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Comments

The Civil Disturbance Regulations: Threats Old and New

DOMINIC J. CAMPISI*

In a recent article in this journal,[1] Professor David E. Engdahl joined in the criticism[2] of the Nixon Administration's civil disturbance regulations.[3] He noted the impropriety of the claim of an inherent presidential power to use military force to execute the law or to protect federal property and functions as asserted in these regulations.[4] He pointed out the flaws in the assertion that naval and Marine Corps personnel could be used by the President without checks provided by Congress,[5] and examined some of the other devices used to circumvent the strictures of the Posse Comitatus Act.[6] However, his analysis was flawed by a quixotic interpretation of the relevant constitutional and legislative history, and of the regulations themselves. This comment will attempt to demonstrate the flaws in Engdahl's approach.

Professor Engdahl correctly asserts that our traditions preclude the use of distinctively military force to execute the laws except when all civil measures have failed. However, he incorrectly interprets the current regulations as authorizing such a use of unbridled military power and martial law. The current regulations call for the use of military forces in subordination to civil authorities, protect the rights of citizens to trial at law, strictly limit the use of deadly force, and subject military personnel to the sanctions and deterrence of federal and state civil laws governing the use of deadly force. In addition, some of the

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

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

[3] 32 C.F.R. § 215 (1974); *see also id.* § 501.

[4] *Intervention* at 607–12; *see Honored* at 132–37.

[5] *Intervention* at 603–05; *see Honored* at 144.

[6] 18 U.S.C. § 1385 (1970). *See Intervention* at 605–12; *but see Honored* at 139–40; 144–46.

fears expressed in the article about the potential under the regulations for an expansive use of troops at the discretion of military commanders are not warranted by an examination of all the regulations and an examination of the history of practice under them. These defects should not be permitted to obscure the very real problems posed by the civil disturbance regulations which do merit a prompt congressional response.[7]

CONSTITUTIONAL AND STATUTORY FRAMEWORK

The power of the federal government to use military force to execute the laws and protect the states from domestic violence has never been clearly articulated in the Constitution or statutes. The problems of obtaining judicial review[8] have left us with little judicial guidance as well.

The constitutional scheme was a compromise based on conflicting fears of dominance of the states by the federal government,[9] of the impotence of state and federal governments in the face of popular resistance to the enforcement of law,[10] and of presidential or military dictatorship.[11] The scheme reflected the inconclusive debate between the partisans of militia and those of a regular army.[12] In the face of such conflicts the language of the Constitution and early military legislation was necessarily quite vague.

As a check on the executive, Congress was given the power to organize, arm, and discipline the militia,[13] to provide for calling forth the militia to execute the laws of the United States,[14] to raise and support the regular military force,[15] and to make rules for the government and regulation of the land and naval forces.[16] Although it was clear that the framers of the Constitution had intended that regular troops could be used to execute the laws,[17] no provision was made for

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[7] *See Honored* at 147–50.

[8] *Id.* at 150–52.

[9] *See, e.g.,* remarks of Col. George Mason, in 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 339 (1934), and those of Patrick Henry, in 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 422–24 (2d ed. 1881) [hereinafter cited as ELLIOT].

[10] *Cf. e.g.,* Letter from Elbridge Gerry to James Monroe, June 11, 1787, in 3 M. FARRAND, *supra* note 9, at 45.

[11] *See, e.g.,* debate at 2 M. FARRAND, *supra* note 9, at 329–33, 385–88.

[12] *See, e.g.,* statement of George Washington to the President of the Continental Congress, Sept. 24, 1776, in W. MILLIS, AMERICAN MILITARY THOUGHT 13 (1966).

[13] U.S. CONST. art. I, § 8 cl. 16.

[14] *Id.* cl. 15.

[15] *Id.* cls. 12 & 13.

[16] *Id.* cl. 14.

[17] *See, e.g.,* statement of Wilson Nicholas, 3 ELLIOT, *supra* note 9, at 389–90; THE

this in the Constitution or in the initial military legislation.[18]

Current statutes empower the President to use regular or militia forces to respond to requests for assistance from state governments,[19] to enforce the laws of the United States,[20] to protect the rights of persons within the states when *both* state and federal laws are violated,[21] to reinforce the Secret Service in protecting the President and Vice President and major candidates for those offices,[22] and to meet specified contingencies.[23] The President is prohibited from using troops to interfere with elections,[24] and from using them as a posse comitatus or otherwise to execute the laws other than as expressly provided by the Constitution or act of Congress.[25] This latter restriction thus prohibits the use of troops without the issuance of a proclamation[26] or the military enforcement of state law without either a state request for assistance or a concurrent violation of federal law.[27]

THE ENGDAHL CRITIQUE

In a series of articles,[28] Professor Engdahl has developed a

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FEDERALIST No. 28 (A. Hamilton).

[18] Act of May 2, 1792, ch. 28, §§ 1 & 2, 1 Stat. 264. Explicit permission was granted by the Act of Mar. 3, 1807, ch. 39, 2 Stat. 443. In the interim, the first three Presidents all used regular troops to execute the law based on their inherent duty to see that the laws be faithfully executed. *See* U.S. CONST. art. II, § 3; *Honored, supra* note 2, at 134 n.36.

[19] 10 U.S.C. § 331 (1970), *discussed in Intervention, supra* note 1, at 583–90.

[20] 10 U.S.C. § 332 (1970), *discussed in Intervention* at 590–93.

[21] 10 U.S.C. § 333 (1970), *discussed in Intervention* at 593–97. Engdahl believes that section 333 permits the use of federal troops to execute state laws. University of Colo. Law Revision Center, *Military Troops in Civil Disorders,* 43 COLO. L. REV. 399, 409 (1972) [hereinafter cited as *Troops*]. This conclusion is contradicted by the plain meaning of the statute itself and a study of the congressional debates surrounding its passage. *See* CONG. GLOBE, 42d Cong., 1st Sess. 567, 703 (1871) (remarks of Sen. Edmunds). The Nixon Administration made the same error. *See* 32 C.F.R. § 215.4(c)(2)(i)(c) (1974); *Honored* at 139–40. Section 333 was held constitutional. *Cf.* Griffen v. Breckenridge, 403 U.S. 88, 99 (1971) (dissenting opinion); 22 H.R.J. Res. 1292, 82 Stat. 170 (1968). Professor Engdahl believes this violates the Posse Comitatus Act, 18 U.S.C. § 1385 (1974), because the resolution does not expressly mention the use of troops. Congress clearly intended the resolution to permit the use of military personnel, *see* 114 CONG. REC. 16,170 (1968) (remarks of Sen. Javits). *Cf.* Mitchum v. Foster, 407 U.S. 225, 236–38 (1972). However, the expansive use of this provision by President Nixon to authorize the commitment of thousands of troops on five occasions provides a strong policy argument for a restrictive reading of this provision. *See Honored* at 145–46. It should be noted that the reservations expressed by Professor Engdahl about the use of troops pursuant to H.R.J. Res. 1292 parallel the arguments made against the use of troops in a posse.

[23] *See Honored* at 138 n.60.

[24] 18 U.S.C. § 592 (1970).

[25] 18 U.S.C. § 1385 (1970).

[26] 10 U.S.C. § 334 (1970).

[27] *Honored* at 139–41.

[28] *See,* in addition to those mentioned in notes 1 & 21 *supra,* Engdahl, *Soldiers, Riots,*

theory that our constitutional tradition and due process of law require that military force be applied only in a limited set of circumstances:

1) Distinctively military force can be used only in cases of insurrection after ordinary civil measures have failed.[29]

2) The troops used in other circumstances must be "obedient to the ordinary local civilian officials (state or federal, depending upon whether state or federal law enforcement is the objective)."[30] Use of troops under presidential control in such circumstances is impermissible.[31]

3) Deadly force can be used only "under a standard of reasonableness under the circumstances."[32]

4) The conduct of troops must be governed by civil standards to be reviewed by courts.[33]

While there can be no serious disagreement about the latter two assertions, the first two pose some serious problems.

Professor Engdahl holds that the use of the military domestically should be governed by the rule of Lord Mansfield that troops could be utilized—as civilians—to enforce the law in circumstances other than insurrections. In Lord Mansfield's words: "[n]o 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."[34] Engdahl asserts, without support, that the present military regulations call for the use of a "distinctively military force" in cases other than insurrections and that such usage is violative of the common law and the due process clause of the fifth amendment. This argument misinterprets Mansfield, grafts an unwarranted requirement of local control onto our constitutional history, and ignores the fact that the current regulations call for the use of troops in strict subordination to civil authorities, under civil standards and sanctions governing the use of deadly force, and without supplanting the civil court system.[35] His claim that troops cannot be used to suppress riots or execute the

and Revolution: The Law and History of Military Troops in Civil Disorders, 57 IOWA L. REV. 1 (1972) [hereinafter cited as *Soldiers*].

[29] *Troops, supra* note 21, at 419.

[30] *Id.* at 418.

[31] *Id.*

[32] *Id.*

[33] *Intervention, supra* note 1, at 617 n.15; *Troops* at 417.

[34] 21 THE PARLIAMENTARY HISTORY OF ENGLAND 698 (W. Cobbett ed. 1814); *see also Soldiers* at 32–34.

[35] The applicable federal regulations and military regulations have a very low visibility; hence it is understandable that a competent scholar such as Professor Engdahl overlooked them.

laws in situations short of insurrection is not supported by constitutional precedent, historic practice, or the realities of government.

The British Precedents

Limitations on the use of military force in Britain derived from fears that troops would be used by the Crown or a Cromwell to usurp the power of Parliament[36] or to deny citizens the right to a civil trial by their peers.[37] There were also fears that excessive force would be used.[38]

Although the historic method utilized in Britain to suppress civil disturbances had been the power of magistrates to call on citizens of the county and members of the milita for assistance—the posse comitatus—by the middle of the 18th century this practice had become ineffective.[39] Until the development of civilian police forces in the 19th century, reliance was placed on regular military forces for restoring order. "It is, indeed, no exaggeration to say that early industrial Britain was policed by soldiers; they put down virtually every serious disturbance."[40]

Faced with claims that such uses of military force conflicted with Britain's historic fear of military intervention, the judiciary developed an accommodating doctrine which recognized that such practices were a necessary evil. Troops could be subjected to civilian rules governing use of force, civil trial could be guaranteed to insurgents, and the risk that the executive would be emboldened or the troops politicized was ignored in the paramount need to restrain the disorders that threatened the fabric of industrializing England.

The basic precedent was set during the suppression of a sectarian riot which devastated London in 1780—the Lord Gordon Riots. During this disorder the local magistrates proved unwilling to risk the fury of the mob or the possibility of civil punishment for undue use of force. They also were quite realistic in recognizing that the militia and the citizenry were with the mob and would reject a call to the posse.[41] George III responded to the disorder by issuing a general order to the regular troops which he had moved into the city:

> In obedience to an order of the King in Council, the military to act without waiting for direction from the Civil Magistrates,

[36] *Soldiers* at 13–14.
[37] *See id.* at 6.
[38] *Intervention* at 585 n.20.
[39] T. CRITCHLEY, THE CONQUEST OF VIOLENCE 74 (1970).
[40] *Id.* at 68.
[41] *Id.* at 84.

> and to use force for dispersing the illegal and tumultuous assemblies of the people.[42]

Some 285 persons were killed in the actions which followed.[43] Lord Mansfield defended this action in Parliament, arguing that "[t]he military have been called in, and very wisely called in, not as soldiers, but as citizens . . . ."[44] Thus the underlying precedent of Engdahl's critique involved a use of troops by the chief executive, without the control of local officials. The use of troops in the Bristol riot of 1831, in the aftermath of which Justice Tindal echoed the Mansfield doctrine,[45] was also accomplished without the intervention of the magistrates.[46] Such uses of troops in the suppression of riots—which were not insurrections—were held not only to be proper, but commendable, and distinctly *civil* as well.[47]

It should be noted that troops could not be moved from garrisons by the magistrates without the permission of the military authorities or the King.[48] If the case were otherwise, the King could be disarmed and the defense of the county imperiled by the actions of local officials. Unlike the militia, the regular troops were a national rather than a local military body. Hence national authorities had to give permission for their use.

British policy at the time of the framing of our Constitution included the concept that troops could be used, under military or royal command, as civilians to restore order. This doctrine was a face-saving reaction to the inabilty of the posse and traditional control measures to meet the challenge of economic and class disorders. Thus martial law—confinement of civilians by the military and trial by courts-martial and the conduct of civil affairs by military edict—could exist only where the civil authorities had been ousted. The use of force had to be reasonable under the circumstances—although the bloody statistics of the industrial riots confirm that rioters who failed to disperse were fair game. Regular troops who acted to support civil authorities would be tried as civilians under civil standards of conduct.

American Constitutional Doctrine

As noted above, the compromises which produced our Constitution

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[42] *Quoted in id.* at 85.

[43] G. RUDÉ, HANOVERIAN LONDON: 1714–1808, at 142 (1971).

[44] 21 THE PARLIAMENTARY HISTORY OF ENGLAND 698 (W. Cobbett ed. 1814); *see Soldiers* at 34.

[45] T. CRITCHLEY, *supra* note 39, at 87.

[46] *Id.* at 124.

[47] *Soldiers* at 33–34.

[48] T. CRITCHLEY, *supra* note 39, at 74.

provided no clear exposition of policy with respect to the use of military force in domestic affairs. In general, the development of military policy reflected the experience of the various states in dealing with past disorders. For example, all of the states had provisions which gave the governor the power to call up the militia to suppress insurrections.[49] Such provisions also held the military in strict subordination to civil authorities.

The federal government was given authority to execute the laws, suppress insurrections, and protect the states against domestic violence.

Professor Engdahl asserts that the Constitution and enabling legislation reflected the doctrine that military force could not be used by the President except in circumstances where the disorder was an organized opposition to the existing governmental structure—an insurrection.[50] This argument is not supported by the records of the constitutional debates or the consistent practice of the past 200 years. The fact is that the Constitution and the enabling legislation envisioned the use of military force as a means of suppressing any sizable opposition to the law which prevented the proper functioning of the government or the enforcement of a law. Note that the military force used did not rise to the level of martial law, but rather involved the use of military force under military or presidential orders to support civil law enforcement institutions.

The use of federal military force to supplant civilian courts and legislative enactments has existed only during the Civil War and in the early stages of the Second World War in the western part of the United States. In the *Milligan*[51] and *Constantin*[52] cases the Supreme Court held that civil trials could not be denied and civil laws could not be replaced by military edict except where those institutions had been effectively eliminated by an insurrection or major disorder.[53] However, the constitutional debates illustrate that it was intended that troops could be used in *support* of civil institutions in circumstances where civil law enforcement was frustrated by disorders which did not rise to the level

[49] *Soldiers* at 30.

[50] *Intervention* at 586–87.

[51] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

[52] Sterling v. Constantin, 287 U.S. 378 (1932).

[53] A major flaw in Engdahl's analysis lies in his confusing such martial law with the use of troops under 10 U.S.C. §§ 331–33 (1970). The use of troops from the Whisky Rebellion on—with the exception of the Civil War and in the early stages of the Second World War in the western part of the United States—has been made to support and not supplant civil institutions. The question of whether courts are closed by the disorder is irrelevant unless the troops are used to apprehend people who will be incarcerated without recourse to habeas corpus and tried by courts-martial.

of insurrections. For example, during the debates at the Virginia ratifying convention the question was raised why it was necessary to give Congress power to provide for military forces to execute the laws as well as suppress insurrections.

> Mr. CLAY wished to know the instances where an opposition to the laws did not come within the idea of an insurrection.
>
> Mr. MADISON replied, that a riot did not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell.[54]

At another point in the debate, Madison argued that the Constitution gave the federal government the power to use troops to assist law enforcement personnel who had been outnumbered by lawbreakers. He alluded to recent experience in Alexandria and noted that "[t]he militia ought to be called forth to suppress smugglers."[55]

Hence, when the federal government was given the power to execute the laws, it was intended that disorders which did not amount to insurrections could be suppressed. Indeed, the mention of the power to use troops "to execute the Laws" would be surplusage if only insurrections could be met with military force.

Similarly, the concept of domestic violence contained in article IV, section 4 of the Constitution is much broader than that of insurrection. During the Virginia debates, it was noted that "[a] republican form of government is guarantied, and protection is secured against invasion and domestic violence on application."[56] Madison explained that the states could use their own militia "to suppress insurrections, quell riots, &c., and call on the general government for the militia of any other state, to aid them, if necessary."[57]

Engdahl argues that since the enabling legislation speaks only of the use of troops to assist states confronted with "insurrection,"[58] federal assistance cannot be provided in circumstances of mere riots.

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[54] 3 ELLIOT, *supra* note 9, at 410.

[55] *Id.* at 414.

[56] *Id.* at 427 (statement of George Nicholas).

[57] *Id.* at 416. Note that the legislation only permits the federalization of the militia of other than the requesting state. 10 U.S.C. § 331 (1970). This wording is a result of fears expressed at the ratifying conventions that the federal government would federalize and march away the militia of a requesting state. *See* 3 ELLIOT at 422 (Remarks of Patrick Henry). Recent administrations have circumvented this provision by federalizing the requesting state's National Guard under 10 U.S.C. §§ 332 & 334 (1970). *See, e.g.*, Proclamation No. 3795, 3 C.F.R. § 68 (1967). Engdahl misinterprets the purpose behind this wording. *Intervention* at 584 n.19.

[58] *Intervention* at 584–87.

This is wholly unrealistic. First, the words "shall protect" indicate that the requirement that the federal government protect the states "against domestic Violence" is a mandatory one. The enabling legislation should be read broadly to honor this policy. Thus the term "insurrection" in the legislation has been interpreted to encompass "lawlessness and disorder beyond the control of the civil authorities."[59]

In practice, the federal government has consistently responded to requests from states to assist in suppressing riots which did not amount to insurrections in the technical sense. The first instance in which such aid was provided involved a labor dispute on a canal project in Maryland in 1834.[60] The most recent example is the assistance provided during the racial riots of 1968, and certainly those disorders did not rise to an organized attempt to overthrow the government. It is inconceivable that any court would follow Engdahl's theory and hold that the federal government could not provide assistance to a requesting state facing an urban riot of the type found in Detroit in 1967. At most Professor Engdahl's theory could validly be supported in arguing that martial law could not be imposed in situations less than insurrections. So defined, the theory has little application to the current regulations or to an analysis of historic uses of military force to execute the laws or suppress riots.[61]

Use of Troops by Local Authorities

Professor Engdahl also maintains that due process and our Anglo-American constitutional principles require that military forces may not be employed merely under the control of the President as Commander-in-Chief, but must act only under the tactical and strategic command "of the civilian officials who would have charge of the situation if the military personnel had not been employed."[62] There is no support for this theory in our Constitution or the consistent history of military practice in the United States.

As noted above, Engdahl's basic English precedents involved interventions at the direction of the King and under the control of military commanders. The same practice has been followed in the United States. In recent years, however, civilian control has been tightened by placing control of the military forces in the hands of a

[59] United States v. Fischer, 280 F. 208, 210 (D. Neb. 1922).

[60] *See* Morris, *Andrew Jackson, Strikebreaker,* 55 Am. Hist. Rev. 54 (1949).

[61] The current regulations do not contemplate the imposition of martial law or the "distinctively military force" discussed by Engdahl. *See* text at notes 101–19 *infra.*

[62] *Intervention* at 617 n.151.

Senior Civilian Representative of the Attorney General (SCRAG) or a senior representative of the President. While there are policy arguments for placing such control in the hands of local officials, no constitutional provision mandates this, and prudent military practice dictates against it.[63] In addition the broad claim that early American policy required that troops could be used only by the President after local authorities using federal troops had failed to suppress the violence is equally without support in federal law or practice.

In order to deal with these arguments, it is best to examine separately the policies and practice involved in the use of the troops to execute federal law and those relating to interventions at the request of state governments.

Enforcement of Federal Laws

Professor Engdahl argues that when troops are used to execute federal laws, they should act under the command of a federal marshal. He argues that this is constitutionally mandated and follows the pattern of early federal practice. It can be argued that the marshals utilized regular troops in their posses under the authorization of the 1792 military legislation which gave the marshals the same power as sheriffs in enforcing the laws, *i.e.*, the power to summon the posse comitatus.[64] The initial military legislation further provided:

> That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act . . . it shall be lawful for the President . . . to call forth the militia of such state to suppress such combinations, and to cause the laws to be fully executed.[65]

Engdahl concludes that this legislation could only mean that the President could not use troops to execute the law until the marshal had used militiamen and troops in his posse and failed to contain the disorder. In support of this interpretation, he cites an 1878 opinion of Attorney General Charles Devens, stating:

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[63] *Id.*

[64] Act of May 2, 1792, ch. 28, § 9, 1 Stat. 265.

[65] *Id.* § 2. Three years later Congress dropped the requirement that the President act only after being informed by a judge of the obstruction. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424. Congress thus indicated that it intended troops to be used when the courts had not been disabled. The change in the wording of the Act in 1861, Act of July 29, 1861, ch. 25, 12 Stat. 281, was not the radical innovation that Engdahl asserts in *Intervention* at 593.

> It has been the practice of the Government since its organization (so far as known to me) to permit the military forces of the United States to be used in subordination to the marshall . . . .[66]

This interpretation of the historic practice is inaccurate. The initial legislation contemplated no such grant of power; at most, section 9 of the 1792 legislation authorized the marshal to call on *state* militiamen. Authority to call on regular troops or *federalized* militiamen would be inconsistent with the tenor of the law and the debates leading to its enactment. The President himself was not given authority by this legislation to use regular troops to execute the law.[67] After placing this and other restrictions on the power of the President to use military force, it would have been counterproductive for Congress to sanction the President, without controls, to permit his marshals to use regular troops to execute the laws.[68]

An examination of the early uses of the military bears out the conclusion that the marshals, as well, did not have this power. In 1792, following the passage of the military legislation, President Washington found it necessary to issue a proclamation exhorting obedience to the revenue laws and urging support for the federal courts and officials. His proposed draft of the proclamation included a charge to military officers to assist in the enforcement of the laws. This mention of the military was dropped in response to the criticism of Edmund Randolph:

> The charge to the military would inflame the Country. Nor do I think it sufficient to let it stand upon the word *"Officers"* generally as the military have no power on the subject and where this is the case of the exciting of a suspicion to introduce them cannot be too sedulously avoided.[69]

If the 1792 legislation had in fact empowered the marshal to call on regular troops, Randolph could not have stated that "the military have no power on the subject." If Engdahl's interpretation is correct, it would have been entirely proper to exhort the military and to urge them to rally to the support of the court. It should be noted also that in the three years of turmoil in Pennsylvania that followed, there is no evi-

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[66] 16 OP. ATT'Y GEN. 163 (1878), *quoted in Intervention* at 601 n.83.

[67] *See* note 18 *supra.*

[68] Since sheriffs did not have authority to command federal troops to join their posse—they were not citizens of the county as were the regular militia, 7 CONG. REC. 4302 (1878) (remarks of Sen. Maxey)—the grant to the marshals by section 9 of the 1792 legislation would convey no greater power; *see also* Opinion of Judge Advocate General W.M. Dunn, June 8, 1878, in F. WILSON, FEDERAL AID IN DOMESTIC DISTURBANCES 290, S. Doc. No. 263, 67th Cong., 2d Sess. (1922).

[69] Letter to Alexander Hamilton, Sept. 8, 1792, in 12 THE PAPERS OF ALEXANDER HAMILTON 336, 340 (H. Syrett ed. 1967) (italics in original).

dence that the marshal of Western Pennsylvania ever called on the federal troops garrisoned in the area despite his difficulties in enforcing the law.

Even after the passage of the 1807 legislation permitting the President to use regular troops to enforce federal laws,[70] the evidence of presidential action indicates that the marshals did not have the claimed power. For example, when President Jefferson found that federal customs officials were unable to enforce the embargo laws, he obtained a specific authorization from Congress to use regular troops under the command of subordinate civil officials to enforce the law.[71] If the marshals already had this power, Jefferson would not have had to issue such a proclamation to use troops to suppress minor incidents of opposition to the laws[72] or to ask Congress for permission to delegate control of federal troops to lesser officials. Similarly, when President Jackson was faced with the Nullification controversy, he also was compelled to obtain specific authorization from Congress to use regular forces under the command of the marshal.[73]

The use of federal troops in the posses of marshals actually began in 1854 as a means of enforcing the Fugitive Slave Act.[74] That law had stated that it was the duty of federal marshals to arrest and return all fugitives brought to their attention, and reasserted the marshal's power to summon the posse.[75]

When a Boston mob released a fugitive slave in the custody of a federal marshal in 1851, President Fillmore found it necessary to issue a proclamation in order to direct the local federal military commander to assist the marshal.[76] The proclamation only served to heighten hostility towards the marshals (and the President), whereupon Fillmore turned to Congress for relief, asking for the elimination of the proclamation requirement and for the power to delegate control over such military actions "to any civil officer of the United States."[77] Congress took no action in response to this request. Again, if the marshal already had the power to call the Boston garrison to join his posse, this whole episode is meaningless.

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[70] *See* note 18 *supra.*

[71] Act of Jan. 7, 1809, ch. 5, § 11, 2 Stat. 510.

[72] *See* 1 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 450 (1897).

[73] *See* Act of Mar. 2, 1833, ch. 57, § 5, 4 Stat. 634. *See also* 2 J. RICHARDSON, *supra* note 72, at 630.

[74] Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

[75] *Id.* § 5, 9 Stat. 463.

[76] 5 J. RICHARDSON, *supra* note 72, at 110.

[77] *Id.* at 101; *see also Honored, supra* note 2, at 142.

When President Pierce faced the same dilemma in 1854, his Attorney General, Caleb Cushing, found a means of circumventing the problem by ruling that federal troops could be used as part of the posse comitatus.[78] This obviated the need for the President to issue a proclamation in such circumstances and thus avoided the political risks of publicly supporting the enforcement of the Fugitive Slave Act.[79]

The use of federal troops in the command of federal civil officials continued after this date, with troops used extensively under the command of federal marshals,[80] federal officers,[81] and sheriffs.[82] Congress ended this practice in 1878 with the passage of the Posse Comitatus Act.[83] Although the Act was a product of the struggle to end federal intervention in the South,[84] the debates indicated a finding by Congress that the use of regular troops in posses resulted in serious abuses.[85] The debates also evidenced an awareness on the part of many Congressmen and Senators that the use of regular troops in a posse dated from the 1854 opinion of Attorney General Cushing.[86]

It should be noted that, even at the height of the posse practice, marshals did not have unrestricted authority to call for the services of federal troops—as Engdahl's theory requires. Before a marshal could utilize troops, permission had to be sought from the President,[87] and military commanders had authority to refuse the command of a marshal.[88] This reduces the effect of the posse to a deployment of troops at the command of the President, reflecting the parallel British practice of requiring royal permission before regulars could be moved from their garrisons to serve in a magistrate's posse.[89] The prohibition on the use of troops to execute the law as part of a marshal's posse contained in the Posse Comitatus Act was thus a reaffirmance of historic practice, rather than a rejection of it, as asserted by Professor

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[78] 6 OP. ATT'Y GEN. 466 (1854).

[79] The potential of the posse practice as a means of avoiding public responsibility for the overt or covert use of troops is one of the more objectionable features of the current military regulations. *See Honored* at 140–41.

[80] *See Honored* at 142 n.85.

[81] *Id.* at 142 n.86.

[82] *Id.* at 142 n.87.

[83] Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152, now codified at 18 U.S.C. § 1385 (1970).

[84] *See Honored* at 142–43.

[85] *Id.*

[86] 7 CONG. REC. 4296 (Remarks of Sen. Teller), 4241 (Remarks of Sen. Sargent), 3582 (Remarks of Congressman Kimmel); *see* note 78 *supra.*

[87] J. SEFTON, THE UNITED STATES ARMY AND RECONSTRUCTION, 1865–1877, at 219 (1967).

[88] *Id.* at 217.

[89] *See* note 48 *supra.*

Engdahl.[90]

Since 1792, the President has had the direction to utilize military force to execute the laws when he determined that the law could not otherwise be enforced.[91] There was no requirement that he first resort to the use of regular troops in a marshal's posse. When troops were in fact committed to execute federal laws, they acted under the control of representatives of the President or military commanders rather than under the direction of a marshal.

Protection of the States Against Domestic Violence

Professor Engdahl asserts that when troops are utilized in response to a request for assistance from state legislatures or governors pursuant to the guarantee clause, they should be subordinated to "state magistrates and police."[92] Again, this requirement is without constitutional support or historical precedent.

When troops have been committed in response to state requests for aid, they generally acted under the command of federal civil and military officers. For example, in the first use of federal troops in such a role, in suppression of labor violence in Maryland in 1834, troops acted under the orders of federal military commanders.[93] Although there were some instances where federal troops acted under state command,[94] in such circumstances the governor was the commanding official.[95] The constitutional debates reflect this policy of retention of command by federal officials, and the debates at the Virginia ratifying convention demonstrate that the delegates were not only aware that federal officers would command troops, but voiced fears that the federals would take command of the requesting state's militia as well.[96] As a consequence of this fear, the enabling legislation was written to permit the federalization only of the militia of states other than the requesting one.[97] Such a provision would be unnecessary if the federalized militia were to be under state control, either of the governor or local officials.[98]

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[90] *Troops* at 411.

[91] *See* note 65 *supra.*

[92] *Troops, supra* note 21, at 418 n.94; *see also Intervention, supra* note 1, at 617 n.151.

[93] *See* note 60 *supra.*

[94] F. WILSON, *supra* note 68, at 231 (use of troops during Dorr's Rebellion); at 272–76 (use of troops in Maryland and West Virginia during strike of 1877); C. DOWELL, MILITARY AID TO THE CIVIL POWER 200 (1925) (use of troops during the West Virginia coal strike of 1921). The military objected to and obtained a change in this policy. F. WILSON, *supra,* at 278.

[95] F. WILSON, *supra* note 68, at 231.

[96] 3 ELLIOT, *supra* note 9, at 422 (Remarks of Patrick Henry).

[97] *See* statement of George Nicholas in *id.* at 425–27.

[98] Note that it would be desirable for a governor to have his militia federalized—if

Policy Issues

As noted above, British practice endorsed the use of regular troops under the authority of military commanders acting under royal command. Control by magistrates was not essential to a judicial finding that the action of the troops was essentially civilian and in conformity to the common law.

In the United States there was no constitutional requirement that troops enforcing federal laws act under the command of federal marshals. The practice of using troops in a posse did not itself begin until 1854, and was emphatically rejected by Congress in 1878. Such use of troops was thus never a prerequisite to use of troops by the President. With respect to the use of troops to assist state governments, the constitutional debates indicated that federal command was to be retained. Federal enabling legislation has consistently reflected this intent.

Although current policy calls for command of troops by civilian representatives of the President rather than local magistrates, there may be some policy considerations which would dictate local control: familiarity of local officials with the dispute and locale, placement of control in the hands of officials who would prosecute as well as apprehend offenders, and support of local governmental institutions at a time when their authority and legitimacy has been undercut by violence. Such considerations have been outweighed in practice by the need for continuity in command of military forces, for personnel experienced in the command of large task forces and the suppression of disorders with minimum use of force, for protection against local prejudices and excesses,[99] and to prevent the abdication of the President's responsibilities as Commander-in-Chief and the misuse of federal military power in the hands of local officials.

Command of federal riot control troops by local officials or federal marshals is impracticable. Professor Engdahl is imbued with the view of a 19th century marshal leading a half dozen troopers to collect a debt or arrest a fugitive—a span of control which would permit him to dictate every move they made. However, the reality of riot control tactics—in the 19th as well as the 20th centuries—is that no civil official could do more than set policies governing the conduct of the thousands

he retained control—since the federal government would then bear the cost of their salaries and supplies.

[99] *See, e.g.*, dismissal of Colorado National Guard by President Wilson after Ludlow Massacre, F. Wilson, *supra* note 68, at 313; discharge of voluntary militia in Kansas in 1856 after confrontation with abolitionist forces, *id.* at 241.

of troops who are needed to restore order quickly without recourse to firepower.[100] Reliance must be placed on military officers and NCO's to carry out the dictated policies on use of force and the conduct of the riot control mission. Moreover, local law enforcement officials—whether local police or federal marshals—lack the training and experience with federal military organization and tactics to command the large bodies of troops used to contain the recent urban disorders: for example, the 25,000 troops which were committed in Detroit in 1967.

The premise of a local control requirement is that local officials will be more temperate in the use of deadly force than federal civil or military officers. The reverse is probably true. For example, the bulk of shooting and fatalities in the Detroit riot took place prior to federal intervention. The indiscriminate use of deadly force in the Newark riot by state and city police and the intemperate use of force by local police during the 1968 Democratic National Convention in Chicago point out the need for the intervention of unbiased and neutral federal authorities. There seems no reason for believing that a local federal marshal will be more restrained than an assistant attorney general. Moreover, there is no policy basis for preferring an appointive local federal officer over a senior one.

Distinctively Military Force

Professor Engdahl has also argued that distinctively military force cannot be used until civil options have been exhausted and the courts closed.[101] He asserts that the present federal military regulations are constitutionally infirm because they contemplate the use of a "distinctively military force" in circumstances where the courts are open. By this term Engdahl implies something akin to martial law. A "distinctively military force" involves—in his view—the use of troops under military command or the command of a national rather than a local official; review of the actions of the military personnel under military standards rather than the common law standard of reasonableness under the circumstances;[102] and displacement of civil institutions by military ones—the use of courts-martial for civilian law violators and the replacement of civil laws with military edict.[103]

An Engdahl correctly points out, federal military forces used domestically may use only that degree of force which is reasonably

[100] *See Honored, supra* note 2, at 142 n.86.
[101] *Troops* at 418; *Soldiers, supra* note 28, at 70 n.324.
[102] *Troops* at 417–18.
[103] *Intervention* at 586–87.

necessary.[104] However, with the exception of the Civil War,[105] federal troops have been subject to civil standards and sanctions for acts done during the course of riot duty. For example, the troops involved in two killings during the Whisky Rebellion were tried in accordance with civilian law.[106] The same is true of present military practice under the new civil disturbance regulations.

Engdahl's assertion that troops cannot be used to displace civil institutions except when they are incapacitated by disorder is essentially correct. The *Milligan* and *Constantin* decisions point to the fact that courts-martial and military edict cannot be used in circumstances where civil institutions are functioning. But the basic flaw in Engdahl's analysis is his argument that current military policy envisions the use of "distinctively military force." Under the strictures of the Mansfield doctrine and American constitutional principles, the use of troops under the Defense Department regulations is essentially civilian in nature.

Line of Command

Engdahl asserts that federal troops used to execute the law act under purely military command.[107] This is not true. The Interdepartmental Action Plan between the Department of Justice and the Department of Defense approved by the President in 1969 places the Attorney General in control of all federal forces in riot control and law enforcement situations.[108] The Attorney General prepares federal policy governing the use of troops in such circumstances, and an assistant attorney general is sent to the scene of the disorder to observe the situation and report to the Attorney General on the implementation of policies established and to recommend changes to meet the current disorder.[109]

> During Emergencies, Civil Disturbance Teams under the leadership of an Assistant Attorney General are sent to the scenes of disturbances to consult with local officials, to report to the Attorney General on the need for Federal assistance, and to direct any Federal effort needed.[110]

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[104] Luther v. Borden, 48 U.S. (7 How.) 1, 45–46 (1849).

[105] *Intervention* at 593.

[106] *See* L. BALDWIN, THE WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING 226 (1939).

[107] *Intervention* at 613.

[108] Interdepartmental Action Plan at 2, 3.

[109] ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES, FY 1970, at 33.

[110] *Id.*

While the military commander is in operational control of the troops, he is under orders to consult with the Senior Civilian Representative of the Attorney General (SCRAG) on all significant matters.[111] Given the SCRAG's direct communications with the Attorney General and President and his constant supervision of the federal forces, the control of the federal task force is firmly in civilian hands.

This policy of placing a civilian in command of the federal task force was also observed by the Kennedy and Johnson Administrations. Such men as Nicholas Katzenbach, John Doar, Bryon White and Cyrus Vance were in charge of federal military task forces during the 1960's. Such use of senior federal officials to control military task forces provides an appropriate degree of civilian control over the military and provides a degree of expertise in the control of such operations which could not be met by the placement of control in local officials.

Civil Sanctions

When federal troops are utilized in law enforcement missions, they are subject to the same sanctions and standards of review which would govern the actions of local police. The Army Field Manual, *Civil Disturbances*, which establishes military policy in this area, states:

> When Federal military forces are employed in the United States and its territories, whether or not martial law prevails, the acts of individual military personnel are subject to review by the civil courts in actions for damages or in criminal proceedings.[112]

Troops are also advised that they will be held responsible by civil courts for following orders of military commanders "if the illegality of the act is so obvious as to be immediately apparent to a reasonable person."[113] Similarly, military lawyers have been counseled to be familiar with state and local law in order to be able to prepare the defense of any soldier accused of improper use of force during a civil disturbance mission.[114]

Support of Civil Institutions

When troops are utilized under the Defense Department regulations they do not bring with them martial law and do not supplant civil

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[111] 32 C.F.R. § 501.3(b) (1974); Department of the Army Civil Disturbance Plan, Annex C, Appendix 7, at 4 (1975).

[112] DEPARTMENT OF THE ARMY, CIVIL DISTURBANCES (Field Manual 19-15) ¶ 2-10 (1972).

[113] *Id.*

[114] Murray, *Civil Disturbances, Justifiable Homicide, and Military Law*, 54 MIL. L.J. 129 (1971).

institutions. For example, civilian offenders arrested by military personnel are turned over to the civil authorities as soon as possible after apprehension.[115] There is no provision for courts-martial of offenders. When curfews or other restrictions are necessary, local officials are used to accomplish such procedures and violators are tried under local laws.[116] Under the Mansfield doctrine, such uses of troops can only be described as civil, rather than as "distinctively military."

Use of Deadly Force

It should also be noted that federal planning calls for an extremely restricted use of deadly force in civil disturbance control situations. Federal military commanders are instructed that:

> The primary rule which governs the actions of federal forces in assisting state and local authorities to restore law and order is that you must at all times use only the minimum force required to accomplish your mission.[117]

The standards regulating the use of deadly force are in strict compliance with those regulating civil police forces.[118] The regulation even precludes the loading of weapons by soldiers unless ordered to do so by a superior officer or when necessary to protect life or prevent the commission of serious felonies.[119]

It can thus be seen that the current regulations contemplate the use of military personnel under civilian control and under civil, rather than military, standards of conduct. The manner in which troops are utilized to enforce the laws, suppress insurrections, and protect the states against domestic violence is in strict compliance with our constitutional and historical precedents.

Emergency Power

Professor Engdahl is also concerned with the threat posed to our civil institutions by the regulations permitting the intervention of the military to restore order in cases where

> sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal government functions to such an extent that duly constituted local authorities are unable to control the situation.[120]

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[115] 32 C.F.R. § 501.1(c) (1974).
[116] *See, e.g.*, Glover v. District of Columbia, 255 A.2d 556 (D.C. App. 1969).
[117] Department of the Army Civil Disturbance Plan, Annex C, Appendix 7, at 10.
[118] *Id.* at 12–13.
[119] *Id.* at 15.
[120] 32 C.F.R. § 215.4(c)(1)(i) (1974).

While Engdahl asserts that the prior "regulations contained nothing at all comparable to this bold claim of inherent executive power . . . ,"[121] this regulation and its predecessors have been a part of military practice since the start of this century. A similar regulation provided the authority for military assistance during the 1906 earthquake in San Francisco.[122] Prior regulations also contained a provision for the use of military force to restore order during calamities when normal lines of communication have been disrupted.[123] The current regulations, as they have since 1953,[124] restrict such interventions to an "emergency so imminent as to make it dangerous to await instructions from the Department of the Army requested through the speediest means of communications available."[125] The regulations have tightly limited such actions:

> However, in view of the availability of rapid communications capabilities, it is unlikely that action under this authority would be justified without prior Department of the Army approval while communications facilities are operating. Such action, without proper authorization, of necessity may be prompt and vigorous, but should be designed for the preservation of law and order and the protection of life and property until such time as instructions from higher authority have been received, rather than as an assumption of functions normally performed by the civil authorities.[126]

Certainly one can worry that there might be a risk of improper intervention of military forces into civilian affairs, but this is really a fear of military adventurism which would not be restrained by any regulations, even the tightly circumscribed one present here. In brief, the emergency regulation permits military action to support civilian authorities without recourse to a presidential decision only in circumstances of a calamity that prevents communication with higher authority. This is a necessary and commonsense regulation which has not resulted in untoward military intervention during this century. There appears to be no cause for alarm.

Pre-positioning of Troops

Professor Engdahl also expresses some fears about the provision

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[121] *Intervention* at 610.

[122] DEPARTMENT OF THE ARMY, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (D.A. Pamphlet 27-11) 20 (1966).

[123] 32 C.F.R. § 187.5(a)(1) (1968); 32 C.F.R. § 501.2(a) (1969).

[124] *See* 18 FED. REG. 5593 (1953).

[125] 32 C.F.R. § 501.2(a) (1974).

[126] *Id.*

in the current regulations permitting the pre-positioning of bodies of military personnel of less than battalion size without the approval of the President.[127] There is some merit in his concern that the pre-positioning of troops outside of federal enclaves might be used to chill the rights of demonstrators. Troops have been used in this function since the 1877 railroad disorders,[128] most recently in the 1971 demonstrations in New Haven and the antiwar demonstrations in Washington, D.C., in 1970 and 1971.[129] Professor Engdahl's fear that local commanders will use this power to move troops onto the streets is without substance. At most the regulation contemplates the movement of troops *between* federal military installations—and even then with the approval of the civilian leaders of the Defense Department.

It is understandable why Professor Engdahl is so suspicious when one examines the other provisions of the Nixon Administration regulations. These provisions provide for the use of federal military forces to execute the laws by the President without the issuance of a proclamation,[130] and permit the intervention of federal forces to execute state laws when no federal laws have been violated and when no request has been made by the state.[131] They would also permit the use of naval and Marine Corps personnel to execute the law—covertly or otherwise—as a posse comitatus.[132] As I have stated elsewhere, these claims to an inherent presidential power to execute the laws cannot be sustained.[133]

CONCLUSION

Professor Engdahl has correctly pointed out the inadequacy of the civil disturbance regulations' claim to an inherent presidential power to use military force to execute the laws. His analysis is flawed, however, by his unsupported claim that federal military forces cannot constitutionally be used to execute the laws in circumstances which do not constitute insurrections, by his insistence that there is constitutional support for his requirement that troops act under the command of local authorities, and by his mistaken belief that the regulations call for the use of troops in a "distinctively military" role.

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[127] *Intervention, supra* note 1, at 614; 32 C.F.R. § 215.5(g) (1974).

[128] F. WILSON, *supra* note 68, at 284.

[129] The Supreme Court has held that such pre-positioning does not present an injury for which a judicial remedy exists. Alabama v. United States, 373 U.S. 545 (1963).

[130] *Honored, supra* note 2, at 148–49.

[131] *Id.* at 139–40.

[132] *Id.* at 144; *but see* United States v. Walen, 490 F.2d 372, 375 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[133] *Honored* at 132–37.