, knock out the police, and imprison the legislature before taking any steps to interfere with the courts. The same author would apparently oppose the use of troops in some cases even when the courts are seized, as in *Valdez*, where he concludes that "a criterion less mechanistic and more adapted to contemporary needs might not have justified military measures." *Engdahl III* 405 n.37.

Contemporary definitions of "insurrection," particularly in the context of construing an insurance policy provision exempting a carrier from liability, may not be an accurate criterion for determining what was meant by the term in the seventeenth and eighteenth centuries. Professor Crosskey has argued that "insurrection" in the sense that it was used by the founding fathers meant "any rising-up against established law and order; it includes definitely the more trifling varieties, and the incipient stages, of those civil disorders which, on a larger scale, or at a more advanced stage, are sometimes called 'rebellions.' This reference to the more trivial and incipient aspects of such disorders was especially characteristic of the American usage of the word in the eighteenth century." 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 424 (1953). Such a definition of insurrection was apparently that used in England in determining when the militia could be used in civil disorders from the Restoration to the Revolution. See notes 233, 265, 268 *infra* and accompanying text. *Contra, Engdahl V* 586-87.

86. Troops have been used pursuant to section 331, for example, to suppress racial unrest in New Orleans in 1873, to restore order after riots which resulted from an altercation between the Ku Klux Klan and Negro militia in South Carolina in 1876, to suppress railroad strike riots in 1877, to subdue labor disturbances near the turn of the century, and to quell the Detroit riot in July, 1967. CIVIL DISORDERS REPORT 292-93; see also RICH 192; Gartland & Chikota, *supra* note 78, at 883-97.

87. See the letter sent to all governors by Attorney General Ramsey Clark, 1967 HEARINGS 5645, 5669-70; CIVIL DISORDERS REPORT 292.

The definitional problems arising from the ambiguity of "insurrection," "domestic violence," and "riot" are considered in CIVIL DISORDERS REPORT 287; *Engdahl V* 584-87; Sultan & Howard, *supra* note 78, at 854-56; Comment, *Executive Power and Due Process: Demonstration, Riot and Insurrection*, 6 HOUSTON L. REV. 882, 882-86 (1969).

88. CIVIL DISORDERS REPORT 287-88. The Riot Commission proposed "domestic violence" rather than "serious domestic violence." Others have suggested that the language "riot or uncontrollable civil commotion" be used. Sultan & Howard, *supra* note 78, at 857.

We believe that the formulation of Attorney General Clark is clearly correct. It is the size and intensity of the disorder, not the motivation of those involved in it, or "whether the courts have been closed," that should be decisive. His interpretation is

A second statute, section 332 of Title 10, implementing the constitutional duty of the President to "take care that the Laws be faithfully executed,"⁸⁹ empowers the President to determine whether there are "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States" which make it impracticable to enforce the laws of the United States by the ordinary course of judicial proceeding.⁹⁰ If he makes such a determination, he may call elements of the National Guard into federal service or use regular troops to execute federal laws or to suppress rebellion.⁹¹ The exercise of presidential power under this statute requires a finding by the President that it is "impracticable" to enforce federal laws by the usual judicial process, but no request by state or federal authorities is necessary.⁹²

consistent with the practice that has evolved in the use of troops under section 331. CIVIL DISORDERS REPORT 292-93. It constitutes a systematic, unbroken, executive practice, long pursued with the knowledge of Congress and rarely questioned. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Its use on five occasions in the last half century suggests no reason to fear the kind of abuse that might dictate an excessively narrow definition at this late date.

The Riot Commission also proposed that the statute be amended to make it clear that not only National Guard of "other states," but of the requesting state, can be called into federal service. CIVIL DISORDERS REPORT 288. It has been stated that the present wording of section 331 was intended as a guarantee that the President would not call up the Guard of the hard-pressed requesting state. *Presidential Authority* 132. If so, that object may be frustrated by the recent practice of presidents who have federalized the Guard of the requesting state to enforce federal laws and protect federal property. See note 97 *infra*. Another view suggests that the "other states" wording occurred because it was obvious that no state would call for federal assistance until it had first mobilized its own militia. *Engdahl III* 406.

89. U.S. CONST. art. 2, § 3. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 394-96 (1879).

90. 10 U.S.C. § 332 (1970):

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

A unique interpretation of the meaning of section 332 is provided in *Engdahl V* 590-93. See notes 340-47 *infra* and accompanying text. Presidents have acted under this provision since the Whiskey Rebellion in 1794. See 41 OP. ATTY GEN. 313 (1958); Coakley, *supra* note 78. Despite the failure of the Act to refer to the District of Columbia, the use of troops there in April, 1968, was based at least in part upon the Act. See Proc. No. 3840, 3 C.F.R. 35 (1968 comp.); Exec. Order No. 11,403, 3 C.F.R. 107 (1968 comp.).

91. Some of the difficulties involved in utilizing the National Guard under sections 332-33 are considered at note 97 *infra*.

92. The distinguishing feature of section 332 is that the predicate of intervention is the impracticability of enforcing the laws of the United States by ordinary judicial proceedings. Before ordering in the troops, therefore, the President must determine the

The first section of a third statute, section 333, originally enacted pursuant to the fifth section of the fourteenth amendment,⁹³ directs the President to take such measures as he considers necessary, including the use of troops, to suppress domestic violence that impedes the execution of the laws in such a way as to deprive persons of their constitutional rights, in circumstances where a state has failed to provide the necessary protection.⁹⁴ If hindrance of the execution of the laws does deprive persons of their constitutional rights, moreover, there is a presumptive denial of equal protection.⁹⁵ The second section of the

existence of resistance to federal law, and his determination has been said to be conclusive. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-33 (1827); *WIENER 54*; but cf. *RICH 197*. Though this may involve determinations of statesmanship and not law, *WIENER 55*, it raises an interesting question when civil riots are considered. In the recent past, this power has been used primarily to enforce federal court desegregation orders. See note 97 *infra*; see also 41 *OP. ATT'Y GEN.* 313 (1957). For the interesting argument that the President has no power to enforce court decrees, which it is said are not laws of the United States, see Schweppe, *Enforcement of Federal Court Decrees: A "Recurrence to Fundamental Principles,"* 44 *A.B.A.J.* 113 (1958). In a riot, of course, there would ordinarily be no court orders to enforce, and without the court order it might be argued that there are no laws which are incapable of enforcement. But see note 99 *infra*. This problem was sidestepped by President Cleveland during the Pullman Strike of 1894 by obtaining an injunction against violence which would have interfered with the mails. See *In re Debs*, 158 U.S. 564 (1895). Although it has been said that reliance upon section 332 should not be used by the President to intervene in an urban riot, *Riot Control and Federal Troops 648*, there appears to be no reason why it would not be a proper exercise of authority. Even without a court order, it would seem that frequently section 332 would be an available means of intervention in a riot simply because the processes of civil enforcement will often be effectively paralyzed by any widespread outbreak of violence, thus making it "impracticable to enforce the laws." *RICH 201*. See note 99 *infra*.

93. U.S. CONST. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

94. 10 U.S.C. § 333 (1970):

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

95. *Id.* The problems of "state action," the necessity of finding "inability" or "refusal" or "failure" to protect a right "named in the Constitution and secured by law," and the concept of "hindrance" are discussed in Comment, 1966 *DUKE L.J.*, *supra* note 78, at 425-32, 441-50. See also *Griffin v. Breckenridge*, 403 U.S. 88 (1971). It has been argued that the statute is unconstitutional. *Engdahl V 595-96*.

statute permits the use of troops if any domestic violence opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.⁹⁶ Unlike the language of the two other statutes, the seemingly mandatory verb "shall" is used rather than the permissive "may."

Section 331 is obviously designed to provide federal military assistance to state authorities, while sections 332 and 333 provide military assistance for the enforcement of federal statutory and constitutional law. The principal use of sections 332 and 333 in recent years has been for the enforcement of federal court orders in civil rights cases.⁹⁷ Although the Riot Commission apparently assumed that sec-

96. The second paragraph of section 333 is quite similar to section 332. It has been stated that it is broader because it offers a wider choice of avenues to the President by providing for the use of the militia, armed forces, or "any other means". See Comment, 1966 DUKÈ L.J., *supra* note 78, at 46. It is difficult to see any substantial difference.

97. Proc. No. 3204, 3 C.F.R. 132 (1954-1958 comp.), Exec. Order No. 10,730, 3 C.F.R. 389 (1954-1958 comp.) (Little Rock, Arkansas); Proc. No. 3497, 3 C.F.R. 225 (1959-1963 comp.), Exec. Order No. 11,053, 3 C.F.R. 645 (1959-1963 comp.) (University of Mississippi); Exec. Order No. 11,111, 3 C.F.R. 771 (1959-1963 comp.); Exec. Order No. 11,118, 3 C.F.R. 782 (1959-1963 comp.) (University of Alabama). The use of troops to enforce the court decrees in Arkansas and Mississippi is described in Coakley, *supra* note 78, at 28-32, and in Scheips, *Enforcement of the Federal Judicial Process by Federal Marshals: A Comparison of Little Rock and Oxford*, in BAYONETS 35-51; cf. Faubus v. United States, 254 F.2d 797, 805-06 (6th Cir.), *cert. denied*, 358 U.S. 829 (1958); note 70 *supra*. Attacks were made on the constitutionality of this use of troops. Schweppe, *supra* note 92. See also *Address of Governor Orval Faubus*, 30 Miss. L.J. 520 (1959); Pittman, *The Federal Invasion of Arkansas in the Light of the Constitution*, 20 GA. B.J. 325 (1958); Stennis, *The Multiplying Evils of Bad Law*, 29 Miss. L.J. 430 (1958). The claims of unconstitutionality were answered effectively. See Faust, *The President's Use of Troops to Enforce Federal Law*, 7 CLEVE.-MAR. L. REV. 362 (1958); Pollitt, *A Dissenting View: The Executive Enforcement of Judicial Decrees*, 45 A.B.A.J. 600 (1959); Pollitt, *Presidential Use of Troops to Enforce the Laws: A Brief History*, 36 N.C.L. REV. 117 (1958); Schmetterer, *A Reply to Mr. Schweppe: Military Enforcement of Court Decrees*, 44 A.B.A.J. 727 (1958).

With respect to the use of sections 332-33 to enforce school desegregation orders, it is important to make several observations about the practice that has evolved. As pointed out at the beginning of this note, their authority has been invoked on three separate occasions—by President Eisenhower in Little Rock, Arkansas, in 1957, and by President Kennedy in 1962 in Mississippi and in 1963 in Alabama. On each occasion, the President, in the appropriate Proclamation and Executive Order, claimed the power to so act "by virtue of the authority vested in me by the Constitution and laws of the United States, including . . . sections 332, 333 and 334 . . ." See, e.g., Proc. No. 3497, 3 C.F.R. 225 (1959-1963 comp.); Exec. Order No. 11,053, 3 C.F.R. 645 (1959-1963 comp.). The use of this authority has not, however, been limited solely to the enforcement of school desegregation orders in the South. Thus, during similar difficulties in Boston in 1974, President Ford put federal troops on alert, N.Y. Times, Oct. 17, 1974, at 24, col. 1, though they were taken off that status shortly thereafter. *Id.* Oct. 19, 1974, at 34, col. 3.

The most difficult problem that has evolved from this use of military force under

sections 332-33 concerns the federalization of the National Guard of the state in which the disturbance has occurred. Thus, in each of the Executive Orders authorizing the use of the troops in the school desegregation situations, the President authorized the Secretary of Defense to federalize the National Guard of the state in question. Exec. Order No. 11,111, 3 C.F.R. 771 (1959-1963 comp.); Exec. Order No. 11,053, 3 C.F.R. 645 (1959-1963 comp.); Exec. Order No. 10,730, 3 C.F.R. 389 (1954-1958 comp.). See also Exec. Order No. 11,364, 3 C.F.R. 309 (1967 comp.) (riot in Detroit). This authorization is of interest for two reasons. The first is that by proceeding under sections 332-33 the President has authority, under their provisions, to utilize the militia (National Guard) of any state, whereas under section 331 he could only utilize the militia of "other states"—that is, other than the state in which the disturbance takes place. See note 88 *supra*. The ability to federalize the Guard of the state in question may be significant, especially if the Governor of that state has sought to utilize those very troops to frustrate the court order. This was, indeed, the case in Arkansas in 1957, and on that occasion Governor Faubus was enjoined from making use of the Guard to interfere with the constitutional rights of the children subject to the desegregation order. *Faubus v. United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958). See also 41 OP. ATT'Y GEN. 313, 315-17 (1957); Wiener, *Martial Law Today*, *supra* note 31. A similar spectacle was apparently about to take place in Alabama in 1963, and, in issuing his Proclamation under section 334, President Kennedy stated that

I have requested but have not received assurances that the Governor and forces under his command will abandon this proposed course of action in violation of the orders of the United States District Court and will enforce the laws of the United States in the State of Alabama Proc. No. 3542, 3 C.F.R. 292, 293 (1959-1963 comp.).

By federalizing the Guard in these states, therefore, the President was able to avoid the unseemly spectacle of the unfederalized National Guard seeking to interfere with the very court order that regular federal troops were seeking to enforce. For a more general discussion of this problem, see Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 219-20 (1940).

The second reason that the authorization in the Executive Orders is of interest is because of the uncertainty that there is a statutory basis for federalization in the circumstances then present. In pursuit of its power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions," U.S. CONST. art. I, § 8, cl. 15, Congress has granted the President statutory authority to federalize units of the National Guard in the event of (1) invasion, (2) rebellion, or (3) an inability to execute the laws with the regular forces at his command. 10 U.S.C. § 3500 (1970). See also *id.* § 8500 (1970) (Air National Guard). In the circumstances in which the orders were issued, however, there was certainly present neither an invasion nor a rebellion. Although one might seek to argue that the term "rebellion" would include a governor's use of the troops at his command to interfere with a federal court order, we do not believe that such action would, of itself, constitute a "rebellion" as we understand the term. See note 85 *supra*. There is also no reason to believe that the President in those situations was unable to enforce the court orders with the forces otherwise at his command. It has been suggested that the limitation on the "inability to execute the laws with the regular forces at his command" in section 3500(3) means only that the forces in the locality of the disorder are inadequate, see 1967 HEARINGS 5821, but there is little basis for that conclusion. Attorney General Brownell did advise President Eisenhower that the United States marshals were unable to execute the court order in Little Rock in 1957, 41 OP. ATT'Y GEN. 313, 328 (1957), but he did not state that the President would not have been able to do so with the "regular forces"—that is, the military forces—at his command. There does not appear to be any basis for a conclusion that "regular forces" in section 3500 relates only to United States marshals.

The ability of the President to federalize the National Guard in such circumstances

was well summarized by Colonel Wiener, and his conclusion was that

[a]s a practical matter, therefore, it is extremely unlikely that any call for such a purpose [that is, the events identified in § 3500] would be made today. It is difficult, if not impossible, to imagine at this time any domestic violence so widespread as to justify such a call. Nothing short of imminent civil war would meet the specification. WIENER 39.

The limitations on the power of the President to call the National Guard into federal service, then, lead to the question of whether he can federalize the Guard under circumstances such as those that were present in Arkansas in 1957, in Alabama in 1963, or in Detroit in 1967. Absent a showing that the regular forces are unable to execute the laws, there does not appear to be statutory authority for such action in section 3500.

The only other source of authority to federalize the National Guard would be in sections 331-33, each of which authorizes the President to call forth the militia. Thus, sections 331 and 332 provide that the President may, if they are operative, "call into Federal service such of the militia" of, respectively, the other states or of any state that he considers necessary. Similarly, section 333 provides that he may utilize the "militia" to enforce its requirements. The question raised by these provisions is whether they expand the President's authority to federalize the Guard. It is our understanding that the current position of the Department of Justice and the Department of the Army is that sections 331-33 do themselves authorize federalization. We question this interpretation. Sections 331-33 provide a statutory identification of the situations in which the President is expressly delegated power to use military force. They also provide that the President may call the Guard "into Federal service" in that effort, at least under sections 331-32 (although section 333 states that he may use the "militia," it does not as such authorize calling it into federal service; though the power to do so would seem to be apparent if the requirements in section 3500 can be met).

Concededly, the relationship between sections 331-33 and section 3500 is unclear. Section 3500, which gives the President power to call the Guard "into Federal service," does not identify sections 331-33 as creating an additional category of situations in which the Guard may be federalized. Section 3500 was, moreover, first enacted in 1903, *see* Act of Jan. 21, 1903, 32 Stat. 776, ch. 196, § 4, and sections 331-33 had, of course, been on the books for many decades by that late date. Inasmuch as section 3500 provides the general authority for federalization, its silence as to the specific circumstances of sections 331-33 provides a substantial basis for the conclusion that they are directive only, in the sense that they would allow use of the Guard in the situations where military force is permitted, *provided* that the Guard can be properly federalized under section 3500. *See* WIENER 45-47; Coakley, *supra* note 78, at 26.

In short, we doubt the President had the authority to federalize the National Guard for the purpose of enforcing desegregation orders in 1957, 1962, and 1963, or quelling the riot in Detroit in 1967. Federalization did, to be sure, eliminate the spectacle of the federal troops being opposed by the state militia, but the proper course would appear to have been to order in the federal troops, and then cause the unfederalized Guard to withdraw. *See* WIENER 53-54.

The ability of the President to federalize the National Guard in any situation involving a civil disorder of sufficient magnitude as to warrant federal intervention is an issue of immense importance, and, in light of the possible failure of section 3500 to authorize federalization in the circumstances that will be present in most such situations, Congress should determine whether the President does at present have sufficient power. If he does not, it should then determine what additional power should be delegated. In its 1967 study of the capability of the National Guard to cope with civil disturbance, the House did not make any recommendations concerning the matter. *See* REPORT OF SPECIAL SUBCOMM. TO INQUIRE INTO THE CAPABILITY OF THE NATIONAL GUARD TO COPE WITH CIVIL DISTURBANCES, in 1967 HEARINGS 5645; *cf.* 1967 HEARINGS 5814-59 (discussion between members of the committee and a representative of the Justice Department).

tion 331 would be the only statute utilized in civil disorders,⁹⁸ it seems probable that the President could, in appropriate cases, use troops to quell disorders by the use of 332 and 333 as well.⁹⁹

A decision to order the use of troops under each of the statutes requires that the President, by proclamation, immediately order the "insurgents" to disperse and retire peaceably to their abodes within a limited time.¹⁰⁰ At one time the proclamation may have been intended to deter rioters,¹⁰¹ but, if so, it no longer performs this function since it may be issued virtually simultaneously with the order to commit the troops.¹⁰² It does perform an important function in giving

98. CIVIL DISORDERS REPORT 287-88.

99. See Poe, *supra* note 78. Thus, a large-scale disorder might interfere with the mails, see *In re Debs*, 158 U.S. 564 (1894), or prevent the processes of a federal court from being exercised in the disorder area, making it "impracticable to enforce the laws". In particular, a disorder may make it impossible to enforce federal anti-riot legislation. See 18 U.S.C. § 2101 (1970) (prohibiting travel in interstate or foreign commerce or using the mails, telephone, or broadcasting facilities with intent to incite, organize, promote, or participate in a riot); *id.* § 231 (prohibiting the facilitation of civil disorders in certain ways when interstate or foreign commerce is involved or adversely affected); and *id.* § 245 (punishing any person who injures or interferes with anyone during a riot or civil disorder if that person is engaged in business affecting interstate commerce or sells commodities which have moved in interstate commerce). Presidents Johnson and Nixon, under the authorization of H.J. RES. 1292, 82 Stat. 170 (1968), were prepared, if necessary, to use troops if antiwar demonstrations interfered with the national conventions of the two major political parties or threatened the White House. See note 64 *supra*. Federal law specifically protects federal property from destruction, 18 U.S.C. § 1361 (1970), and military action to protect it in certain circumstances may be permissible. But see *Engdahl V* 596. Other statutes are collected in *Presidential Authority* 138. On occasion a federal court injunction may have issued and been flouted. See notes 92 & 97 *supra*.

The circumstances justifying action under section 333 in the absence of a violation of federal law are much more ambiguous. Frequently, large-scale disturbances will interfere with the civil rights of citizens. We may agree that "a strict limitation on the utilization of Section 333 is vital to federalism," R. CLARK, *supra* note 64, at 284, without ignoring the possibility that appropriate cases may arise. The apparent assumption of the Nixon administration that the President was authorized to act simply on a finding that state laws as such were being violated, see 32 C.F.R. § 215.4(c)(2)(i)(c), is not justified by the language of the Act or the intentions of its framers. ENGDahl V; *Presidential Authority* 139-140; Comment, 1966 DUKE L.J., *supra* note 78, at 443-44.

As a matter of practice, we agree that a President should normally not act to send troops into a state without a request unless there is a paramount federal policy that requires vindication. See *Riot Control and Federal Troops* 648-52.

100. 10 U.S.C. § 334 (1970).

101. Professor Corwin relates that President Fillmore unsuccessfully urged Congress to modify the requirement on the ground that it seriously diminished the efficacy of military aid to the civil authority by putting those whose conduct necessitated the use of troops on notice. CORWIN 132. See also 5 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 105 (1897).

102. *Presidential Authority* 141.

publicity to the exercise of the presidential power, requiring the President to assume any political risks that may result from public knowledge and dissatisfaction with his decision.¹⁰³

2. *Constitutional Authority.* From the beginning of the Republic, presidents have asserted that they possess inherent constitutional power to use federal forces on certain occasions, without regard to statutory authorization.¹⁰⁴ Justification for this exercise of power has

103. *Id.* at 141, 147-49. Thus, it seems appropriate that legislation be enacted to modernize the language to require obedience to law rather than an order to disperse, to permit the use of an executive order as an alternative to a proclamation, and to apply the requirement in all instances where troops are used to assist civilian authorities, unless specifically exempted by Congress. *Id.* The present requirement applies only to the use of forces pursuant to 10 U.S.C. §§ 331-33 (1970), and this does not cover assistance rendered to the Secret Service, see note 64 *supra*, or when troops are used pursuant to the inherent constitutional powers of the President, if such powers exist. See notes 104-22 *infra* and accompanying text.

104. One commentary attributes the assertion of power to the Nixon Administration, *Presidential Authority* 130 n.1, but its documentation reveals that the proposition has a much longer history. Regular troops were used by the first three Presidents before congressional authorization, *id.* at 134; President Fillmore challenged the constitutional validity of the statute requiring a proclamation before troops could be used to enforce the laws, CORWIN 132; President Hayes asserted the right on more than one occasion, *id.* at 134; President Cleveland (although later doubting the existence of inherent power) sent troops to protect Chinese laborers after a massacre in Wyoming, *Presidential Authority* 135 n.36; President Taft argued that the President possessed such inherent powers, *id.* at 134; troops were regularly used without formal state request or compliance with statutory law between 1917 and 1922, when the drafting of the National Guard left the states without forces, CORWIN 135; and President Hoover used troops to meet the Bonus Marchers in 1932. RICH 167-76. On other occasions troops have been used ostensibly to protect federal property. See 9 OP. ATT'Y GEN. 520-21 (1860); *Presidential Authority* 135. The Executive Orders, issued by Presidents Eisenhower, Kennedy, and Johnson, moreover, do not refer to a specific statute but use the language, "[b]y virtue of the authority vested in me as President of the United States and Commander in Chief of the Armed Forces by the Constitution and laws of the United States, including Chapter 15 of Title 10 of the United States Code, and Section 301 of Title 3 of the United States Code . . ." (emphasis added). See note 97 *supra*.

No attempt has been made to be exhaustive. The important point is that the assertion was not novel with President Nixon. The present formulation of the power asserts two circumstances in which the President may use troops pursuant to his constitutional powers:

(1) The constitutional exceptions are two in number and are based upon the inherent legal right of the U.S. Government—a sovereign national entity under the Federal Constitution—to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary.

(i). *The emergency authority.* Authorities [sic] prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.

been predicated on different theories,¹⁰⁵ and has some support in the cases.¹⁰⁶ It has, however, never been universally accepted, and a strong argument can and has been made that, whatever the justification may have been at one time for presidents to exercise the power to use troops without statutory authorization, there is no longer any justification where Congress "has covered the field" by authorizations and restrictions on the use of troops.¹⁰⁷ The argument against the existence of an inherent executive power is supported by the constitutional history of England during the seventeenth and eighteenth centuries, which reflects the struggle for parliamentary supremacy over the Crown in determining for what purposes military forces might be used,¹⁰⁸ and by the deliberate balancing of executive and legislative powers over the militia and armed forces that took place in the Constitutional Convention of 1787.¹⁰⁹

There are strong arguments in favor of such inherent power, at least where Congress has not acted in such a way as to deny it. It is asserted that the President has implicit or inherent authority to use federal troops to enforce the laws of the United States, or protect federal property, or to respond to a request for assistance by a state, in the absence of congressional authorization. Such presidential authority derives from the express provisions of the Constitution making the President Commander-in-Chief of the Army and Navy¹¹⁰ and charging him with the duty to "take Care that the Laws be faithfully executed."¹¹¹ Support for such implied authority may be found in the cele-

(ii). *Protection of Federal property and functions.* Authorizes Federal action, including the use of military forces, to protect Federal property and Federal governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection. 32 C.F.R. 215.4(c)(1) (1974).

See also Department of Defense Directive 3025.12, *supra* note 78; *Engdahl V* 607-12. The same authority was asserted almost a half century previously. MILITARY AID 208, 204.

105. See *Presidential Authority* 134, n.34 ("the aggregate of the President's powers," a "Stewardship theory," and the power of the President as Head of State as distinguished from "Chief Executive").

106. See notes 112-21 *infra* and accompanying text.

107. *Presidential Authority* 132-37 (relying primarily upon *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which is discussed at notes 123-32 *infra* and accompanying text). See also *Engdahl V* 607-12.

108. See notes 231-68 *infra* and accompanying text.

109. See notes 297-304 *infra* and accompanying text.

110. U.S. CONST. art. II, § 2, cl. 1.

111. *Id.* § 3. It has also been argued that a President may have authority to send troops to a state upon request without legislative authorization because article IV, section 4 of the Constitution is self-executing and thus expressly grants such power to the President. *Riot Control and Federal Troops* 643-44. *But see* *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1849).

brated *Neagle* case,¹¹² where the Attorney General had directed a United States Marshal to protect the person of Supreme Court Justice Stephen Field from Sarah and David Terry, who had on several occasions made violent threats on his life.¹¹³ The case arose when Neagle, a deputy marshal who was accompanying Justice Field on a railway dining car, shot and killed David Terry in the midst of his assault upon Justice Field. When Neagle was then charged with murder and arrested by local authorities in California, he brought a petition for a writ of habeas corpus, which was issued. Upon its return he was discharged. In a challenge to the propriety of the issuance of the writ, it was argued that the writ could only have been issued if Neagle had been acting pursuant to a "law of the United States."¹¹⁴ This argument was rejected by the Court's conclusion that the word "law" embraced "any duty of the marshal to be derived from the general scope of his duties under the laws of the United States. . . ."¹¹⁵ Thus, the Court was compelled to consider the duties of Neagle and the power of the executive to specify those duties. It began by noting that "there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field"¹¹⁶ The lack of express statutory authorization would not, however, prevent exercise of power necessary to that end. The President had, it said, the duty to faithfully execute the laws, and this duty was to be fulfilled by his power to commission officers of the United States and to act as Commander-in-Chief of the military. In terms of whether he had unexpressed or undelegated power to carry out these duties, the Court framed the issue in a rhetorical question:

Is this duty limited to the enforcement of acts of Congress . . . according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself . . . and all the protection implied by the nature of the government under the Constitution?¹¹⁷

112. *In re Neagle*, 135 U.S. 1 (1890).

113. The threats arose out of a decision of a three-judge court, of which Justice Field had been a member, declaring that a purported marriage document, to which Sarah Terry had been a party prior to her marriage to Stephen Terry, was void. While the decision was being rendered, both Sarah and Stephen Terry committed direct contempts of the court, and were later sentenced to jail terms for their outbursts and violence. Subsequently, Sarah Terry on several occasions threatened to kill Justice Field and the other members of the panel. *Id.* at 44-47.

114. *Id.* at 41.

115. *Id.* at 59.

116. *Id.* at 58. The Court also noted that the marshal did have a statutory duty to enforce the laws, but this was not a central basis for its conclusion. *Id.* at 68.

117. *Id.* at 64 (emphasis in original).

In response to that question, the Court clearly stated that the President had the implied or inherent power necessary to fulfill the duties imposed upon him by the Constitution.¹¹⁸ There was, therefore, sufficient power in the executive to order physical protection for Justice Field. The Court went on to observe that the President would also have power, in the absence of specific statutory authorization, to utilize military force to rescue a naturalized citizen from the hands of a foreign government,¹¹⁹ to protect the mails,¹²⁰ and to protect the property of the government.¹²¹ Additional support for the propriety of inferring inherent or implied presidential authority from express powers which are concededly less specific and arguably less expansive may be found in a long line of cases.¹²²

118. *Id.* at 58-59. In reaching this conclusion, the Court specifically relied upon its earlier statement in *Ex parte Siebold*, 100 U.S. 371 (1879), to the effect that

[w]e hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. *Id.* at 395.

Mr. Justice Lamar filed a strenuous dissent to the Court's opinion. 135 U.S. at 76. His dispute with the majority was their construction of the word "law" in the habeas corpus statute. See note 114 *supra* and accompanying text. The Court's construction was erroneous, he said, because there is no authority in the President to act in the absence of express constitutional power or congressional delegation. The only basis for implication of power in the Constitution was the "necessary and proper" clause, U.S. CONST. art. I, § 8, which provided power to Congress, but not the President. 135 U.S. at 83. Thus, the orders which required Neagle to guard Justice Field were "without authority of law." *Id.* at 84. In short, he said that "[t]he right claimed must be traced to legislation of Congress; else it cannot exist." *Id.* at 90.

119. 135 U.S. at 64.

120. *Id.* at 65. With respect to the mail, the Court seemed to assume that it was too clear for argument that the President had the power to protect it from abuse. Thus, it asked, "who can doubt the authority of the President . . . to make an order for the protection of the mail . . . by . . . providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped . . ." *Id.* See *In re Debs*, 158 U.S. 564 (1895).

121. 135 U.S. at 65-67.

122. See *Korematsu v. United States*, 323 U.S. 214 (1944) (order for exclusion of persons of Japanese ancestry from specified areas of the West Coast during World War II); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (order of curfew for persons of Japanese descent during World War II); *Myers v. United States*, 272 U.S. 52 (1926) (power to remove executive officer of federal government; *but cf.* *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (when Congress limits grounds of removal, *Myers* does not apply)); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (withdrawal of oil lands in the presence of congressional acquiescence); *In re Debs*, 158 U.S. 564 (1895) (power to seek injunction to protect against violence); *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) (power to institute suit to annul land patent); *Wells v. Nickles*, 104 U.S. 444 (1882) (power to appoint agents to protect timber lands); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (power to seize vessels during Civil War). See generally CORWIN 147-58.

The most recent support for the concept of inherent or implied presidential powers

is the opinion of Chief Justice Burger in *United States v. Nixon*, 418 U.S. 683 (1974), where he concluded that existence of an "executive privilege" was not precluded by the fact that it was not enumerated in article II of the Constitution. Thus, he stated that "[c]ertain powers and privileges flow from the nature of enumerated powers . . ." *Id.* at 705. As authority for this proposition, the Chief Justice quoted *Marshall v. Gordon*, 243 U.S. 521 (1917), as follows:

The rule of constitutional interpretation announced in *McCullough v. Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. 418 U.S. at 705 n.16, quoting 243 U.S. at 537.

The invocation of either *McCullough v. Maryland* or *Marshall v. Gordon* as a basis of inherent, implied, or "necessary and proper" power in the President is, of course, curious, since they dealt with the powers of Congress. The Constitution provides Congress with such power through the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18, but whether such elastic authority is provided to the President in article II is much more doubtful. See Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A. L. REV. 116, 118-19 (1974). See also, Gard, *Executive Privilege: A Rhyme Without a Reason*, 8 GA. L. REV. 809, 827-31 (1974).

The authorities have discussed the farthest potential reach of inherent presidential power to use troops in terms of whether the President has the power to declare "martial law", the meaning of which is discussed in note 66 *supra*. When it has been concluded that the President has such power, the usual basis for the conclusion has been that executives, both state and federal, are justified by the law of "necessity" in taking all action that is necessary to restore order when ordinary law no longer adequately secures the public safety and the rights of private property. See, e.g., FAIRMAN 29-30; 2 J. HARE, AMERICAN CONSTITUTIONAL LAW 954 (1889); RICH 209; WIENER 16-27; 1967 HEARINGS 5830-31. Thus, it is said that when a sovereign is menaced with invasion, insurrection, or domestic violence, it may meet force with force and all acts will be lawful which are necessary to successful restoration of order—the so-called rule of *salus populi, suprema lex*. See *Moyer v. Peabody*, 148 F. 870, 876 (D. Colo. 1906), *aff'd* 212 U.S. 78 (1909). We question whether this is a satisfactory predicate for the assertion of such sweeping constitutional authority.

The word "martial law" is not mentioned in the Constitution, see FAIRMAN 94, WIENER 44, and has never been declared by the President under non-wartime conditions. RICH 209. It has been declared only during the Civil War by President Lincoln, see WIENER 58-59, and the declaration of the Governor of Hawaii pursuant to statute was approved by President Roosevelt during World War II. See *Duncan v. Kahanamoku*, 327 U.S. 304, 314-15 (1946) (general discussions of the Hawaiian experience are cited at note 191 *infra*). Although the relevant constitutional and statutory provisions, see notes 78-109 *supra* and accompanying text, give the President significant power to respond to civil disturbance, they suggest neither that he does nor does not have the power to declare martial law. Similarly, the several opinions of the Supreme Court that have involved presidential use of military force against civilians have carefully avoided the issue. Review of those opinions does, however, suggest the broad outlines of how we believe the issue (at least with respect to the use of troops in civil disturbances not under wartime conditions) should be resolved.

In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the President had undertaken to utilize his power under the predecessor of section 331, but the Court did not discuss the power of the President to declare martial law. Similarly, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court held that a civilian could not be tried by military commission in a district where the courts were open and functioning, but it did not undertake to analyze the President's power to declare martial law, except to the extent of its holding that civilians could not be subject to military trial. The Court in *Milligan* also observed that in *Luther v. Borden* "[t]here was no question in issue about the power

of declaring martial law under the Federal Constitution. . . ." *Id.* at 130. The issue was also sidestepped in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), where, like in *Milligan*, the Court held that a civilian could not be tried by military tribunal. The Court in *Duncan* did, however, comment on the status of "martial law." After noting that President Roosevelt had approved the declaration of martial law by the Hawaiian Governor, which power had been authorized by Congress in the Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153, Justice Black observed that martial law was not mentioned in the Constitution and was a term with "no precise meaning." 327 U.S. at 315. He then concluded that

[t]he phrase 'martial law' as employed in that [Organic] Act . . . while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of [civil] courts by military tribunals. *Id.* at 324.

See also *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Dow v. Johnson*, 100 U.S. 158 (1880); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

The only discussion of the President's power to declare martial law in the Supreme Court cases is that of Justice Woodbury in his vehement dissent in *Luther v. Borden*. Justice Woodbury's thesis was that a state could not declare martial law itself, and in the course of his analysis he gave attention to the powers of the President in times of civil strife. During the Dorr Rebellion, the Governor of Rhode Island had requested the President to send in federal troops under the predecessor of section 331. The troops were apparently deployed but never actually sent into Rhode Island. In discussing this action, Justice Woodbury apparently concluded that the President could not declare martial law. Thus, he said that

[t]he [predecessor of § 331] . . . seems to be made broader as to the power of the President over *all* the militia, and, indeed, over the regular troops, to assist on such an occasion [i.e., sending the troops into the state] He might, perhaps, have conferred some [martial law-type] rights on the militia, had he called them out, under the consent of Congress; but it would be unreasonable, if not absurd, to argue that the President, rather than Congress, was thus empowered to declare war [martial law], or that Congress meant to construe such insurrections, and the means used to suppress them, as wars; else Congress itself should in each case pronounce them so, and not intrust so dangerous a measure to mere executive discretion. 48 U.S. (7 How.) at 76.

Although Justice Woodbury apparently concluded that the President could not declare martial law, he did agree that the President could confer "belligerent rights" upon the military forces utilized under his statutory powers. Thus, he observed that if the President had, indeed, sent troops into Rhode Island pursuant to his power under the predecessor of section 331, he would then be

attempting to suppress domestic violence by force of arms, and in doing it the President may possess and exert some belligerent rights in some extreme stages of armed opposition. It is he, however, and those acting under his orders, who . . . may . . . use some such rights, and not the State or its organs. *Id.* at 77.

The remarks of Justice Woodbury are important because they appear to be the only direct discussion of the President's power, and also because they were written by an ardent opponent of the use of military force against civilians.

It is our opinion that to phrase this particular inquiry in terms of the President's power to declare martial law is to raise a question which is unlikely to materialize and thus to create an immensely difficult constitutional issue that need not be reached. Inasmuch as it is quite unlikely that a President would undertake to declare martial law in any civil disturbance short of the conditions that existed during the Civil War or in Hawaii during World War II, and since his powers under sections 331-34 would cover almost all civil disorder situations, it is neither necessary nor appropriate to consider whether he would have such power in domestic disturbances. Attention should rather

The decision casting the greatest doubt upon the concept of "inherent power" is the *Steel Seizure Case*,¹²³ where the Court confronted the question of whether, in the absence of statutory authority, President Truman had the constitutional power to order the Secretary of Commerce to take possession of and operate the nation's steel mills to prevent their closure during the Korean War. In holding that the President had no such power, Justice Black found that not only was there no statutory authorization for the seizure order, but that Congress had specifically refused to adopt the seizure method of settling labor disputes.¹²⁴ He then concluded that the President's order could be justified neither by his power to act as Commander-in-Chief of the military, his duty to faithfully execute the laws, nor any form of implied power.¹²⁵ The legislative power, he said, was vested in Congress, and the statute-like order of the President could be justified only by legislative action.¹²⁶ Justice Black's opinion neither cited nor distinguished *Neagle* and the other presidential power cases. Each of the concurring members of the Court filed separate opinions,¹²⁷ which, when read together, seem to agree that a President may not assert implied or inherent authority to justify his actions when Congress has denied the President the authority to act in a certain manner.¹²⁸ We do not believe

be directed to the more likely situation in which the President undertakes to utilize military force against civilians in situations where he does not have explicit statutory power to do so—that is, in situations which would not be textually covered by sections 331-34. Thus, the issue is not whether the President can declare martial law to quell civil disorder, but whether he can use military force in situations not covered by sections 331-34, and, if so, when, and how his use of troops in those situations will be reviewed. It is to this question that the textual discussion is directed.

123. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

124. *Id.* at 586.

125. *Id.* at 587-88. See also *United States v. United States District Court*, 407 U.S. 297, 321 (1972) (President must follow statutory guidelines for electronic surveillance of domestic activity); *Little v. Barreine*, 6 U.S. (2 Cranch) 170, 176 (1804) (statutory power to seize vessels destined to French ports does not authorize order to seize Danish vessel arriving from French port); *United States v. Ehrlichman*, 376 F. Supp. 29, 33 (D.D.C. 1974).

126. 343 U.S. at 588.

127. Thus, Justices Frankfurter, Douglas, Jackson, and Burton filed separate concurring opinions, and Justice Clark concurred in the judgment but not the opinion, filing a concurring opinion, and Chief Justice Vinson filed a dissenting opinion, joined by Justices Reed and Minton. The separate concurring opinion of Justice Douglas did, however, join that of Justice Black. *Id.* at 632.

128. See note 127 *supra* and accompanying text. Of the concurring opinions, the most important to note here are those of Justices Frankfurter, Jackson, and Clark. Justice Frankfurter concurred in the result of the Court's (Justice Black's) opinion, but felt that the principles to be applied must be more flexible than the opinion suggested. He premised his view of the matter on the belief that in expounding the Constitution the Court must take a "spacious view in applying [the] instrument," and narrowly define

they support the absence of presidential power when Congress has never imposed such restrictions upon executive discretion, at least not in areas so vitally affecting the nation as the maintenance of order.

Equally difficult questions are posed by the issues of whether (1) Congress can limit the inherent authority of the President to use troops to enforce the laws, protect government property or provide assistance to the states, and (2) if it may, it has actually done so. One line of argument asserts that if the President has the implied power to act, Congress may not constitutionally limit that authority.¹²⁹ Recog-

the constitutional issues being expounded. *Id.* at 596. Thus, he believed that the issue of President Truman's exercise of power should be decided "without attempting to define the President's power comprehensively." *Id.* at 597. With specific regard to the seizure order, he agreed with the Court's conclusion and noted that "Congress could not more clearly and emphatically have withheld authority [to seize industries] than it did in 1947." *Id.* at 602. He did not, however, believe that the President was without power in situations where he lacked enumerated power or congressionally delegated power. The Constitution, he said, could not be confined to its words, but those words must be viewed with the "gloss which life has written upon them." This "gloss" on executive power would be present where "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never questioned, [had been] engaged in by Presidents . . ." *Id.* at 610-11. See also *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). Such a pattern was not, however, present in the case then at bar, as it had been, for example, in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (upholding presidential withdrawal of oil lands to enable Congress to deal with them; see note 148 *infra*).

Justice Jackson viewed the issue in a similar manner and argued that exercises of presidential power could best be viewed by grouping them into three separate categories. 343 U.S. at 635-38. The first would include situations where the President acted pursuant to express or implied congressional authorization, and it would be here that he would have the most latitude to act. The second would include exercises of power which lacked either a congressional grant or denial of power, and in this area "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* at 637. The final group would include presidential actions which were incompatible with the will of Congress and could be sustained only "by disabling Congress from acting upon the subject." *Id.* at 637-38. The seizure order, Justice Jackson concluded, fell into the third group, and could not be justified on the facts presented to the Court.

Justice Clark concluded that "in the absence of . . . action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation," *id.* at 662, but that the rule could not be applied to the seizure because Congress had prescribed a method to deal with the problem and the President had acted differently. Chief Justice Vinson was joined by Justices Reed and Minton in a dissent that argued that the seizure was permissible upon the authority of the cases cited in note 122 *supra*, *id.* at 667-710.

For contemporary criticisms of the opinion, see Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Freund, *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89 (1952). See also W. HARBAUGH, *LAWYER'S LAWYER, THE LIFE OF JOHN W. DAVIS* 462-82 (1973); Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, THE W. POL. Q., V (Dec. 1952) 592-618.

129. See *Myers v. United States*, 272 U.S. 52 (1962); *Presidential Authority* 143-44.

nizing that the decision in a given case is "likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of law,"¹³⁰ we think that the *Steel Seizure Case* teaches, at least in the absence of "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,"¹³¹ that Congress has the authority to limit the exercise of powers not expressly granted to the President by the Constitution.¹³²

Has Congress chosen to do so? Sections 331-34 do not by their terms preclude the President from utilizing military force in situations which are not explicitly covered by those provisions. Arguably the decision by Congress to authorize the use of troops in some cases constitutes a decision that they should not be used in others, but such an argument is far less persuasive than the clear decision of Congress not to authorize seizure of property in 1947. A stronger argument that congress has so acted might be based on the Posse Comitatus Act:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.¹³³

While, with some notable exceptions, the Act has been effective in discouraging the use of troops by subordinate officials,¹³⁴ its effectiveness in limiting the President is doubtful at best.¹³⁵ Further, it should

130. 343 U.S. at 637.

131. *Id.* at 610-11.

132. We would include within express powers which cannot be restricted lesser powers necessarily included within the express powers granted by the Constitution.

133. 18 U.S.C. § 1385 (1970). The history of the Act is discussed in *Presidential Authority* 141-45. See also *Engdahl V* at 597-605; 21 OP. ATT'Y GEN. 72 (1894); 19 OP. ATT'Y GEN. 293 (1889); 17 OP. ATT'Y GEN. 71 (1881); 16 OP. ATT'Y GEN. 162 (1878); Furman, *Restrictions on the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85 (1960).

The Act does not preclude the use of Marines or naval forces, compare 32 C.F.R. § 215.4(b) (1974) with 32 C.F.R. § 187.4(b) (1970), a result reflecting "legislative tactics used in the passage of the Act in 1878 rather than any decided congressional policy to exempt those services," *Presidential Authority* 150. See also *United States v. Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 94 S. Ct. 2385 (1974). The Marine Corps has been given the responsibility for protection of the Capitol grounds in the event that civilian forces prove insufficient. 1973 D.C. REPORT 147. See also High, *The Marine Corps and Crowd Control: Training and Experience*, in BAYONETS 114-34. There appears to be no good reason why the legislation should not be amended to include the Navy and Marine Corps. *Presidential Authority* 150. The Act does not preclude the deployment of troops, which play a "passive role in civilian law enforcement activities," but prohibits only "direct active participation." *United States v. Feather*, 43 U.S.L.W. 2446 (D.S.D. Apr. 7, 1975).

134. See CORWIN 135-36; Wiener, *Martial Law Today*, *supra* note 31, at 91.

135. As a means of control over the President, the Posse Comitatus Act has been

be noted that the Posse Comitatus Act prohibits the use of troops unless *expressly* authorized by the Constitution.¹³⁶ It has been urged that this proviso is meaningless because the Constitution does not expressly authorize such use of troops.¹³⁷ Another view argues that the purpose of the reference to the "Constitution" was simply to avoid any embarrassment to a President who might have to use his constitutional power to employ the Army to enforce judicial process.¹³⁸ It is arguable, however, that the proviso is far from meaningless in that it flatly mandates that the President shall not utilize troops on the basis of implied or inherent powers, and so construed, constitutes a congressional limitation upon what otherwise would be permissible executive action.¹³⁹ Such a construction would breathe life into an act which at present has little purpose other than to require proclamations before troops are committed.¹⁴⁰

The powers of the President to act without regard to statutory authorization are nevertheless still unclear. Experience in the District of Columbia provides an example. The history of the use of military force in the District strongly suggests that statutory authorizations are not the sole basis for presidential action. The District of Columbia National Guard was activated on approximately twelve occasions between April, 1968, and March, 1973.¹⁴¹ Regular troops were also

characterized as "the meager result of a protracted struggle between a Republican President [Hayes] and a Democratic Congress over federal interference in elections in the South." CORWIN 137.

136. The legislative history is summarized in *Presidential Authority*:

The original draft of the Act would have limited the use of army or navy forces to express statutory authorizations, 7 CONG. REC. 3586 (1878). Mention of naval forces was dropped, 7 CONG. REC. 3877 (1878), presumably because the Act was a rider to an Army appropriations bill. The original draft also sought to block the use of the appropriations bill's funds for any use of troops which violated the terms of the Act. Republicans in the Senate sought to emasculate the Act by amending it to permit actions taken on the basis of constitutional authorization as well, 7 CONG. REC. 4240 (1878), and excised the word "expressly," 7 CONG. REC. 4248 (1878). In conference the House leaders insisted that "expressly" be replaced, *see* 7 CONG. REC. 4686 (1878) (remarks of Mr. Hewitt), although they were either unable to have reference to constitutional authorizations deleted or felt that it was meaningless if modified by the word "expressly." *Presidential Authority* 143 n. 96.

137. *Presidential Authority* 143. The argument that it is "meaningless" apparently rests on the conclusion that Congress could not disable the President from acting on the basis of implied authorization. The authors subsequently note, however, that the President's actions can be limited to the express terms of a statutory authorization. *Id.* at 144.

138. *See* SCHEIPS, *supra* note 97, at 36. *See also* Pollitt, *Presidential Use of Troops to Enforce the Laws*, *supra* note 97, at 132-34.

139. *See* cases cited at notes 123 & 125 *supra*.

140. *Presidential Authority* 142.

141. 1973 *D.C. Report* 138. The Posse Comitatus Act is construed in an unusual manner in discussing the use of the District of Columbia National Guard. *Id.* at 137-40.

used in 1968¹⁴² and 1971,¹⁴³ as they had been previously in 1919¹⁴⁴ and 1932.¹⁴⁵ Only in 1968, however, did the President proceed in accordance with sections 331-34,¹⁴⁶ and in identifying the sources of his power on that occasion, he viewed those provisions as being merely supportive of a broader authority. Thus, President Johnson stated that the sanction for his action was derived "by virtue of the authority vested in me as President of the United States and Commander-in-Chief of the Armed Forces under the Constitution and laws of the United States, including [sections 331-34]"¹⁴⁷ The failure to proceed in accordance with section 331-34 in 1919, 1932, and 1971, and the limited reliance upon those sections in 1968, suggest a systematic practice, which has been known to, yet never questioned by, Congress, of using troops to protect the property and functioning of government in the federal enclave without the benefit of statutory authority.¹⁴⁸ Indeed it is doubtful whether sections 331-34 apply to the

The District of Columbia National Guard is commanded by the President, D.C. CODE ANN. § 39-112 (1968) who, through his deputy, the Secretary of Defense, may order the Guard into active service. D.C. CODE ANN. §§ 39-102, 603 (1968); *see* Exec. Order No. 11, 485, 3 C.F.R. § 813 (1966-1970 comp.). The Mayor may request the President for the Guard's assistance whenever

there is in the District of Columbia a tumult, riot, mob, or body of men acting together by force with an attempt to commit a felony or to offer violence to persons or property, or by force or violence to break and resist the laws, or when such tumult, riot, or mob is threatened D.C. CODE ANN. § 39-603 (1968).

The Mayor has been reluctant to use the statutory request. Instead, when the Guard is used, it is normally put on training duty pursuant to 32 U.S.C. § 502 (1970), thus avoiding any characterization of the nature of the disorder anticipated and, incidentally, placing the costs on the United States, rather than the government of the District of Columbia. 1973 D.C. REPORT 138-39. When used in this manner, individual Guardsmen are appointed by the Mayor as special police officers pursuant to D.C. CODE ANN. § 4-133 (1966). Aside from doubts about the propriety of ignoring a statute specifically designed to cover the situation, no problems would be encountered unless the Guard were federalized. (The Committee assumed this would occur pursuant to 10 U.S.C. § 332 (1970); *but cf.* note 97 *supra*). The Committee expressed concern that once federalized, the Guard might become a part of the Army, the Posse Comitatus Act "proscriptions against the performance of civilian peacekeeping functions by members of the armed forces may thus apply so that D.C. Guardsmen who are federalized cannot serve under temporary commissions as special police officers." 1973 D.C. REPORT 140. It would seem clear that the Act does not proscribe "the performance of civilian peacekeeping" by the Army in cases "expressly authorized by Act of Congress," and if the Guard may be used pursuant to section 332, it would certainly be acting under express statutory authority. *See* 41 OP. ATT'Y GEN. 313, 329-31 (1957).

142. Exec. Order No. 11,403, 3 C.F.R. 107 (1968 comp.).

143. *See* Sullivan v. Murphy, 478 F.2d 938, 948 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

144. RICH 153-54 (race riot).

145. RICH 167-76 (Bonus Army).

146. Exec. Order No. 11,403, 3 C.F.R. 107 (1968 comp.).

147. *Id.*

District, since by their express terms they refer to the use of troops within a "state" or "territory," and the District of Columbia is, of course, neither. The only case dealing with the problem provides little assistance.¹⁴⁹

148. The practice may not be comparable to the situation in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), where Presidents had followed a practice of withdrawing federal lands from entry for over eighty years and on more than 252 occasions, which Justice Frankfurter identified as coming within his standard of creating a "gloss" on the Constitution in the *Steel Seizure Case*. 343 U.S. at 611. But using federal troops in the District is a practice that has been followed for at least fifty-five years and on at least four occasions. Since the use of troops in the District is a far more extraordinary occurrence than is withdrawal of federal lands from entry, the smaller number of instances in which the power has been exercised may not be conclusive. In any event, the use of troops in the District of Columbia bears a much closer resemblance to the *Midwest Oil* situation than it does to the *Steel Seizure* circumstances.

149. Whether the District is to be considered a "state or territory" within the meaning of any given statutory provision will depend "upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). See also *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *affd.*, 497 F.2d 684 (D.C. Cir. 1974). The only authority which bears directly upon whether sections 331-34 apply to the District would suggest a negative conclusion. Thus, in *United States v. Stewart*, 27 F. Cas. 1339 (No. 16,401a) (D.C. Crim. Ct. 1857), the court gave an instruction to the effect that the predecessor of section 331 did not apply to the District, because it applied only to "states" and because it was not intended to deal with situations there present (use of the military to open the polls).

The D.C. REPORT is ambiguous. The Committee apparently determined that sections 331-34 applied to the District of Columbia because "although these provisions are phrased in terms of civil disturbances within the boundaries of a 'State' it is doubtful that Congress intended thereby to preclude the use of troops in the District of Columbia." *Id.* at 144. A strong argument can be made for applicability of section 332 to the District of Columbia, but the case for section 331 is weak at best, since a request from a state legislature or governor is a prerequisite to presidential action, and the District of Columbia has neither. It also seems doubtful that the Congress, legislating pursuant to the fourteenth amendment, intended to cover the District of Columbia within the coverage of the Ku Klux Klan Act of 1871, which is now section 333. The Committee also relied upon the President's inherent authority. Thus, it stated that the "authority to use regular troops in the District has generally been assumed to be part of the Government's inherent power to protect federal property and functions and the President's executive powers under Article II of the Constitution." *Id.* at 19, 145. The Committee concluded, however, that the use of troops should be taken only after the President "has made the specific findings required by Sections 331-34." Perhaps the Committee was urging that the President has inherent power in the District of Columbia, but should exercise it only when he could do so in a state pursuant to statute. If so, the quite different bases for action under sections 331, 332, and 333(1) remain unexplained.

It would seem obvious that Congress should undertake to clarify whether the District is to be considered within the definition of "state or territory" for this particular purpose. A District of Columbia Criminal Court judge in 1857 charged a jury that in sending marines into the District upon the request of the mayor to open the polls, the President was justified in his action. Although the court had earlier instructed that the case was not covered by the antecedent of section 331, it stated that

[t]he authority, then, according to the evidence which the jury had heard, was

A conclusion that the President has inherent or implied power to use troops in the District of Columbia would not imply that he has such power in other situations where the use of troops is not explicitly authorized by sections 331-34. But no useful purpose is served by leaving the matter in doubt. Congress should determine when troops may properly be used, authorize their use in such cases, and prohibit their use in other circumstances.

3. *Judicial Review of Presidential Actions.* The ineffectiveness of the Posse Comitatus Act as a restriction upon presidential power makes the issue of the availability of judicial review a matter of considerable significance. There is a natural tendency to conclude that the resolution of the issue should be governed by the same standard which subjects actions by state officers functioning under martial law to judicial scrutiny.¹⁵⁰ This result is far from obvious, however. Not only has the President never declared martial law under non-wartime conditions,¹⁵¹ but the powers are fundamentally different. The intervention power flows directly or indirectly from the provisions of the Constitution itself, so that rules created to apply to state executives under state constitutions are not necessarily applicable.

The constitutional basis of the intervention power is the heart of the problem. Inasmuch as section 331 flows from the guaranty clause, section 333 from the fourteenth amendment, and the residual inherent authority of the President from the provisions of article II, the immediate question is whether their exercise creates a political question of a non-justiciable nature¹⁵²—and, thus, subject to limitation only at the polls. Although *Luther v. Borden*¹⁵³ suggested that

a necessary application of the power granted by congress, and was properly and lawfully exercised by the executive upon this occasion. *United States v. Stewart*, 27 F. Cas. 1339, 1342 (No. 16,401a) (D.C. Crim. Ct. 1857).

This comment is, however, of little real usefulness in resolving the issue. It was preceded by discussion of the antecedent of section 331, which it held to be inapplicable, and by the constitutional duties of both Congress and the President. Its reference to the "power granted by congress" is unclear since it disclaimed reliance upon the power that had been delegated by Congress.

150. *Baker v. Carr*, 369 U.S. 186, 242-43 n.2 (1962) (Douglas, J., concurring). See also RICH 197-98. This would also appear to be the thrust of Wiener, *Martial Law Today*, *supra* note 31.

151. See note 122 *supra*.

152. A "political question" is a controversy which has one or more elements which identify it as essentially or primarily a function of the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210, 217 (1962). Where a political question is found, the courts will not hear the case through which it is presented. *Coleman v. Miller*, 307 U.S. 433 (1939).

153. 48 U.S. (7 How.) 1 (1849). In *Luther v. Borden*, discussed at note 167 *infra*,

the exercise of these powers does involve a political question, it is highly debatable whether that view would prevail in light of the Court's subsequent political question decisions,¹⁵⁴ or whether the de-

the President had not intervened, but he had taken preparatory measures under the original antecedent of section 331. See note 167 *infra*. The Court noted that the guaranty clause, by authorizing the federal power to intervene in domestic emergencies, had created a subject which was "political in its nature," and by placing the power in the hands of the President, Congress had precluded judicial review. *Id.* at 43-44. If the courts could review presidential action in the course of the disorder, the Court noted, the guaranty clause would be "a guarantee of anarchy, and not of order," *id.* at 43, and no less a rule could be followed when peace is restored. Though such a power might be dangerous and subject to abuse in the hands of a single man, the power was said to be justified by the fact that the President is a chosen leader and, in emergency circumstances, could not fail to properly exercise his responsibility with prudence and foresight. *Id.* at 44. See also 10 OP. ATT'Y GEN. 74, 84 (1861). The power is in any event, "conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." 48 U.S. (7 How.) at 44. Inasmuch as the Court in *Alabama ex rel. Wallace v. United States*, 373 U.S. 545 (1963), held that the President's purely preparatory actions under section 333 caused no basis for complaint, it might be argued that it reaffirmed the principle of *Luther*. Such a conclusion, however, is difficult to draw from the short per curiam opinion.

A similar result was reached in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), where actions had been brought to contest the blockade established by President Lincoln during the Civil War. The Court said that

[w]hether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. *Id.* at 670 (emphasis in original).

It is interesting to note that Congressman James F. Byrnes was of the opinion that the guaranty clause barred investigation into the disturbance which culminated in *Moyer v. Peabody*, 212 U.S. 78 (1909). H.R. Doc. No. 1630, 63rd Cong., 3d Sess. 48-50 (1915).

154. Thus, attention must be directed at the Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Powell v. McCormack*, 395 U.S. 486 (1969). See Jackson, *The Political Question Doctrine: Where Does It Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?*, 44 U. COLO. L. REV. 477 (1973). Considerable authority supports the rule that cases arising under the guaranty clause are nonjusticiable. See, e.g., *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Marshall v. Dye*, 231 U.S. 250 (1913); *Kiernan v. Portland*, 223 U.S. 151 (1912). Although the Court in *Baker v. Carr* held the case before it to be not within that rule, it reaffirmed the rule's viability, 369 U.S. at 209, and observed that "the Guaranty Clause is not a repository of judicially manageable standards . . ." *Id.* at 223. With specific regard to the political question doctrine, the Court in *Baker v. Carr* analyzed it by noting the common characteristics which "label and identify" such questions. These included

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217.

cision in *Luther v. Borden* actually encompassed a presidential intervention question.¹⁵⁵

With specific regard to *Luther v. Borden*, the Court, by dictum, specifically approved the language which indicated that presidential action under what is now section 331 was a political question. *Id.* at 220-22. It also observed, significantly, that by construing the case before it as not constituting a political question, it did not "risk . . . grave disturbance at home," which it indicated might be grounds for concluding that a future case might, in fact, involve a nonjusticiable claim. *Id.* at 226. Although the opinion in *Carr* did no more than reaffirm *Luther*, such was clearly not the opinion of Justice Douglas. In a footnote to his concurring opinion, he specifically said that the rule in *Luther* that courts would not review action taken under martial law declarations was "indefensible," and that the rule of *Sterling v. Constantin*, 287 U.S. 378 (1932), see notes 172-86 *infra* and accompanying text, should be given controlling weight. 369 U.S. at 242 n.2. It is unclear, however, whether Justice Douglas spoke of martial law invocation, which went unreviewed in *Luther*, or of presidential intervention.

In *Powell v. McCormack*, the Court said that the justiciability of a case was to be ascertained by making two determinations. First, whether the case was a proper subject for judicial resolution, and second, whether it presented a political question. 395 U.S. at 516-17. With regard to the second step, the Court considered specifically whether there had, in the case before it, been a "textual commitment" to a coordinate department of government—the first of the characteristics of a political question set out in *Baker v. Carr*. To answer that question, however, required a two-step inquiry—what power the Constitution actually conferred, and to what extent its exercise was subject to judicial review. *Id.* at 519. After analysis of the history of the constitutional provision there in question, the Court concluded that there was no "textual commitment" which would constitute a nonjusticiable political question, and that, therefore, judicial review was appropriate. *Id.* at 548.

Whether a similar result would be reached if action by the President under section 331 came before the Court today is, of course, a subject which is open to considerable dispute. *Luther* stands for the proposition that its exercise was a political question—not subject, that is, to judicial review—and application of the "textual commitment" rule does not compel a contrary result. Article 4, section 4 provides that the "United States shall guarantee to every State . . . a Republican Form of Government, and shall protect each of them . . . against domestic Violence." This is a commitment to Congress, a coordinate branch, of the power to protect the states against domestic violence, which, by section 331, it properly delegated to the President. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1849).

Although there is, thus, a substantial basis upon which one might argue in favor of the *Luther* conclusion, it is highly unlikely that a similar result would be reached for a contemporary intervention in a civil disorder. See notes 159-60 *infra* and accompanying text. Indeed, *Luther* involved, in addition to the intervention question, a declaration of intent to intervene in favor of one of two competing governments, which the Court said involved a political question—a situation not likely to be soon recurring. The opinion is, in any event, subject to an analysis that would suggest that the intervention question was never actually reached by the Court. See note 155 *infra*.

155. One interpretation of *Luther* would be that the intervention question as such was not involved in the case, because the Court actually held only that the choice of governments was a political question, and the justiciability of the intervention question was never reached. The choice of governments was made by the decision to intervene. The choice, not the decision, therefore, was the political question. Reference to the political nature of the intervention decision was purely dictum. Concededly, this is a very narrow reading of the case, but it is, in terms of later developments, arguably accurate. This may be the conclusion of Mr. Justice Douglas. See *Massachusetts v. Laird*, 400

If the President concludes that the use of troops in a certain situation falls within his statutory authority under sections 331-34 and his actions are challenged, it may be that his decision to intervene might itself not be subject to judicial review,¹⁵⁶ while the actions taken thereunder would be subject to judicial scrutiny. Authority for review of the actions taken may be drawn from previous examinations by the Court of the merits of presidential uses of power in emergency situations. In the *Prize Cases*,¹⁵⁷ the Court had no difficulty looking into the merits of President Lincoln's blockade of the South and the subsequent seizure of neutral vessels. Similarly, when President Truman seized the steel plants during the Korean conflict, the Court was not troubled by the political nature of the inquiry and determined the validity of the President's action.¹⁵⁸ Both cases involved exercises of presidential power that would be roughly similar to action by the President to intervene in the states or the District of Columbia.

Although the *Prize Cases* and the *Steel Seizure Case* may be distinguished from the inquiry under the guaranty clause regarding the intervention power, the spirit of the review of presidential action is unmistakably clear—where the President makes an excessive use of power, his action will be subject to review. This is, indeed, the basic

U.S. 886, 895 n. 4 (1970) (dissenting opinion).

A second feature of *Luther* was that the case was initiated by a citizen objecting to the search of his home. His claim was rejected, however, not because it involved a political question, but because the lawful government—the determination of which was a political question—was justified in taking the disputed actions. This distinction is crucial, because it further disassociates the question of the intervention power.

156. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). See also *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

157. 67 U.S. (2 Black) 635 (1863).

158. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In defense of the President's acts, it was argued that they were within the "aggregate of his constitutional powers" and his power as Commander-in-Chief. *Id.* at 582. These arguments were rejected upon a theory best expressed by Justice Frankfurter in his concurring opinion:

To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, *with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of [the] Executive Order . . .*" *Id.* at 596 (emphasis added).

See also *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. United States District Court*, 407 U.S. 297 (1972).

At least one writer is of the opinion that presidential determinations of necessity may not be judicially cognizable. See McGonagle, *Emergency Detention Acts: Peacetime Suspension of Civil Rights—with a Postscript on the Recent Canadian Crisis*, 20 CATHOLIC U.L. REV. 203, 211-15, (1970).

concept articulated by the decisions that have reviewed exercises of martial law power by state executives, and we believe that the principles set forth by those cases reflect the principles that would inevitably be applied by a court called upon to review actions taken pursuant to the President's authority to intervene in civil disturbances in the states or the District of Columbia.¹⁵⁹

Fortunately, the use of regular troops by the President has been infrequent in recent years, and hopefully the condition will not change. But in the present state of the law, the frequency of use depends largely on executive discretion. Indeed, it is difficult to fault Professor Corwin's conclusion that since 1807 it has rested with the President "to say when the national forces shall be employed against combinations too powerful to be dealt with in the ordinary course of judicial proceedings, and hence to say whether such combinations exist."¹⁶⁰

C. Powers of Military Forces When Used in Support of the Civil Power in Domestic Disorders

Consideration of the power of state and federal executives to use military force to quell domestic civil disorder should make it clear that there is substantial authority for such utilization and that it has been invoked at both levels on a relatively frequent basis. Our discussion of the authority is intended neither to defend nor oppose what we understand to be the present state of the law. Rather, our intention is to compare that authority with the powers of civilian forces to quell civilian disorder. It is our thesis that there should be no incentive for either state or federal executives to use the troops instead of the civilian police as a means of quelling disorder. Such an incentive does, however,

159. See *Presidential Authority* 150-52. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 709 (1952) (Vinson, C.J., dissenting).

160. CORWIN 139.

In determining and implementing the Federal response to civil disorders, the Attorney General advises the President when to invoke federal military support and the Secretary of Defense provides the required military forces. The Secretary of Defense may pre-position federal troops near an area of disorder although approval of the President is required if more than a battalion (about 500 men) is involved. During the actual deployment of troops, the Secretary of Defense is responsible for the conduct of military operations. A "personal representative of the Attorney General is sent to the location and is consulted" by military commanders on all important matters. The Attorney General retains responsibilities for "coordinating all Federal agencies." ATT'Y GENERAL'S FIRST ANNUAL REPORT, FEDERAL LAW ENFORCEMENT AND CRIMINAL JUSTICE ASSISTANCE ACTIVITIES 133-34 (1972). Confusion between the Attorney General and the military concerning command responsibilities is quite possible under such division of responsibility. The potential for such confusion should be eliminated.

exist if the civilian police are tightly limited to their normal non-emergency powers while the military is given broader discretionary authority to deal with disorders. The Riot Commission has recommended the first proposition; existing case law supports the second.

The legal principles governing the powers of military forces when used to assist civilian authorities rest primarily on the opinions of the Supreme Court in *Moyer v. Peabody*¹⁶¹ and *Sterling v. Constantin*.¹⁶² In *Moyer*, the Governor of Colorado had declared that a county was in a state of insurrection as a consequence of expected labor trouble between the Western Federation of Miners and mine owners.¹⁶³ In accordance with the declaration, the Governor called out troops to put down the trouble and ordered the arrest and detention of Moyer, president of the miners' federation. Moyer was detained for a period of approximately seventy-five days. After his release, he brought suit against the Governor, the adjutant general, and an officer of the National Guard, all then out of office, for violation of his rights under the fourteenth amendment.¹⁶⁴ Noting that there was no allegation that the Governor acted dishonestly, or that Moyer had been detained after fears of disorder had ceased, the Supreme Court held that Moyer had not made out a "suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States."¹⁶⁵

Justice Holmes painted the authority of the executive in times of domestic violence with a broad brush.¹⁶⁶ He noted that the state statu-

161. 212 U.S. 78 (1909).

162. 287 U.S. 378 (1932).

163. A lengthy analysis of the Colorado situation is contained in H.R. Doc. No. 1630, 63rd Cong., 3d Sess. (1915).

164. 212 U.S. at 82-83. Suit was brought pursuant to the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983 (1970).

165. 212 U.S. at 86.

166. The oft-criticized sweep of the opinion by Justice Holmes in *Moyer v. Peabody* has been attributed to the recollections of his wartime experience, which, he later admitted, often plagued him. O.W. HOLMES, *Learning and Science*, in *COLLECTED LEGAL PAPERS* 138 (1921); see WIENER 110.

The broadness of the rule has also been said to have "forged a sword which, in the hands of ill-advised officers, has done tremendous wrong." Fairman, *Martial Rule and the Suppression of Insurrection*, 23 ILL. L. REV. 766, 788 (1929). One can indeed regret the rhetoric, agree that the opinion is too broad, and even oppose the result, without an *ad hominem* attack upon the author of the opinion such as that directed at Justice Holmes by Professor Engdahl:

[T]he Court's opinion was written by Justice Holmes, that poet whose exaggerated reputation as a jurist has contributed to the confusion of so much Constitutional law. With his characteristic aloofness from details and precedent, Holmes in a short, simplistic, and cavalier opinion tendered a quit claim due to the most fundamental of our liberties. . . . *Engdahl* 170.

tory language giving the executive power to quell disorder granted authority to use whatever force he deemed necessary. The Governor was sanctioned to use lethal force against those who resisted his authority, and to arrest and detain those whose incarceration he deemed necessary "to prevent the exercise of hostile power."¹⁶⁷ This preventive detention power was lawful so long as carried out in good faith and with the honest belief that it was necessary to restore order.¹⁶⁸ With regard to other measures taken by the executive in time of such a crisis, Justice Holmes observed that "[p]ublic danger warrants the substitution

The reputation of Justice Holmes has survived other such attacks, Lucey, *Holmes-Liberal-Humanitarian-Believer in Democracy?*, 39 GEO. L.J. 523 (1921); Palmer, *Hobbs, Holmes and Hitler*, 31 A.B.A.J. 569 (1945), and will undoubtedly survive this one. Personal opinions about the Justice or his opinion cannot alter the fact that the decision sustaining the detention was that of a unanimous court.

167. 212 U.S. at 85. Justice Holmes also noted that the fact of arrest would not itself give a right to bring such a suit, citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), which has been characterized as "the foundation" for the use of martial law in the United States. RANKIN 34. *Luther v. Borden* arose out of the Dorr Rebellion in Rhode Island, which had broken out over the conflicting claims of two groups, separated by their views on popular suffrage, each claiming to be the legal government. When the conflict reached the point of armed rebellion, martial law was declared by the legislature over the entire state. After the President had declared his intent to use federal forces if necessary, the rebellion quickly subsided. See generally MILITARY AND 185-87; A. MOWRY, *THE DORR WAR* (1901); RANKIN 26-28; 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 185-95 (rev. ed. 1932). Suit was brought by Luther, a civilian, against Borden, a member of the state militia of the charter government, who at the command of his captain had broken and entered Luther's house for the purpose of searching for and arresting Luther. Borden defended on the ground that the state was under martial law at the time of his entry. After resolving that the lawful government had instituted martial law, the Court had little difficulty upholding the acts of the defendant. It held that when an insurrection becomes too strong to be controlled by civil authority, the state may use its military power and the courts should not question the exercise of that authority. 48 U.S. (7 How.) at 44. Once martial law is declared, it said, militiamen may arrest or search upon "reasonable grounds," and Borden's search was justified on that basis. *Id.* at 45. The Court clearly suggested, however, that an abuse of power by militiamen would render him liable in damages. *Id.* at 47. See also *Dow v. Johnson*, 100 U.S. 158, 170 (1879) (Clifford, J., dissenting). The authority of *Luther v. Borden* as constitutional precedent is open to question since, despite the broad language of Chief Justice Taney's opinion, 48 U.S. (7 How.) 45-46, which has generally been regarded as stating constitutional law, the case was a diversity case applying state law. The case was, of course, decided before the adoption of the fourteenth amendment. See Fairman, *The Law of Martial Rule*, *supra* note 66, at 1264.

168. 212 U.S. at 85. Subsequent cases have made it clear that even if a detention is originally justified by necessity, its continuation must also be justified. Thus, the power to evacuate from the West Coast and detain American citizens of Japanese descent in World War II, see *Korematsu v. United States*, 323 U.S. 214 (1944), did not justify the continuation of detention of a person shown to be loyal. *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

of executive process for judicial process"¹⁶⁹ and that "the ordinary rights of individuals must yield to what he [the executive] deems the necessities of the moment."¹⁷⁰ Perhaps the most extraordinary assertion was that the Governor's declaration that a state of insurrection exists is "conclusive of the fact."¹⁷¹

Moyer dealt with a genuine domestic disorder where the normal criminal process was inadequate to restore order. *Sterling v. Constantin*,¹⁷² however, arose out of quite different facts. During the Great Depression, the Texas Railroad Commission had sought to limit the production of oil, because of chronic oversupply, and producers had obtained a federal court temporary restraining order against the exercise of the limitations. The Texas legislature then passed a proration law which the Governor sought to enforce by declaring that certain counties were under "martial law," because of the insurrection, tumult, and riot involved in the "wasteful production of oil."¹⁷³ This action was challenged by the owners in federal district court as infringing their property rights which were protected by the fourteenth amendment,¹⁷⁴ and the three-judge federal court, upon finding that there had been neither a riot nor insurrection, issued an injunction.¹⁷⁵ The Supreme Court affirmed the lower court. Specifically, it rejected the assertion that "the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government."¹⁷⁶ Where the evidence was clear that the troops were

169. 212 U.S. at 85. The scope of this substitution was stated as follows:

This [substitution] was admitted with regard to killing men in the actual clash of arms, and we think it obvious . . . that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of the opinion that the same is true of a law authorizing by implication what was done in this case. *Id.* at 85-86.

170. *Id.* at 85.

171. *Id.* at 83. This position was rejected in *Sterling v. Constantin*, 287 U.S. 378 (1932). See notes 172-81 *infra* and accompanying text.

172. 287 U.S. 378 (1932).

173. *Id.* at 387-89, 397.

174. The federal jurisdiction was based upon the familiar theory that where state officials invade a right secured by the Constitution, while purporting to act under state authority, they are subject to federal court process, so that persons injured may have proper relief. *Id.* at 393. See *Ex parte Young*, 209 U.S. 123 (1908).

175. *Constantin v. Smith*, 57 F.2d 227 (E.D. Tex. 1932).

176. 287 U.S. at 397. The Court noted that:

[I]f this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land. . . . Under our system of government, such a conclusion is obviously untenable. *Id.* at 397-98.

not called out to deal with serious domestic violence, the Court held the proclamation of the governor could not justify their use to interfere with the plaintiff's property rights.¹⁷⁷

In *Sterling*, then, the Supreme Court concluded that if a situation justified the calling out of troops, their use must bear a direct relation to the disturbance sought to be subdued.¹⁷⁸ While the Court clearly retreated from the broad language of *Moyer*, which had indicated that a governor's decision to declare martial law or to use troops was conclusive and unreviewable,¹⁷⁹ it affirmed the actual holding of *Moyer* that the Governor's action in using troops to detain Moyer for seventy-five days was lawful so long as the arrest was "made in good faith and in the honest belief that [it was] necessary to head the insurrection off."¹⁸⁰ The Court noted that

[b]y virtue of his duty to "cause the laws to be faithfully executed," the *Executive* is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, "necessarily results from the nature of the power itself, and from the manifest object contemplated." The power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." . . . Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. . . . The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself could be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.¹⁸¹

177. *Id.* at 403-04. This conclusion has been rephrased to say that "[w]hen a governor proclaims what may be notoriously false, and proceeds to take measures which only actual extremity would justify, it is exorbitant to claim that he has uncontrolled discretion to implement his declaration." FAIRMAN 103-04. This use of the troops has also been said to constitute "bogus" martial law, WIENER 102, though that phrase has now been modernized to "phony," Wiener, *Martial Law Today*, *supra* note 31, at 92.

178. 287 U.S. at 400.

179. 212 U.S. at 85.

180. 287 U.S. at 400.

181. *Id.* at 399-400 (emphasis added). The Court then went on to reaffirm the hold-

It will be noted that the Court upheld the use of military forces by governors to quell "disorders" as well as "insurrections."

It is clear that *Sterling* modified that part of *Moyer* which had held that a governor's proclamation was so far conclusive that any action taken by him was unreviewable in the courts, and also added an objective standard of a "direct relationship" between the measure undertaken and the restoration of order to the "good faith and honest belief" test of *Moyer*. One goes too far, however, to conclude that "the tragically inept opinion in that case [*Moyer*] was before long so reinterpreted and confined by the Supreme Court as to be virtually overruled"¹⁸²; or that *Moyer* "is no authority whatsoever for any relaxation of the ordinary standards of civilian due process for governmental action in the event of a riot or a civil disorder not approaching an 'insurrection'. . . ."¹⁸³ The Court, quite to the contrary, specifically reaffirmed the *holding* in *Moyer*, and in so doing observed that

in *Moyer v. Peabody*, . . . the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and the right of recovery against the Governor was denied. The Court said that, as the Governor "may kill persons who resist," he "may use the milder measure of seizing the

ing of *Moyer*, since there had been in that case the requisite "direct relation" between the measures used and the disorder. *Id.* at 400.

182. *Engdahl I 70.*

183. *Engdahl IV 11.* Professor Engdahl comes to the conclusion that *Sterling* emasculated *Moyer* by an interesting reasoning process. He initially concludes that in *Sterling* the Court "restated" or "radically restated" the facts in *Moyer*. *Engdahl I 70 n.321; Engdahl IV 10.* In support of this conclusion he cites the *Sterling* Court's discussion of *Moyer*, 287 U.S. at 400, but neither on that nor any other page did the Court restate the facts in *Moyer*. It simply stated that it had in *Moyer* upheld the Governor's action in detaining *Moyer*, and that the action of the Governor "had a direct relation" to the detention. Thus, rather than restating the facts, the Court simply characterized the detention as having a "direct relation" to the disorder. Professor Engdahl then goes one step further and suggests that the Court in *Sterling* "warned" that the language in *Moyer* must be taken in connection with the restated facts. Aside from the fact that the Court did not, as we have noted, restate the facts, it did not in any way qualify its acceptance of *Moyer* on its facts. Rather, the Court concluded this part of its opinion by noting that "the general language of the [*Moyer*] opinion must be taken in connection with the *point* actually decided." 287 U.S. at 400 (emphasis added). The term "point" clearly refers to the legal permissibility of the detention of *Moyer*, because of the presence of what the Court identified as a "direct relation," not to any prior restatement of fact. In short, we find no support at all for Professor Engdahl's construction of *Sterling* as it relates to *Moyer*, and reject any suggestion that *Sterling* did more than add an objective factor to the test enunciated in *Moyer* for judicial review and make it clear that such review would be available. There is a significant difference between the sharpening of a standard of review articulated in an earlier case, and a rejection of the earlier case's underlying principle. The sharpening was indeed present in *Sterling*, but the rejection was just as clearly absent.

bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had no reasonable ground for his belief." In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided.¹⁸⁴

It is important to note that the term "insurrection" utilized in *Sterling* to identify the facts in *Moyer* referred to a labor dispute which had previously resulted in serious disorder, but was not an organized attempt to overthrow a government.¹⁸⁵

We read the *Moyer-Sterling* standard to say that military forces may be used to quell a civil disorder with which civil law enforcement agencies cannot cope. In determining what action should be taken to restore order, moreover, broad discretion will be accorded the executive. Although his decision to call out the troops will be unreviewable in the courts, their actual utilization will be examined by the courts to determine if (1) there was, in fact, a disorder requiring the use of troops; (2) the actions taken by them were directly related to the restoration of order; and (3) the actions were honestly and in good faith believed to be necessary to restore order.¹⁸⁶ Such actions in cases

184. 287 U.S. at 400, citing 212 U.S. at 84-85. We also find no support for Professor Engdahl's interpretation of *Moyer* in the recitation of the facts found to exist by the district court, in which it stated, *inter alia* that

[w]e find, therefore, that not only was there never any actual riot, tumult, or insurrection, which would create a state of war existing in the field, but that, if all of the conditions had come to pass, they would have resulted merely in breaches of the peace to be suppressed by the militia as a civil force, and not at all in a condition constituting or even remotely resembling a state of war. 57 F.2d at 231, quoted in 287 U.S. at 391.

185. The distinction between an "insurrection" and other types of domestic violence is considered at notes 83-85 *supra* and accompanying text.

186. It may be questioned whether an inquiry into the subjective belief of the actor is required if a disorder is found to exist and the action taken bears a direct relation to the restoration of order. On occasion, the standard is stated only in terms of its objective components. See Note, *Developments in the Law, supra* note 66, at 1296. We think that, in the present state of the law, the subjective element is appropriately included. In the first place, the requirement that the measure be conceived in good faith is a part of the *Sterling* reformulation of the principles and has been recognized in more recent authority. See *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Valdez v. Black*, 446 F.2d 1071, 1076-77 (10th Cir. 1971), cert. denied, 405 U.S. 963 (1972). See also *Krause v. Rhodes*, 471 F.2d 430, 447, 463-64 (6th Cir. 1972) (Celebrezze, J., dissent-

where necessity requires may involve seizure of the person (whether denominated an arrest or not) without a warrant, detention without presentation before a magistrate, and reasonable searches without a warrant.

There is obviously considerable tension between the *Moyer-Sterling* approach to the use of troops in domestic disorders and the attitude towards the relationship of military power and civil rights reflected in *Ex parte Milligan*.¹⁸⁷ But the doctrine of *Milligan*, decided

ing), *rev'd sub. nom.* *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Second, the requirement of an honest and good faith belief in the necessity of the action adds some protection to the citizenry. Undoubtedly cases can arise where measures are contemplated which, if adopted, would directly relate to quelling a disorder, but which might not in subjective good faith be regarded as necessary. In such a situation a less restrictive measure should be taken.

It has been urged that a sterner test is justified, which would be predicated upon a finding (1) of an emergency and (2) that the steps taken were necessary (as distinguished from directly related and believed to be necessary). Such a standard would require "that there not be available to the government alternative means of coping with the emergency that were as effective as the measures employed but less restrictive of individual liberties." Note, *Developments in the Law, supra* note 66, at 1296-97.

187. 71 U.S. (4 Wall.) 2 (1866). *Milligan* had been arrested in Indiana during the Civil War by military order and confined in a military prison. Although a federal grand jury had been in session during the period of his detention, he was tried and convicted by a military commission for (1) conspiracy against the Government, (2) affording aid to rebels, (3) inciting insurrection, (4) disloyal practices, and (5) violations of the laws of war, and sentenced to death. *Id.* at 6-7. He then made application for a writ of habeas corpus. *Id.* at 107-09. The decision by the Supreme Court was rendered on the day following the President's proclamation that peace had been restored throughout the United States, with the opinions issuing eight months later. See G. SCHUBERT, *THE PRESIDENCY IN THE COURTS* 188 (1957). Justice Davis, author of the majority opinion, stated that the "controlling question in this case is this: . . . had the military commission . . . jurisdiction. . . ?" 71 U.S. (4 Wall.) at 118. He then determined that a citizen unconnected with the military service, and a resident of a state where the courts were open and operating, could not constitutionally be tried and sentenced in other than the ordinary courts of justice. *Id.* at 119-30. The opinion clearly stated that Congress could not empower such action. *Id.* at 122. The concurring opinion, authored by Chief Justice Chase, reached the same result, but as a matter of statutory interpretation of the Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, which the Chief Justice read to have been intended "to secure the trial of all offenses by civil tribunals in states where these tribunals were not interrupted in the regular exercise of their functions." 71 U.S. (4 Wall.) at 136. He made it clear that four members of the Court would have found no constitutional objection if Congress had authorized the trial of *Milligan* by military commission. *Id.* at 141-42. The tension between *Moyer* and *Milligan* arises because of the language of Mr. Justice Davis in asserting that the fourth, fifth, and sixth amendments had been "established by irrepealable law," *id.* at 120, and the language used in dealing with the Government's extraordinary assertion that in time of war the commander of a force had power, subject to the President, to suspend all civil rights and to subject civilians to his will: "Martial rule can never exist when the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 127.

forty-three years earlier, was known to the Court that decided *Moyer*, and it apparently found the *Milligan* dicta inapplicable to the detention of the potential riot leader in Colorado. Nowhere in *Milligan* does the Court state that the use of military troops to quell a civil disorder or the detention of a potential rioter by such troops is unconstitutional.¹⁸⁸ The holding of the Court is limited to prohibiting the trial of a civilian by a military commission where the civilian courts are open and operating.¹⁸⁹ There is a real difference in kind between the trial of a civilian by military commission and the use of troops to quell a disorder, or the detention of persons by troops until they can be handed over to civilian authorities for their decision whether prosecution under normal judicial procedures should ensue. The significance of the difference was recognized by the Congress which, five years after *Milligan*, authorized the President to use troops to protect constitutional rights when states were unable or unwilling to do so and to enforce the law, but specifically required that persons detained by troops be handed over to civilian authorities.¹⁹⁰ The distinction was again recognized in *Duncan v. Kahanamoku*.¹⁹¹

See Renzo, *The Basic Constitutional Dilemma: The Milligan and Moyer Principles*, 43 U. COLO. L. REV. 421, 421-29 (1972). The definitive analysis of *Milligan* is in C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-68, PART ONE, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 182 (1971). While *Moyer* has been modified by *Sterling*, *Milligan* has been modified by *Ex parte Quirin*, 317 U.S. 1 (1942).

188. There is, indeed, some language in *Milligan* which arguably supports such powers:

If it was dangerous, in the distracted condition of affairs, to leave *Milligan* unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended. 71 U.S. (4 Wall.) at 122.

189. *Id.* at 130.

190. Act of Apr. 20, 1871, ch. 22, § 3, 17 Stat. 13. See notes 94-96 *supra* and accompanying text. This particular provision did not, however, survive re-codification.

191. 327 U.S. 304 (1946). Thus, Mr. Justice Black stated that in the Whiskey Rebellion of 1794,

[t]he troops were to see to it that the laws were enforced and were to deliver the leaders of armed insurgents to the regular courts for trial In the many instances of the use of troops to control the activities of civilians which followed, the troops were generally again employed merely to aid and not to supplant the civilian authorities. *Id.* at 321-22.

Although the Court stated that it was not necessary to consider "[t]he power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection and war," *id.* at 314 (*citing Moyer, Luther v. Borden, Sterling, and Fairman* 209-18), it made it clear that it interpreted *Milligan* to preclude trials. 327 U.S. at 321-24. See CORWIN 143-44:

The most recent utterance of the Court on the subject of martial law is its decision in the Hawaiian Martial Law cases. The holding of these cases as stated

It has also been urged that *Sterling* and *Moyer* were both decided before the Supreme Court began to expand the meaning of the Bill of Rights and to apply those express prohibitions to the states.¹⁹² It is argued that the standard of due process applied by Justice Holmes in *Moyer* was less stringent than the standards of the fourth, fifth, sixth, and eighth amendments, as presently articulated, and if "one is to apply the modern notion of 'incorporating' the Bill of Rights specifics into the Fourteenth Amendment, then the rule of *Moyer* has been superseded by the rule of *Milligan* without actually being overruled."¹⁹³ The argument has considerable superficial appeal, but in substance it is predicated upon the proposition that guarantees of civil liberties in the Constitution mean the same in emergencies that they do under normal conditions. There is indeed significant authority to the effect that, unless the Constitution protects civil rights in an emergency, they are of little significance, since the greatest need for protection occurs when the state has the greatest incentive to disregard them.¹⁹⁴ Civil liberties are thus said to be regarded as both "irrepealable" and "unchangeable."

Not surprisingly, the case law has not been totally consistent. The standards which seem to us to have gained acceptance, however, demonstrate extraordinary flexibility. They display little of the rigidity inherent in notions that the Constitution must be interpreted to permit no greater limitations upon the liberties of the citizen in a nuclear war than in a period of tranquility, or that attach a magical significance to a single condition such as whether the courts are open.¹⁹⁵ In-

in the headnote amounts substantially to a reiteration of the *Milligan* decision, but Justice Black's controlling opinion for the Court advances the quite untenable thesis that the only employment of the military in the enforcement of civil law that the Constitution contemplates is its use as adjunct police taking its orders from civil authorities. Any implication, however, that the Court wished to call *Moyer v. Peabody* into question is diligently avoided.

For analysis of the Hawaiian martial law episode, see Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477 (1943); Anthony, *Martial Law in Hawaii*, 30 CALIF. L. REV. 371 (1942); Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27 (1947); Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COLUM. L. REV. 639 (1944); King, *The Legality of Martial Law in Hawaii*, 30 CALIF. L. REV. 599 (1949). The Hawaiian experience has been said to have provided two "objective lessons"—(1) how not to operate martial law, and (2) how not to litigate it afterwards. WIENER, *Martial Law Today*, *supra* note 31, at 95, 725.

192. See Comment, *Martial Law*, 42 S. CAL. L. REV. 546, 554 (1969).

193. Renzo, *supra* note 187, at 426.

194. See note 52 *supra* and accompanying text.

195. *Engdahl I* 71. In a later article, Professor Engdahl recognizes that "the closure of the courts is not a very satisfactory criterion" and suggests that the test should be "whether civilian executive force could effectively enforce the civilian laws, including such orders as a civilian court might issue." *Engdahl IV* 11-12; cf. *Ex parte Marais*

stead, the cases are characterized by attempts to relate the Court's perception of the seriousness of an alleged emergency to the conduct sought to be vindicated and its impact upon the "ordinary" liberties of the citizen,¹⁹⁶ considerable solicitude for executive discretion of high executive officers in "affairs of state,"¹⁹⁷ and much less solicitude for subordinates in "personal" emergencies faced by them in the routine performance of their duties.¹⁹⁸ The reconciliation of the alleged needs of the state and the rights of the individual sometimes becomes intertwined with questions of separation of powers, with the courts granting considerable leeway to executives acting with legislative authorization¹⁹⁹ and much less to the executive whose action appears to contravene legislative intent.²⁰⁰ It may not be solely a matter of docket delay that opinions condemning state actions during emergencies tend to occur after the emergency is over.²⁰¹

Our point is only to show that the criminal procedure decisions of the Warren Court do not necessarily mean that the constitutional limitations upon arrest, search and seizure, or detention must be applied with the same rigor in times of war, rebellion, insurrection, or

[1902] A.C. 109; Dodd, *The Case of Marais*, 18 L. Q. REV. 143 (1902); Pollock, *What is Martial Law?* 18 L. Q. REV. 152 (1902). Professor Engdahl makes it clear, however, that the test of whether the civilian executive force could effectively enforce civilian laws requires that all of the manpower of the National Guard and other military forces be used as civilians under civilian command: "military troops cannot be used as *soldiers* on the 'mere pretext' that civilian peace forces are overtaxed or undermanned." *Id.* at 12. He has also observed that "[t]he executive branch cannot be dissolved by mere shortage of manpower, since it has the personnel of the Army or National Guard available to be called as subordinate civilian assistants in the nature of *posse comitatus*." *Engdahl I* 70 n.324.

196. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 95 (1943). We do not suggest the correct conclusion has always been reached. See Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). It is this flexible concept of state power that lies at the base of the concept of graduated levels of military force depending upon the necessity for its use, the classic explanation of martial law. WIENER 16.

197. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

198. See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970). This is not to suggest that the existence of an emergency has not also been considered relevant in determining "reasonableness" in fourth amendment searches without warrants—a subject that will be considered in Part II of this essay. See note 44 *supra*.

199. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 342 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

200. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 342 U.S. 579 (1952); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 132-42 (1866) (Chase, C.J., concurring).

201. See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See also *Duncan v. Kahanamoku*, 327 U.S. 304, 357 (1946) (Burton & Frankfurter, JJ., dissenting).

civil disorder, as in non-emergency circumstances. They may provide less protection to the citizen for the same reason that the due process clause of the fifth amendment provided less protection in *Moyer*.²⁰² It is for this reason that the Tenth Circuit Court of Appeals recently rejected the assertion that "*Moyer* and *Sterling* belong to another age and no longer represent the law on the subject."²⁰³

The *Moyer-Sterling* standard only sets the limits beyond which a state may not permit its military forces to act without violating the

202. Thus, Justice Holmes observed that "[o]f course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process depends on circumstances. It varies with the subject-matter and the necessities of the situation." 212 U.S. at 84.

203. *Valdez v. Black*, 446 F.2d 1071, 1076 (10th Cir. 1971), cert. denied, 405 U.S. 963 (1972). See also *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974) (citing *Moyer v. Peabody* with approval).

In *Valdez v. Black*, suit had been brought by members of an organization of Spanish-speaking Americans known as *Alianza Federal de Mercedes* against the commander and two members of the New Mexico National Guard for the alleged deprivation of rights under the fourteenth amendment, resulting from the arrests and detention of the plaintiffs by the defendants. 446 F.2d at 1073. The case arose out of activities of the *Alianza*, which had as its object the recapture of certain land which it claimed belonged to persons of Spanish or Mexican ancestry. During May and June of 1967, the *Alianza* held several mass meetings culminating in an armed raid on a courthouse in New Mexico. *Id.* at 1074-75. The Lieutenant Governor, acting as Governor, issued a proclamation declaring the county to be "in a state of extreme emergency, and called out the National Guard to assist in the restoration of peace and order." *Id.* at 1075. The State Police and the National Guard arrested and detained the plaintiffs, who were located at a nearby ranch after having abandoned the courthouse.

In instructing the jury concerning the liability of the Guardsmen, the trial judge first noted that the Governor was the sole judge of whether military forces of the state were needed to assist local civilian authorities, and whether they should be ordered into active service. The jury was then instructed:

When the Governor orders into active service the National Guard after determining that its aid and assistance is necessary, the commander of the Guard may use the measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.

If you find from evidence that the Governor had called out the National Guard and declared a state of extreme emergency in Rio Arriba County, and that the detention of plaintiffs was accomplished by the National Guard pursuant to such proclamation, and that such detention was made in good faith and in the honest belief that it was necessary under the circumstances to preserve peace then you should find for the defendant John Jolly and against the plaintiffs. *Id.* at 1076.

The plaintiffs unsuccessfully asserted that this instruction was erroneous in that the National Guard was held to a less stringent standard of conduct than were the state police, because although the police could arrest and detain only "upon probable cause," the National Guard was permitted to do so without probable cause if they acted "in good faith and in the honest belief that their actions were necessary to preserve the peace," and because the *Moyer-Sterling* standard was obsolete.

Valdez v. Black involved an uprising against the government, and thus presented a different factual situation from that presented by the normal civil disorder. The intensity and duration of the violence was, however, actually less than many more orthodox civil disorders.

Constitution. Nothing in *Moyer* or *Sterling* precludes a state from placing tighter restrictions upon its National Guard when dealing with civil disorders within the state. A few have done so by judicially limiting the authority of a Guardsman to that exercised by a police officer.²⁰⁴ Other courts apparently permit greater powers of the kind permitted by the *Moyer-Sterling* standard.²⁰⁵ The Riot Commission, in a particularly ambiguous passage, seemed to question whether military forces might have even less authority than a peace officer in some states.²⁰⁰ In most states, the answer is simply not known, since there

204. *Middleton v. Denhardt*, 261 Ky. 134, 87 S.W.2d 139 (1935); *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911); *Fluke v. Canton*, 31 Okla. 718, 123 P. 1049 (1912); *Seaney v. State*, 188 Miss. 367, 194 So. 913 (1940); *State v. McPhail*, 182 Miss. 360, 180 So. 387 (1938). See also *Constantin v. Smith*, 57 F.2d 227 (E.D. Tex. 1932); *Manley v. State*, 62 Tex. Cr. 392, 137 S.W. 1137 (1911); cf. *Allen v. Gardner*, 182 N.C. 425, 109 S.E. 260 (1921). It has been pointed out that the lower court's conclusion in *Constantin v. Smith*, 57 F.2d 227, 238, 241 (E.D. Tex. 1932), that a soldier had only the right of a peace officer, was not repeated by the Supreme Court in *Sterling v. Constantin*. See Fairman, *Martial Rule in the Light of Sterling v. Constantin*, 19 CORNELL L.Q. 20, 32-33 (1933); WIENER 77.

Colonel Wiener would include *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924), with the above cases, which we read to hold that a Guardsman's powers may not exceed those of a police officer. He also argues that this group of cases (he does not discuss the Mississippi cases or the North Carolina case) all arose in circumstances where there was no disorder and "it may therefore be doubted whether soldiers on duty under conditions of actual violence will be so limited." WIENER 75.

205. *In re Moyer*, 35 Colo. 159, 85 P. 190 (1904); *State ex rel. O'Connor v. District Court*, 219 Iowa 1165, 260 N.W. 73 (1935); *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916); *Ex parte McDonald*, 49 Mont. 454, 143 P. 947 (1914); *State ex rel. Roberts v. Swope*, 38 N.M. 53, 28 P.2d 4 (1933). Presumably the West Virginia and Pennsylvania cases, which seemed to equate the use of troops with a condition of war, would accept the wider statement of permissible powers. *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903); *Hatfield v. Graham*, 73 W. Va. 759, 81 S.E. 533 (1914); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912); *Ex parte Jones*, 71 W. Va. 567, 77 S.E. 1029 (1913).

206. Thus, the Commission stated that "[i]n the absence of martial law, only seven states have laws granting National Guard troops the arrest powers of peace officers. This lack of authority is not critical if police officers have been designated to accompany Guard troops when arrests are to be made." CIVIL DISORDERS REPORT 291.

The ambiguity results from the failure to explain that, at least in those states to which reference is made in note 205 *supra*, the power to arrest does not depend upon legislation, but arises from the use of troops in circumstances that require such action, or put differently, qualified martial law exists when troops are used in such circumstances. The statement probably relates to an earlier comment that in Detroit, National Guardsmen "could not make arrests under state law." CIVIL DISORDERS REPORT 187 n.12.

It will be remembered that in the 1967 Detroit riot, 7,200 persons were arrested, forty-three persons were killed, over 5,000 Guardsmen were in the city using automatic weapons and tanks, and, for the first time in twenty-four years, federal troops were ordered in at the request of a state governor. In addition, Michigan statutes provided that: "martial law or 'martial rule' means the exercise of partial or complete military control over domestic territory in time of emergency because of public necessity." MICH. STAT.

ANN. § 4.678(105)(j) (1973). The problem arose because of the opinion of the Supreme Court of Michigan in *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924), where the Governor had called out the state troops to stem the flow of liquor from Toledo, Ohio. As a means of stopping traffickers, Vandercook (the commander of the troops) ordered that a log be placed across a highway. The plaintiff then suffered serious injuries when his taxi (which indeed was carrying liquor, though he claimed to be ignorant of that fact) crashed into the log late at night when visibility was poor. The specific holding of the court was that Vandercook could be held liable for the injuries thus caused, since his powers were no greater than those of civilian peace officers who would not be immune from damage claims caused by such wrongful conduct. *Id.* at 313-14, 200 N.W. at 282-83 (quoting at length from *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911)). In considering the court's opinion, it is important to note several factors. The first is that in eschewing the use of military troops to aid in suppressing civil disorders, the court quite apparently confused the concepts of military law and martial law. See note 66 *supra*. The second is that despite the fact that the case was decided in 1924, the opinion made no reference to the principles laid down in 1912 by Justice Holmes in *Moyer* (indicating the constitutionally permissible powers of troops when so utilized). Although the action of Vandercook in placing the log on the road in aid of the prohibition efforts might not be justified even under the *Moyer* principles, they would have indicated to the court that its sweeping limitation on the powers of the troops was much too broad.

Colonel Wiener reads *Vandercook* to state that the powers of Guardsmen were the same as those of police, WIENER 75; we read it to say that the powers do not exceed those of police. It has also been read as leaving open the question of whether Guardsmen had the status of peace officers and whether this status and authority would change in the event of a domestic disturbance requiring martial rule. Murray, *supra* note 80, at 143. More importantly, the Judge Advocate General of the Michigan National Guard interpreted it to mean that a Guardsman had only the powers of an ordinary citizen and that the Michigan statute was partly unconstitutional because of its conflict with *Vandercook*. See Crum, *supra* note 78, at 870, 873. When it learned of the interpretation, the Michigan legislature made its wishes clear by enacting a new statute:

(b) Whenever any portion of the organized militia is called into active state service or into the service of the United States to execute the laws, engage in disaster relief, suppress or prevent actual or threatened riot or insurrection, or repel invasion, any commanding officer shall use his own judgment with respect to the propriety of apprehending or dispersing any snipers, rioters, mob or unlawful assembly. Such commander shall determine the amount and kind of force to be used in preserving the peace and carrying out the orders of the governor. His honest and reasonable judgment under the circumstances then existing, in the exercise of his duty, shall be full protection, civilly and criminally, for any act or acts done while in line of duty; and no member of the organized militia in active state service or in the service of the United States shall be liable civilly or criminally for any act or acts done by him in the performance of his duty.

(c) A member of the organized militia in active state service or in the service of the United States, while acting in aid of civil authorities and in line of duty shall have the immunities of a peace officer. MICH. STAT. ANN. § 4.678(179) (1973).

This provision certainly presents a problem of interpretation in resolving the ambiguity between the last sentence in (b) with (c), but it also poses a substantial question as to whether it is constitutional in light of *Vandercook*. Thus, subsection (b) states that the commander shall determine the propriety of specific acts, which is a power that is not clearly consistent with the *Vandercook* opinion.

The situation in Michigan is not dissimilar from that which may exist in many states. An additional example of such potential ambiguity is provided by the statutory scheme in Massachusetts, where civil disorders occurred following a court desegregation order in October of 1974. See note 81 *supra*. The applicable provisions provide that

are neither statutes nor cases relating to the issue. Likewise, in states which limit the power of their Guardsmen, it is unclear whether federal troops or federalized Guardsmen would be so limited, and if federal law controls, whether it is federal military or civil law.²⁰⁷

The resulting confusion as to who has what power in which circumstances contributes to several quite distinct evils: (1) in all except the states which have limited the power of Guardsmen to those of police, there is an incentive to use the Guard with their arguably greater

the Governor may call out the militia in case of actual or threatened "tumult, riot, mob or body of persons acting together by force to violate or resist the laws of the commonwealth. . . ." MASS. GEN. LAWS ANN. ch. 33, § 41 (1958), and that in all cases of "public catastrophe or natural disaster," other than those referred to in section 41, a mayor (among other designated persons) may issue a precept to the militia of the city to appear and preserve order. *Id.* § 42.

The difficulty which this scheme could pose is that a situation could arise—for example, in response to a court desegregation order—wherein it could appear to both the mayor of a city and the governor that usual police forces would be inadequate to preserve order and protect persons and property. The mayor might then seek to order out the militia of the city under section 42, believing that the situation was not yet a "tumult, riot, mob or body of persons acting together by force to violate or resist the laws of the commonwealth" under section 41, so as not to be excluded from his power under section 42. The governor, on the other hand, might believe the situation to be within section 41, and order out the militia from localities outside the city in question. Finally, the President might also conclude that federal forces were necessary to enforce the desegregation order, and order them in under the authority of 10 U.S.C. §§ 332, 333 (1970). See notes 89-96 *supra* and accompanying text.

It might be questioned whether the mayor could properly call out the troops in his city, given the action by the governor, but the early case of *Ela v. Smith*, 71 Mass. (5 Gray.) 121 (1855) (decided under a statutory provision dating from 1840 that provided the governor or the mayor with authority to call out the militia in aid of the civil authority to suppress violence, MASS. GEN. LAWS, ch. 92, § 27 (1840); which was amended in 1935, MASS. GEN. LAWS, ch. 295, § 1 (1935), to read as do sections 41, 42 at the present time), held that the factual decision of a mayor in such circumstances was conclusive. Although *Ela* would probably be read to make factual decisions conclusive only if they were within the mayor's statutory authority, it would at least provide additional fuel for an ambiguous situation. If these three categories of troops were called out, moreover, each would be required to act pursuant to the specific orders of the person calling them out. *Ela v. Smith*, 71 Mass. (5 Gray.) 121, 140-42 (1855); MASS. GEN. LAWS ANN. ch. 33, § 43 (1958); see note 217 *infra* and accompanying text (discussing the discretion that military officers would have to carry into effect the orders so given). One means of solving these areas of ambiguity concerning the status of the state forces, would be for the President to federalize them under 10 U.S.C. § 3500 (1970), but it is questionable if he would have the power to do so. See note 97 *supra*.

It is apparent that such a situation would create considerable ambiguity as to who had what powers or authority to act, but given the confusion that apparently existed in Boston in October of 1974, see note 81 *supra*, it is not altogether unforeseeable. In short, venerated authority may pose serious problems to those seeking to suppress a contemporary civil disorder and the decisional and statutory authority in every jurisdiction should be reviewed to identify whether such ambiguities are present, and, if they are, how they should be resolved.

207. The subject is discussed in Murray, *supra* note 80, at 144-46.

powers at an earlier stage of a disorder than would occur if the police had greater authority and the Guard could exercise only those powers; (2) confusion may be caused within a state when the legislature attempts to provide broader powers in the face of older court decisions reflecting a different view of appropriate limitations;²⁰⁸ (3) the individual Guardsman may be placed in the classic dilemma when ordered to do something which is reasonably related to quelling a disturbance, but beyond the normal authority of a police officer, particularly if he has only the powers of a private citizen.²⁰⁹

208. See notes 141 & 206 *supra* for confusion now existing in the District of Columbia, Michigan, and Massachusetts.

209. The dilemma has plagued the text writers for a century. Professor Dicey stated it in these terms:

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders . . . of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. . . . A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 303 (10th ed. 1959).

See also 2 CLODE 152-53. Professor Dicey subsequently qualifies this view by agreeing with Lord Justice Stephen's conclusion that "a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds." DICEY, *supra* at 305; see 2 CLODE 152; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 205-06 (1883). He also points out the power of the Crown to avoid injustice by the entry of a *nolle prosequi* or pardon. DICEY, *supra* at 306; see also 2 CLODE 615-17 (examples of *nolle prosequi* letters). Under the American precedents, Colonel Wiener concludes that a soldier would be liable for exceeding his authority if he acted in circumstances not justifying the use of troops (resort to martial law), when orders were executed in bad faith, malice, or when excessive force was used, but not where there was sufficient violence to justify resort to military force and the subordinate has obeyed an order which was lawful on its face. WIENER 144-51. This view does not, however, eliminate the ambiguity of the soldier's position, especially if there is concern that his authority may be only that of a private citizen and he is called upon to use deadly force. See note 206 *supra*; Murray, *supra* note 80, at 135-66. With respect to liability of the troops for acts undertaken during their deployment, it is to be noted that in England an act legalizing everything which had been done, and rendering everyone involved immune from suits for damages, has traditionally followed the use of troops. FAIRMAN 207-09; WIENER 154. Cf. ALI MODEL PENAL CODE § 2:10: "It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order for his superior in the armed services which he does not know to be unlawful."

Confusion as to the potential liability of the troops for their acts or omissions while deployed during a civil emergency was the basis of the Riot Commission's recommendation that "each state review its laws on the subject and make such necessary changes to insure that Guardsmen are protected against legal liability when acting pursuant to the valid orders of their superiors." CIVIL DISORDERS REPORT 291. Most states do indeed have legislation purporting to immunize Guardsmen from civil and criminal liability for acts taken to suppress domestic violence. A typical statute provides that

[n]o officer or enlisted person shall be liable, either civilly or criminally, for any damage to property or injury to person, including death resulting there-

from, caused by him or by his order, while performing any military duty lawfully ordered . . . , unless the act or order . . . was *manifestly* beyond the scope of the authority of such officer or enlisted person. MASS. ANN. LAWS, ch. 33, § 53 (1966) (emphasis added).

See also COLO. REV. STAT. ANN. § 94-1-45 (1964). Most statutes, however, make no reference to lawful orders. See, e.g., CONN. GEN. STAT. ANN. § 27-60 (1960); FLA. STAT. ANN. § 250.31 (1962); GA. CODE ANN. § 86-605 (1971); HAWAII REV. STAT. § 121-26 (1968); IOWA CODE ANN. § 21A.50 (1967); KY. REV. STAT. ANN. § 38.480(1) (1974); LA. REV. STAT. § 29.31 (1969); MD. ANN. CODE art. 65, § 52 (1972); MICH. COMP. LAWS § 32.579 (Supp. 1974); MO. ANN. STAT. § 41.700 (1969); NEB. REV. STAT. § 55-168 (1974); N.J. STAT. ANN. § 38A:4-9 (1968); N.Y. MIL. LAW § 235 (McKinney 1953); N.C. GEN. STAT. § 127-106.2 (Supp. 1969); OHIO REV. CODE ANN. § 5923.37 (Page 1973); OKLA. STAT. ANN. tit. 44, § 72 (1954); TENN. CODE ANN. § 7-143 (1973); WIS. STAT. ANN. § 21.13 (1972). Several also provide that a plaintiff in such an action may be required to post security for costs. See, e.g., *Shea v. Rotnour*, 135 N.Y.S.2d 694 (Sup. Ct. 1954); COLO. REV. STAT. ANN. § 44-1-47 (Supp. 1971); MD. ANN. CODE art. 65, § 52 (1972); NEB. REV. STAT. § 55-69 (1974); N.Y. MIL. LAW § 235 (McKinney 1953); OKLA. STAT. ANN. tit. 44, § 212 (1955). Others provide that if the plaintiff loses, he may be assessed treble expenses. See, e.g., MD. ANN. CODE art. 65, § 52 (1972); N.M. STAT. ANN. § 9-4-2, 9-10-250 (1974); N.Y. MIL. LAW § 235 (McKinney 1953).

There is little support in the case law to justify the application of these statutes in as broad a manner as their language would suggest. The most important cases followed the Civil War. During the War, the act which authorized the President to suspend the privilege of the writ of habeas corpus included a provision that relieved anyone who acted under the President's authority from liability for any act done pursuant to the statute. Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755. This act was then amended to provide that the defense would apply to acts or omissions during the rebellion, but not after the date of the amendment, which were pursuant to any order of the President, Secretary of War, or any military officer of the United States. Act of May 11, 1866, ch. 80, § 1, 14 Stat. 46. These provisions were upheld by the Supreme Court in *Mitchell v. Clark*, 110 U.S. 633 (1884), where Justice Miller observed that

[f]or most of these acts there was constitutional power in Congress to have authorized them if it had acted in the matter in advance. It is possible that in a few cases, for acts performed in haste and in the presence of an overpowering emergency, there was no constitutional power anywhere to make them good.

. . . .

That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it. *Id.* at 640.

The actual holding of *Mitchell v. Clark* is, however, not at all broad. It stands only for the proposition that Congress has power to pass immunity legislation to the extent that the actions affected may be *constitutionally* cloaked from redress. If the actions are unconstitutional, the immunity will not be a valid exercise of legislative power. Thus, in *Milligan v. Hovey*, 17 F. Cas. 380 (No. 9605) (C.C.D. Ind. 1871), a civil damage action was brought against persons who in violation of the constitution had tried the civilian plaintiff by military commission during the Civil War. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); note 187 *supra*. The defendants sought to defend their actions by relying upon the same congressional enactments that were subsequently to be upheld in *Mitchell v. Clark*. In charging the jury, which found for the plaintiff, the judge made it clear that the acts could not cloak unconstitutional acts:

If an act is prohibited by the constitution, and it is beyond the power of congress to authorize it, then it may be said the wrong done by the act is not subject to complete indemnity by congress, because then the prohibition of the

constitution to protect private rights would be without effect. 17 F. Cas. at 381.

Similarly, in *McCall v. McDowell*, 15 F. Cas. 1235 (No. 8673) (C.C.D. Cal. 1867), the court held the provision of 1866 to be a constitutional means of shielding a subordinate officer from civil liability, but not the superior officer who gave the order in question, since the superior was not himself acting pursuant to a lawful order. *Id.* at 1246-47. See *WIENER* 156-58. Thus, even though the post-Civil War immunity provisions were broadly worded, as are the state statutes noted *supra*, they were not construed to insulate all persons for all acts that may have been committed. They protected only those who were specifically covered by the statutory immunity, and who had not engaged in unconstitutional action. There is also little support for the broad language of the state immunity statutes in the contemporary state cases. See *Griffin v. Wilcox*, 21 Ind. 370, 373 (1863); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); *Bryon v. Walker*, 64 N.C. 39 (1870). But see *Teagarden v. Graham*, 31 Ind. 422 (1869); *State ex rel. Judge v. Gatzweiler*, 49 Mo. 17 (1871). In addition to state immunity provisions, the soldier may also be protected by common law defenses relating to the law of riot and self-defense. See, e.g., *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974).

Professor Engdahl has urged that "any attempt to immunize any public officer or agent from the civil liability he would otherwise bear for injuries resulting from his unconstitutional official acts, even if performed in good faith or under military orders, without affording alternative redress for the injured person against the state itself, must be judged unacceptable." *Engdahl III* 416. He relies upon the Civil War cases, the dissenting opinion of Justice Field in *Mitchell v. Clark*, 110 U.S. 633, 648-49 (1884), *United States v. Lee*, 106 U.S. 196 (1882), and *Pointexter v. Greenhow*, 114 U.S. 270 (1884). See also Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972).

There is, as we have already noted, considerable doubt about the permissibility of any legislative attempt to immunize Guardsmen from the civil consequences of acts which neither the legislature nor the governor could validly authorize. The acts which apply only to conduct in pursuance of "valid orders" may avoid attack on this ground because, unlike the traditional English acts or the Civil War legislation immunizing those who detained persons under presidential authority, they do not attempt to deprive a citizen of all remedies, but only to deny a remedy against subordinate Guardsmen acting under the orders of a superior who is given no immunity from suit. There is arguable precedent for a limited immunity of this nature, at least in actions for damages for false imprisonment under state acts. See *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *McCall v. McDowell*, 15 F. Cas. 1235 (No. 8673) (D. Calif. 1867). With regard to the acts which purport to immunize all conduct, however, their validity is much less certain. These acts could be interpreted to immunize only those who acted pursuant to a "valid order", in order to avoid doubts concerning constitutionality, although it is doubtful that the legislatures so intended. In the absence of such an interpretation, the acts may be unconstitutional to the extent that they purport to immunize actions which abridge rights protected by the Constitution.

A further difficulty lies in the likelihood that an action brought after a disorder would not be a common law tort suit, but rather an action in a federal court for deprivation of civil rights under color of law against state Guardsmen, pursuant to 42 U.S.C. § 1983 (1970), or its counterpart, the "constitutional" cause of action against members of the armed services or federalized Guardsmen. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Indeed, this was the basis for litigation in *Moyer, Valdez*, and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Such an action might also raise the issue of executive immunity, and the extent to which it would insulate the senior commanders and their civil superiors. In its most simple formulation, the doctrine of executive immunity states that

officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those

duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

. . . . The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. *Barr v. Matteo*, 360 U.S. 564, 571, 572-73 (1959).

See also *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 1949 (1950). The doctrine of executive immunity, therefore, immunizes executive department personnel from liability arising from acts undertaken within their powers, but where an act is undertaken that cannot be justified by the purpose for which the power was vested, no immunity exists. See e.g., *Pierson v. Ray*, 386 U.S. 547 (1967) (protection of judge from civil rights action); *Barr v. Matteo*, 360 U.S. 564 (1959) (protection of executive official from libel action); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (protection of legislator from civil rights action); *Spalding v. Vilas*, 161 U.S. 483 (1896) (protection of executive official from libel action). The argument that there should be an absolute executive immunity in a civil emergency context was clearly rejected by the Supreme Court in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *noted in* 60 IOWA L. REV. 191 (1974), where it was made clear that the standard of immunity that would be applied to a governor and ordinary Guardsmen will be quite different:

When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. . . . Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.

. . . . These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. 416 U.S. at 246-48.

Thus, in *Scheuer*, the Court held that the executive immunity doctrine would be applicable to actions taken during a civil disorder, but that it would not be absolute and its availability in any given case would depend upon the facts and circumstances. A similarly qualified immunity was held to be applicable to federal executive officials in *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974). Although an effort was made in earlier litigation relating to the Kent State incident in 1970 to have an Ohio immunity statute invalidated, OHIO REV. CODE ANN. § 2923.55 (Supp. 1972), it was rejected by the Sixth Circuit, *Morgan v. Rhodes*, 456 F.2d 608, 614-15 (6th Cir. 1972), and review of that decision was not sought in the Supreme Court. *Gilligan v. Morgan*, 413 U.S. 1, 4 n.4 (1973). For a thoughtful, pre-*Scheuer* analysis of the constitutional problems that are inherent in the application of sovereign immunity principles to prevent responsibility for unconstitutional conduct, see Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548 (1972) (the article does not, however, deal as such with executive immunity or with the nearly universal state immunity statutes cited earlier in this note).

The issues involved in the immunity area are complex, and at this point not fully resolved, but it is not necessary to accept the full reach of Professor Engdahl's conclusion to suggest that the present state of the law is unsatisfactory to indicate clearly to

We think the wisest way to deal with these problems is to limit the powers of the military when used to assist civil authorities to those of the police,²¹⁰ while expanding and stating with precision the powers which the police should be permitted to utilize in major disorders. Before discussing the kinds of powers that we think should be entrusted to civil authorities in times of serious civil disorder,²¹¹ we must confront the recently articulated thesis that, notwithstanding the authorities which have already been considered, neither National Guardsmen nor regular troops may be constitutionally used as military units to deal with civil disorder.

IV. THE "NO MILITARY FORCE IS PERMISSIBLE" THESIS

In recent commentary, it has been suggested, primarily by Professor David E. Engdahl, that the use of troops in the manner in which they have been used by governors and presidents in this country for at least the last century is per se unconstitutional because of "the most fundamental of all the principles of due process—the abiding conviction that military force should not be used in suppressing

the Guardsman who serves his state and nation in times of civil disturbance whether and to what extent he may be required to face civil and criminal proceedings for his disturbance-related actions. These issues have sufficiently serious collateral consequences to the capability of the criminal justice system to respond to civil disorder to justify thoughtful re-examination and legislative modification. If police officers or military troops who are employed to suppress civil disorder need statutory immunity for actions taken in response to valid orders of their superiors, it may then be appropriate or necessary to waive sovereign immunity to some extent to allow those who have suffered injury as a result of those actions to seek vindication or recompense from the governmental entity responsible for the action. A similar result may flow from analysis and evaluation of the executive immunity doctrine in this context. The thrust of *Scheuer* clearly reflects the belief that in times of civil emergency, those who are responsible for acting must have sufficient discretion to act effectively. To balance this need with the interest of those who are injured to be compensated, it may simply be necessary to provide the type of qualified immunity sanctioned in *Scheuer* and to also make provision for those who are injured to have their claims heard on the merits.

210. The concept is not new. It was urged by Professor Ballantine in a series of articles over a half century ago. Ballantine, *Martial Law*, 12 COLUM. L. REV. 529 (1912); Ballantine, *Military Dictatorship in California and West Virginia*, 1 CALIF. L. REV. 413 (1913); Ballantine, *Unconstitutional Claims of Military Authority*, 24 YALE L.J. 189 (1915). His legislative proposal is less impressive to us. Ballantine, *Qualified Martial Law, a Legislative Proposal*, 14 MICH. L. REV. 102, 197 (1915). In making this recommendation, we are mindful that eminent authority favors the more flexible approach of permitting any action justified by necessity. WIENER 164. *But see* Mutter, *Some Observations on Military Involvement in Domestic Disorders*, 29 FED. B.J. 59, 63 (1968) ("[t]he lack of a clear legal limit on the exercise of the military's authority in its domestic role, therefore, not only inhibits the effective exercise of the military's function, but also jeopardizes the very basis of our legal structure").

211. See note 44 *supra*.

civil disorders."²¹² Although we certainly agree that our heritage must

212. *Engdahl I 2*. This conclusion is based upon the following premises: (a) a reading of English history that convinces the proponent that by the end of the seventeenth century English law was firmly committed to the principle that "[n]ever in peace-time—that is, so long as the ordinary courts were open—was government to resort to its armed forces to quell civil disturbances," *id.* at 16; (b) an interpretation of colonial charters that is said to support the same conclusion, *id.* at 18-22; (c) a conclusion that colonial resentment against the use of royal troops to suppress civil disorders was a major cause of the American Revolution, *id.* at 22-28; (d) a survey of Revolutionary War state constitutions that "reinforce the anti-militaristic principle of their English heritage," *id.* at 28; (e) an interpretation of the famous speech of Lord Mansfield, defending the use of troops in the Lord Gordon Riots of 1780, to mean troops could be used only as members of a posse; (f) a principle said to have been accepted by the drafters of the Constitution, *id.* at 31-35; (g) an interpretation of the militia and guaranty clauses of the Constitution to mean that troops could be used only in a rebellion, invasion, or "genuine" insurrection, or where there was conduct akin to treason, *id.* at 35-40; (h) a conclusion that the concern demonstrated over the military powers of the new federal government in the ratifying conventions must be interpreted to mean that the fifth amendment "inherently implied subjection of the military to the civilian power." *Id.* at 43. The thesis is expanded by reading the 1792 congressional delegation of authority to the President to use the militia to execute the laws of the United States to mean that the militia could only be used as part of a marshal's posse unless the marshal was unable to quell a disorder with the use of all men at his command, including the militia. *Id.* at 44-49; see also *Engdahl III* 402-08. The argument then suggests that this limited use of the troops was accepted until President Lincoln's assertion of greater powers during the Civil War. *Engdahl I* 49-55. Reliance on the use of soldiers as a distinctly military force, as distinguished from civilian members of a *posse comitatus*, did not occur, according to this interpretation, until after Reconstruction and the Posse Comitatus Act of 1878. *Id.* at 55-65. The argument then concludes by suggesting that troops constitutionally may be used against civilians only (1) in their capacity as civilians; (2) under the tactical command of local, state, or federal officials; (3) in the absence of an invasion, rebellion, or "genuine" insurrection; (4) when so used they are bound neither by orders nor military discipline; and (5) statutes which purport to subject them to military law, displace civil authority, or immunize soldiers for conduct during a disorder are an "excrescence upon our Constitution, and utterly void." *Id.* at 71. In *Engdahl II* the author restates the views expressed in *Engdahl I*, but goes further and queries whether the use of soldiers should be prohibited altogether. *Engdahl II* 216. In *Engdahl III*, the thesis was moderated slightly to the extent of conceding that troops may be used as units and not merely as individuals if under civilian tactical command. *Id.* at 419.

A similar approach has been adopted in other commentary. In Comment, *Executive Military Power: A Path to American Dictatorship*, 54 *NEB. L. REV.* 111 (1975), for example, the article is essentially premised upon the views of Professor Engdahl of English and American constitutional history, and undertakes to analyze executive power to deal with civil disorders in terms of what is identified as a "Posse Comitatus Doctrine"—that the civilian posse under local control is the only force that may be used to deal with civil disorders. *Id.* at 115-16. Given this norm, the author then, predictably enough, concludes that "[p]resent legislation concerning the use of military troops in civil disorders has deviated substantially from the intent of the Constitution's language." *Id.* at 125. A similar conclusion is reached with respect to judicial decisions in this area, observing, interestingly, that "[a]ctual standards defining and limiting executive power have not yet emerged." *Id.* at 142. The primary problem posed by this particular article is its doctrinal base. As will be considered in the following discussion, see notes 216-362 *infra* and accompanying text, there is little authoritative support for

produce concern about the use of troops in quelling civilian disorders, we fundamentally disagree with the conclusion that military force may not or should not be used for that purpose, if the ordinary civil procedures prove unable to maintain order. We do not read the English constitutional history of the use of troops in aid of the civil authority to support or require that conclusion, and we cannot agree that "a careful review" of Anglo-American legal history "discloses unmistakably that the traditional prohibition against using military troops in civil disorders, as adapted by the Mansfield doctrine, was well understood and was consciously and deliberately preserved as inherent in the concept of due process of law."²¹³ We are aware of no evidence that the due process clause of the fifth amendment was intended to deal at all with the subject of military aid to the civil power.

We think that appropriate concerns over the excessive use of force by military troops should not require an interpretation of the Constitution that would declare the pertinent laws of virtually every state, and of the federal government, to be unconstitutional. In our opinion, a far wiser approach would be to accept that military forces have been used as troops in support of civilian authorities throughout the modern history of England and the United States; there is, we think, respectable, although disputed, authority that troops may exercise broad powers when so used, in the absence of limiting legislation. However, it is sounder policy to limit their powers to those exercised by civilian law enforcement authorities.

In the following ways, we disagree with Professor Engdahl's conclusions.

A. *Local Control and Military Discipline*

The primary thesis advanced by Professor Engdahl is that troops may be used as soldiers, "as a uniquely military force," only where "civil authority has been incapacitated, whether by foreign attack or domestic rebellion."²¹⁴ In all other cases they must be used as supplementary personnel under local civilian control.²¹⁵ The "local" civilian officials should be state or federal depending upon whether the objective is state or federal law enforcement.²¹⁶

the so-called "Posse Comitatus Doctrine" in either English or American constitutional history. See also Note, *Martial Law and the National Guard*, 18 N.Y.L.F. 217 (1972); Note, *Constitutional Law—Martial Law—Preserving Order in the States: A Traditional Reappraisal*, 75 W. VA. L. REV. 143 (1972).

213. *Engdahl IV* 7.

214. *Id.* at 11.

215. *Id.* at 13.

216. *Engdahl III* 418. Where federal troops or federalized National Guardsmen are

Assuming a case in which civilian control is required, neither persuasive decisional authority nor cogent reasoning is offered for the conclusion that a governor is not a "civilian authority" or that there is anything of intrinsic federal constitutional significance in the decision by a state to place its troops under state, instead of city or county, control in coping with disorders, or to place responsibility for their conduct in the highest elected official of the state instead of a low level executive or appointed police official.²¹⁷ We recognize that a local

employed to enforce federal law, this would ordinarily mean the local federal marshal. If such troops were called to "quell violent disruptions or breaches of state law," this would mean subordination to state magistrates and police. *Id.* Apparently the use of federal troops pursuant to the guaranty clause is regarded as the enforcement of state law. *But cf.* Murray, *supra* note 80, at 144.

217. The case authority said to support such a conclusion does not withstand close scrutiny. A lower court in Pennsylvania did hold that a sheriff could avail himself of the services of a military organization as a posse, but it in no way suggested that the governor could not use them as military units. *Commonwealth v. Martin*, 7 Pa. Dist. 219, 224 (1898). Five years later, the Supreme Court of Pennsylvania made it clear that the law of Pennsylvania does permit such action by the governor. *See Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).

The leading case on this particular subject is probably *Ela v. Smith*, 71 Mass. (5 Gray) 121 (1855), and it held merely that when state troops were called out in accordance with a statutory procedure by a mayor, they could act only pursuant to the mayor's command. *See* note 206 *supra*. *See also* *United States v. Stewart*, 27 F. Cas. 1339 (No. 16,401a) (Crim. Ct. D.C. 1857) (troops called out by mayor); *State v. Coit*, 8 Ohio Dec. 62 (1897) (troops called out by sheriff). Although there is language in *Ela* which may be construed to suggest that the local official must decide not only what must be done but also how it must be done down to the finest detail, the language of the opinion can be read to require a somewhat less stringent procedure. Thus, the court stated that the local magistrate could not "delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power to take any steps or do any act to prevent or suppress a mob or riot." 71 Mass. (5 Gray) at 140. It then went on, however, to state in the same paragraph that

[i]t does not follow from this [that the local official shall have control of the troops], however, that the military force is to be taken wholly out of the control of its proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and to manage the details in which a specific service or duty is to be performed. *Id.*

Similar language is contained in *Coit*, where the court charged the jury that

[t]he military must perform only such service and render such aid as is required by a civil officer; but the military officers have a discretion, which they may freely use, as to the best methods and most effectual means to be employed to carry out an order received by them from the civil magistrate, the purpose of which is to prevent or suppress a riot, or protect property or life when a riot actually exists. 8 Ohio Dec. at 63.

In both *Ela* and *Coit*, therefore, the courts concluded that, when the troops are summoned in aid of the civil authority, the civil authority would be in control of their activities. Indeed, any other conclusion would mean that the troops would replace the civil authority. That conclusion does not, however, ineluctably mean that the military commander shall not have discretion to implement the decisions of the civil authority. The language quoted from each opinion thus vests in the military commander the authority to execute the orders that are given.

Any ambiguity in this regard was clarified in both Massachusetts and Ohio by leg-

magistrate commanded the troops under the English Riot Act of 1714,²¹⁸ and that in the early days of this country troops were frequently subject to such control, probably by analogy to the English practice or because of local statutes modeled after the Riot Act. It must be remembered, however, that the government of England in the eighteenth century provided no counterpart to the elected governors of a federal union. In substance, Professor Engdahl is arguing that because several eighteenth century statutes placed civil control in a local official, it must be unconstitutional for an American state in the twentieth century to entrust such responsibilities to its governor. In the absence of controlling precedent, or cogent reason, we do not believe that such a conclusion is either justified or defensible.

We also fail to understand Professor Engdahl's conclusion that the Constitution would be violated even if soldiers were used as members of a *posse comitatus* under the command of local civilian officials who entrusted no discretion to military officers, so long as the troops remain bound by their orders and military discipline and subject to court-martial.²¹⁹ Although we agree that the actions of soldiers must

islative action. In Massachusetts, for example, the applicable provision states that the civil authority shall give orders to the military officers in charge, setting forth the purpose to be accomplished, but the civil authority "shall not prescribe the military measures to be used or the orders to be issued by such officer who shall use such measures and issue such orders as he deems necessary to accomplish the purpose indicated." MASS. GEN. LAWS ANN. ch. 33, § 43 (1958). See also OHIO REV. CODE ANN. § 5923.23 (Baldwin 1974) (civil authority shall "designate in general terms the particular objects to be accomplished. The mode and means of execution shall be left to the discretion of the commanding officer"). See generally FAIRMAN 30.

The problems involved in denying military officers the right to make technical decisions, including whether to shoot, after their assistance has been sought by a magistrate are related quite well by Sir Charles James Napier:

I heard of a magistrate saying to an officer of the guards at Burdett's riots, 'Sir, you must disperse the rioters.' 'Yes, sir', answered the guardsman. 'Soldiers, prime and load.' 'Stop sir,' said the magistrate, 'you must not fire! What are you about?' 'Shall I charge with the bayonet then, sir?' asked the officer. 'Oh no, you must disperse the rioters.' 'But how am I to disperse them if I neither fire nor charge?' 'Oh, that is your business not mine. Do it as you like, only you must not fire or use your bayonets.' C. NAPIER, REMARKS ON MILITARY LAW AND THE PUNISHMENT OF FLOGGING 47 (1837).

Although the line between military control and limited discretion in carrying out orders of civilian authorities is indeed blurred, we think the early practice probably entrusted some discretion to military officers, although basic decisions as to means, such as whether to use lethal force, like the decision as to ends, were usually the province of civilian authority. We may be in error, but it is clear that *Ela* and the other cases relied upon for the necessity of local control were construing local statutes that had been invoked by local officials, and did not purport to define the constitutional power of the state under the Federal Constitution.

218. An Act for preventing Tumults and riotous Assemblies, and for the more speedy and effectual punishing the Rioters, 1 Geo. 1, c. 5, § III (1714).

219. Engdahl I 71; Engdahl III 417; Engdahl IV 13-14.

be subject to subsequent civilian judicial review,²²⁰ we think the defense of obedience to an order which would appear to be valid to a reasonable person is justifiable, and that immunity is justified if it is restricted to conduct pursuant to such orders.²²¹ Even if the opposite conclusions were reached, there is no good reason for removing the disciplinary sanctions which result from the obligation of troops to follow valid orders of a superior, disobedience of which is subject to court-martial²²²—a proposition that was clear in eighteenth century England.²²³

Professor Engdahl apparently concedes that troops may be used as units and not merely as individuals,²²⁴ noting that the Riot Commission favorably commented upon the superior discipline shown by Army units.²²⁵ To jeopardize this discipline seems a foolhardy way to protect civil liberties. It is one thing to insist that civil authorities should have precedence in asserting jurisdiction over any offense that occurs, in order to avoid the assertion of former jeopardy that might follow a prior trial by court-martial.²²⁶ But to remove the offender from court-martial jurisdiction altogether is a strange way of ensuring that the

220. *Engdahl I* 71; *Engdahl III* 417; *Engdahl IV* 13-14.

221. See note 209 *supra*.

222. The likelihood of a state court-martial for disobedience is small. Punishment is limited to 200 days confinement. 32 U.S.C. §§ 327, 330 (1970). The period of active duty normally involved when Guardsmen are called up to deal with a civil disorder is short. *But cf. Ex parte McKittrick v. Brown*, 337 Mo. 281, 85 S.W.2d 385 (1935) (which is said to be "a precedent of extremely doubtful value," WIENER 153-54); *United States ex rel. Seymour v. Fischer*, 280 F. 208 (D.C. Neb. 1922) (apparently accepting the same extreme view of the nature of civil disorders as did the West Virginia cases cited in note 205 *supra*). See also *United States ex rel. Toth v. Quarles*, 350 U.S. 1 (1955); Comment, *The Week-end Warrior and the Uniform Code of Military Justice: Does the Military Have Jurisdiction Over Week-end Reservists?*, 7 CALIF. W.L. REV. 238 (1970).

223. Mr. Clode, for example, quoted with approval a report which stated that the military duty of a Soldier remains whilst he acts under the orders of a Civil magistrate; that he is still necessarily subservient to, and that the command of the Magistrate cannot exempt him from, military discipline. On the contrary, when His Majesty, and officers by his command, authorize any Military corps to act in the assistance of the Civil magistrate, they do not authorize the individuals composing that corps to leave their Military duty, but require them to afford assistance to the Civil magistrate in obedience to and exercise of their military duty. 2 CLODE 145.

224. *Engdahl III* 419.

225. *Id.*

226. See *Grafton v. United States*, 206 U.S. 333 (1907); *Ex parte McKittrick v. Brown*, 337 Mo. 281, 85 S.W.2d 385 (1935). It is assumed that offenses committed during the performance of duties relating to the disturbance would be "service related," thereby providing a basis for the assertion of military jurisdiction. If not, civilian jurisdiction would be exclusive. See also *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969).

conduct will be reviewable in a civilian forum, particularly in view of the kinds of offenses directly relating to the maintenance of discipline which are made punishable only under military law.²²⁷

The idea of quelling a serious civil disorder, such as that which occurred in Detroit in 1967, with 10,000 National Guardsmen and regular troops under the command of a mayor who must specifically decide how each unit should proceed, communicate his wishes without any pre-existing chain of command, and expect voluntary compliance with his edicts by troops facing extreme provocation and no immunity for acts performed in good faith compliance with valid orders, is not appealing to us. The same can be said for the idea of enforcing a federal court order in Mississippi in 1962 with 14,700 troops deployed and 16,000 in reserve under the command of the United States Marshal for Mississippi, who would have had no power to punish anyone for wilful disobedience of his orders.²²⁸

B. *English Constitutional History*

English history during the relevant period does not sustain Professor Engdahl's conclusions that at the time of the American Constitution it was settled constitutional doctrine that soldiers could be used only as citizen members of a *posse comitatus* under the command of local officials who could delegate none of their authority. The history is in places confusing, but the outlines emerge with substantial clarity as a result of the careful historical analysis of two distinguished legal historians, one of military institutions,²²⁹ the other of the criminal law.²³⁰

As a common law proposition, every citizen had the duty to help sustain the King's peace.²³¹ This obligation was at an early time reflected in the institution of the *posse comitatus*, which authorized sheriffs and magistrates to call on their neighbors for aid in suppress-

227. See Articles 90-92, Uniform Code Military Justice, 10 U.S.C. §§ 890-92 (1970) (failure to obey, wilful disobedience, dereliction of duty).

228. See *Scheips*, *supra* note 97, at 48. Mr. Scheips has urged the use of marshals supported by deputized federal agents from other law enforcement organizations in lieu of troops. *Id.* at 71. Interestingly enough, Professor Engdahl does not discuss the use of troops to enforce court desegregation decrees, where the use of local officials may pose particularly difficult problems. See note 97 *supra*.

229. CLODE.

230. RADZINOWICZ. Surprisingly, Professor Engdahl does not refer to CLODE, RADZINOWICZ, WIENER, FAIRMAN, RANKIN, or RICH in any of the articles setting forth his thesis.

231. RADZINOWICZ 105.

ing disorder.²³² By the beginning of the eighteenth century, however, the institution of the posse was falling into disuse,²³³ though there are examples of its use as late as the first third of the nineteenth century.²³⁴ In the words of Professor Radzinowicz, "what was needed in such emergencies, however, was not a motly assortment of individuals called together at short notice but disciplined bodies, trained in the use of arms, accustomed to working together under some measure of discipline, and quickly available when called upon."²³⁵ After the Restoration, reliance was placed primarily on the militia,²³⁶ the yeomanry (voluntary cavalry),²³⁷ and the regular army.²³⁸ There can be no doubt that there was substantial concern over the size, concentration, and use of a standing army in time of peace,²³⁹ but in the second half of the eighteenth century "[i]n the absence of organized civil police, magistrates had seldom any means of preventing the first signs of disorder from building into active violence," and "[o]nce that had happened they had no alternative but to call in the armed forces, militia,

232. *Id.* at 106-07.

233. Thus, in M. BELOFF, *PUBLIC ORDER AND POPULAR DISTURBANCES 1660-1714* (1938), it is said that

[i]t is thus probable that the posse comitatus was still recognized as the force upon which lay, in the first instance, the obligation of preserving the public peace. Its actual utility for this purpose may, however, be doubted, though there is little direct evidence of its conduct in the face of disorder. Where the rioters had popular sympathy on their side the posse could not be relied upon for more than nominal obedience. . . .

For further evidence of the unreliability of civil forces it is only necessary to consider the large number of instances in which military help was called for almost immediately on the outbreak of disorder. Regular troops within the county affected could be called upon by the justices, or, it would seem, by the sheriff. Their legal powers of action, unless thus specially summoned to assist, remained for long a debatable point. *Id.* at 139-40.

See also 1 S. WEBB, *ENGLISH LOCAL GOVERNMENT, THE PARISH AND THE COUNTY* 488 n.4 (1963).

234. RADZINOWICZ 107.

235. *Id.*

236. *Id.* at 110-12. As early as 1717, there were criticisms of the efficiency of the militia. An early compiler of militia statutes complained that "experience shows that instead of that ready Compliance herein which might so reasonably be expected, the service of the militia is now so imperfectly as well as awkwardly performed, so deficient to the charge, and unfit for the design, that the same is more commonly accounted as just subject for ridicule and complaint than of any real use or security to the Kingdom." J. HARDESTY, *THE MILITIA LAW* viii (1718).

237. 2 CLODE 139-40; 4 RADZINOWICZ 112-15.

238. 4 RADZINOWICZ 114-24. Mr. Clode's research of the War Office Records indicates that the earliest "use of Troops in suppressing riots . . . bear date in Jan., 1716-17, and June, 1717." 2 CLODE 131.

239. 4 RADZINOWICZ 118-19, 134. The parliamentary inquiries into the use of the military in support of the civil authority in the eighteenth century are noted in 2 CLODE 134-37.

yeomanry, and above all the regular army, to quell the rioters."²⁴⁰

At least after the Riot Act of 1714,²⁴¹ troops were usually employed to suppress disturbances only after a request by magistrates, and normally functioned under the magistrates' command.²⁴² When

240. 4 RADZINOWICZ 116. A similar conclusion was reached by Mr. Clode. Thus, after reviewing the use of the military in aid of the civil authority in the eighteenth century, he concluded that

[f]rom this period [1717-1771] the legality of employing the Military in aid of the Civil Power has never been seriously questioned. Indeed, . . . the . . . controversies that have arisen have turned upon the relative responsibility imposed upon the Ministers of the Crown on the one hand, and the subordinate Officers (Civil and Military) on the other, in the suppression of riots by the Military. 2 CLODE 137.

It is also worth noting that Mr. Clode, writing in 1869, described the use of the military in the late eighteenth century as "clearly the foundation of the *existing practice* of calling out the Military in aid of the Civil Power." *Id.* at 132 (emphasis added). See also F. MATHER, PUBLIC ORDER IN THE AGE OF THE CHARTISTS 75 (1967).

An invaluable collection of War Office correspondence concerning the use of the military in support of the civil authority is contained in an appendix to Mr. Clode's discussion. 2 CLODE 617-52.

241. An Act for preventing Tumults and riotous Assemblies, and for the more speedy and effectual punishing the Rioters, 1 Geo. 1, c. 5 (1714). The Act made it a felony for twelve or more rioters to continue together for one hour after the proclamation of a magistrate ordering them to disperse. It required a magistrate to seize and apprehend all persons who failed to disperse, and provided for indemnity to the magistrates and those acting under their orders in the event that anyone was injured or killed in the process. The effect of the Riot Act has been described by Justice Stephen as follows:

As a standing army had come into existence before this act passed, the effect of it was that after making the proclamation and waiting for an hour the magistrates might order the troops to fire upon the rioters or to charge them sword in hand. To say so in so many words would no doubt have given great offense, but the effect of the indirect hint at the employment of armed force given by the statute was singular. 1 J. STEPHEN, *supra* note 209, at 203.

See also J. CARSWELL, FROM REVOLUTION TO REVOLUTION: ENGLAND 1688-1776, at 79 (1973); 2 CLODE 129-30.

Before the Riot Act, a rioter was guilty only of a misdemeanor unless his conduct amounted to constructive treason. If any rioter committed a felony, all were liable, and deadly force was justified when a rioter was resisting apprehension. If no felony was committed, only the nondeadly force necessary to restore order was justified, although apparently if a private person was called upon by a magistrate to help suppress a riot and killed a rioter who resisted, the homicide was *prima facie* justifiable. The Act thus added to the powers of the magistrates by authorizing the use of deadly force to disperse a riot if the magistrate complied with its provisions regardless of whether the rioters had committed some other felony. See 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 329-31 (1937); 10 W. HOLDSWORTH, *supra* at 705-08.

242. The language of instructions issued to troops differed widely. Thus, the instructions might stress the need to "repel force with force in case the civil magistrates shall find it necessary"; "repel force with force in case it shall be found necessary"; "not to repel force with force unless the Civil Magistrates . . . shall find it necessary"; "to repel force with force, if it shall be found absolutely necessary, and not otherwise"; "not to repel Force with Force, unless it shall be found absolutely necessary"; and "not to interfere at all unless explicitly requested to do so by the civil power"; not to act "unless thereunto required by the Civil Magistrates"; not to act unless "it shall be found abso-

the troops were called to the aid of a magistrate, moreover, it is clear that they served as "a uniquely military force" under their own officers, not as anything resembling a *posse comitatus*. Magistrates were expected to listen to the expert advice of military commanders,²⁴³ but the responsibility for making decisions was that of the magistrate, and officers were expected to convey the magistrate's decision to their troops, not to act independently. The degree of discretion involved in transmitting the directions of the magistrate into action by the troops was doubtlessly a variable which depended upon the character of the magistrate and the officer, the specificity of the magistrate's command, and the exigencies of the situation.²⁴⁴

English law did not, however, require a magistrate's order in all

lutely necessary"; "do not at all interfere in any of their things but at such times as they shall be required by the Civil Magistrates, who best will judge when they stand in need of Military assistance." See 4 RADZINOWICZ 129-30; 141-42. See also 2 CLODE 133, 623-24.

243. 4 RADZINOWICZ 138.

244. Thus, in *Rex v. Pinney*, 172 Eng. Rep. 962, 974-75 (1832), it was held that the mayor was justified in refusing to ride with the troops when requested to do so by their commander. The mayor fulfilled his duty, the court said, when he authorized the commanding officer to disperse the mobs. His duties were to give "general directions." When an officer subsequently refused to let the troops fire without an explicit order from the magistrate, he was found guilty of neglect of duty by a court-martial. 4 RADZINOWICZ 138, 148-49. See also 2 CLODE 151, 630-35.

The practice at the beginning of the nineteenth century is described in F. DARVALL, *POPULAR DISTURBANCES AND PUBLIC ORDER IN REGENCY ENGLAND* (reprint 1969) as follows:

The primary and normal responsibility for suppressing disturbances, and for arresting, and bringing to trial and judgement, any offenders against the law, lay with the local authorities, with the constables and justices. They were supposed to act on their own initiative and to use their own local forces and funds. They had, however, very often, and almost invariably in the event of serious or protracted disturbance, to appeal to the Home Secretary for emergency powers, for government funds, and for regular troops. In order to supervise the grant of these exceptional powers and forces the Home Secretary was forced to step out of his usual role of passive recipient of local reports and to become . . . directly responsible for dealing with disorders.

. . . .

These military forces [regular troops], which were used to replace the local militia and yeomanry which served in the first days or weeks of any disturbance if and when regular forces were not available, were under the command of their own officers, but at the disposal of the civil power. The area commander was supposed to plan his campaign in consultation with the civil and local authorities. He sent detachments of his force wherever and whenever they requested it. And these detachments were supposed to cooperate equally closely with the responsible local authorities in the places where they found themselves, acting only at their request. It was even necessary for parties of military, out to disperse nocturnal (sic) meetings or to apprehend offenders, to be accompanied by a magistrate (who could read the Riot Act) or at least by a constable (who could make legal civil arrests). The military did not, at least in theory, supersede the civil power. There was no declaration of martial law. The army merely served as if it were a police force, at the request and subject to the orders of the civil authorities, and it had to observe the normal legal procedure. *Id.* at 247, 261.

cases before troops could act. In extreme situations, where magistrates failed to act, commanders were under an obligation to use troops without any order by a magistrate and to meet force with force.²⁴⁵ Indeed, it was to vindicate this principle, and to correct an erroneous belief that had evolved to the contrary, that Lord Mansfield spoke in the 1780 debates in the House of Lords, following the suppression of the Lord Gordon riots in London and the speech of the King to both Houses of Parliament justifying his use of troops.²⁴⁶ In declaring this

245. Thus, Professor Radzinowicz states that

[t]he primary responsibility for maintaining public order might rest with the civil power, but nonetheless, the established principle was that an officer would fail in his duty if, from fear of responsibility, he allowed outrages to be committed which it was in his power to check, merely on the ground that there was no magistrate on the spot to give orders to the military. 4 RADZINOWICZ 147.

See also 2 CLODE 143 ("[i]n extreme cases where the danger is pressing and immediate . . . the Military . . . not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve lives and property of the people"); 10 W. HOLDSWORTH, *supra* note 241, at 706; F. MATHER, *supra* note 240, at 157.

246. 10 W. HOLDSWORTH, *supra* note 241, at 706-07. The Lord Gordon riots are considered in 3 RADZINOWICZ 89-107. The historic remarks of Lord Mansfield, stating the principles which underlie the use of power by the state to suppress riots, were as follows:

It has been taken for granted, my lords, and I wish sincerely the task had fallen upon some other noble lord, that his Majesty, in the orders he gave respecting the riots, acted merely upon his prerogative, as being entrusted with the protection and preservation of the state, in cases arising from necessity, and not provided for in the ordinary contemplation and execution of law. . . . [H]is Majesty, with the advice of his ministers, acted perfectly and strictly agreeable to law, and the principles of the constitution

. . . [I]t appears most clearly to me, that not only every man may legally interfere to suppress a riot, much more prevent acts of felony, treason, and rebellion, in his private capacity, but he is bound to do it as an act of duty; and if called upon by a magistrate, is punishable in case of refusal. What any single individual may lawfully do, so may any number assembled, for a lawful purpose; which the suppression of riots, tumults, and insurrections certainly is. . . . It is the peculiar business of all constables to apprehend rioters, and to endeavour to disperse all unlawful assemblies; to apprehend the persons so offending, and in case of resistance, to attack, wound, nay kill those who shall continue to resist. The very act of apprehending in arms the person, with every necessary power for the effectual performance of the duty prescribed by the law; and consequently every person acting in support of the law is justifiable respecting such acts as may arise in consequence of a faithful and proper discharge of the duties annexed to his office, if he does not abuse the power legally vested in him, which may in that case, according to the circumstances accompanying the transaction, degenerate into an illegal act, though professedly committed under the colour or pretext of law. . . .

The persons who assisted in the suppression of those riots and tumults, in contemplation of law, are to be considered as mere private individuals, acting according to law, and upon any abuse of the legal power with which they were invested, are amenable to the laws of their country. For instance, supposing a soldier, or any other military person, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt but he is liable to be tried and punished, not by martial law, but by the common and statute law of the realm; consequently, the false idea that we are living under a military government, or that the military have any more power, or other power, since the commencement of the riots, is the point which I rose

action to have been legally and constitutionally justified, Lord Mansfield (without the benefit of reference to his personal library, which had been destroyed by the rioters) stated that all citizens (including soldiers) had the duty, as citizens in their private capacity, to interfere to suppress riots, and that "[w]hat any single individual may lawfully do, so may any number assembled, for a lawful purpose; which the suppression of riots, tumults, and insurrections certainly is."²⁴⁷ Moreover, Lord Mansfield stated that anyone would be amenable to the ordinary courts of justice for his acts and omissions while engaged in the suppression of riots.²⁴⁸

The remarks of Lord Mansfield on this occasion are construed by Professor Engdahl to support the proposition that soldiers may be used only as civilians under command of local authorities.²⁴⁹ The circumstances in which the remarks were made clearly establish that Lord Mansfield, despite the ambiguity of his language, was defending the authority, and indeed the obligation, of soldiers to act pursuant to the orders of their officers without authorization from the local magistrates to suppress riots. Troops were summoned during the Lord Gordon Riots. The magistrates failed to give them any instructions, undoubtedly in part because of uncertainty concerning their powers arising out of an incident twelve years earlier when a magistrate had been tried (but acquitted) of murder for ordering troops to fire on rioters.²⁵⁰ The military, on the other hand, refused to act because of

to refute, and on that ground to remove those idle and ill-founded apprehensions, that any part of the laws or the constitution are either suspended or have been dispensed with.

On the whole, my lords, while I deprecate and sincerely lament the cause which rendered it indispensably necessary to call out the military to assist in the suppression of the late disturbances, I am clearly of opinion, that no steps have been taken which were not strictly legal, as well as fully justifiable in point of policy. Certainly the civil power, whether through native imbecility, through neglect, or the very formidable force they would have been obliged to contend with, were unequal to the task of suppressing the riots, and putting an end to the insurrection. The rabble had augmented their numbers by setting the felons at liberty. If the military had not been called in, none of your lordships can hesitate to agree with me, that within a very few hours the capital would have been in flames, and shortly reduced to an heap of rubbish. The King's prerogative is clearly out of the question. His Majesty and those who have advised him, have acted strictly conformable to law. The military have been called in, and very wisely called in, not as soldiers, but as citizens: no matter whether their coats be red or brown, they have been called in aid of the laws, not to subvert them, or overturn the constitution, but to preserve both. 21 THE PARLIAMENTARY HISTORY OF ENGLAND 694-98 (W. Cobbett ed. 1814).

We are aware of no evidence that his remarks were known to any of the delegates to the Constitutional Convention of 1787.

247. 21 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 246, at 695.

248. *Id.* at 696.

249. *Engdahl I* 34-35.

250. 4 Radzinowicz 131-34, 145.

their apparent belief that they could not act without the authority of the magistrate pursuant to the Riot Act.²⁵¹ The King, presiding over the Privy Council, intervened, and "[h]aving obtained the opinion of Mr. Wedderburn, the Attorney General, that by the law of England the force necessary to prevent the perpetration of crimes may be lawfully used, and that all the subjects of the realm, whether soldiers or civilians, may be lawfully employed in restoring and preserving the public peace, . . . gave orders to the military to act with the requisite vigor" ²⁵² The troops then acted as military units pursuant to the commands of their own officers. The King explained his action when the House of Parliament met again. The address approving the King's conduct was opposed by peers who questioned the use of the military, claiming that it could not be justified except by special exercise of the royal prerogative proclaiming martial law.²⁵³ Question was also raised whether the common law justified military interference without the approval of the magistrate, or whether it was "an extraordinary exertion, which the necessity of the case only could justify, and which demanded an act of indemnity."²⁵⁴ It was to these questions that Lord Mansfield addressed himself, concluding that the fact that soldiers are permanently organized and subject by the Mutiny Act to military discipline, and bound to obey the lawful orders of their superior officers, did not exempt them from the common law obligation of all of the King's subjects to keep the peace and disperse unlawful assemblies. In case of extreme emergency, they could lawfully do so without being requested to do so by the magistrates,²⁵⁵ but when the soldiers acted they were privileged to use only the force that was necessary to achieve their objective. Their common law powers were not superseded by the Riot Act. Shortly after Lord Mansfield's remarks were delivered, his position was recognized in the case law.²⁵⁶

It is quite clear, then, that the doctrine of the Attorney General,

251. *Id.* at 135.

252. 3 J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 431 (1874); 10 W. HOLDSWORTH, *supra* note 241, at 706-07. The "General Orders" issued were brief: "In obedience to an Order of the King in Council, the Military to Act without waiting for directions from the Civil Magistrates, and to use force for dispersing the illegal and tumultuous assemblies of the people." 4 RADZINOWICZ 143.

253. 3 J. CAMPBELL, *supra* note 253, at 432.

254. 4 RADZINOWICZ 145.

255. STEPHEN, *supra* note 209, at 203-204.

256. *Rex v. Pinney*, 172 Eng. Rep. 962 (1832); *Rex v. Kennett*, 172 Eng. Rep. 976 (1781). See also 2 CLODE 630-35 (notes of the opinion of the judges in *King v. Gillam*, a trial at Old Bailey on July 10, 1768, in which a magistrate's action in sending for the military and ordering them to fire to suppress a riot was upheld).

the Privy Council, Lord Mansfield, and the cases which followed, all sustain the conclusion that it was permissible to use troops in the late eighteenth century to quell a riot without the authority of a magistrate, but that in so acting their powers were no greater than those of anyone else in the kingdom.²⁵⁷ The standard of culpability was the same for citizen and soldier if either acted without the command of a magistrate, but troops could act without the authority of a magistrate, and, under the existing law, could use deadly force if a felony had been committed by one of the rioters.

We find a similar lack of support for Professor Engdahl's thesis in other significant events of English constitutional history. The Petition of Right of 1628²⁵⁸ was a landmark in the evolution of the rights of a free people, but it was not concerned with the use of troops to assist the civil power in dealing with domestic disorders. It concerned, rather, the summary trial of citizens pursuant to commissions issued by the King.²⁵⁹ Its language provides, in pertinent part, that

of late times divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law

By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed.²⁶⁰

The Petition of Right forbade only the practice of punishing those apprehended during the military suppression of riots by illegal tribunals.²⁶¹ It did not affect the ability of the crown to use the military to suppress riots. It is asserted, however, that the Petition of Right de-

257. For present British Law see *MANUAL OF MILITARY LAW* pt. II, § V (1972).

258. 3 Car. 1, c.1, §§ VII, VIII (1628).

259. Three such commissions are recited in STEPHEN, *supra* note 209, at 208-10.

260. W. STUBBS, *SELECT CHARTERS OF ENGLISH CONSTITUTIONAL HISTORY* 515, 516 (8th ed. 1900).

261. Thus, Justice Stephen has pointed out that "[t]he distinctive feature in all these commissions is, that they authorize not merely the suppression of revolts by military force, which is undoubtedly legal, but the subsequent punishment of offenders by illegal tribunals, which is the practice forbidden by the Petition of Right." J. STEPHEN, *supra* note 209, at 210. See also 1 CLODE 18-19; 2 CLODE 156-57; J. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689*, at 224 (1966); G. TREVELYAN, *ENGLAND UNDER THE STUARTS 142-44* (12th ed. rev. 1925). The Petition of Right, in other words, prevented the same abuse which the Supreme Court held unconstitutional in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See notes 187-91 *supra* and accompanying text.

clared "that the practice of dealing with riots by military means was 'wholly and directly contrary to the said laws and statutes of this your realm,'"²⁶² and that by the close of the seventeenth century "[n]ever in peacetime—that is so long as the ordinary courts were open—was government to resort to its armed forces to quell civil disturbances"²⁶³ The statements are, for the reasons noted, simply inaccurate.

Each of the other major developments in the English constitutional history as it related to civil riots failed to significantly affect the accepted practice of using troops in aid of civilian authority. The new Militia Act of the Restoration²⁶⁴ was designed primarily for the protection of the realm from foreign invasion and rebellion, but militia were widely used in dealing with domestic disorders of a lesser magnitude,²⁶⁵ and other statutes specifically permitted the use of military force in domestic matters.²⁶⁶ The Bill of Rights of 1689 contained no prohibition against a standing army or its use against civilians if authorized by Parliament.²⁶⁷ Indeed, the number of people killed by troops in England during the years immediately preceding the Constitutional Convention is staggering by contemporary standards.²⁶⁸

262. *Engdahl IV 5.*

263. *Engdahl I 16.*

264. An Act for ordering the Forces in the several Counties of this Kingdom, 13 & 14 Car. 2, c. 3 (1662).

265. See BELOFF, *supra* note 233, at 140-51; Miller, *The Militia and the Army in the Reign of James II*, 16 HIST. J. 659-79 (1973). The use of militia to quell rioting in the eighteenth century is likewise clear. See J. WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY* 431-33 (1965). One reason for their frequent use rather than the *posse comitatus* may have been the ability to use militia outside of the county in which they were raised. An Act for ordering the Forces in the several Counties of this Kingdom, 13 & 14 Car. 2, c. 3, § II (1662).

266. See An Act to prevent and suppress seditious Conventicles, 22 Car. 2, c. 1, IX (1670) (providing that if a justice were unable to dissolve a conventicle and arrest those illegally attending it, he could obtain the assistance of the armed forces to do so); An Act for preventing Frauds, and regulating Abuses in his Majesty's Customs, 13 & 14 Car. 2, c. 11, XXXII (1662) (by which officers of the armed forces were authorized to aid customs authorities in preventing smuggling).

267. An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown, 1 W. & M., sess. 2, c. 2 (1689).

268. See G. RUDÉ, *THE CROWD IN HISTORY: A STUDY OF POPULAR DISTURBANCES IN FRANCE AND ENGLAND 1730-1848*, at 255 (1964). Professor Rudé lists the following civilian casualties as a result of military action between 1740 and 1780: five killed at Norwich in 1740; ten killed, twenty-four wounded at West Riding turnpike riots of 1753; eight killed at Kidderminster, 100 killed or wounded at Hexham in 1761; two killed at Frome, and one killed at Stroud in the food riots of 1766; eleven killed at St. George's Fields 1768; 285 killed in the Lord Gordon Riots.

We do not wish to overstate our position. The fear of a standing army continued for at least a century after the Protectorate,²⁶⁹ and parliamentary control only partially answered the fear of thoughtful people who were concerned that the army might be used to jeopardize the liberties of Englishmen.²⁷⁰ While public outrage was expressed when authorities did not put a halt to mob violence through the use of available forces,²⁷¹ it would also be expressed if force was used and death resulted.²⁷² One influential writer advocated the use of the *posse comitatus*, transformed into a quasi-military organization, as an alternative to the use of troops.²⁷³ Others urged greater reliance upon the militia, which was apparently never regarded as the same kind of threat to liberty as was the army.²⁷⁴ Throughout this troubled period, there was concern over when it would be appropriate to use the militia or regular troops, and who should make the crucial decisions concerning the manner in which they should be employed. It was clear that military law governed the individual soldier when troops were used in riot control,²⁷⁵ but he remained accountable to the civil law as well for his conduct, and, at least when not acting pursuant to the direct order of a magistrate, his culpability would be judged by the normal standard of the common law. At the same time, there was concern over the plight of the soldier caught between the dictate of military law that he obey an apparently valid order and the command of the common law that force was used at the peril of the actor if a jury should later determine that it was excessive.²⁷⁶ The dilemma of the magistrate and the soldier was very real—a decision to use force might result in a subsequent indictment for murder, and a decision not to do so might result in a charge of dereliction of duty.²⁷⁷ In practice there were ways

269. See TANNER, *supra* note 261, at 225; 4 RADZINOWICZ 115-24.

270. See note 239 *supra*.

271. See 3 RADZINOWICZ 89-93.

272. See 4 RADZINOWICZ 132-34 (St. George's Fields riot).

273. W. JONES, *LEGAL MODE OF SUPPRESSING RIOTS* (1780), which Professor Radzinowicz asserts was "constantly used by all radicals as an argument both against the use of the army for the maintenance of order and against the establishment of a professional police force." 3 RADZINOWICZ 94. The views expressed by Sir William Jones are surprisingly similar to those expressed by Professor Engdahl, though he does not go so far as to suggest that regular troops who happen to be in a county should be recruited into the posse of that county. The theme is understandably recurrent in Anglo-American legal thought. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 48-88 (1849) (Woodbury, J., dissenting).

274. See 3 RADZINOWICZ at 97-100.

275. 4 RADZINOWICZ at 124-30.

276. See note 209 *supra*.

277. Thus, in *Rex v. Pinney*, 172 Eng. Rep. 962 (1832), the court observed that a person, whether a magistrate, or peace-officer, who has the duty of suppress-

to ameliorate the dilemmas, but theory provided no easy answers.²⁷⁸ In the early nineteenth century there were complaints that the magistrates placed too great a reliance upon troops and used them too frequently.²⁷⁹ As their use became more common, the justification that they were acting only as civilians became more shallow.²⁸⁰

In short, the problems of the eighteenth century were quite similar to those of today. No democratic nation should enjoy the spectacle of the use of its troops to subdue unruly elements within the body politic, but unless a permanent police force is maintained at a size much larger than required for usual functions, some resort to the other trained, equipped forces of the state is necessary to deal with emergencies.

C. *American History*

Evidence for the proposition that military force cannot constitutionally be used against civilians in aid of the civil authority is even weaker in the American colonial experience. Little help is provided by analysis of the colonial charters. The objectives of the organizers of colonial expeditions to America differed substantially, and the language of the charters probably reflected more of what they sought and the political decisions of the King and his advisers concerning how much power should be granted to them, than any contemporary understanding of legal limitations upon royal power or constitutional limitations upon the use of local militia outside the realm. In addition, as has previously been noted,²⁸¹ the phrase "martial law" was frequently used to mean "military law" or "military government" during the period. A reading of the charters certainly does not suggest that the King intended that the holders of the charters should be precluded from using locally raised militia to deal with domestic disturbances. Such an attitude would, indeed, have been remarkable in a frontier

ing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty *Id.* at 971.

278. In practice, of course, the monarch could avoid injustice by the entry of a *nolle prosequi* or pardon, see note 209 *supra*, or the good sense of juries could be relied upon, as reflected in the verdicts in *Rex v. Pinney*. *Id.*

279. 4 RADZINOWICZ 153.

280. See 3 H. HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 262-63 (8th ed. 1855), where it is said that "for the doctrine of some judges, that the soldier, being still a citizen, acts only in preservation of the public peace, as another citizen is bound to do, must be felt as a sophism, even by those who cannot find an answer to it."

281. See note 66 *supra*.

wilderness where royal troops were few and organized police forces non-existent. The language of the charters does not deal explicitly with the question of when militia could be used in civil disorders, and the language concerning the power to "use and exercise Martial Law" shows no consistent pattern.²⁸² There is, however, evidence that the militia was used for this purpose. Thus, a careful study of the use of

282. Professor Engdahl apparently sees such a pattern. *Engdahl I* 18-22. In part his conclusion rests upon his own misconception that the Petition of Right prohibited the use of troops in civil disorders as well as the trial of offenders by military commission. See note 261 *supra* and accompanying text. In part the pattern also results from his reading of his own, and we would suggest erroneous, interpretation of the English law of the period into ambiguous language, or the omission of language, in the charters. He concedes that wide powers to "use and exercise Martial Law in Cases of Rebellion or Mutiny" were contained in the Elizabethan charter to Sir Walter Raleigh in 1584, the Stuart Charters of James I and Charles I to Virginia in 1606 and 1609, and the Charter of New England of 1620. *Id.* at 18-19. Such provisions do not appear in the Massachusetts Charter of 1629 (allegedly because of the Petition of Right), but appear again in the Maryland Charter of 1632 and the Maine Charter of 1639. *Id.* at 19. The absence of such broad language in the Charters of Connecticut in 1662 and Rhode Island in 1663 is viewed as a redemption of the due process principle of the Petition of Right. *Id.* at 19-20. The inclusion of specific authority "to exercise martial law against mutinous or seditious persons" and "to exercise martial law in cases of rebellion, tumult or sedition" in the Carolina Charter in 1663 and 1665, and in the 1669 Fundamental Constitutions of Carolina, are discounted, as is the repetition of broad language similar to that in the 1639 Maine Charter and the 1664 and 1674 charters. *Id.* at 20-21. The absence of such provisions in the 1680 New Hampshire Charter, the 1681 Pennsylvania Charter, and the 1691 Massachusetts Charter is again viewed as a triumph of the Petition of Right. *Id.* at 21-22. Provision was made in the Georgia Charter of 1732 for the use of "martial law in time of actual war and invasion or rebellion, in such cases, where by law the same may be used or exercised," but we are told that the last clause is "an obvious general reference to the provision of the Petition of Right, the Bill of Rights, and the Riot Act." *Id.* at 22 n.94.

Professor Engdahl makes no reference to New Jersey. In the grant of New England from Charles II to the Duke of York in 1676, provision was made for "full power and authority to use and exercise marshall law in cases of rebellion, insurrection and mutiny, in as large and ample manner as our lieutenants in our counties within our realm of England have or ought to have, by force of their commission of lieutenantancy, or any law or statute of this our realm." 5 F. THORPE, *supra* note 65, at 2590, 2592 (1909). Previously, but after the Restoration in 1664, the Lords Proprietors of New Jersey (or New Caesarea) had authorized the general assembly "to constitute train'd bands and companies, with the number of soldiers . . . [t]o suppress all mutinies and rebellions." *Id.* at 2539. In 1672, the Lords Proprietors made a declaration of their intent in making the earlier agreement, and stated that the Governor would have the power to call up any persons "in case of foreign invasion or intestine mutiny or rebellion." *Id.* at 2545.

We fail to see any consistent pattern. Authority was granted and denied by Charles I before the Puritan Revolution. It was granted and denied by Charles II after the interregnum. We doubt that the provisions referred to dealt at all with the use of militia in aid of the civil power, as distinguished from the power to try soldiers and civilians by military courts—that is, powers relating to military law and government (a wholly different subject).

militia during the period of the early eighteenth century has concluded that

[m]ilitia put down riots in both town and countryside. On the occasions when it did not quell disorder, the reason was usually simple: the militia was doing the rioting, or was in sympathy with the rioters. It seems reasonable to say that the militia was not a means of defense at all, but an instrument of either order or insurrection, depending on the circumstances.²⁸³

A decision not to use the militia in a given situation did not necessarily reflect any concern over constitutional power. Some scholars have concluded that mob violence in early America was not confronted with the speed and force sometimes exercised during later periods because

mobs in that period functioned more as an accepted part of the political structure than an attack on it, largely because authorities unofficially recognized their legitimacy so long as they acted within certain bounds. This reflected in part English preference for granting the lower classes occasional informal sway to giving them any established influence on government and in part on willingness to use the mob to make imperial authorities heed local interests.²⁸⁴

There is no evidence of which we are aware to sustain the conclusion that colonial governments could not use their militias to deal with serious civil disorders.²⁸⁵

283. J. SHY, *TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION* 40 (1965). See also Shy, *A New Look at Colonial Militia*, 20 WM. & MARY Q. 175, 181 (3 Ser. 1963).

284. Maier, *Popular Uprisings and Civil Authority in Eighteenth Century America*, 27 WM. & MARY Q. 3 (3 Ser. 1970); Wood, *A Note on Mobs in the American Revolution*, 23 WM. & MARY Q. 635 (3 Ser. 1966). See also Grimsted, *supra* note 28, at 362 (citing W. Smith, *Anglo-American Society and the Mob, 1740-1775* (Ph.D. dissertation, Claremont)).

285. The available evidence is, indeed, quite to the contrary. Thus, in describing the machinery of order, a distinguished historian of the period has observed that

[b]y the eighteenth century magistrates turned most often . . . to the *posse comitatus*, literally the 'power of the country,' but meaning in practice all able-bodied men whom a sheriff might call upon to assist him. Where greater and more organized support was needed, magistrates would call out the militia. P. MAIER, *FROM RESISTANCE TO REVOLUTION* 16 (1973).

Similarly, a leading historian of the National Guard states that

[b]y delving into voluminous colonial histories, many other incidents can be found in which the local troop units functioned one month in defensive or offensive operations against the Indians and within the next year sallied forth again, with the same equipment, against disturbers of the domestic peace. It may well be doubted if, in a given mission, anyone troubled his mind as to whether it put the troop-unit in the role of conventional soldiers, or in the status of a *posse comitatus*. Hill, *supra* note 67, at 64.

The same author suggests that most colonial disorders, as in America today, were readily handled with a minimum of force by local police agencies, and that "[i]f and when they

It is not necessary to accept the characterization of General Gage as a military autocrat who was insensitive to the limitations placed by civil law upon the use of military power,²⁸⁶ or to accept a simplistic

were overawed, the local company of volunteer militia was available in its traditional role as a militarily organized, stand by *posse comitatus*." *Id.* at 68. It is clear that the term "*posse comitatus*" is not used in its technical sense as unorganized civilians called to suppress disorder by the sheriff. The phrase is frequently used as a rough way of indicating the fact that the militia was not a force on permanent active duty but a citizen force organized for military service. Thus, Professor Corwin refers to the militia as a "kind of . . . *posse comitatus*," CORWIN 139, and General Ansell refers to the militia as a "*posse comitatus* armed for military service." Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471 (1917). Volunteer militia were apparently particularly well organized. See D. BOORSTIN, AMERICANS: THE COLONIAL EXPERIENCE 363-72 (1958); M. CUNLIFFE, SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA 1775-1865, at 177-254 (1968).

Use of regular troops was less common because they were fewer, the separation between the military representing the royal governor and the colonist was more distinct, and legislatures and magistrates more frequently sympathized with the rioters. See MAIER, *supra* at 18. Thus, by the time the Massachusetts Riot Act expired (July 1, 1770), no magistrate in the state would use it. ZOBEL, *infra* note 287, at 347 n.40. Riot Acts, modeled after the English Riot Act of 1714, were enacted in Connecticut (1722), Massachusetts (1751), New Jersey (1747), Pennsylvania (1764), North Carolina (1771), and New York (1774). MAIER, *supra* at 24-25. Like the English Act, however, no reference was made to the use of troops (except for the North Carolina Act which specifically referred to the militia), the language referring instead to the magistrate's right to seek assistance from "such other person or persons." The language was broad enough to include not only civilians but also militia and regulars. See note 241 *supra*. The Pennsylvania statute was enacted specifically for the purpose of authorizing the use of regular troops against "the Paxton" boys who were victimizing Indian proselytes. J. SHY, *supra* note 283, at 206.

286. *Engdahl I* 23-26. This judgment of General Gage is quite different from that which emerges from the definitive biography. J. ALDEN, GENERAL GAGE IN AMERICA (1948). Indeed, Colonel Wiener suggests that "[w]hatever may be said of his purely soldierly abilities, and assuredly he will never be ranked among Britain's great captains, his correspondence reveals him to have been up to then [1774] a thoughtful, temperate, and law-abiding administrator . . . ;" and that "as long as there was still no fighting [1774-75], General Gage's own orders reflect a wholehearted desire to avoid quarrels with the colonists, and breathe a scrupulous regard for legality." F. WIENER, *supra* note 65, at 78-79, 81-82 (1967). Thus, in 1765, during the Stamp Act trouble, he informed the Governor of New York that the military could do nothing except in aid of the civil power. J. SHY, *supra* note 283, at 210. The use of troops against civilian rioters in New York in 1766, referred to by Professor Engdahl, *Engdahl I* 24, followed instructions to local commanders to proceed only with a New York magistrate and with a Massachusetts magistrate if the troops followed into that colony. Only after the fighting drifted into spasmodic affrays did Gage order his commanders to pursue and kill anyone who fired on the troops without the assistance of a magistrate. J. SHY, *supra* note 283, at 217-21. Throughout this period, he had accepted the role of a military commander as a passive instrument of a civil magistrate who was wholly responsible for the maintenance of law and order. *Id.* at 408. In 1773, he received ambiguous instructions not to use troops without the express consent of the Sovereign in aid of civil magistracy unless in cases of absolute and unavoidable necessity or until it had been clearly shown that every

account of the Boston Massacre,²⁸⁷ to agree that the presence of a standing army without the consent of colonists, the quartering of troops, the removal of cases involving soldiers from the normal jurisdiction of the civil courts, and the conduct of General Gage in 1774-1775 in assuming civil powers, whether or not justified,²⁸⁸ were important causes of the dissatisfaction that erupted in the American Revolution. A combination of the kinds of concern that troubled Englishmen at home,²⁸⁹ and these local exacerbations, produced an opposition to domestic militarism that has fortunately continued to be an American tradition.²⁹⁰ It should also be remembered that the colonial opposition was directed against a standing army which had been imposed upon the colonists without their consent in a time of peace, and against appointed royal governors who were supported by troops while applying imperial policies of a Parliament in which colonists were not represented. It was these practices that in the colonists' view had rendered the "Military independent and superior to the Civil Power."²⁹¹ Occasion did not arise to either oppose or endorse the use of a colonial militia, organized pursuant to local legislation and commanded by an elected governor, against dissidents defying locally enacted laws.

power in the colony had been exerted without effect. *Id.* In 1774, as Governor, he requested the cabinet to define exactly his authority to use force in quelling disturbances without the advice and consent of his Council. *Id.* It was generally understood that a colonial governor could employ military force only with the advice and consent of his council. See L. LABAREE, *ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776*, at 397 (1935). The cabinet replied that as governor he was first magistrate and could use troops, although the cabinet hoped it would not occur. The reply finished with an ambiguous statement to the effect that the answer did not mean to interfere with any existing constitutional powers. J. SHY, *supra* note 283, at 408-09. General Gage did not declare martial law in Boston until five days before Bunker Hill, when, in fact, the superior courts of Massachusetts were not open and operating. F. WIENER, *supra* note 65, at 83.

287. The authoritative work is H. ZOBEL, *THE BOSTON MASSACRE* (1970). See also 3 *LEGAL PAPERS OF JOHN ADAMS* (L. Wroth and H. Zobel eds. 1965). Mr. Zobel attributes the incident to a fundamental legal misconception, encouraged by radicals among Bostonians, that soldiers could not fire on civilians unless authorized to do so by a civilian magistrate. As a matter of fact, soldiers, of course, had the right of self-defense, as Adams effectively argued to the jury. H. ZOBEL, *supra*, at 290-91. The magistrate who had been approaching the crowd was chased away. *Id.* at 196. Mr. Zobel concludes that acquittal was justified in the case. *Id.* at 303. It is not surprising that Bostonians, who learned their law from the local press, entertained different views. See *BOSTON UNDER MILITARY RULE 1768-1769* (O. Dickerson comp., 1936).

288. See note 286 *supra*.

289. See text accompanying notes 269-70 *supra*.

290. See A. EKIRCH, *THE CIVILIAN AND THE MILITARY* (1956); W. MILLIS, *ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY* (1956).

291. *DECLARATION OF INDEPENDENCE* (1776).

The new state constitutions enacted during and shortly after the Revolution "customarily asserted, along with the right of a people to bear arms in their own defense, the danger of standing armies in time of peace, the superiority of the civil over the military authority, the right to freedom from troops being quartered in private dwellings, and prohibitions against military appropriations for longer than one or two years."²⁹² Some states added other protections against militarism, usually in the form of requiring legislative acquiescence before extraordinary measures could be used.²⁹³ Every state made the Governor Commander-in-Chief of the militia,²⁹⁴ but none precluded the use of the militia in civil disturbances. Not one of the original states has ever interpreted a constitutional provision declaring that the military power shall be subordinate to the civil power to preclude the use of troops in civil disorders.

The event most relevant to the use of troops against civilians occurring between the Revolution and the Constitutional Convention was "Shay's Rebellion" of 1786. It arose when armed mobs in Massachusetts prevented the orderly sitting of the courts, after the rendition of judgments against debtors which were regarded as harsh. Although the United States arsenal at Springfield was threatened, the disorder was suppressed by the Massachusetts militia expanded by volunteers. The inability of the federal government under the Articles of Confederation to enforce federal laws, protect federal property, or provide assistance to a state became clear, and it was one of the causes for the resolution calling the Constitutional Convention in 1787.²⁹⁵

The delegates to the Constitutional Convention brought with them not only a fear of a standing army in time of peace, and a strong belief in the supremacy of the civil power over the military, but also a realization that a new federal government must have the power to enforce its own laws and protect individual states from domestic disorders beyond their individual capacity to resist. There was concern that the militia remain primarily a state institution as well as a recognition that the federal government must have some power over the militia if the citizen soldiers of different states were to be welded together to serve as a national force. These concerns were reflected in a document that satisfied state and federal interests in the militia; divided powers

292. Ekirch, *The American Liberal Tradition and Military Affairs*, in BAYONETS 141.

293. *Engdahl I* 28-30.

294. *Id.*

295. See 3 FARRAND 528 (letter from James Madison to John Tyler); Hill, *supra* note 67, at 72-73; R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 84 (1967); C. ROSSITER, 1787, *THE GRAND CONVENTION* 56-57 (1966).

between the Congress and the President over the militia; provided for the use of federal force to protect states against domestic violence and to execute the laws of the United States; permitted, but did not require, a standing army; and struck a balance acceptable to both those who feared anarchy and those who feared military despotism.²⁹⁶ Thus, Congress was given the power to "raise and support Armies,"²⁹⁷ to make rules for the government and regulation of the military forces,²⁹⁸ to "provide for organizing, arming, and disciplining, the Militia,"²⁹⁹ to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"³⁰⁰ and to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."³⁰¹ The President, on the other hand, was made Commander-in-Chief of the military forces of the union, and the militia when called into federal service,³⁰² and was given the duty to "take Care that the Laws be faithfully executed . . ."³⁰³ Finally, the United States assumed the obligation to protect each state against domestic violence upon request by any state.³⁰⁴

We find no basis in the debates of the Convention for the conclusions that federal assistance to the states was to be limited to "that sort of armed violence comparable to foreign invasion in its imperious assault on an established republican government," or that authorization for use of the militia to "execute the laws of the Union" was intended to authorize military force only in cases of "such resistance to law as would constitute treason."³⁰⁵ Edmund Randolph, who introduced the Virginia Plan, was concerned not only with the lack of any national power to suppress rebellion under the Articles of Confederation, but also that the character of the national government should be such as to secure against "seditions in particular states," pointing to "the prospect of anarchy from the laxity of government every where."³⁰⁶ Similarly, Roger Sherman thought that one of the objects of union was defense against internal disputes and resorts to force.³⁰⁷ James Wilson

296. WEIGLEY, *supra* note 295, at 86-87; HUNTINGTON, *supra* note 65, at 163-69.

297. U.S. CONST. art. I, § 8, cl. 12.

298. *Id.* cl. 14.

299. *Id.* cl. 16.

300. *Id.* cl. 15.

301. *Id.* cl. 18.

302. *Id.* art. II § 2, cl. 1.

303. *Id.* § 3.

304. *Id.* art. IV, § 4.

305. *Engdahl I* 39.

306. 1 FARRAND 18-19.

307. *Id.* 133.

regarded the object of the guaranty clause to be "to secure the states [against] dangerous commotions, insurrections and rebellions."³⁰⁸ Mr. Randolph also viewed the object of the clause as the suppression of "domestic commotions."³⁰⁹ With respect to the guaranty clause, probably the most important point, for our purposes, was the defeat of a motion to strike out "domestic violence" and insert "insurrection."³¹⁰ Another provision to authorize federal intervention to subdue a rebellion in any state on application of its legislature was deleted.³¹¹

It seems clear, then, that the framers at different times considered the possibility of using the phrases "domestic violence," "domestic commotion," "insurrection," and "rebellions," tentatively accepted the phraseology "domestic violence" and then specifically rejected a proposal that "insurrection" be substituted for the broader phrase. Under these circumstances, a conclusion that their intent was to authorize intervention only in "rebellions" or "insurrections," in the narrow sense of these terms, is simply unjustified.

We also cannot accept the argument that when the framers authorized Congress to provide for calling forth the militia in order to execute the laws of the Union,³¹² they meant only to authorize its use in circumstances approximating treason.³¹³ Charles Pinckney observed that in order to execute the national laws, the choice lay between a standing army and the militia, and he argued in favor of the proposition that the militia should be utilized to provide security against "Foreign Invasions or Domestic Convulsions," pointing out that "they are in fact the only adequate force the Union possess, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution."³¹⁴ The New Jersey Plan proposed that if any body of men in any state should "oppose or prevent" the carrying into execution of the Acts of Congress, the federal executive should be authorized to call forth the power of the Confederated States "or so much thereof as may be necessary to enforce and compel an obedience to such Acts"³¹⁵ Similarly,

308. 2 FARRAND 47.

309. *Id.*

310. *Id.* 459.

311. *Id.* 313.

312. U.S. CONST. art. I, § 8, cl. 15.

313. *Engdahl I* 28-30.

314. 3 FARRAND 118. The defense of the militia as the only alternative to a standing army is a constant theme. See 2 FARRAND 388 (remarks of James Madison).

315. 1 FARRAND 245. The New Jersey Plan is set forth in 3 FARRAND 611-16.

Edmund Randolph's notes speak of the power "to execute the Laws of the Union to repel Invasion to inforce Treaties [and] suppress internal [commotion],"³¹⁶ and Roger Sherman commented that "the States might want their Militia for defence [against] invasions and insurrections, and for enforcing obedience to their laws."³¹⁷ When the clause was presented to the Convention in its present form, on August 23, it passed without dissent.³¹⁸

The only argument that is advanced against the obvious meaning of the words is that three days earlier the treason clause had been limited to "treason against the United States,"³¹⁹ from which Professor Engdahl infers that the language of the militia clause must have been intended to apply to only "engaging in war" or "treason."³²⁰ Such speculation finds support in neither the debates of the Convention³²¹ nor the views of constitutional scholars.³²² Indeed, the only

316. 2 FARRAND 144.

317. *Id.* 332. In his notes on the New Jersey Plan, see note 315 *supra*, Roger Sherman also made the following entry:

That the legislature of the United States have power to make laws calling forth such aid from the people . . . as may be necessary to assist the civil officers in the execution of the laws of the United States 3 FARRAND 616.

318. 2 FARRAND 390.

319. U.S. CONST. art. 3, § 3.

320. *Engdahl I* 39.

321. The debates that surrounded the militia clause related to who should have control of the militia rather than what occasions would be appropriate for calling it forth. See 2 FARRAND 384-88; Scott, *The Militia*, S. Doc. No. 695, 64th Cong., 2d Sess. 30-37 (1917). Thus, James Madison observed that

[t]he primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the Militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution. 2 FARRAND 386-87 (emphasis in original).

322. In his discussion of the militia clause, Justice Story made the following observations:

The next power of congress is "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions."

This clause seems, after a slight amendment, to have passed the convention without opposition. It cured a defect severely felt under the confederation, which contained no provision on the subject.

The power of regulating the militia, and of commanding its services to enforce the laws, and to suppress insurrections, and repel invasions, is a natural incident to the duty of superintending the common defence, and preserving the internal peace of the nation. In short, every argument, which is urged, or can be urged against standing armies in time of peace, applies forcibly to the propriety of vesting this power in the national government. There is but one of two alternatives, which can be resorted to in cases of insurrection, invasion, or violent opposition to the laws; either to employ regular troops, or to employ the militia to suppress them. In ordinary cases, indeed, the resistance to the

pertinent discussion in the debates would suggest a contrary conclusion. Thus, in the preliminary debates on the clause on August 18, James Madison's notes report that Charles Pinckney was concerned that the nation's security required a "real military force," due to his "scanty faith in Militia." With respect to the militia, he observed that "[t]he United States had been making an experiment without it, and we see the consequence in their rapid approaches toward anarchy."³²³ This comment was footnoted in Madison's notes to say that it "had reference to the disorders particularly which had occurred in Massachusetts [Shay's Rebellion] which had called for the interposition of the federal troops."³²⁴ Although the precise meaning of these comments is not clear, they at least suggest that the power contained in the militia clause was not limited to circumstances that might be characterized as involving "treason."

In the ratifying conventions that followed the Constitutional Convention, the anti-Federalists attacked the militia and army articles with vigor.³²⁵ Most of the objections centered around the authoriza-

laws may be put down by the *posse comitatus*, or the assistance of the common magistracy. But cases may occur, in which such a resort would be utterly vain, and even mischievous; since it might encourage the factious to more rash measures, and prevent the application of a force, which would at once destroy the hopes, and crush the efforts of the disaffected. The general power of the government to pass all laws necessary and proper to execute its declared powers, would doubtless authorize laws to call forth the *posse comitatus*, and employ the common magistracy, in cases, where such measures would suit the emergency. But if the militia could not be called in aid, it would be absolutely indispensable to the common safety to keep up a strong regular force in time of peace. The latter would certainly not be desirable, or economical; and therefore this power over the militia is highly salutary to the public repose, and at the same time an additional security to the public liberty. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 81-82 (3d ed. 1858).

See also B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 74-75 (1963); 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1554 (1929). The phraseology used in the militia articles was not novel. Compare U.S. CONST. art. I, § 8, cl. 15 with the provisions of the English Agreement of the People of 1648:

We do not empower [Parliament] to impress or constrain any person to serve in foreign war, either by sea or land, nor for any military service within the kingdom; save that they may take order for the forming, training, and exercising of the people in a military way, to be in readiness for resisting of foreign invasions, suppressing of sudden insurrections, or for assisting in execution of the laws; and may take order for the employing and conducting of them for those ends; provided, that, even in such cases, none be compellable to go out of the county he lives in, if he procure another to serve in his room. C. GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 368-69 (3d ed. 1906).

323. 2 FARRAND 332.

324. *Id.* See also Scott, *supra* note 321, at 34; H.R. Doc. No. 398, 69th Cong., 1st Sess. 570 (1927). Shay's Rebellion is discussed at note 295 *supra* and accompanying text.

325. See generally Wiener, *The Militia Clause, supra* note 97, at 185-86. This controversy had been forecast in the Convention debates. See 2 FARRAND 330-33, 384-88.

tion of a standing army and the extensive congressional powers over the militia,³²⁶ particularly the power of the federal government to transfer the militia of one state to another state.³²⁷ The defense was equally spirited,³²⁸ and the result was a series of proposed amend-

326. See Wiener, *The Militia Clause*, *supra* note 97, at 185-86.

327. One of the dominant features of colonial use of militia was the unwillingness of one colony to come to the aid of a neighbor. BOORSTIN, *supra* note 285, at 358. See, e.g., 3 FARRAND 207-08 (objections of Luther Martin).

328. Hamilton and Madison used the rhetoric of the day in defending the provisions. See THE FEDERALIST No. 8, 23-39 (A. Hamilton); 41, 43 (J. Madison) (B. Wright ed. 1961). We think it is clear that they agreed that under the proposed constitution military force would not become the ordinary means for executing national laws and that the *posse comitatus* would suffice for ordinary exigencies. Federal military force would be used in domestic situations only where the local civil authorities could not maintain order. These situations would include circumstances such as rebellion or insurrection, used in the sense of an uprising against the established law and order, which would be beyond the powers of civil authority to suppress. See note 85 *supra*. No suggestion is made that a federal marshal must draft a state militia into the services of the federal civil power before the state militia could be federalized.

The views of Hamilton and Madison are of sufficient importance to the present discussion, and identify the merits of the controversy over the militia in such clear terms, as to warrant extended treatment. Hamilton did not regard the use of an army against a mob as an "evil," as suggested by Professor Engdahl, *Engdahl I* 40-41, though he did observe that a standing army might, as such, be regarded as a "necessary evil" in some circumstances. Thus, he stated that

[t]he army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people. THE FEDERALIST No. 8, *supra*, at 122.

He also observed that

[t]he principal purposes to be answered by union are these—the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks THE FEDERALIST No. 23, *supra*, at 199.

Hamilton also argued in *Federalist No. 26* that the English Constitution did not prohibit standing armies, but standing armies without the consent of Parliament. *Id.* at 214-17. His remarks in *Federalist No. 27* were designed to answer arguments that opposition to a federal government would be so intense that a military force would usually be required to execute its laws. *Id.* at 219. In *Federalist No. 28*, he acknowledged that force may sometimes be necessary to deal with "seditions" and "insurrections", *id.* at 222-23, and that although a state militia would normally be adequate to deal with a "slight commotion", army forces might be required for an "insurrection" or "rebellion". *Id.* at 223-24. He was also of the opinion that the ability of the national government to utilize the state militia would be the most effective curb against a more objectionable need for resort to the force of a standing army. Thus, in *Federalist No. 29* he said that

[i]f the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary, will be a more certain method of preventing its existence than a thousand prohibitions upon paper. *Id.* at 227.

He did not, moreover, believe that the army was the only vehicle for enforcing the law. Congress could authorize the calling forth of the militia, *id.* at 227-28, since it would be natural and proper for the militia of neighboring states to be marched into another

"to resist a common enemy, or to guard the republic against the violence of faction or sedition." *Id.* at 231.

James Madison also defended the necessity of federal aid to the states in times of domestic violence. Thus, he observed in *Federalist No. 43* as follows:

Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State, especially a small State as by a majority of a county, or a district of the same State; and if the authority of the State ought in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. *Id.* at 313.

Madison's views were made clearest in the debates in the Virginia Convention of June, 1788, as were the objections to those views expressed by Henry Clay and Patrick Henry. Thus, on June 14, 1788, Mr. Clay "wished to be informed why Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution." He was answered as follows:

Mr. MADISON supposed the reasons of this power to be so obvious that they would occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing and enable the Government to make use of their services when necessary. Scott, *supra* note 321, at 58.

Madison and Clay also had a colloquy relating to the ability of the national government to use the militia of one state to aid another:

Mr. CLAY apprehended that by this power our militia might be sent to the Mississippi. He observed that the sheriff might raise the *posse comitatus* to execute the laws. He feared it would lead to the establishment of a military government, as the militia were to be called forth to put the laws into execution. He asked why this mode was preferred to the old, established custom of executing the laws.

Mr. MADISON answered that the power existed in all countries; that the militia might be called forth for that purpose under the laws of this State and every other State in the Union; that public force must be used when resistance to the laws required it, otherwise society itself must be destroyed; that the mode referred to by the gentleman might not be sufficient on every occasion, as the sheriff must be necessarily restricted to the *posse* of his own county. If the *posse* of one county were insufficient to overcome the resistance to the execution of the laws, this power must be resorted to. He did not, by any means, admit that the old mode was superseded by the introduction of the new one. And it was obvious to him that when the civil power was sufficient this mode would never be put in practice. *Id.* at 63.

They also debated the necessity for a provision authorizing the militia to be used "to execute the laws":

Mr. CLAY made several remarks; but he spoke too low. He admitted that he might be mistaken with respect to the exclusion of the civil power in executing the laws. As it was insinuated that he was not under the influence of common sense in making the objection, his error might result from his deficiency in that respect. But he thought that another gentleman was as deficient in common decency as he was in common sense. He was not, however, convinced that the civil power would be employed. If it was meant that the militia should not be called out to execute the laws in all cases, why were they not satisfied with the words, "repel invasions, suppress insurrections"? He thought the word *insurrection* included every opposition to the laws; and if so,

it would be sufficient to call them forth to suppress insurrections, without mentioning that they were to execute the laws of the Union. He added that, although the militia officers were appointed by the State governments, yet, as they were sworn to obey the superior power of Congress, no check or security would result from their nomination of them.

Mr. MADISON. Mr. Chairman, I can not think that the explanation of the gentleman last up is founded in reason. It does not say that the militia shall be called out in all cases but in certain cases. There are cases in which the execution of the laws may require the operation of militia, which can not be said to be an invasion or insurrection. There may be a resistance to the laws which can not be termed an insurrection. *Id.* at 75-76.

Patrick Henry also expressed concern about the use of the militia to quell riots and enforce the laws:

The honorable gentlemen [Mr. Madison] said that the militia should be called forth to quell riots. Have we not seen this business go on very well to-day without military force? It is a long-established principle of the common law of England that civil force is sufficient to quell riots. To what length may it not be carried? A law may be made that, if twelve men assemble, if they do not disperse, they may be fired upon. I think it is so in England. Does not this part of the paper bear a strong aspect? The honorable gentleman, from his knowledge, was called upon to show the instances, and he told us the militia may be called out to quell riots. They may make the militia travel and act under a colonel or perhaps under a constable. Who are to determine whether it be a riot or not? Those who are to execute the laws of the Union? If they have power to execute their laws in this manner, in what situation are we placed? Your men who go to Congress are not restrained by a bill of rights. They are not restrained from inflicting unusual and severe punishment, though the bill of rights of Virginia forbids it. What will be the consequence? They may inflict the most cruel and ignominious punishments on the militia, and they will tell you that it is necessary for their discipline. *Id.* at 77.

Madison's reply was as follows:

I really thought that the objection in the militia was at an end. Was there ever a constitution in which, if authority was vested, it must not have been executed by force, if resisted? Was it not in the contemplation of this State, when contemptuous proceedings were expected, to recur to something of this kind? How is it possible to have a more proper resource than this? That the laws of every country ought to be executed can not be denied. That force must be used, if necessary, can not be denied. Can any government be established that will answer any purpose whatever unless force be provided for executing its laws? The Constitution does not say that a standing army shall be called out to execute the laws. Is not this a more proper way? The militia ought to be called forth to suppress smugglers. Will this be denied? The case actually happened at Alexandria. There were a number of smugglers who were too formidable for the civil power to overcome. The military quelled the sailors, who otherwise would have perpetrated their intentions. Should a number of smugglers have a number of ships the militia ought to be called forth to quell them. We do not know but what there may be a combination of smugglers in Virginia hereafter. We all know the use made of the Isle of Man. It was a general depository of contraband goods. The Parliament found the evil so great as to render it necessary to wrest it out of the hands of its possessor.

The honorable gentleman says that it is a government of force. If he means military force, the clause under consideration proves the contrary. There was never a government without force. What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty or not, as he pleases, would be a new species of government, or rather no government at all. The ingenuity of the gentleman is remarkable in introducing the riot act of Great Britain. That act has no connection or analogy to any regulation of the militia, nor is there anything in the Constitution to warrant the General Government to make such an act. It never was a complaint in Great Britain that the militia could be called forth. If riots should happen, the militia are proper to quell it, to prevent a resort to another mode

. . . .

ments dealing with the military,³²⁹ two of which were accepted as amendments,³³⁰ and the remainder rejected.³³¹ The debates demonstrate a healthy concern for subordination of the military to the civil power, but do not suggest that a federalized militia could not be used to enforce federal law or to assist a state that requested aid in dealing with serious domestic disorder. The fact that separate amendments were deemed necessary to place limitations upon the federal military powers authorized in the Constitution, and a special clause inserted in the fifth amendment to exempt the armed services from the guarantee of grand jury indictment,³³² is persuasive evidence that no one thought that the due process clause of the fifth amendment was designed to limit the use of the militia or army in dealing with domestic disorders.

Further, we find nothing in the history of the United States between 1790 and the Civil War which justifies the interpretation of the Constitution advocated by Professor Engdahl. There were indeed a few isolated cases which imposed civil liability upon soldiers who defended on the basis that they had acted under orders³³³—the most notable of which was the famous Louisiana case striking down Andrew Jackson's assertion of martial law in New Orleans in 1814.³³⁴

An act passed a few years ago in this State to enable the Government to call forth the militia to enforce the laws when a powerful combination should take place to oppose them. This is the same power which the Constitution is to have. There is a great deal of difference between calling forth the militia when a combination is formed to prevent the execution of the laws and the sheriff or constable carrying with him a body of militia to execute them in the first instance, which is a construction not warranted by the clause. There is an act, also, in this State, empowering the officers of the customs to summon any persons to assist them when they meet with obstruction in executing their duty. This shows the necessity of giving the Government power to call forth the militia when the laws are resisted. It is a power vested in every legislature in the Union, and which is necessary to every government. He then moved that the clerk should read those acts, which were accordingly read. *Id.* at 78-80.

Finally, Mr. Henry wanted to know what authority the state government would have over the militia, and Madison's response was that

the State governments might do what they thought proper with the militia, when they were not in the actual service of the United States. They might make use of them to suppress insurrections, quell riots, etc., and call on the General Government for the militia of any other State to aid them if necessary. *Id.* at 81.

329. See CUNLIFFE, *supra* note 285, at 44-45; Engdahl I 43-44.

330. U.S. CONST. amend. II (right of the people to keep and bear arms); amend. III (preventing the quartering of soldiers).

331. See CUNLIFFE, *supra* note 285, at 44-45.

332. No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in time of war or public danger, . . . U.S. CONST. amend. V.

Professor Engdahl notes that an attempt to change the words "public danger" to "foreign invasion" was rejected. Engdahl I 43 n.203.

333. See Engdahl I 51.

334. Johnson v. Duncan, 3 Martin 530, 6 Am. Dec. 675 (La. 1815). Andrew Jack-

Other cases suggested that when troops were used to quell civil disturbances they could be held responsible for some types of conduct,³³⁵ but were usually resolved in favor of the troops.³³⁶ The general thrust of these cases, to say nothing of their holdings, does not suggest that a governor cannot constitutionally use the militia to quell a civil disorder of a magnitude that is beyond the capability of local police forces, or that a President cannot constitutionally provide federal troops or federalized militiamen to a state legislature which requests assistance in the face of serious domestic violence with which it is unable to cope. While it is true that on the eve of the Civil War it was proposed that the posse, including troops, be utilized as an alternative to the actual use of troops to enforce the Fugitive Slave Law,³³⁷ the justification in terms of civil supremacy over the military is less persuasive than the obvious intent to avoid the necessity of issuing a proclamation which would have been required as a condition to the use of troops, but not required for the use of a posse.³³⁸ Similarly, the invocation by President Buchanan of the principle of military subordination to the civil power to justify the decision not to use troops against the seceding states is authority for nothing except the extent to which statesmen will go in reinterpreting the law to meet the demands of political exigency.³³⁹

There is also no support for Professor Engdahl's interpretation of the constitutional provisions to be found in the legislation of Congress following adoption of the Constitution. Although militia legislation had been introduced in 1789,³⁴⁰ the first statute was not passed until 1792. Prior to the passage of the Militia Act of 1792,³⁴¹ members of the House had wrestled with a formula that would satisfactorily express the common view that the militia should not be used for minor or trivial matters.³⁴² The result was a provision which stated that

son was indemnified by an act of Congress for the fine that was imposed upon him, Act of Feb. 16, 1844, ch. 2, 5 Stat. 651.

335. The general principles that may be drawn from the whole range of martial law-type cases are considered at notes 161-211 *supra* and accompanying text.

336. *See, e.g.,* Luther v. Borden, 48 U.S. (7 How.) 1 (1849); United States v. Stewart, 27 F. Cas. 1339 (No. 16,401a) (Crim. Ct. D.C. 1857); *Ela v. Smith*, 71 Mass. (5 Gray.) 121 (1855).

337. 6 OP. ATT'Y GEN. 466 (1854). *See Presidential Authority* 142.

338. *Presidential Authority* 142.

339. 9 OP. ATT'Y GEN. 516 (1860). *See* 5 J. RICHARDSON, *supra* note 101, at 634.

340. *See Wiener, The Militia Clause, supra* note 97, at 186-87.

341. Act of May 2, 1792, 1 Stat. 264.

342. 3 ANNALS OF CONGRESS 574-77 (1792).

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, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.³⁴³

The Act also made it clear that troops were not to be used if the laws could be executed by marshals with the powers conferred upon them,³⁴⁴ which were the same powers in executing the laws of the United States as sheriffs had in executing state laws.³⁴⁵ They already had power to command "all necessary assistance" in the execution of their duties.³⁴⁶ In all probability, the earlier act had conferred power to summon a posse upon a marshal, as Hamilton had predicted would happen;³⁴⁷ certainly the two acts together conferred this power. Undoubtedly a marshal could lawfully summon citizens who were also members of a state militia.

Although the Militia Act of 1792 reflects the sentiments that had been expressed in both the Constitutional Convention of 1787, and the later ratifying debates,³⁴⁸ Professor Engdahl concludes that it overreached the intent of the drafters of the militia clause. Thus, he suggests that the differences in membership between the Convention and the Congress in 1792 caused the latter to lose sight of the belief of the former that the phrase to "execute the Laws" in the militia clause was equated with "treason."³⁴⁹ We agree that the membership was indeed dissimilar,³⁵⁰ but, as already noted, there is no evidence to support the "treason-equivalence" theory.³⁵¹ The members of the Convention had no such thought, and, not surprisingly, the Congress in 1792 interpreted its constitutional powers to authorize the use of the militia in cases far less serious than treason.

343. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264.

344. *Id.*

345. *Id.* § 9, 1 Stat. 265.

346. Act of Sept. 24, 1789, ch. 20 § 27, 1 Stat. 73, 87.

347. THE FEDERALIST No. 29 (A. Hamilton).

348. See notes 296-332 *supra* and accompanying text.

349. Engdahl I 45.

350. Compare H.R. Doc. No. 398, 69th Cong., 1st Sess. 85-86 (1927) (list of delegates appointed by the states represented in the Constitutional Convention) with 1 ANNUALS OF CONGRESS 16-21, 93-104, 933-37, 1041-56 (1789-91) (list of members of the Senate and the House).

351. See notes 312-18 *supra* and accompanying text.

Professor Engdahl goes further, however, and asserts that under the Militia Act of 1792, before state militia could be federalized, the marshal was first required to summon them to serve in a posse, and only when the marshal, with the state militia posse, was unable to execute the laws could the President use the militia as a military force.³⁵² There are no judicial opinions interpreting the Act, and hence no authoritative determinations of its meaning. Three years after its enactment it was repealed, and a new statute omitting the requirement of notification to the President by a judge was enacted.³⁵³ In 1807, at the request of President Jefferson, authority was granted to the President to use regular forces whenever the use of militia was permitted.³⁵⁴ In 1861, the limitation that the militia could be used only if there were combinations "too powerful to be suppressed" was removed from the statute and authority was granted to use militia or regular troops when it was "impracticable . . . to enforce, by the ordinary course of judicial proceedings, the laws of the United States"³⁵⁵ The power of the marshals to use troops as part of a *posse comitatus* was repealed by the Posse Comitatus Act of 1878.³⁵⁶ The law in this regard has been unchanged since 1861, so that the validity of Professor Engdahl's analysis of the 1792 Act is significant only to the extent that it reflects a contemporary understanding of constitutional limitation or as an argument that the present law should be changed.

Even if Professor Engdahl's interpretation of the 1792 Act were accepted, there is no reason to conclude that Congress felt a constitu-

352. *Engdahl I* 48.

353. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424.

354. Act of Mar. 3, 1807, ch. 39, 2 Stat. 443.

355. Act of July 29, 1861, ch. 25, 12 Stat. 281. It may be doubted whether the broader language actually changed the practice to any significant extent. Perhaps more important in terms of military-civilian relations was the change in legislative policy from exclusive reliance upon the militia to vindicate the federal power in the 1792 and 1795 legislation to an alternative use of regular forces in 1807, to almost exclusive reliance upon regular forces at the beginning of the twentieth century, when the power to use the militia was limited to situations where the President was "unable with the regular forces to execute the laws of the United States." See 10 U.S.C. § 3500 (1970). But see note 97 *supra* for the Justice Department and Department of the Army's view that the Dick Act does not limit a President's authority to federalize a state National Guard. The Dick Act, Act of Jan. 21, 1903, ch. 196, 32 Stat. 775, also changed the method by which the President called the militia into service. Since 1903, he has been authorized to issue orders to militia officers *through* the governor. 10 U.S.C. § 3500 (1970). Previously his call went *to* the governor. No President has relied exclusively upon the militia since the Whiskey Rebellion of 1794, and regular troops were used exclusively between the Civil War and the Little Rock incident in 1957. See Coakley, *supra* note 78, at 22, 26.

356. Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145. See notes 133-38 *supra*.

tional necessity to act as it did. Furthermore, we do not think that the existing evidence sustains his interpretation. If Congress had intended that federal marshals should draft a state militia into federal service as a posse before a state militia could be called into federal service by the President, it presumably would have said so. It did not, and the probable reason that it did not was a delicate concern for federalism. The militias were at that time state organizations in substance as well as name.³⁵⁷ The power of Congress over them had been vigorously contested in the ratifying conventions,³⁵⁸ and it had been a bitter pill for some states to accept the proposition that the President of the United States could use a state militia to enforce federal law. It is unthinkable that Congress in 1792 would have conferred that power on federal marshals.

The Whiskey Rebellion of 1794 provides an example. In 1794, after the home of a revenue inspector had been burned, collectors' offices closed, and federal officials exiled from Western Pennsylvania, President Washington decided to act. Justice Wilson provided the necessary certification, although it is clear that the local federal marshal had not attempted to recruit the Pennsylvania militia as part of a posse. Indeed, the Governor of Pennsylvania declined to call out the state militia and advised the President against its use by the federal government. The President, exercising his power under the Militia Act of 1792 to employ militia force from adjacent states when the militia of a state was unable or unwilling to suppress an unlawful combination within the state,³⁵⁹ made requisitions on the governors of Pennsylvania, Virginia, Maryland, and New Jersey for militia.³⁶⁰ It is easy to imagine the effect on federal relations that would have occurred if a United States Marshal had called out the Pennsylvania militia (he presumably would have had no authority over the militia of the other states) after the Governor of Pennsylvania had determined that the use of the state militia was not necessary. It is not surprising that we find no evidence of marshals' calling up state militias to form a posse to execute federal laws in significant matters with political implications until the power was utilized in the enforcement of the fugi-

357. See note 355 *supra*. They remained in this status until the Dick Act, Act of Jan. 21, 1903, 32 Stat. 775.

358. See note 326 *supra* and accompanying text.

359. Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264.

360. See Coakley, *supra* note 78, at 18-23. See also L. BALDWIN, *WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING* (1939); RICH 6-18; Cooke, *The Whiskey Insurrection—A Re-Evaluation*, 30 PA. HIST. 316 (1963).

tive slave laws.³⁶¹ There were, however, several examples of the use of troops by the President which were not preceded by a marshal's attempt to recruit the militia into a posse.³⁶²

D. Summary

In summary, we conclude that the *Moyer-Sterling* test continues to be the governing standard of constitutionally permissible military action in civil disorders. In the absence of limitations upon the powers

361. Professor Corwin has referred to the 1854 opinion by Attorney General Cushing, interpreting the 1795 statute to authorize the use of a posse composed of militia and regulars to enforce the fugitive slave laws, 6 OP. ATT'Y GEN. 466 (1854), as "ingenious." CORWIN 133. It will be recalled that the opinion followed the refusal of Congress to accede to President Fillmore's request for repeal of the statutory requirement that a proclamation be issued before troops could be used. *Id.* at 132-33. See Act of May 2, 1792, ch. 28, § 3, 1 Stat. 264. President Pierce subsequently used the concept in the struggle then going on in Kansas. *Id.* at 133. We find no mention of the concept previously, and certainly no sustained practice of using a marshal's posse composed of militia or regulars before relying upon troops. In the first use of federal troops after the Whiskey Rebellion, President Adams, before enactment of the 1807 statute, used regular troops, placing them under the command of a militia general, not the local federal marshal. See W. DAVES, *THE FRIES REBELLION* (1899); RICH 21-30; Coakley, *supra* note 78, at 23. In periods of crisis, President Jefferson received special authority to use troops to enforce the embargo laws in 1809, Act of Jan. 9, 1809, ch. 5, § 11, 2 Stat. 510, which was shortly thereafter repealed, and President Jackson obtained authorization to use troops to enforce the tariff laws during the nullification controversy. Act of Mar. 2, 1833, ch. 57, § 5, 4 Stat. 634. See generally U.S. ADJUTANT GENERAL, *FEDERAL AID IN DOMESTIC DISTURBANCES*, S. DOC. NO. 209, 57th Cong., 2d Sess., 32-101 (1903); RICH 35-71; Coakley, *supra* note 78, at 24-25; M. Reichley, *supra* note 66, at 54-82. President Jackson also ordered federal troops to riot areas on at least three occasions. See Grimsted, *supra* note 28, at 367; Morris, *Andrew Jackson as a Strikebreaker*, 55 AM. HIST. REV. 54, 66-67 (1949). The practice during the period of 1807-50 has been summarized as follows:

The pattern in other instances normally was one of using a mixture of militia and regular forces as was most convenient. In small incidents when sufficient regular forces were positioned nearby, reliance was almost exclusively on them; in large affairs requiring more troops, some militia were normally called upon as a supplement, though at times, under state rather than federal authority and at other times by federal marshals or local troop commanders or acting without the required Presidential authority. Coakley, *supra* note 78, at 25.

Although marshals did on occasion use federal troops, their recruitment into a marshal's posse was not regarded as a statutory condition precedent to their use by the President to enforce federal law. No federal troops were actually employed to protect the states from domestic violence during the period.

The first quarter of the nineteenth century was relatively free from disorders, but in the 1830's, riots caused by ethnic hatreds, religious animosities, class tensions, racial prejudices, economic grievances, and moral concerns over drinking, gambling, prostitution, and slavery erupted. Grimsted, *supra* note 28, at 362-64. They culminated in the draft riots during the Civil War in which more than 1000 persons died. *Id.* There were repeated instances of the use of militia rather than a sheriff's posse in enforcing order. See CUNLIFFE, *supra* note 285, at 88-94; cf. Dennison, *Martial Law: The Development of a Theory of Emergency Powers 1776-1861*, 18 AM. J. LEG. HIST. 52, 59-79 (1974).

362. See Coakley, *supra* note 78, at 25.

of the state National Guard or regular troops imposed by statute or judicial opinion, which exist in only a few states, broad discretionary power may be exercised by military forces called to the aid of the civil power. The Engdahl thesis fails when it asserts that the historical evidence supports the conclusion that, except in major upheavals threatening the existence of government, troops may not be used as military units, unless civil authorities are first unable to maintain order with troops functioning as requisitioned civilians, and then only under local command as distinguished from the control of governors or the President.

Fortunately, there has been little disposition by the military to use these powers in recent disorders, as distinguished from performing a more passive role of protecting vital installations, replacing the police in performing routine functions in order to free them for use in restoring order, and providing a presence in force to bolster police morale and deter rioters in the areas of disturbances. The potential for more extensive use of the military, and their exercise of broader powers, continues, as does the confusion concerning the precise powers that may be lawfully exercised and the degree of immunity from liability for misuse that may exist.³⁶³

We wish again to make it clear that we do not like the spectacle of troops acting as military units against elements of the civil populace. We, like the Riot Commission, simply see no reasonable alternative if order is to be restored in serious domestic disturbances. To paraphrase another's conclusion, the issue is no longer whether military troops have been or will be used in riots at home,³⁶⁴ but *how* they will be used and *what* powers they should be entrusted with when they are used.

Our thesis is that less reliance upon troops will be necessary, and the dangers of the use of excessive force will be lessened, if the powers of civilian authorities are expanded within constitutional limits during civil emergencies. We shall next proceed to outline the powers we think should be entrusted to the police and troops.³⁶⁵

363. See note 209 *supra*.

364. Williams, *The Army in Civil Disturbances: A Professional Dilemma?*, in *BAYONETS* 159. In this perceptive article, Professor Williams expresses concern over the use of the Army, not in the more familiar rhetoric of civilian rights but in terms of its impact upon the Army's principal mission of protecting the nation from external aggression.

365. A discussion of the powers we think civilian authorities should possess during the period of the emergency will be the subject of Part II of this essay, which shall appear in issue No. 5 of the 1975 *DUKE LAW JOURNAL*.