~~CLASSIFIED~~

The White House

Washington, D.C.

May 1, 1999

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: WHITE HOUSE COUNSEL

SUBJECT: Presidential Powers To Use the U.S. Armed Forces To Control Potential Civilian Disturbances

In light of published reports that the governments of Canada, Great Britain, France, and Germany had placed their armed forces on standby for January 1, 2000 in preparation for possible deployment for disaster assistance and/or domestic disorder, you have asked us to research (1) the extent of your powers to deploy U.S. Armed Forces within the boundaries of the United States for law enforcement purposes involving civilians; (2) the powers that could be exercised by those forces; and (3) whether a declaration of martial law would be necessary to initiate such deployment.

SUMMARY

As president of the United States, you may persuasively claim to have extensive statutory and constitutional powers to deploy the armed forces of the United States within the boundaries of the United States for law enforcement purposes without recourse to declarations of martial law. The limitations imposed by the Posse Comitatus Act and related statutes are no significant check to your executive powers as Commander-In-Chief to use the armed forces to take such measures as you consider necessary for the public good.

This memorandum is fictional but accurately depicts the broad powers assumed and exercised by presidents to utilize U.S. military forces to regulate civilian activity

This memo was written by William J. Olson and Alan Woll. William J. Olson heads a four-attorney McLean, Virginia law firm with a practice which focuses on the areas of constitutional law, administrative law, and civil litigation. Alan Woll was an associate at that firm. (E-mail: wjo@mindspring.com.)

© 1999 Gun Owners of America, Inc., 8001 Forbes Place, Suite 202, Springfield, Virginia 22151, (703) 321-8585; www.gunowners.org. Permission to reproduce in its entirety is granted will full attribution and disclaimers intact.

TABLE OF CONTENTS

I. **Constitutional and Statutory Authority** 2
II. **Presidential Use of the Military To Quell Domestic Disturbances** . . 5
Colorado, 1914 5
Idaho, 1899 7
South Carolina, 1871 7
United States, 1861-62 7
General Practice 9
California, 1992 11
III. **The Posse Comitatus Act and Other Related Statutes** 13
Effect of the Posse Comitatus Act 15
Constitutional and Statutory Exceptions to the Posse Comitatus Act 16
Early Statutes Providing for Federal Responses to Domestic Disturbances 18
Statutory Exceptions 19
IV. **Martial Law** 21
A. **Judicial Review of Martial Law** 24
Ex parte Milligan 24
Duncan v. *Kahanamoku* 26
B. **Military Analysis of Martial Law** 29
CONCLUSION 30
APPENDIX 31

I. Constitutional and Statutory Authority

You have statutory authority to intervene with military force in a state's domestic disputes, upon request from the state legislature (or governor), at 10 U.S.C. 331:

> 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. [Emphasis added.]

Similar statutory authority permits you to use military force without any state request to address circumstances whenever and wherever you determine that the laws of the United States cannot be enforced (10 U.S.C. 332):[1]

> 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. [Emphasis added.]

This power is particularly broad, as the U.S. Supreme Court has stated that you may act **unilaterally** both in deciding whether an insurrection is in effect, and how much force is necessary to address it:

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions 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. 'He must determine what degree of force the crisis demands.'[2]

As Constitutional scholar Clinton Rossiter observed, the U.S. Supreme Court has herein decided that you have **dictatorial power**, including **the power to suspend the Constitution.**:

> What the Supreme Court held was simply this: that the president of the United States has the constitutional power, under such circumstances as he shall deem imperative, to **brand as belligerents** the inhabitants of any area in general insurrection. In

---

[1] In 1894, federal court officials in Illinois requested the deployment of U.S. troops to enforce judicial processes. The Illinois governor protested sharply against such deployment of U.S. troops within his state, and requested that they be withdrawn. The President refused the governor's request, and his action was upheld by the U.S. Supreme Court in the case In re Debs, 158 U.S. 564 (1895).

[2] The Prize Cases, 67 U.S. 635, 670 (1863), emphasis added.

> other words, he has an **almost unrestrained power** to act toward insurrectionary citizens as if they were **enemies of the United States**, and thus **place them outside the protection of the constitution**. This, it seems hardly necessary to state, is **dictatorial power in the extreme**. **The Constitution can be suspended** after all — by any President of the United States who **ascertains** and **proclaims** a widespread territorial revolt.[3]

Moreover, such plenary power, even in the face of state government opposition has been authorized by Congress (10 U.S.C. 333):

> 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. [Emphasis added.]

Prior to your use of such force, it is anticipated that you will issue an appropriate proclamation:

> Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation,

---

[3] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. (Princeton: Princeton University Press, 1948) p. 230, *quoted in* U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Brief History of Emergency Powers in the United States*, committee print, 93rd Cong., 2d sess. (Washington: GPO, 1974), p. 15, emphasis added.

> immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.[4]

II. Presidential Use of the Military To Quell Domestic Disturbances

Using these and similar statutory and Constitutional powers, prior presidents have deployed federal military personnel in response to domestic disturbances without the declaration of martial law. Such presidential use of the military has been quite expansive.

Colorado, 1914

For example, on April 28, 1914, President Wilson ordered infantry units into Colorado, with orders to **disarm** all persons, including sheriff's deputies, policemen, and members of the Colorado National Guard.[5] The army units were given the following orders:

> **The measure of your authority is what necessity dictates.** State civil functions and processes should not be displaced or interfered with when they can be successfully employed in the suppression of violence and the restoration of order. Persons arrested should ordinarily be turned over to the proper State authorities as soon as practicable. Should you find that State judicial procedure only results in the release and return to the scene of disorder of persons whose presence and conduct tend to prevent the restoration of normal conditions, you may find it necessary to **retain in military custody those whom you arrest**. Persons in military custody will be held under authority of the United States and a **writ of habeas corpus** issued from a **State court** should be met with a return **declining to produce** in court the body of the prisoner on the ground that he is held under the authority of the United States. In case of a writ issued from a United States court you will obey the writ, produce the body of the prisoner, and state in full the reason for restraint, reporting the fact direct by telegram to The Adjutant General of the Army.[6]

---

[4] 10 U.S.C. 334.

[5] Bennett Rich, *The Presidents and Civil Disorder* (Washington, D.C.: The Brookings Institution, 1941), pp. 140, 144.

[6] *Id.*, pp. 141-42, emphasis both original and added.

On April 25, 1914, Colorado Governor Ammons had requested federal assistance in ending labor-related violence in the coal fields of Huerfano and Las Animas counties.[7] President Wilson responded under section 5297 of the Revised Statutes (of the United States) which then provided for the use of federal troops to oppose an insurrection against a state's government:

> In case of an **insurrection** in any State against the government thereof it shall be lawful for the **President**, on application of the legislature of such State, or of the executive when the legislature cannot be convened, to **call forth such number of the militia** of any other State or States which may be applied for as he deems sufficient to suppress such insurrection, or on like application, to employ for the same purposes such part of the **land or naval forces of the United States** as he deems necessary. [Emphasis added.]

It is important to observe that, **without a presidential declaration of martial law**, President Wilson ordered the U.S. Army to:

- **disarm** American citizens — including state and local officials, expressly including sheriffs, the police, and the National Guard;[8]
- **arrest** American citizens;
- monitor state judicial process and to **rearrest** (holding in military custody) persons released by the state courts, and
- **deny** writs of habeas corpus issued by state courts.

Nor was President Wilson the first president who both acknowledged and exercised these presidential powers — even to use the U.S. military to **disarm rebellious Americans** (without any **technical requirement** to **define** who is **rebellious**).

---

[7] *Id.*, p. 138. The previous October, Colorado Governor Elias Ammons had declared a "modified form of martial law." *Id.*, p. 137.

[8] Obviously, this ability to disarm persons within the United States is critical in light of reports that disaffected religious and political fanatics, including so-called patriots, continue to purchase arms and ammunition.

Idaho, 1899

On April 30, 1899, in response to a gubernatorial request, President McKinley ordered federal troops to Idaho without issuing a presidential declaration of martial law. Upon arrival, the troops "scrutinized" passengers on local rail lines, detained suspected criminals, and eventually held prisoners for several months awaiting trial in the local courts. The governor of Idaho declared martial law on May 3, 1899.[9]

South Carolina, 1871

During Reconstruction, **without declaring martial law**, President Grant sent troops into nine counties of South Carolina (in 1871). This followed his issuance of a proclamation by commanding residents "to deliver, either to the marshal of the United States for the District of South Carolina, or to any of his deputies, or to any military officer of the United States within said counties, all **arms, ammunition** ... used, kept, possessed or controlled by them...."[10] President Grant even suspended the writ of habeas corpus.[11] More than 600 arrests had been made by the end of 1871.[12]

United States, 1861-62

In 1861, following the inauguration of Abraham Lincoln, a series of arrests of American citizens was undertaken, under the loose oversight of **Secretary of State** Seward. Arrests normally occurred at night, at the order of Secretary Seward or a **military officer**, on grounds of:

---

[9] U.S. Congress, Senate Document No. 24, *Coeur D'Alene Mining Troubles*, 56th Cong., 1st sess. (Washington: GPO, 1900), pp. 3, 74.

[10] President Grant's October 12, 1871 Proclamation, 17 Stat. 949-50, emphasis added, *reproduced in* U.S. Congress, Senate Document No. 209, *Federal Aid in Domestic Disturbances*, 57th Cong., 2d sess. (Washington: GPO, 1903), p. 122.

[11] Legalistic critics of President Grant's action assert that Article I, Section 9, clause 2 of the U.S. Constitution, which states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it," required a finding of either a state of invasion or rebellion.

[12] *Federal Aid in Domestic Disturbances,* p. 122.

- **suspicion** of having given, or intending to give, aid or comfort to the enemy;
- public or private **communications** that opposed U.S. enlistments or encouraged C.S. enlistments;
- expressing **sympathy** with the South;
- **criticizing** the Lincoln administration; or
- belonging to **proscribed organizations**.[13]

Prisoners were locked in crowded casemates or batteries within a fort. Visitors were forbidden with rare exceptions. Attorneys were absolutely forbidden — requesting an attorney would prejudice a defendant's case. Only unsealed letters would be forwarded; such letters were returned or retained in the case file if they contained objectionable matter.[14] Thus, without a statute — or even a presidential proclamation — authorizing these arrests, American citizens were **arrested by military officers, on suspicion**, held without trial in military facilities, and denied access to the courts, yet **no martial law had yet been declared.**

On February 14, 1862, President Lincoln issued an "executive order" releasing many of these political prisoners, with exceptions for: (1) spies, or (2) persons whose release "may be deemed incompatible with the public safety." A review panel consisting of Judge Edwards Pierrepont and General John Dix was established to expedite releases.[15]

Also without a declaration of martial law, on April 27, 1861, President Lincoln delegated to General Winfield Scott authority to suspend the writ of habeas corpus on or near the railroad lines between Philadelphia and Washington, D.C.[16]

---

[13] U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Brief History of Emergency Powers in the United States*, committee print, 93rd Cong., 2d sess. (Washington: Government Printing Office, 1974), p. 19.

[14] *Id.*

[15] *Id.* at 20.

[16] This action, which had the form of a proclamation, is reproduced in William H. Rehnquist, *All the Laws But One* (Alfred A. Knopf: New York, 1998),

The scope of this authority was expanded to New York City on July 2, 1861,[17] and to Bangor, Maine, on October 14, 1861,[18] before its extension to all persons arrested or imprisoned by military forces, in a **declaration of martial law**.[19] Nearly two years after President Lincoln's first suspension of habeas corpus, Congress passed an act authorizing such suspensions of habeas corpus by the President.[20]

General Practice

For the first 50 years following the enactment of the 1807 statute allowing the use of federal forces in domestic disturbances, such forces were ordinarily deployed together with the militia. The limited size of the regular army made it necessary to call out the militia concurrently to obtain an effective response to domestic disturbances.[21]

Nevertheless, between 1807 and 1925, federal troops were used **more than 100 times** to quell domestic disturbances.[22] In most instances, the simple presence

---

p. 25. This action was determined to be unconstitutional by Chief Justice of the United States Roger Taney, sitting as a circuit court judge in Baltimore, in Ex parte Merryman 17 F.Cas. 144 (C.C.D. Md. 1861), but the Lincoln Administration refused to either enforce or appeal the federal court ruling.

[17] Jill E. Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 Kan. J.L. & Pub. Pol'y, 129, 130 (1996).

[18] Rehnquist, p. 48. Following the war, the U.S. Supreme Court granted a writ of habeas corpus, notwithstanding its suspension by the President. Ex parte Milligan, 71 U.S. 2 (1866), discussed at length, *below*. The concurring opinion pointed out that the holding in Milligan was contrary to the terms of the Habeas Corpus Act of 1863. Rehnquist, p. 131.

[19] Proclamation Suspending the Writ of Habeas Corpus (September 24, 1862) *cited by* Hasday, p. 130.

[20] An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases (March 3, 1863) ("Habeas Corpus Act of 1863").

[21] *Federal Aid in Domestic Disturbances*, p. 61.

[22] *Military Aid to the Civil Power*, p. 185.

of the U.S. armed forces proved sufficient to quell the domestic disturbance;[23] in others, the troops were not dispatched until the disturbance was over.[24] On two occasions, both parties in a violent dispute requested federal troops.[25]

One example indicative of the breadth of authority which you enjoy in the use of federal troops is the deployment of such troops to disarm civilians. For example, U.S. soldiers also disarmed American citizens pursuant to deployments in Norfolk, Virginia in 1866,[26] New Orleans in 1874,[27] and West Virginia in 1921.[28] Not one of these deployments involved a federal declaration of martial law.

Not only do you have the benefit of these precedents of the use of federal military personnel to disarm disaffected Americans, more modern, efficient means have been developed (through mandatory registration schemes) to systematically seize the arms of such dangerous individuals. Thus, you enjoy abundant means to protect society from any violent, disaffected fanatics no matter what the year 2000 may bring.

It is also important to recognize that such direct use of federal troops to enforce the laws is not merely of historical interest. The most recent presidential exercise of this power was by President Bush in response to the Rodney King riots in 1992.

---

[23] *E.g.*, when the Army was called out in Indiana in 1877; to Seattle in 1885; and to Idaho in 1892. *Federal Aid in Domestic Disturbances*, pp. 202, 218, 224.

[24] *E.g.*, when the Army was called out in Seattle in 1886; Los Angeles in 1894; Idaho in 1899; Army and Marines in Los Angeles in 1992. *Id.*, pp. 221, 236; 247-49; Christopher Schnaubelt, "Lessons in Command and Control from the Los Angeles Riots," *Parameters*, Summer 1997. *Parameters* is a quarterly publication of the U.S. Army War College.

[25] *E.g.*, the Dorr Rebellion in Rhode Island (1842); also both claimants to the office of Governor of Arkansas requested federal troops in 1874, *Id.*, pp. 66-68, 171-74.

[26] *Federal Aid in Domestic Disturbances,* p. 109. Only blacks were disarmed.

[27] *Id.*, p. 155. Only whites were disarmed.

[28] *The Presidents and Civil Disorder*, p. 166.

California, 1992

On April 29, 1992, the acquittal of four police officers on a charge of beating Rodney King in Los Angeles, California, resulted in riots which spread over hundreds of square miles.[29] The riots caused the deaths of at least 54 people, and more than $800 million in property damage throughout Los Angeles County.[30]

On May 1, 1992, President Bush issued Proclamation 6427, commanding "all persons engaged in such acts of violence and disorder to cease and desist therefrom and to disperse and retire peaceably forthwith."[31] That same day, he issued Executive Order 12804, which stated that:

> Units and members of the Armed Forces of the United States and Federal law enforcement officers will be used to suppress the violence described in [Proclamation 6427] and to **restore law and order** in about the City and County of Los Angeles, and other districts of California.[32]

Pursuant to this executive order, soldiers of the U.S. Army's 7th Infantry Division and Marines from Camp Pendleton were deployed in Los Angeles beginning on May 3.[33]

As expressed by the executive order, the role of federal troops was "to restore law and order." However, according to the deputy adjutant general of the California National Guard, that mission "had been accomplished before [the federal troops] arrived."[34]

Unfortunately, the commander of the so-called Joint Task Force ("JTF") — comprised of U.S. infantry, marines, and federalized units of the California

---

29 Schnaubelt.

30 *Id.*

31 57 *Fed. Reg.* 19359. President Bush appeared to rely on both 10 U.S.C. 331 and 332 as bases for the Proclamation.

32 57 *Fed. Reg.* 19361, emphasis added.

33 Colonel Thomas Lujan, "Legal Aspects of Domestic Employment of the Army," *Parameters*, Autumn 1997.

34 Schnaubelt.

National Guard — asserted that his troops had not been called out to maintain law and order. He stated that "[i]t was not the military's mission to solve Los Angeles' crime problem, nor were we trained to do so."[35] As a result, the JTF "required each request for assistance to be subjected to a nebulous test to determine whether the requested assignment constituted a law enforcement or military function." The federal troops became "largely unavailable for most assignments requested by the LAPD."[36] This administration has been diligent in exposing and criticizing this failure by the command to be more aggressive. Colonel Thomas Lujan (Staff Judge Advocate of the United States Special Operations Command) observed that:

> The JTF commander apparently believed that he and his troops were constrained by the **Posse Comitatus Act**, and therefore could not legally participate in law enforcement activities. He was mistaken. In this particular situation, pursuant to the presidential power to **quell domestic violence**, federal troops are **expressly exempted** from the prohibitions of **Posse Comitatus**. This exemption applies equally to active-duty military and federalized National Guard troops.... This **misunderstanding** seriously degraded the effectiveness of military support of local law enforcement in Los Angeles.[37]

Colonel Lujan concluded: "senior leaders will have to **reorient** their thinking. Given the scarcity of resources, our nation can ill afford to have the effectiveness of their military assets artificially constrained by a misunderstanding of the law."[38]

The Defense Department has since worked to re-educate commanders regarding their necessary role in preserving public order. For example, we note that the **Operational Support Planning Guide of Joint Task Force Six** (which coordinates military and civilian law enforcement activities in the Southwestern United States) states that:

> Innovative approaches to providing new and more effective support to law enforcement agencies are constantly being sought, and **legal and**

---

[35] *Id.*

[36] *Id.*, quoting from Judge (and former FBI Director) William Webster's report concerning the military and law enforcement response to the Los Angeles riots.

[37] Lujan, emphasis added.

[38] *Id.*, emphasis added.

> **policy barriers to the application of military capabilities are gradually being eliminated**.[39]

So that these efforts can be better understood, a quick review of the **Posse Comitatus Act** and other statutory limits on the use of U.S. military personnel (and equipment) is discussed below.

III. The Posse Comitatus Act and Other Related Statutes

In 1878, in response to alleged abuses resulting from the use of federal troops for law enforcement by the post-Civil War Reconstruction state governments, Congress enacted a statutory limitation on the use of the U.S. Army for domestic law enforcement. This statutory provision, known as the **Posse Comitatus Act**,[40] originally read as follows:

> From and after the passage of this act it shall not be lawful to employ any part of the **Army of the United States** as a **posse comitatus**, or otherwise, for the purpose of **executing the laws**, **except** in such cases and under such circumstances as such employment of said force may be **expressly** authorized by the **Constitution** or by **act of Congress**; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section, and any person willfully violating the provisions of this section shall be deemed guilty of a **misdemeanor**, and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years, or by both such fine and imprisonment.[41]

---

[39] Quoted in House Rept. 104-749, *Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians*, p. 33, emphasis in original.

[40] The Posse Comitatus is "[t]he entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases." Black's Law Dictionary, Revised Fourth Edition (West Publishing: St. Paul, Minnesota, 1969), p. 1324.

[41] Section 15 of the army appropriation bill for fiscal year 1878, reproduced in *Federal Aid in Domestic Disturbances*, p. 188, emphasis added.

The "Constitution" and "Act of Congress" exceptions to the prohibition on the use of the army remain in the current version of the Posse Comitatus Act, which has been broadened to add the U.S. Air Force (once the Army Air Corps):

> Whoever, except in cases and under circumstances expressly authorized by the **Constitution** or **Act of Congress**, willfully uses any part of the **Army** or the **Air Force** as a posse comitatus or otherwise to **execute the laws** shall be fined under this title or imprisoned not more than two years, or both.[42]

The focus on use of the U.S. Army and Air Force rather than on all services, is said to reflect the origin of the bill — a rider to an army appropriations bill.[43] The statute does not expressly interfere with your use of the Navy, Marines, or Coast Guard for law enforcement purposes within the United States as you deem necessary.

Another, similar statute implemented a limitation on law enforcement activities on all branches of the U.S. Armed Forces (excepting the Coast Guard). Unlike the Posse Comitatus Act, this statute is not in the criminal section of the U.S. Code.

> The Secretary of Defense shall prescribe such **regulations** as may be necessary to ensure that any activity (including the provision of any **equipment** or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the **Army, Navy, Air Force, or Marine Corps** in a search, seizure, arrest, or other similar activity **unless** participation in such activity by such member is otherwise **authorized by law**.[44]

Soon after the enactment of this law in 1981, Secretary Weinberger of the Reagan Administration promulgated the called-for implementing regulations. This statute is no longer of concern, however, as your administration wisely **"removed"**

---

[42] 18 U.S.C. 1385.

[43] *See* Charles Doyle, Congressional Research Service, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS-39 (1995).

[44] 10 U.S.C. 375; Pub. L. 97-86, title IX Sec. 905(a)(1), Dec. 1, 1981, 95 Stat. 1116, emphasis added.

these regulations on April 7, 1993.[45] No regulations published in the Code of Federal Regulations now implement this code section. Without implementing regulations, this statute will be unlikely to impede your plans.

Effect of the Posse Comitatus Act

In practice, the "Constitution" and "Act of Congress" exceptions have prevented the Posse Comitatus Act from substantially limiting presidential action. However, the Posse Comitatus Act appears to have only effectively precluded the deployment of federal troops in response to applications — made directly to military officials — by local, state, and judicial officials. Before enactment of the Posse Comitatus Act, infantry had been deployed at the request of the mayor of Norfolk, Virginia (in 1831), a federal judge in Boston (in 1854), a state judge in Utah (in 1859), and the sheriff of Mobile, Alabama (in 1869).[46] No such deployments have evidently taken place since the law was enacted.

In addition, the Congressional Research Service has observed that:

> the Act is a criminal statute under which there **has never been a prosecution**. Although violations will on rare occasions result in the exclusion of evidence, the dismissal of criminal charges, or a civil cause of action, as a practical matter compliance is ordinarily the result of military self-restraint.[47]

In part, this reflects the existence of recognized (if not clearly-defined) limits to the authority which can be exercised by the military in domestic disturbances, including the violation of constitutional rights.[48] Military Analyst Major Dowell

---

[45] 53 *Fed. Reg.* 25776. Secretary of Defense Aspin's notice of the removal of the regulations observed that the regulations "have served the purpose for which they are intended and are no longer valid." *See* Doyle, CRS-12, n. 28.

[46] *Federal Aid in Domestic Disturbances*, pp. 56, 76-77, 97, 129.

[47] Doyle, opening summary, emphasis added.

[48] Ironically, 10 U.S.C. 333 provides for the use of federal military forces where "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." Thus the prescribed statutory remedy, military intervention in domestic disturbances, may result in further violations of

observed, "[i]n cases of the exercise of military force in the suppression of internal disorders, the military man is liable to civil suit or even to criminal prosecution after the emergency ceases."[49] We do not believe this risk to be credible, and it should not deter military obedience to your orders. The military requires strict and prompt obedience to **lawful orders**. Major Dowell properly prescribed the standard that all orders should be obeyed unless patently illegal.[50]

Constitutional and Statutory Exceptions to the Posse Comitatus Act

There is disagreement as to whether any provisions of the Constitution expressly provide for the use of federal forces for law enforcement purposes. The best authorities have identified Article IV, Section 4 as a provision of the U.S. Constitution which "expressly authorizes" the use of federal military personnel in law enforcement:[51]

> 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.

Opponents to this view assert that it is undermined by the fact that presidents had no statutory authority to use U.S. soldiers, sailors or marines to quell domestic disturbances until 1807. The responsibility for maintaining the public peace rested first with the sheriffs and then with the militia.[52] They would

---

constitutional rights, as in the disarming of American citizens.

[49] *Military Aid to the Civil Power*, p. 211.

[50] *Id.*, p. 213.

[51] *Federal Aid in Domestic Disturbances*, p. 5; *Military Aid to the Civil Power,* p. 204; *see also* President Hayes' proclamations of July 18 and 21, 1877, and President Harrison's proclamation of July 15, 1892.

[52] George Mason, author of the Virginia Declaration of Rights and a participant in the Constitutional Convention, defined the militia as "the whole people, except for a few public officials." Larry Pratt, ed., *Safeguarding Liberty: The Constitution and Citizen Militias* (Franklin, Tennessee: Legacy Communications, 1995) p. xiii. A similar definition currently survives in the U.S. Code at 10 U.S.C. 311:

also argue that this practice was consistent with the founding fathers' concerns about maintaining a **standing army**, citing authority such as James Madison. For example, during the ratification debates in Virginia, Madison stated:

> Mr. Chairman, I most cordially agree with the honorable member last up [George Mason] that **a standing army is one of the greatest mischiefs that can possibly happen**.... The most effectual way to guard against a standing army is to render it unnecessary. The most effectual way to render it unnecessary is to give the General Government full power to call forth the militia and exert the whole natural strength of the Union when necessary. Thus you will furnish the people with sure and certain protection without recurring to this evil....[53]

These questionable historians miss the fact that Madison was clearly calling for the General Government to have "full power."

Likewise, in 1832, President Andrew Jackson — who had the experience of leading regulars and militia in battle — once expressed concerns regarding the size of the Army in his annual message:

> Neither our situation nor our institutions require or permit the maintenance of a large regular force. History offers too many lessons of the fatal result of such a measure not to warn us against its adoption here. The expense which attends it, the obvious tendency to

---

(a) The **militia of the United States** consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32 [which allows persons who are under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps to enlist in the National Guard] under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are -

(1) the **organized militia**, which consists of the National Guard and the Naval Militia; and

(2) the **unorganized militia**, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

[53] *Federal Aid in Domestic Disturbances,* p. 22, emphasis added.

> employ it because it exists, and thus to engage in unnecessary wars, and its **ultimate danger to public liberty**, will lead us, I trust, to place our principal dependence for protection upon the great body of the citizens of the Republic. If, in asserting rights or in repelling wrongs, war should come upon us, our regular force should be increased to an extent proportioned to the emergency, and our present small Army is a nucleus around which such force could be formed and embodied. But for the purposes of defense under ordinary circumstances we must rely upon the electors of the country [*i.e.*, all able-bodied citizens].[54]

Of course, these quotations, are not only taken out of context, they fail to address the inability of 18th and 19th Century political philosophy to deal with 21st Century problems. Fortunately, in contrast with the philosophizing of these "dead white males," the practice of your predecessors firmly establishes your power to employ the military vigorously in the face of domestic disturbances.

Early Statutes Providing for Federal Responses to Domestic Disturbances

First, in 1792, President Washington received express authority from Congress to call out the militia to quell domestic disturbances.[55] This law addressed two types of disturbances: (1) **insurrection** against the **government of a state** (where a state legislature, or the governor if the legislature was not in session, had applied for assistance, incorporating the provisions of Article IV, Section 4); or (2) the **obstruction** of the **execution of federal laws**. These provisions, as amended, still exist at 10 U.S.C. 331-33.

It is technically true that statutory authority to use the national armed forces to quell **domestic disturbances** did not exist until 1807:

> That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, **such part of the land or naval force**

---

[54] *Id.*, p. 59, emphasis added.

[55] 1 Stat. 264.

> **of the United States** as shall be judged necessary, having first observed all the prerequisites of the law in that respect.[56]

However, since it is obvious that the Constitution **expressly provides** for such use of U.S. military forces — and the Constitution trumps any statute — obviously the Congress' failure to expressly provide for such use of military forces before 1807 was an oversight.[57]

Statutory Exceptions

Besides this evident Constitutional exception to the Posse Comitatus Act, a number of statutes expressly provide for the use of U.S. military personnel and equipment. Even by 1903, Congress had recognized the need for strong executive action, having enacted 20 statutes which authorized deployment of "the land and naval forces of the United States" for law enforcement purposes.[58] Thanks to Congress, this number had nearly doubled by 1995, including the statutes which were identified above.[59]

For example, U.S. military units may, as a matter of course, "provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials."[60] Not only is such information to be provided, requests for information should be solicited. "The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations."[61]

Also, the Secretary of Defense may "make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement

---

[56] 2 Stat. 443, emphasis added.

[57] *See* n.11, *infra.*

[58] *Federal Aid in Domestic Disturbances,* pp. 5-9.

[59] Doyle, CRS-21 through CRS-23.

[60] 10 U.S.C. 371(a).

[61] 10 U.S.C. 371(b).

official for law enforcement purposes."[62] He may also "make Department of Defense personnel available to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under section 372 of this title; and to provide such law enforcement officials with expert advice."[63] The Secretary of Defense may make military personnel available for the maintenance and operation of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under section 372 of this title.[64] Your administration has already made effective use of military personnel and equipment in the Waco incidents by means of these provisions.

For example, active duty military personnel trained agents of the Bureau of Alcohol, Tobacco and Firearms ("BATF") before the attempt to serve warrants at Waco.[65] The military assistance to BATF from active duty and National Guard units was based upon allegations (later discovered to be unsubstantiated) of an active methamphetamine lab in the Davidian compound.[66] This assistance included surveillance overflights, training by Special Forces soldiers, and direct support by Texas National Guard personnel providing an aerial diversion during the raid.[67]

After the raid, active duty military personnel provided services to the FBI in support of the FBI's activities during the standoff.[68] Some Special Forces personnel were dressed in civilian clothes while at or near the Branch Davidian residence.[69]

---

[62] 10 U.S.C. 372(a).

[63] 10 U.S.C. 373.

[64] 10 U.S.C. 374.

[65] U.S. Congress, House Committee on Government Reform and Oversight and Committee on the Judiciary, *Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians*, H. Rep. 104-749, 104th Cong., 2d sess. (Washington: Government Printing Office, 1996), p. 5.

[66] *Id.*, pp. 35, 40.

[67] *Id.*, p. 38.

[68] *Id.*, p. 50.

[69] *Id.*

Texas National Guard forces provided 10 Bradley Fighting Vehicles, 4 M728 Combat Engineering Vehicles ("CEV"), 2 M1A1 Abrams Tanks, and 1 M88 Tank Retriever.[70] These vehicles were effectively employed, demonstrating the value of military/civilian collaboration. The Bradleys were used by FBI agents to fire projectiles containing CS agent into the residence.[71] The CEVs were used to ram holes into the residence and insert CS agent.[72] National Guard troops assisted the FBI in refilling the CEVs with the CS agent.[73]

> As the day progressed, the FBI began to use the CEVs to "deconstruct" the Branch Davidian residence, using them to ram into the corners and sides of the building, creating large openings in the building. At one point, part of the rear roof collapsed after once CEV made multiple entries into the side of the building.[74]

Support vehicles and equipment (*e.g.*, tents, generators, concertina wire) were also provided by the Defense Department to the FBI.[75]

IV. Martial Law

Given the almost limitless authority these precedents provide you to use military forces for civilian law enforcement purposes within the United States however, it hardly seems necessary to address the nature of martial law.[76]

---

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*, p. 53.

[74] *Id.*, p. 50.

[75] *Id.*

[76] In addition, you already enjoy emergency powers, granted by statute, derived from the declaration of states of national emergency. Fourteen declarations of national emergency are currently in effect: Iran I (November 14, 1979); Iran II (April 17, 1980); Libya (January 7, 1986); Iraq (August 2, 1990); Yugoslavia (May 30, 1992); UNITA (September 26, 1993); Export Control (August 19, 1994); Bosnia/Herzegovina (October 25, 1994); Weapons of Mass Destruction (November 14, 1994); Middle East Terrorists (January 23, 1995); Columbian Drug Dealers

Additionally, the precedents in this area are less well established — apparently, there have been only two occasions where a president has formally declared martial law, both by President Lincoln.[77] On September 24, 1862, President Lincoln declared disloyal persons throughout the United States subject to martial law. He later placed the Commonwealth of Kentucky under martial law on July 5, 1864.[78]

Nevertheless, to give complete coverage to the issues which you raised, we present the following analysis.

While no federal statutes appear to define martial law, one section of the Code of Federal Regulations ("CFR") — 32 CFR 501.4[79] — makes four points about martial law:

- First, federal troops are normally deployed domestically without a declaration of martial law.[80] *"It is **unlikely** that situations requiring the **commitment of Federal Armed Forces** will necessitate the declaration of martial law."*

- Second, the "law of necessity" undergirds the implementation of martial law. *"When Federal Armed Forces are committed in the event of civil disturbances, **their proper role is to support, not supplant,***

(October 21, 1995); Cuba (March 1, 1996); Burma (May 22, 1997); and Sudan (November 3, 1997).

[77] Some argue that President Grant's suspension of the writ of Habeas Corpus in South Carolina was a tacit declaration of martial law. This view is based upon a February 3, 1880 opinion by the U.S. Secretary of State to the Secretary of War. According to the Secretary of State, the deployment of federal troops in New Mexico pursuant to a presidential proclamation dated October 7, 1878 "can not properly be considered a proclamation 'declaring martial law;' it does not suspend or authorize the suspension of the writ of habeas corpus" *quoted in* Major Cassius Dowell, *Military Aid to the Civil Power* (Ft. Leavenworth, KS: General Service Schools Press, 1925) p. 219. Thus, in the view of the Secretary of State, **the suspension of the writ of habeas corpus is an incident of martial law.**

[78] *Military Aid to the Civil Power*, p. 238.

[79] Regulations of the Department of Defense, emphasis added.

[80] 32 CFR 501 is entitled "Employment of Troops in Aid of Civil Authorities."

***civil authority**. Martial law depends for its justification upon **public necessity**. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration. The extent of the military force used and the actual measures taken, consequently, will depend upon the **actual threat to order and public safety which exists at the time**."*

- Third, declarations of martial law are not limited to the President. "***In most** instances the decision to impose martial law is made by the **President**, who normally announces his decision by a proclamation, which usually contains his instructions concerning its exercise and any limitations thereon. However, **the decision to impose martial law may be made by the local commander on the spot**, if the circumstances demand immediate action, and time and available communications facilities do not permit obtaining prior approval from higher authority* (Sec. 501.2). ***Whether or not a proclamation exists**, it is incumbent upon commanders concerned to weigh every proposed action against the threat to public order and safety it is designed to meet, in order that the necessity therefor may be ascertained."*

- Fourth, the rules of conduct for citizens are merely announced by the military and are immediately effective. *"When Federal Armed Forces have been committed in an objective area in a martial law situation, **the population of the affected area will be informed of the rules of conduct** and other restrictive measures the military is authorized to enforce. These will normally be announced by proclamation or order and will be given the widest possible publicity by all available media. Federal Armed Forces ordinarily will exercise **police powers** previously inoperative in the affected area, restore and maintain order, insure the essential mechanics of distribution, transportation, and communication, and initiate necessary relief measures.*

Another section of the Code of Federal Regulations, 32 CFR 501.1(c), discusses military arrests:

> Persons not normally subject to military law taken into custody by the military forces incident to the use of Armed Forces, as contemplated by this part, will be turned over, as soon as possible, to the civil authorities. The Army will not operate **temporary confinement/detention facilities** unless local facilities under the control of city, county, and State governments and the U.S.

> Department of Justice cannot accommodate the number of persons apprehended or detained. Further, this authority may be exercised only in the event Federal Armed Forces have been committed under the provisions of this part and only with the prior approval of the Department of the Army. When the requirement exists for the Army to operate such facilities, the provisions of Army confinement regulations will apply to the maximum extent feasible under the circumstances.

The termination of the deployment of federal troops to address civil disturbances within the United States are addressed at 32 CFR 501.6:

> The use of Federal Armed Forces for civil disturbance operations should end as soon as the necessity therefor ceases and the normal civil processes can be restored. **Determination of the end of the necessity will be made by the Department of the Army.**

A. Judicial Review of Martial Law

Only two U.S. Supreme Court cases have been found which appear to constrain presidential powers under martial law. However, with Congress' deference toward presidential use of military power against rebellious elements within the United States, the effect of these cases is questionable. In light of the fact that virtually any objective you may have could be efficiently achieved without resort to a declaration of martial law, we would advise against any such action as needlessly provoking citizens and legal purists.[81]

Ex parte Milligan

The U.S. Supreme Court helped define the proper scope and application of martial law in Ex parte Milligan, 71 U.S. 2 (1866). Milligan, a citizen of Indiana, was arrested by federal troops and found guilty — by a military court — of conspiracy against the government of the United States, affording aid and comfort to rebels, inciting insurrection, disloyal practices, and violation of the laws of war. Milligan presumably became subject to military judicial process under President

---

[81] *I.e.,* a faction of lawyers and law professors who cling to the outdated notion that the U.S. Constitution should be interpreted as its authors intended (so-called "original intent") in ignorant denial of the knowledge gained from 200 years of experience — as well as the wisdom and insights gleaned from modern science.

Lincoln's declaration of martial law of September 24, 1862. Milligan was sentenced to death.[82] He filed a writ of habeas corpus in federal court, seeking release from military custody.[83]

Counsel for the military argued that Milligan's treatment was legal "under **the 'laws and usages of war**.'"[84] Disagreeing, the Court held that:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; **they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed**. This court has judicial knowledge that, in Indiana, the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances, and **no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life in nowise connected with the military service.** Congress could grant no such power, and, to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. **One of the plainest constitutional provisions was therefore infringed when Milligan was tried by a court not ordained and established by Congress and not composed of judges appointed during good behavior.**[85]

The Court continued:

> It is claimed that **martial law** covers with its broad mantle the proceedings of this military commission. The proposition is this: that, in a time of war, the **commander** of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to **suspend all civil rights and their remedies** and **subject citizens**, as well as soldiers **to the rule of his will**, and, in the exercise of his lawful

---

[82] 71 U.S. at 6-7.

[83] *Id.* at 7.

[84] *Id.* at 121, emphasis added.

[85] *Id.* at 121-22, emphasis added.

> authority, **cannot be restrained except by his superior officer or the President of the United States**.
>
> **If this position is sound to the extent claimed,** then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, **the commander** of one of them **can, if he chooses,** within his limits, on the plea of necessity, with the approval of the Executive, **substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules.** The statement of this proposition shows its importance, for, **if true, republican government is a failure,** and there is an **end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"** — the attempt to do which by the King of Great Britain was deemed by our fathers such an offence that they assigned it to the world as one of the causes which impelled them to declare their independence. **Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable, and, in the conflict, one or the other must perish.**[86]

The writ of habeas corpus was issued.[87]

Duncan v. *Kahanamoku*

The only other treatment of the topic of martial law by the U.S. Supreme Court came as a result of the declaration of martial law in Hawaii during World War II. Duncan v. Kahanamoku, 327 U.S. 304 (1946), arose out of the **declaration of martial law in Hawaii (before it became a state) by its governor** on December 7, 1941, pursuant to the federal statute organizing Hawaii as a territory ("the Organic Act"). On December 8, the Commanding General prohibited both civil and criminal courts from summoning jurors and witnesses or trying cases. The Commanding General established military tribunals to take the place of the courts.[88]

---

[86] *Id.* at 124-25, emphasis added.

[87] *Id.* at 130.

[88] 327 U.S. at 308.

Duncan was a civilian shipfitter employed in the Navy Yard at Honolulu. On February 24, 1944, he engaged in a brawl with two armed Marine sentries at the yard. By the time of his arrest, the military had authorized civilian courts to "exercise their normal functions." However, only military tribunals were to try "Criminal Prosecutions for violations of military orders." Duncan was charged with violating one of these orders, which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty. **He was therefore tried by a military tribunal** rather than the **Territorial Court**, although the general laws of Hawaii made assault a crime. A conviction followed and Duncan was sentenced to six months imprisonment.[89]

Duncan filed a writ of habeas corpus in federal district court. The court issued an order to the military authorities to show cause why Duncan should not be released. In response, the military argued "that the writ of habeas corpus had ... properly been suspended and martial law had validly been established in accordance with the provisions of the Organic Act; that consequently the District Court did not have jurisdiction to issue the writ; and that the trials of petitioners by military tribunals pursuant to orders by the Military Governor issued because of military necessity were valid." The District Court then held its own trial, found that the courts had always been able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regular courts. It accordingly held the trials void and ordered the release of the petitioners. The federal court of appeals reversed, holding the military trials to be valid.[90]

> As to the nature of martial law, the U.S. Supreme Court stated that:
> the term 'martial law' carries **no precise meaning**. The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as 'military law' limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply **some kind of day to day expression of a General's will dictated by what he considers the imperious necessity of the moment**. In 1857 the confusion as to the meaning of the phrase was so great that the **Attorney General** in an **official opinion** had this to say about it: 'The **Common Law** authorities and commentators afford **no clue** to what martial law, as understood in

---

[89] *Id.* at 310-11.

[90] *Id.* at 311-12.

> England, really is.... In this country it is still worse.' What was true in 1857 remains true today.[91]

The Court examined whether Congress had intended to "give the armed forces power to supplant all civilian laws and to substitute military for judicial trials" when it, by statute, gave the governor of Hawaii the power to declare martial law. It concluded that "both the language of the Organic Act and its legislative history fail to indicate that the scope of 'martial law' in Hawaii includes the supplanting of courts by military tribunals."[92] The Court then asked:

> Have the **principles** and **practices** developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their **daily conduct governed by military orders substituted for criminal laws**, and that such **civilians** should be tried and punished by **military tribunals**? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.
>
> People of many ages and countries have **feared** and **unflinchingly opposed** the kind of **subordination** of **executive**, **legislative** and **judicial** authorities **to complete military rule** which according to the government Congress has authorized here. In this country **that fear** has become part of our cultural and political institutions.[93]

The Court concluded:

> Our system of government clearly is the **antithesis** of **total military rule** and the **founders of this country** are not likely to have contemplated **complete military dominance** within the limits of a Territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their

---

[91] *Id.* at 315-16, citations omitted, emphasis added.

[92] *Id.* at 319.

[93] *Id.*, emphasis added. The Court would have done well to remember President Roosevelt's admonition about the dangers of fear.

> philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the constitution itself. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.
>
> Military tribunals have no such standing. For as this Court has said before: '... the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield.'[94]

The writ of habeas corpus was issued.

It is important to observe that both rulings were issued well after the crisis had passed. Were any challenge to your actions to reach the Court during a time of emergency, the Court's extreme deference to forceful executive action would likely be exercised.[95]

B. Military Analysis of Martial Law

A military analyst, of the 1920s, Major Cassius Dowell, addressed the nature of martial law in his work, *Military Aid to the Civil Power.* First, he observes that the term is a misnomer — the true definition is where "the State or National government, through its military forces, controls the civil population **without authority of written law, as necessity may require**."[96] Major Dowell states that martial law should be distinguished from circumstances where the military is employed under statute; for in the latter circumstances the military "is not called

---

[94] *Id.* at 322-23, citations omitted, emphasis added.

[95] *E.g.,* The Prize Cases, 67 U.S. 635 (1863); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Dames & Moore v. Regan 453 U.S. 654 (1981).

[96] *Military Aid to the Civil Power* p. 231, emphasis in original.

out to **supercede** civil authority but to **maintain** or **restore** it."[97] He adds that **martial law**:

> **is not part of the Constitution**, but is rather a power to preserve the Constitution when constitutional methods prove inadequate to that end. It is the **law of necessity**. Manifestly it **cannot be instituted** at the **caprice** of an **executive** or a **military commander**. It cannot, strictly speaking, be created by declaration. As has been said by good authority, it proclaims itself. A declaration of martial law is an **announcement of fact** rather than the **creation of that fact**.[98]

Major Dowell observes that:

> Martial law is **not** an **absolute** power. It is the **will of the general** who commands the army, but the occasion and justification for its employment, like the exercise of the right of self-defense by an individual, is **necessity**. It may not be permitted to serve as a pretext for license or disorder on the part of the military, and **acts of undue violence or oppression** committed in its name will, by the laws of war, be visited with **extreme punishment**.[99]

Thus, if there is to be a declaration of martial law, a full and convincing explanation of the necessity undergirding the action should be part of the proclamation.

Incidentally, the proposed plan to appoint a military commander to oversee deployments of the U.S. military within the United States is another positive step in the organized use of military resources in the struggle to ensure domestic tranquility into the 21st century.[100]

CONCLUSION

A presidential declaration of martial law has not been a necessary predicate to the deployment of federal troops to control unruly and insurrectionist elements

---

[97] *Id.*, emphasis in original.

[98] *Id.*, p. 232, emphasis both in original and supplied.

[99] *Id.*, p. 234, emphasis both in original and supplied.

[100] *See, e.g.*, *New York Times*, March 10, 1999, p. A15.

within the United States. In light of this history, and these favorable precedents, it appears to be absurdly unlikely that the U.S. Congress or federal judiciary would ever make any determined effort to limit your broad statutory powers to use the military to **take such measures as you consider necessary** for the public good.

APPENDIX

The Arming of Federal Bureaucrats

If you have any qualms about the use of military forces within the United States or in the event that necessary U.S. military forces are unavailable or reluctant to participate, you enjoy other resources generally not available to your predecessors. Current estimates are that there are 80,000 armed employees in the Executive Branch — an increase of 20,000 over 1996![101]

The power to carry firearms has been granted, by statute, to:

- the Treasury Department's Inspector General for Tax Administration (5 U.S.C. 8D);
- designated employees of the Office of Inspector General of the Department of Agriculture (7 U.S.C. 2270);
- designated employees of the Department of Agriculture engaged in animal quarantine activities (7 U.S.C. 2274);
- Immigration and Naturalization Service employees (8 U.S.C. 1357);
- civilian employees of the Department of Defense (10 U.S.C. 1585);
- members of the Park Police (16 U.S.C. 1a-6);
- designated employees of the Forest Service (16 U.S.C. 559c);

---

[101] "Freedom Report," March 1999, published by Rep. Ron Paul (R-TX). The 1996 figure was cited in an October 14, 1997 speech on the floor of the House of Representatives by Rep. Paul; he was quoting published reports.

- designated employees of the Department of Agriculture or Department of the Interior (16 U.S.C. 670j);
- designated employees of the Tennessee Valley Authority (16 U.S.C. 831c-3);
- designated employees of the Department of the Interior, Department of Transportation, or the Department of the Treasury (16 U.S.C. 3375);
- employees of the Bureau of Prisons (18 U.S.C. 3050);
- employees of the Federal Bureau of Investigation (18 U.S.C. 3052);
- United States marshals (18 U.S.C. 3053);
- Postal inspectors (18 U.S.C. 3061);
- "law enforcement" personnel of the Environmental Protection Agency (18 U.S.C. 3063);
- federal pretrial services officers (18 U.S.C. 3154);
- federal probation officers (18 U.S.C. 3603);
- officers of the United States Customs Service (19 U.S.C. 1589a);
- designated employees of the Department of Health and Human Services (21 U.S.C. 372);
- employees of the Drug Enforcement Agency (21 U.S.C. 878);
- designated special agents of the Department of State (22 U.S.C. 2709);
- law enforcement employees of the Bureau of Indian Affairs (25 U.S.C. 2803);
- officers of the Bureau of Alcohol, Tobacco and Firearms (26 U.S.C. 7608);
- the Marshal of the Supreme Court and the Supreme Court police (40 U.S.C. 13n);

- designated employees of the General Services Administration (40 U.S.C. 318d);
- employees, **contractors**, and **subcontractors** of the Atomic Energy Commission (42 U.S.C. 2201);
- **contractors** and **subcontractors** of the United States Enrichment Corporation (42 U.S.C. 2297h-5);
- designated employees, **contractors**, and **subcontractors** of the National Aeronautics and Space Administration (42 U.S.C. 2456);
- designated employees, **contractors**, and **subcontractors** of the Department of Energy (42 U.S.C. 7270a);
- federal law enforcement personnel with responsibilities respecting the public lands (43 U.S.C. 1733);
- personnel with air transportation security responsibilities (49 U.S.C. 44903);
- designated Central Intelligence Agency personnel (50 U.S.C. 403f); and
- designated employees of the Office of Export Enforcement of the Department of Commerce (50 U.S.C. App. 2411).

As highlighted above, several of these statutes not only authorize federal employees to carry firearms, but also extend this authority to federal contractors and subcontractors. This elastic concept could be useful.

Again, however, there has been some effort to publicize this issue by politicians motivated by personal animus. For example, in 1997 Rep. Ron Paul (R-TX) observed that:

> Under the constitution, there was never meant to be a federal police force. Even an FBI limited only to investigations was not accepted until this century. Yet today, fueled by the federal government's misdirected war on drugs, radical environmentalism, and the aggressive behavior of the nanny state, we have witnessed the massive buildup of a virtual army of armed regulators prowling the States where they have no legal authority. The sacrifice of individual

> responsibility and the concept of local government by the majority of American citizens has permitted the army of bureaucrats to thrive.[102]

Of course, the loyalty of these dedicated public servants to the policies of your administration should make them a valuable resource, whatever the future may hold.

[102] October 14, 1997 speech on the floor of the House of Representatives.

AUTHORS' POSTSCRIPT

It would be difficult for most Americans in 1999 to imagine any president's use of the military against U.S. citizens — if it had not already happened innumerable times in the history of our country. No president, even one with the highest moral character, should be entrusted with such plenary powers, as have been exercised by presidents in the past. As Senator Daniel Hastings once said of a statutory authority being given to Franklin Roosevelt, it was:

> more power than any good man should want, and more power than any other kind of man ought to have.

The constitutional duty to constrain the exercise of unauthorized and unconstitutional presidential powers may someday rest with the federal judiciary. However, at present, it is the solemn constitutional duty of the U.S. Congress to act decisively to remove any pretense of legality from the exercise of such unconstitutional powers — powers that have been accurately described as "dictatorial" in nature.

— Bill Olson & Alan Woll