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A Rejoinder

DAVID E. ENGD AHL*

The editors have offered me this opportunity for a rejoinder to Mr. Campisi's response to my article on the new Civil Disturbance Regulations.¹ I have chosen to reply on only a few points, inviting the reader to review both the original article and Mr. Campisi's response with greater care.

My several earlier articles on the general topic of military troops and civil disorders have dealt not only with the use of federal troops but with the use of troops by the states as well. The principle which I distilled from the English history and precedents, requiring that military troops when used in civil disorders be subordinated to ordinary local civil authorities and laws, is a principle that carries no connotations hostile to American federalism. Applied to our polity, it means that federal troops must be subordinated to federal officials, state troops to state officials (and also to federal officials insofar as prescribed by the supremacy clause).² Campisi is quite wrong in his assertion that I have claimed that command of troops by "a national rather than a local official" constitutes those troops a "distinctively military force."³

Moreover, by stressing the impracticality of sheriff or marshal command of troops in modern circumstances, Campisi too easily deprecates the importance of the traditional requirement of "local" civilian control. The federal government and the state governments of course have power to reorganize their respective civilian law enforcement structures. Sheriffs and marshals were the familiar officers of law enforcement in the early United States, as sheriffs had been in England, and the posse tradition, including the civilian use of troops, was formulated in that context. But states can establish, or authorize municipalities to establish, police forces or other officials or agencies to which the constitutional tradition of "local" civilian control must adapt. So also may the federal government with respect to its duties to enforce federal law. For these reasons I wrote to Mr. Campisi, while his article was in prep-

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

² U.S. CONST. art. VI, § 2.

³ Campisi, *The Civil Disturbance Regulations: Threats Old and New*, 50 *IND. L.J.* 757, 772 (1975).

aration, the following observations which he seems to have disregarded:

[Y]ou seriously misunderstand my articles on this subject if you think I advocate a return to the quaint old pre-1878 posse-comitatus practice. What is of concern to me is the constitutional principle that personnel used in civil law enforcement must be viewed, for all legal purposes, as civilian and not as military personnel. That, and not the trappings of posse status or marshal leadership, is the essential constitutional requisite that was respected by, but is not necessarily peculiar to, the pre-1878 practice. SCRAG leadership may be more desirable than marshal leadership, I certainly agree; and adequate SCRAG in lieu of marshal leadership certainly is not unconstitutional. Neither, however, is SCRAG leadership by itself sufficient to satisfy the constitutional requirements. . . . The old troop posse practice happened to comport with these requirements. A different and more modern practice, if equally consistent with these requirements, would certainly be preferable.⁴

The states for purposes of state law enforcement, and the United States for purposes of federal law enforcement, are competent to restructure their respective law enforcement structures. They may even provide exceptional or more centralized structures for employment in unusual exigencies. Whatever structure is adopted, however, it is not to be displaced or superseded by military forces that are called in to render law enforcement aid. That, and not any archaic forms, is the essential substance of the historic requirement of subordination to ordinary "local" civilian authorities.

The fact that King George III might have had power as sovereign in conformity with the laws of England to shunt aside lesser magistrates in execution of the laws does not mean that the President or a governor has power to do the same in this country today. It depends upon the statutes and constitution of the nation or the state. If the President or governor has no power to do so when he makes *no* use of troops, for him to claim power to supersede other authorities *by virtue of* his use of troops would be offensive to the rule of civilian due process for which I have argued. It is for this reason that the actions of the King in the Gordon and Bristol riots are of less significance as precedent than the opinions of Mansfield and Tindal justifying those actions by reference to the posse tradition.

I find most curious Campisi's assertion that the practice of using federal troops as a posse originated with the opinion of Attorney General Cushing in 1854. I had found persuasive evidence to the contrary. Cushing, from my research, hardly seems to have been a proponent of

⁴ Letter from David E. Engdahl to Dominic Campisi, Feb. 14, 1975 (on file with the INDIANA LAW JOURNAL).

enlarged military power on the domestic scene; an opinion of his as Attorney General in 1857⁵ was inhospitable to some of the militaristic pretensions of Civil War and Reconstruction radicals, although not so much so as the Supreme Court's opinion in *Ex parte Milligan*.⁶ More significant, Cushing's 1854 opinion⁷ certainly purports to be a reflection of a traditional practice rather than the inauguration of something new. In addition, the 1878 opinion of a successor Attorney General⁸ also attests to the historicity of the practice. Moreover, a long-established equivalent practice in the states is attested to by the 1855 Massachusetts Supreme Court decision in *Ela v. Smith*.⁹ It is my view that chapter 28, section 9 of the Act of May 2, 1792¹⁰ (a provision which in context pertains to the use of the military, and is in addition to the civilian posse authorization of the Act of September 24, 1789, chapter 20¹¹) was intended to make the state practice, derived from the Mansfield doctrine, a federal practice as well.¹² Campisi would counter all of this with an inference drawn from the fact that on certain occasions Presidents Jefferson and Jackson sought special authorization from Congress to employ troops under marshals. For a number of reasons, however, such as confusion, doubt, political caution, or abundance of care, special approval for a variety of actions is often sought when it is not needed. To infer from this that the power was otherwise lacking is quite unwarranted.

At one point at least, Campisi asserts that I claim that troops cannot constitutionally be used to execute laws in situations short of insurrection.¹³ That misstates my position. Troops may be used, I maintain, but only as an essentially civilian force. This is a proposition with which Campisi, after considerable equivocation, appears in the end to agree. We differ, perhaps, over the factors that distinguish troops as a civilian from troops as a military force, and over the question whether the Nixon Civil Disturbance Regulations adequately ensure a *civilian* force of soldiers for circumstances short of insurrection.

Campisi seems to have fallen into confusion as to what uses of

⁵ 8 OP. ATT'Y GEN. 365 (1857).

⁶ 78 U.S. 2 (1866).

⁷ 6 OP. ATT'Y GEN. 466 (1854).

⁸ 16 OP. ATT'Y GEN. 162 (1878).

⁹ 2 Gray 121, 66 Am. Dec. 356 (1855).

¹⁰ 1 Stat. 264, 65.

¹¹ 1 Stat. 73, 87.

¹² See Engdahl, *Military Troops in Civil Disorders*, 43 U. COLO. L. REV. 399, 406-07 n.41 (1972).

¹³ Campisi, *supra* note 3, at 763.

troops I find to be constitutionally precluded, and what uses I find to be constitutional but poorly provided for by statute. Of the principal federal statutes discussed in my Symposium article, there are some I consider unconstitutional, others which I consider constitutional but only if construed in light of their origin and legislative history rather than as they have been applied in practice. However, I am hardly so naive as to think it likely 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."¹⁴ Neither do I argue that such judicial boldness is to be desired. These statutes, inapt as they are, are all the Congress has provided thus far. Modern needs and conditions have outstripped them and shown up some of their faults. What is to be sought is not judicial disablement of needed executive action in emergencies (although disabling decisions under these statutes would be justified), but, rather, new and mature legislative attention to the problems of providing adequate powers for dealing with civil disorders while at the same time better protecting indispensable historic safeguards of civilian due process.

¹⁴ *Id.* at 765.

