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THE NEW CIVIL DISTURBANCE REGULATIONS: THE THREAT OF MILITARY INTERVENTION

DAVID E. ENGDALH†

INTRODUCTION

In February 1972, the Nixon administration promulgated new regulations concerning the employment of federal military resources to deal with civil disturbances. These new regulations, which, for convenience, will be referred to as the "Civil Disturbance Regulations," take the place of earlier regulations that had been promulgated under the Johnson administration in 1968 and discontinued in November 1971. The 1968 regulations were themselves open to criticism on several points of law, as will be pointed out in the course of this study; but in addition to preserving the objectionable features of the old regulations, the new Civil Disturbance Regulations dramatically increase the likelihood of federal troop utilization in domestic situations while significantly reducing the safeguards against their abuse. These new regulations give a color of legality to almost unprecedented military intrusions into the realm of domestic government. Moreover, they present some ominous possibilities that a people attached to free civilian institutions cannot afford to dismiss lightly. It would be temeritous to predict that these extreme possibilities will be realized; but it would be folly, if the possibilities exist, to ignore them.

The stated purpose of the Civil Disturbance Regulations is to establish policies and furnish guidance for the utilization of federal troops and other Defense Department resources "[i]n support of civil authorities during civil disturbances" and "[i]n other related instances where military resources may be used to protect life or Federal property or to prevent disruption of Federal functions." Virtually the same

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1. "Military resources include military and civilian personnel, facilities, equipment, and supplies under the control of DOD component." 32 C.F.R. § 215.3(c) (1973). This definition does not encompass National Guard troops that have not been federalized.
language appeared in the 1968 regulations. The innovations introduced by the draftsmen of the new regulations, however, invite their application in circumstances which rather clearly were not within the contemplation of the earlier regulations at all, and in which, more importantly, the utilization of military force is clearly unwarranted under the Constitution and federal case and statute law. This lack of authority for the new Civil Disturbance Regulations becomes clear, however, only after careful examination of the constitutional and statutory premises on which the regulations purport to rest.

Recently, Chief Justice Burger observed on behalf of a unanimous Supreme Court that

[w]hile both federal and state laws plainly contemplate the use of force when the necessity arises, the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly and association.7

On other occasions the Supreme Court has denounced even more forcefully the improper intrusion of military resources into civil affairs, even where the intrusion has come at the instance of a chief executive.8 This traditional abhorrence of military measures for dealing with domestic civil and political problems, which is an element of the constitutional concept of civilian "due process," has roots that run more than seven centuries deep in Anglo-American history;9 and it was prominent in the minds of the statesmen who gave birth to our Republic. Their Declaration of Independence railed against the King for his offenses against this tradition;10 and they took pains in preparing their original state

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8. The most eloquent case on point is Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). See also Johnson v. Jones, 44 Ill. 142, 147, 92 Am. Dec. 159, 163 (1867), an Illinois Supreme Court opinion of the same era. Milligan has been cited and reaffirmed in more recent cases, one of the most notable being Sterling v. Constantin, 287 U.S. 378 (1932). Sterling was reaffirmed in Scheuer, 94 S. Ct. 1683 (1974).
10. British troops had been used, for some time before open hostilities broke out, to suppress dissent and disorder in the colonies. See Soldier, Riots, and Revolution, supra note 9, at 22–28. In their Declaration of Independence the revolutionary statesmen denounced the King as having "affected to render the Military independent of and superior to the Civil Power."
constitutions\textsuperscript{11} as well as in drafting formative federal legislation\textsuperscript{12} to preserve the tradition intact. Some specific aspects of this tradition will be pointed out in the pages that follow, as the defects and implications of the new Civil Disturbance Regulations are explored.

Both the old and the new Civil Disturbance Regulations articulate at length their purported legal foundations.\textsuperscript{13} The bases claimed by the new regulations, however, are more numerous and far broader, including extravagant claims to inherent executive power. The breadth and significance of these newly asserted powers of military intervention in domestic affairs can be adequately appreciated only if viewed against some statutory and historical background. The next two parts of this article explore that background.

**THE STATUTES IN TITLE 10**

The old and the new Civil Disturbance Regulations both rely, as authority for the domestic use of troops in certain circumstances, upon three federal statutes presently codified as Title 10 U.S.C. §§ 331, 332, and 333. The origin and terms of each of these three statutes must be examined before the additional bases of power claimed in the new regulations are explored.

**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.

This statute is derived from section 1 of the very first statute enacted by Congress pertaining to military troops and domestic unrest, a statute enacted in 1792.\textsuperscript{14} The 1792 Act was drafted and adopted in lieu of a provision that was stricken from the Senate version of the

\textsuperscript{11} For the provisions inserted in the original state constitutions, see *Soldiers, Riots, and Revolution*, supra note 9, at 28–31.

\textsuperscript{12} See text accompanying notes 14–46 infra.


\textsuperscript{14} Act of May 2, 1792, ch. 28, 1 Stat. 264. As originally enacted it authorized only the use of federalized state militia; but after the development of standing federal armed forces another enactment in 1807 authorized the use “for the same purposes, [of] such part of the land or naval force of the United States, as shall be judged necessary . . . .” Act of March 3, 1807, ch. 39, 2 Stat. 443.
so-called Militia Bill a few weeks earlier because of vigorous opposition in the House. The unacceptable proposal had provided that the President could call out troops "to execute the laws of the Union, suppress insurrections, and repel invasions." The House debate on that proposal indicates that there was no apprehensiveness over the use of military force in circumstances so grave as invasion or insurrection, but that the prospect of military force for law enforcement in any lesser exigency was the subject of very serious concern. Judging from the debate and from the more elaborate provisions that were enacted a few weeks later in lieu of the original proposal, what was found unacceptable about the original proposal was its failure to take account of an essential legal distinction (to be examined below) bearing upon the utilization of military personnel for law enforcement in circumstances less severe than invasion or outright insurrection. Section 1 of the Act that was finally adopted in 1792 omitted any reference to executing the laws of the Union, and instead dealt only with two circumstances in which it seems to have been agreed that distinctively military force is warranted: invasion, and insurrection against the government of a state. So much of that section as pertained to insurrection as distinguished from invasion is the antecedent of current 10 U.S.C. § 331.

This legislative history tends to confirm that what is contemplated by the term "insurrection" in 10 U.S.C. § 331 is something quite different from riot, tumult, or civil disorder. The latter circumstances might indeed present a need for additional manpower to enforce the

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15. The Militia Bill was Congress' first measure under U.S. Const. art I, § 8, cl. 16, "[t]o provide for organizing, arming, and disciplining, the Militia . . . ." As finally enacted, the Bill became the Act of May 8, 1792, ch. 33, 1 Stat. 271.
17. 3 Annals of Cong. 553–55 (1792).
18. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper; and in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, 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, as may be applied for, or as he may judge sufficient to suppress such insurrection. Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264.
19. It will be noted that the statute only authorizes the President to call in militia from states other than the requesting state. The National Advisory Commission on Civil Disorders in its Report, at page 288 (GPO ed. 1968), found this curious and "apparently unintended." If the statute is construed in accordance with its history and purpose,
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laws; but this statute does not provide for those needs, and it certainly does not provide for those needs to be met with military resources. The term "insurrection" in the statute is to be understood in the light of the rule, inherited from English law, that military force could lawfully be employed against the citizenry only when there was such an uprising specifically against the duly constituted government that the courts of the common law had been forced to close. The congressional debates

however, this is not curious at all; it may be expected that a state faced with insurrection would employ its own militia as a matter of course, and federal assistance would be needed only when the state's own militia proved inadequate to the task, and outside help was needed.

20. The crucial distinction between governing the realm in accordance with reasoned rules of law and governing by sheer force and prerogative was recognized when King John by Magna Carta promised in dealing with his nobles to be governed by "legem terre" [the law of the land]. Magna Carta, ch. 29 (1215). In the fourteenth century that pledge was taken as authority by Parliament for holding that it was unlawful for the King to seize traitors and try them and execute them for treason by military process; so long as the common law courts were open and able to function, to proceed by military process was to derogate from "the law of the land." See Thomas Earl of Lancaster's Case, in 1 M. Hale, Pleas of the crown 344-47 (1st ed. 1736); Edmund Earl of Kent's Case, in M. Hale, History of the Common Law 35-36 (4th ed. C. Runnnington 1792). When the armed citizenry who constituted both the posse and the militia rose up to suppress the Peasants' Revolts of 1381 with measures of force more appropriate to their role as a military force than to their role as the posse comitatus, the common law would have punished them for their immoderate force if King Richard II had not extended them his pardon for suppressing the riots "sanz due proces de loye"—without due process of law. 5 Rich. 2, stat. 1, ch. 5 (1381).

The first English riot act was enacted in 1411. In accordance with what had already become tradition, it provided for suppression of riots by the posse comitatus under the command of civil officers and made no provision whatsoever for military intervention. 13 Hen. 4, ch. 7 (1411). During the Wars of the Roses and under the Tudors, absolutist monarchs did resort to the expedient of putting down civil disturbances with military force; but legal scholars of that period and of our own agree that those monarchs' actions were in violation of the law of the land. See F. Maitland, The Constitutional History of England 266-68 (1908). What had been suffered under the Tudors was to cause revolution under the Stuarts. When Charles I in 1627 sent military troops instead of relying on the civilian posse comitatus to suppress riots in several towns, Parliament postponed all of its other business to prepare, under the leadership of former Chief Justice Lord Coke, the Petition of Right of 1628. That historic document declared that the practice of dealing with riots by military means was "wholly and directly contrary to the said laws and statutes of this your realm." 3 Car. 1, ch. 1, § 8. Later, in his landmark Institutes of the Laws of England, Lord Coke elaborated upon this thesis, and added that for a soldier to kill a civilian under a claim of military authority, at a time when civilian courts were open, would be murder. E. Coke, Third Institute, ch. vii, at 52v.-52r. When Charles persisted in employing military measures to solve domestic problems even after the Petition of Right, it led directly to revolution and the execution of the King. After the Restoration, the principle that military measures must never be employed domestically so long as the civilian institutions of the law remain operable was reiterated by Lord Chief Justice Hale, in his History of the Common Law, supra, at 34-36, and then reconfirmed by enactment of the 1689 Bill of Rights, 1 W. & M. 2, ch. 2 (1689).

When England was beset with scattered riots and disturbances in protest of the Hanoverian succession in 1714, Parliament enacted a new riot act to correct the defects which the developments of three centuries had created in the old. Just like the 1411 statute, however, the 1714 riot act provided for suppressing riots by the posse comitatus
on the 1792 legislation illustrate that this rule was very much on the minds of that early Congress, and most of the American authorities have continued to adhere to the rule. Only a handful of "insurrections" within the fair and constitutional meaning of this statute have been experienced in American history: for example, the Civil War, Shays' Rebellion (1786-87), the Whisky Rebellion (1794), the Dorr Rebellion (1842), and the 1856 civil war in the Territory of Kansas.

Executive officials under the pressures of seeming emergencies have sometimes, out of expediency, asserted a much broader scope for this statute, taking the term "insurrection" to encompass mere riot, tumult, and civil disorder. The Civil Disturbance Regulations reflect this assertion, claiming authority by virtue of 10 U.S.C. § 331 to employ troops to deal with any "domestic violence" on request of the states. "Domestic violence" is a constitutional term, found in the guaranty clause which provides that the federal government on request of the states is to "protect each of them . . . against domestic Violence." This constitutional term, however, comprehends far more than the extreme exigency of "insurrection." The terms are not equivalent, and to equate them is to obscure essential constitutional principles that were clear in the minds of the early statesmen who prepared the Constitution and who enacted the 1792 legislation from which 10 U.S.C. § 331 is derived.

In the case of an actual insurrection, organized political society is in extremis; the situation is tantamount to war. In such circum-

under the control and command of the ordinary local civilian officers, and contained not a hint of any authorization for the use of military troops to suppress any civil disorder, however aggravated the circumstances might be. 1 Geo. 1, stat. 2, ch. 5 (1714). This confirmed a principle that the struggles of the seventeenth century had firmly ensconced as a fundamental precept of due process of law. Blackstone, writing on the eve of American independence, ratified this principle that military force could not be used so long as the courts could function. 1 W. BLACKSTONE, COMMENTARIES *152. His re-statement served to punctuate the colonists' own assertion of their due process heritage in this regard.

21. 3 ANNALS OF CONG. 574–77 (1792).
22. E.g., Prize Cases, 67 U.S. (2 Black) 635 (1863); Sterling v. Constantin, 287 U.S. 378 (1932); Constantin v. Smith, 57 F.2d 227 (E.D. Tex. 1932); Bishop v. Vancreek, 228 Mich. 299, 200 N.W. 278 (1924). See also Faibus v. United States, 254 F.2d 797 (8th Cir. 1958); Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959); Middleton v. Denhardt, 261 Ky. 134, 87 S.W.2d 139 (1935); Scaney v. State, 188 Miss. 367, 194 So. 913 (1940); Ex Parte McDonald, 49 Mont. 454, 143 P. 947 (1914); and Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P.2d 582 (1933).

23. This misconstruction of 10 U.S.C. § 331 has given rise to various practical problems, which were noted in the REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 287 (GPO ed. 1968) [hereinafter cited as REPORT].
stances, it is necessary and appropriate for the government to employ force which is distinctively military in character. It was only in such extreme situations—foreign invasion and genuine insurrection—and never in cases of mere riot or civil disorder, that the English tradition which the founding fathers endeavored to preserve permitted the domestic application of distinctively military force.26

Some type of federal force to deal with "domestic violence" that is less severe than "insurrection" against a state is certainly contemplated by the Constitution. Nothing in the Constitution, however, suggests that federal protection from these less severe forms of "domestic Violence" must be in the form of distinctively military force—or even that it may. The fact is that early American legal doctrine and ensuing decades of practice disclose an alternative federal force, not distinctively military in character, which consistently with the Constitution could be utilized in circumstances less severe than insurrection. The doctrine derived from a principle articulated by England's Lord Chief Justice Mansfield in 1780. British troops ("Redcoats") had been employed to suppress rioters in London during the highly destructive Lord Gordon Riots in June of that year.27 Afterwards, Lords and Members of Parliament aware of the English tradition forbidding military force in domestic affairs debated whether this use of troops had been lawful. Responding to those who denounced it as reminiscent of the abusive applications of military force and martial law in 1628 under Charles I,28 Lord Mansfield rose to justify the utilization of the troops.

The Chief Justice justified the use of the "Redcoats" by drawing an essential legal distinction between their utilization in a military capacity, as a distinctively military force, and the utilization of those same organized units of troops in a civilian capacity, in the nature of the posse comitatus under civilian command. He explained:

I presume it is known . . . that every individual, in his private capacity, may lawfully interfere to suppress a riot . . . . Not only is he authorized to interfere for such a purpose, but it is his duty to do so; and, if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime

26. See note 20 supra.
28. See note 20 supra.
and preservation of the public peace, may be done by any
number assembled to perform their duty as good citizens. It is
the peculiar business of all constables to apprehend rioters, to
endeavor to disperse all unlawful assemblies, and, in case of
resistance, to attack, wound, nay, kill those who continue to
resist;—taking care not to commit unnecessary violence, or to
abuse the power legally vested in them. The persons who
assisted in the suppression of these tumults are to be considered
mere private individuals, acting as duty required. My Lords,
we have not been living under martial law . . . . Supposing
a soldier, or any other military person, who acted in the course
of the late riots, had exceeded the powers with which he was
invested, I have not a single doubt that he may be punished,
not by a court-martial, but upon an indictment . . . .

. . . The King's extraordinary prerogative to proclaim
martial law (whatever that may be) is clearly out of the
question. . . . The military have been called in—and very
wisely called in—not as soldiers, but as citizens. No matter
whether their coats be red or brown, they were employed,
not to subvert, but to preserve, the laws and constitution which
we all prize so highly.²⁹

This Mansfield doctrine that military units or personnel may be
used in a civilian capacity in circumstances in which their utilization
as a distinctively military force would be illegal soon made its way
across the Atlantic to the new American states. It is true that the
records of the 1787 Federal Convention do not reflect any discussion of
the Mansfield doctrine in connection with the guaranty clause³⁰ or the
militia clause³¹ of the Constitution. This could be, as I had earlier
argued,³² because the draftsmen of those clauses intended them to apply
only in cases amounting to treason or insurrection. Or it could be, as
now seems to me more likely, because the Mansfield doctrine was already
well enough understood and accepted among American statesmen to be
regarded as implicit in those clauses.³³ In any event, discussion of

Mansfield's doctrine was applied in Rex v. Kennett, 5 Car. & P. 282, 294, 172 Eng. Rep.
962, 967 n.(b) (1832).
³¹. U.S. Const. art. I, § 8, cl. 15.
³². Soldiers, Riots, and Revolution, supra note 9, at 35–39.
³³. Another possibility, of course, is that the draftsmen rejected the Mansfield doc-
trine, repudiated the traditional English rule forbidding military force, and actually in-
these clauses during the period of ratification and afterwards brought the Mansfield doctrine with its essential distinction into prominence. Fear of the abusive use of military force was one of the factors feeding resistance to ratification of the Constitution, which resistance led to the early adoption of amendments. The due process guaranty of the fifth amendment incorporates the traditional English prohibition against distinctively military force in domestic situations short of insurrection, and the clauses authorizing the use of federal armed force can be squared with that prohibition only by application of the Mansfield doctrine.

For nearly seventy years, at least, military troops were utilized both by the states and by the federal government, in accordance with the Mansfield doctrine, as a civilian force under the direction of civil officers essentially as a posse comitatus, to suppress riots and otherwise assist in the enforcement of civilian laws, while their use in such circumstances as a distinctively military force was regarded as unlawful. It was clearly understood that when they were so used the military personnel were civilian in character, subject to the command of the ordinary civilian officials and bound by civilian rather than military law, and no more privileged in their use of force against citizens than the civilian officers themselves might be. An 1854 opinion of the Attorney General of the United States discussed the practice of using military troops in this civilian capacity. Specifically citing Lord Mansfield's discussion of the point, the Attorney General observed: "The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus." For nearly seventy years, at least, military troops were utilized both by the states and by the federal government, in accordance with the Mansfield doctrine, as a civilian force under the direction of civil officers essentially as a posse comitatus, to suppress riots and otherwise assist in the enforcement of civilian laws, while their use in such circumstances as a distinctively military force was regarded as unlawful. It was clearly understood that when they were so used the military personnel were civilian in character, subject to the command of the ordinary civilian officials and bound by civilian rather than military law, and no more privileged in their use of force against citizens than the civilian officers themselves might be. An 1854 opinion of the Attorney General of the United States discussed the practice of using military troops in this civilian capacity. Specifically citing Lord Mansfield's discussion of the point, the Attorney General observed: "The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus." The 1792 Act from whose first section Title 10 U.S.C. § 331 is derived took account of this principle. Section 9 of that Act secured to federal marshals and their deputies the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.

34. See Soldiers, Riots, and Revolution, supra note 9, at 40-42.
35. Id. at 42-43.
38. Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265. The Judiciary Act of 1789
Sheriffs in the states, of course in accordance with the Mansfield doctrine, had power to use state soldiers (i.e., the militia) as their posse.

Consistent with this Mansfield doctrine, it would have been permissible for Congress pursuant to the guaranty clause\(^8\) to have authorized the use of federal troops in a civilian capacity as a civilian force under civilian officers and laws to protect a state, when requested, against "domestic Violence" less severe than genuine insurrection against the government of that state. Congress, however, chose not to do so, apparently concluding that in situations short of insurrection a state's own resources, including its militia employed as a civilian posse, should be sufficient. Section 1 of the 1792 Act provided for federal assistance only in cases of "insurrection." Its descendant and modern counterpart, 10 U.S.C. § 331, provides for nothing more. Some commentators have suggested that well-trained and specialized federal troops might be a more effective and safer force for controlling disorders in the states today than the typical force of state militia (i.e., National Guard). In fact, § 331 has been used a few times, without challenge in the courts, as a pretext for sending federal troops into requesting states to suppress riots and enforce state law. The Report of the National Advisory Commission on Civil Disorders recommended in 1968 that § 331 be amended to legitimate this legally dubious utilization of federal troops.\(^0\) To legitimate it would indeed take an amendment of the statute, because § 331 does not authorize it now. But for such utilization to be constitutionally legitimate, the troops would have to be used in a civilian capacity, and not as a distinctively military force.

\(10\ U.S.C. \ § 332\)

 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.

This statute derives from yet another section of the 1792 statute had already given federal marshals "power to command all necessary assistance in the execution of [their] duty . . . ." Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87.


already discussed; but it was profoundly altered by amendment during the era of the Civil War. Section 2 of the 1792 Act provided

> [t]hat whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by [section 9 of] this act, . . . it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the [federal] laws to be duly executed.\(^{41}\)

An 1807 statute made it lawful for federal troops as well as state militia to be used by the President in such circumstances.\(^{42}\)

In contrast to section 1 of the 1792 Act, section 2 concerned the enforcement of federal law. Like section 1, however, it rather clearly contemplated the utilization of troops in their capacity as a distinctively military rather than a civilian force, under no civilian officer other than the President as commander-in-chief. Their utilization in this distinctively military capacity was authorized by this section, however, only in circumstances in which the resistance was “too powerful to be suppressed” by civilian means, including the use of military troops as a civilian force under the command of federal marshals pursuant to section 9 of the 1792 Act.\(^{43}\) In other words, this section, while not utilizing the word “insurrection,” contemplated circumstances comparable to those contemplated by section 1 but involving assaults upon federal rather than upon state authority: uprisings specifically against established civil authority, disrupting “the ordinary course of judicial proceedings,”\(^{44}\) which civilian federal officials even by exhausting their resources (including troops employed by marshals as a civilian posse) could not suppress.

So understood, section 2 of the 1792 Act in authorizing distinctively military force was quite consistent with the rule, adopted from the English tradition and constitutionalized in the Bill of Rights guaranty of civilian due process, which prohibited the use of distinctively military force against citizens except when civil government was under such assault that civilian institutions, such as the courts, were

\(^{41}\) Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264.
\(^{43}\) See text accompanying note 38 supra.
\(^{44}\) Recall that the traditional due process test of whether military force could be used was whether the courts had been forced to close, see note 20 supra.
incapacitated. When it was first introduced, however, this section aroused fears among many members of Congress, because as originally drafted it did not so clearly confine its authorization of distinctively military force to such in extremis cases. Vigorous opposition was aroused by the section, and several members denounced it as much too indulgent of the use of military force. The heated debate spawned several amendments to the bill. It was one of these amendments that added section 9, countenancing the use of military troops as civilians under the command of federal marshals, in the nature of a posse. As finally enacted, section 2 of the 1792 Act specified that the distinctively military force that it authorized was permissible only when the marshals, even with such troops employed as their posse, proved unable to suppress the resistance to federal authority.

By the time of the Civil War, however, demands for open military action to settle great national issues had caused politicians as well as the public to become impatient with fine distinctions between "civilian" and "military" utilization of military troops, and thus the stage was set for a profound change in this statute. President Buchanan had used a confused misapprehension of the traditional constitutional rule as an excuse for refusing to send troops into the secessionist states. When Lincoln became President, he not only discarded Buchanan's misconstruction and proceeded, in accordance with the constitutional rule, to meet the insurrection with military force. Moreover, he and his partisans in Congress went further, authorizing various military measures unwarranted by the Constitution, even in the loyal states. Some of these excesses were denounced by the courts, and some others were

45. 3 Annals of Cong. 574-77 (1792).
46. One of the other amendments spawned by the House debate required the issuance of a proclamation to disperse before troops could be utilized under section 1 or section 2 of the 1792 Act. This provision survives in substance as 10 U.S.C. § 334 (1970), which provides:

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

Another amendment, which has not survived, required that the circumstances of civilian incapacity prerequisite to the use of distinctly military force under section 2 be certified by a Supreme Court Justice or a district judge.
47. Buchanan referred to the practice of using troops as a posse to assist federal civilian officials, but asserted that it was of no avail because the federal civilian officials had been driven out of the dissident states! 5 J. Richardson, A Compilation of the Messages and Papers of the Presidents 634 (1897).
48. E.g., Ex parte Milligan, 71 U.S. (4 Wall.) 2, 124-25 (1866); Beckwith v. Bean, 98 U.S. 266, 296-98 (1878); Milligan v. Hovey, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871); Johnson v. Jones, 44 Ill. 142, 160-61, 92 Am. Dec. 159, 174-75 (1867); Griffin v. Wilcox, 21 Ind. 370, 388-89 (1863).
saved from probable invalidation only by deft manipulation of federal court jurisdiction.\textsuperscript{49} One of the acts of Lincoln's Congress—one that was never judicially challenged—was an Act of 1861\textsuperscript{50} that replaced section 2 of the 1792 Act and survives as 10 U.S.C. § 332.

The 1861 Act made it quite explicit that troops used under this statute were to be used in their distinctively military capacity, subject to the Articles of War.\textsuperscript{51} More significantly, the new Act deleted the language referring to "the powers vested in the marshals" to utilize troops as a posse.\textsuperscript{52} The most significant change, however, was that the 1861 Act purported to authorize the use of distinctively military force "whenever . . . it shall become impracticable, in the judgment of the President" to enforce federal laws "by the ordinary course of judicial proceedings . . . ."\textsuperscript{53} The 1792 Act had restricted distinctively military measures to circumstances in which the resistance was "too powerful to be suppressed" by civilian means; the 1861 Act purported to allow military measures whenever civilian means seemed "impracticable." This was a profound change, indeed; and the fact that recourse to the only "practicable" civilian means of dealing with serious civil disturbances—troops in a civilian capacity under federal marshals—was no longer statutorily required as a prerequisite, underscores the change.

Title 10 U.S.C. § 332 as it stands today is essentially unchanged since the 1861 Act. It has never been subjected to judicial scrutiny. If the established constitutional principles were to be applied to this statute, it seems clear that it could not survive judicial review. Since the statute has never been challenged, however, it continues to be claimed as broad authority for military intervention in civil affairs. It is claimed as authority by the new Civil Disturbance Regulations,\textsuperscript{54} as it was by the earlier regulations that they replaced.\textsuperscript{55}

10 U.S.C. § 333

The President, by using the militia or the armed forces,

\begin{footnotesize}
\begin{enumerate}
\item[49.] See, e.g., Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1868).
\item[50.] Act of July 29, 1861, ch. 25, 12 Stat. 281.
\item[51.] Id., § 3, 12 Stat. at 282.
\item[52.] The new Act did contain a counterpart to § 9 of the 1792 Act, which had served along with a section of the Judiciary Act of 1789 (see note 38 supra) as the basis of the posse comitatus practice. Act of July 29, 1861, ch. 25, § 7, 12 Stat. 281, 282, Rev. Stat. 1874, § 788; see note 50 supra. However, the new Act's replacement for § 2 of the 1792 Act did not require, as the 1792 Act had, that such civilian force be exhausted before distinctively military force were applied.
\item[53.] Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281.
\item[55.] 32 C.F.R. § 1874(c)(2) (1971).
\end{enumerate}
\end{footnotesize}
or both, or by any other means, shall take such measures as
he considers necessary to suppress, in a State, any insurrec-
tion, 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.

This statute originated with the efforts of Reconstruction Era
Radicals to suppress at all costs the die-hard Southern resistance to the
social consequences of the Civil War. It derives, without substantive
change, from section 3 of the Ku Klux Klan Act of 1871.56 Already
engaged in other nakedly military measures of reconstruction in the
South, of highly dubious constitutionality,57 the Radical Congress did

57. See notes 48 & 49 supra. Congressional Radicals in 1866 secured passage of a
bill providing that any person in the formerly secessionist states charged of infringing
the rights of a freedman should be tried by a military tribunal or by an agent of the
Freedmen's Bureau in accordance with martial law, but President Johnson vetoed this
915-17 (1866).

In 1867 the Radicals passed, over the President's veto, the Military Reconstruction
ments had already been established in the formerly seceded states in accordance with the
less extreme reconstruction plans of Presidents Lincoln and Johnson, this Act recited in
its preamble that "no legal State governments or adequate protection for life or property
now exists in the rebel States. . . ." Id., 14 Stat. 428. The Act then proceeded to
create five military districts, encompassing those states, and to provide for their govern-
ance by martial rule until a civilian government acceptable to the Radical Congress
should be installed. Although by the hypothesis of the Act there were no civilian govern-
ments in those states, the Act provided that the military commanders could, in their
discretion, "allow local civil tribunals to take jurisdiction of and to try offenders. . . ."
Id., § 3, 14 Stat. 428. Otherwise, offenders were to be tried by military tribunals. Id.

Another measure enacted four months later, again over the President's veto, author-
not hesitate to give this carte blanche approval to distinctively military methods of enforcing the new equal protection requirement of the fourteenth amendment.

The 1871 Act made no distinction between "insurrection" and mere "violence, unlawful combination, or conspiracy," for any of these circumstances it purported to authorize distinctively military force:

\[
[I]n \text{ all such cases, . . . it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations. . . .}^{58}
\]

Moreover, this 1871 Act contained no requirement that civilian means of federal law enforcement be first exhausted. The Act was confined to circumstances in which state authorities "shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in [their federal constitutional] rights . . .,"\textsuperscript{60} but there was no requirement that a civilian federal force such as the federal marshals using military personnel or units as their posse, be considered or employed before resort to distinctively military force.

In other words, this 1871 Act, adopted by a Radical Congress during the period of nakedly militaristic post-war Reconstruction, displays the very features that had so alarmed many members of the Congress in 1792. At that time, when members of Congress were more aware of, and more loyal to, the traditional and constitutional restraints on the domestic application of military force, outspoken opposition had forced amendments in the bill that then was pending, in order to conform the legislation to constitutional requirements.\textsuperscript{60} Among the post-Civil War Radicals, however, there was no such appreciation of the civilian constitutional tradition; and the 1871 Act was adopted despite its patent inconsistency with this constitutional tradition.

Unless this settled constitutional tradition is now to be discarded, it is hard to conceive how 10 U.S.C. § 333, derived from the Radicals'
1871 Act, could survive a judicial test. Its constitutionality, however, has never been litigated. Nonetheless it is the pretext upon which federal troops have been utilized as a distinctively military force, including the great Pullman strike of 1894 and various racial disturbances and urban riots during the turbulent decade of the 1960's. It is claimed as authority in the new Civil Disturbance Regulations, as it was in the regulations of 1968.

In sum, of the three sections in Title 10 of the United States Code that are claimed as authority for the Civil Disturbance Regulations, only one—§ 331—seems sustainable in the face of constitutional tradition and precedents dealing with the utilization of military troops in domestic situations; and that one section, construed in accordance with its terms and its history, applies only in cases of genuine insurrection specifically against the duly constituted government of a state. In other words, valid statutory authority for the utilization of federal military troops in riots or other civil disorders, or otherwise to enforce either state or federal laws, simply does not exist in Title 10. It is only because of the practical factors making litigation under these statutes extremely difficult that they have remained on the books as apparent authority for military intervention as long as they have. Of course, it is possible that if they were litigated now courts might ignore the constitutional tradition and approve the practice of utilizing distinctively military force that has grown up under the aegis of these statutes. A line of recent decisions applying the traditional constitutional principles to restrict the "judicial" as distinguished from the "executive" power of the military over civilians, however, strongly suggests that at least the United States Supreme Court is not at all likely to forget or ignore those principles.

This being the case, another statute apart from Title 10 of the Code takes on great significance. That statute, commonly referred to as the "Posse Comitatus Act," is not an authorization but rather a

61. 32 C.F.R. § 215.4(c) (2) (i) (C) (1973).
62. 32 C.F.R. § 187.4(c) (3) (1971).
63. With regard to another asserted statutory basis of authority, see text accompanying notes 104-12 infra.
64. The emerging circumstances under which these statutes are resorted to are normally impossible to predict with certainty, and are usually not of prolonged duration. The doctrines of ripeness and mootness therefore present barriers at least to litigation seeking preventive relief.
limitation upon the domestic utilization of federal troops, and to its terms, its origins, and its purpose the discussion must now turn.

THE POSSE COMITATUS ACT

Title 18 U.S.C. § 1385, the Posse Comitatus Act, provides that

[w]hoever, 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 not more than $10,000 or imprisoned not more than two years, or both.

Both the old and the new Civil Disturbance Regulations acknowledge that this statute places some limits on the domestic utilization of federal troops. However, the new regulations\(^6\) regard it as much less of a limitation than the old regulations did; and even the old regulations,\(^6\) because they put too much faith in the statutes in Title 10,\(^6\) understated the significance of this Act.

The Posse Comitatus Act originated as a rider on the Army Appropriation Act of 1878. The controversy that led to its proposal and enactment explains its purpose and intended effect. Reference has already been made to the Radicals' measures of military Reconstruction in the South after the Civil War.\(^6\) Near the end of President Grant's second term, the excesses of military Reconstruction were beginning to exact a substantial political toll from the Republicans. As voter sentiment swung away from the Radical Republicans and toward the Democrats, charges were made that federal troops were intimidating electors in the South, seizing political prisoners, interfering with civilian governments in the states, and even going so far as to remove and install state legislatures.\(^7\)

In the Presidential election of 1876, Democrat Tilden's popular vote exceeded that of Republican Hayes by a small margin; but Hayes won the election in the Electoral College by virtue of the electoral votes of Louisiana and South Carolina—two states whose Republican Reconstruction governments were being maintained in power by federal troops. Democrats in Congress charged after the election that had it not been

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6. The statutes are discussed in the preceding section of this article, THE STATUTES IN TITLE 10, supra.
6. See notes 56-57 supra & text accompanying.
7. See 7 CONG. REC. 3849, 3850-51, 3852, 4240, 4245, 4248 (1878).
for intimidation of the voters by the federal troops, the vote in many districts in the South would have differed enough to have secured the Presidency for Tilden and the Democrats.\textsuperscript{71} As a consequence, in December 1876, the House of Representatives passed a resolution calling upon outgoing President Grant to account for the use that had been made of federal troops in the states during the several months leading up to that election. On January 22, 1877, two months before leaving office, President Grant sent the House his reply.\textsuperscript{72}

Grant's reply did not assuage the anti-militaristic sentiment among the Democrats in Congress; but Hayes as the new President conducted himself with sufficient restraint in the use of military troops that a showdown on the issue was postponed.\textsuperscript{73} The showdown did come, however, in 1878, when the members of Congress who were determined to put an end to military intervention in domestic affairs succeeded in getting approval of the Posse Comitatus Act as a rider on the Army Appropriation Act of that year.\textsuperscript{74} The provisions of their rider were directly responsive to the arguments which President Grant had advanced in his reply to the House in 1877.

In his reply President Grant had outlined the several legal bases upon which he considered the domestic use of troops to be grounded.\textsuperscript{75} He cited the guaranty clause with its reference to protecting the states at their request against "domestic Violence," together with the statute

\textsuperscript{71} See 7 Cong. Rec. 3851, 3852 (1878).
\textsuperscript{72} The House resolution and President Grant's reply are reprinted in G. Lieber, The Use of the Army in Aid of the Civil Power 4-9 (1898) [hereinafter cited as Lieber].
\textsuperscript{73} President Hayes opened his term with the welcome act of ordering federal troops out of South Carolina and Louisiana—with the result that the governments of those states were promptly taken over by the Democrats.

In the second session of the Forty-fourth Congress the House attached provisions to the Army Appropriation Bill designed to prevent the abusive use of military troops; but the Senate insisted upon striking the House provisions. Neither house would compromise, so no bill was passed. See Field, The Army Bill, 16 Albany L.J. 181 (1877); The President's Relations to the Army, id. 198. Consequently, for a period of some months after June 30, 1877, the Army was maintained without any appropriation. During this curious interval when the Army, already reduced by Congress to 25,000 men, was without authorized appropriation, President Hayes was confronted with the widespread labor riots of 1877. Extravagant counsel was given him by cabinet members and other advisors, and some industrial leaders in particular pressed him to take forceful strike-breaking action; but Hayes exercised great restraint in his actual use of federal military troops, employing them only late in the period of the strike and then only to enforce judicial process. It may be that Hayes' restraint helped to moderate sentiment in the House, for an appropriation bill for the Army for the fiscal year already half over was enacted on November 21, 1877, which did not include the provisions earlier insisted upon by the House.

\textsuperscript{74} Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152.
\textsuperscript{75} For the text of President Grant's reply, see Lieber, supra note 72, at 4-9.
now codified at 10 U.S.C. § 331, and, claiming that the situation in South Carolina had amounted to “insurrection,” put them forward as justification for his utilization of troops there. With regard to some things that were done in several other states, he relied for justification upon the statutes now codified at 10 U.S.C. §§ 332 and 333, and upon another Reconstruction era statute of even more dubious constitutionality which has not survived to the present day. Although some members of Congress may have considered those provisions improperly invoked in the circumstances, and some might conceivably even have perceived their constitutional frailties, no attempt was made at this time to modify or repeal the statutes.

As to other circumstances in which federal troops had been used, however, President Grant in his reply relied upon different grounds. For some circumstances, he relied upon the traditional practice of marshals using troops as their posse (although it is not clear that either he or the troops understood the essential distinction between their use in a civilian and in a distinctively military capacity). He said:

In Florida and in Louisiana, respectively, the small number of soldiers already in the said States were stationed at such points in each State as were most threatened with violence, where they might be available as a posse for the officer whose duty it was to preserve the peace and prevent intimidation of voters. Such a disposition of the troops seemed to me reasonable, and justified by law and precedent, while its omission would have been inconsistent with the constitutional duty of the President of the United States “to take care that the laws be faithfully executed.” . . . The stationing of a company or part of a company in the vicinity, where they would be available to prevent riot, has been the only use made of troops prior to and at the time of the elections. Where so stationed, they could be called, in an emergency requiring it, by a marshal or deputy marshal as a posse to aid in suppressing unlawful violence.77

76. Section 9 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27, 29, re-enacted after adoption of the fourteenth amendment, Act of May 31, 1870, ch. 114, § 13, 16 Stat. 140, 143, Rev. Stat. 1874, § 1989, provided that it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary . . . to prevent the violation and enforce the due execution of [that Act].
77. Quoted in Lieber, supra note 72, at 6-7.
For circumstances that might not fit within either this posse comitatus principle or any of the statutes aforementioned, President Grant, whose life-long career as a soldier had hardly taught him to scorn military force, asserted a "power as commander of the Army and Navy to prevent or suppress resistance to the laws of the United States..."178 It was apparently in reliance upon his asserted power that Grant justified the instances of troop use not supported on other grounds, saying

[the companies stationed in the other States have been employed to secure the better execution of the laws of the United States and to preserve the peace of the United States.]79

In support of this assertion of executive power not derived from any statute, Grant referred to a hodgepodge of historical precedents—all of which, however, seem to have been applications either of one of the statutes or else of the posse comitatus practice.80 In substance, President Grant was now claiming an inherent executive power to employ military troops to execute the laws and preserve domestic peace.

Viewed in the light of President Grant's claims, the effect of the Posse Comitatus Act is plain. It was specifically designed to curtail the kinds of abuses perceived by Congress in 1876, and those abuses were considered to arise primarily in circumstances other than those reached by the specific statutes; thus such "circumstances expressly authorized" were excepted from the new Act's prohibition. The posse comitatus practice, however, had been based upon a statutory provision which did not "expressly" authorize use of troops at all; it merely gave federal marshals the powers of state sheriffs, and it was because of general reception of the Mansfield doctrine that this had been considered sufficient to authorize the use of troops in a civilian capacity in a posse.81

78. Id. at 9.
79. Id. at 8.
80. It has been necessary to employ troops occasionally to overcome resistance to the internal-revenue laws, from the time of the resistance to the collection of the whisky tax in Pennsylvania, under Washington, to the present time.

In 1854, when it was apprehended that resistance would be made in Boston to the seizure and return to his master of a fugitive slave, the troops there stationed were employed to enforce the master's right under the Constitution, and troops stationed at New York were ordered to be in readiness to go to Boston if it should prove to be necessary.

In 1859, when John Brown with a small number of men made his attack upon Harper's Ferry, the President ordered United States troops to assist in the apprehension and suppression of him and his party, without a formal call of the legislature or governor of Virginia, and without proclamation of the President.

Id. at 8-9.
81. See text accompanying notes 30-37 supra.
Consequently, although the wisdom of the prohibition in this respect is open to question, the Act put an end to the practice of marshals using military units under their own command to enforce federal laws. The Act put an end to the practice of marshals using military units under their own command to enforce federal laws.

Even more significant, however, in the light of the claims now being reasserted in the new Civil Disturbance Regulations, is the fact that this 1878 Act was most emphatically a blunt repudiation by the Congress of President Grant's assertion of some inherent executive power to utilize military troops domestically to enforce the laws and preserve the public peace.

The Posse Comitatus Act, however, also had another effect, seriously counterproductive of the end at which its supporters had aimed. That end was curtailment of military intervention in domestic affairs in

82. See text accompanying notes 86–89 infra.

83. The effect of the Act in curtailing the posse comitatus practice was immediately felt. Less than four months after the Act was adopted, the Attorney General in a formal opinion, entitled Employment of the Military as a Posse, recognized its effect:

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 marshal of the United States when it was deemed necessary that he should have their aid in order to the enforcement of his process. This practice was deemed to be well sustained under the twenty-seventh section of the judiciary act of 1789 [see note 38 supra], which gave to the marshal power "to command all necessary assistance in the execution of his duty," and was sanctioned not only by the custom of the Government, but by several opinions of my predecessors. Instructions given by my predecessor, the Hon. William M. Evarts, of date August 20, 1868, state particularly the authority of the marshal in this regard, and call attention to the fact that the military in such case obey the summons of the marshal as a posse comitatus and act in subordination and obedience to the civil officer in whose aid in the execution of process they are called, and only for the object of securing its execution.

While the right to summon a portion of the military forces where it can be spared for the duty, as a part of the posse comitatus, is fairly to be inferred from the provision in the judiciary act which I have already quoted, there is found, however, no express authority by which the marshal may summon any military force of the United States as a part of the posse comitatus. He therefore concluded that the new Act forbade it. 16 Op. Att'y Gen. 162, 163 (1878). Two and one-half years later the Attorney General advised that because of the Act it would be impermissible to use a detachment of troops to aid the civil authorities in arresting certain persons in the State of Kentucky who are charged with the recent robbery of the clerk of the engineer officer superintending the Government works on the Tennessee River.

17 Op. Att'y Gen. 71 (1881), 333 (1882). Other opinions barred the posse practice, on account of the Act, in the Territory of Arizona, id. at 242 (1881), 333 (1882); in the Territory of Oklahoma, 19 id. at 293 (1889); and in the Territory of Alaska, id. at 368.

84. See text accompanying notes 113–20 infra.

85. No constitutional provision apart from article I, § 8, cl. 15, "expressly" provides for the use of troops, and that section, as well as article IV, § 4, has been the subject of implementing legislation, as earlier discussed. The other clauses upon which President Grant seemed to rely—the commander-in-chief clause of article II, § 2, and the faithful execution clause of article II, § 3—contain no express authorization for the use of troops in domestic law enforcement situations.
the face of the historic civilian tradition of due process. But the Congressmen of 1878 had less than a clear perception of that tradition. In particular, they did not seem to realize how profoundly the recently enacted measures of Congress itself offended that tradition. Their Act of 1878 not only left those statutes unchanged, but also gave impetus to a broadening construction of those statutes, as a result of which the use of troops in a distinctively military capacity came to be viewed as authorized even in circumstances in which the constitutional rule, if it were called to mind, clearly would forbid it. In the end, by curtailing the posse practice the Act did not insure that military troops would be used

86. See text accompanying notes 69–72 supra.
87. The Acts of 1861 (see text accompanying notes 47–55 supra); 1866 (see note 76 supra); and 1871 (see text accompanying notes 56–62 supra).
88. This trend was set at the very outset. In his diary for July 30, 1878, six weeks after he had signed the Posse Comitatus Act, President Hayes wrote:

But in the last resort I am confident that the laws give the Executive ample power to enforce obedience to United States process. The machinery is cumbrous and its exercise will tend to give undue importance to petty attempts to resist or evade the laws. But I must use such machinery as the laws give.

Then, hypothesizing an extreme case, he continued that if

the sheriffs or other state officers resist the laws, and by the aid of state militia do it successfully, that is a case of rebellion to be dealt with under the laws framed to enable the Executive to subdue combinations or conspiracies too powerful to be suppressed by the ordinary civil officers of the United States. This involves proclamations, the movement of United States land and naval forces, and possibly the calling out of volunteers, and this looks like war. It is like the Whisky Rebellion in the time of Washington. That precedent, if the case demands it, will be followed.

Then, however, Hayes equated such manifest and open armed rebellion by state officials with ordinary "mobs" undertaking "to prevent United States officers from enforcing the laws;" and without making any distinction between these wholly different situations he declared: "My duty is plain. The laws must be enforced." 3 Diary and Letters of Rutherford B. Hayes 492–93 (1929). It appears that he thought the statutes now codified in Title 10 were equally applicable to open insurrection and to, in his own words, "petty attempts to resist or evade the laws."

A few weeks later, when Hayes' Attorney General advised that the Posse Comitatus Act precluded the use of troops by marshals to suppress "organized, armed, and fortified resistance to the collector of internal revenue in Baxter County, Arkansas," he added the suggestion that Rev. Stat. 1874, § 5298 (now 10 U.S.C. § 332 (1970)) would support the use of troops for such a situation on the President's order, if only the President first issue a proclamation to disperse, in order to fulfill the formal requirement of Rev. Stat. 1874, § 5300 (now 10 U.S.C. § 334 (1970)). Three and one-half years later, the next Attorney General made a similar suggestion that the President could use troops under Rev. Stat. 1874, § 5298 (now 10 U.S.C. § 332 (1970)) to suppress bands of ordinary outlaws in the Arizona Territory. 17 Op. Att'y Gen. 333, 335 (1882). Cf. id. at 242, 243 (1881), advising that the posse practice was foreclosed for the same exigency, because of the Posse Comitatus Act. See also 19 id. at 293 (1889) (Oklahoma Territory); id. at 368 (1889) (Alaska Territory). In none of these Attorney General opinions was there any consideration given to the constitutional limitations upon the use of distinctively military force for civilian law enforcement. The demise of the posse comitatus form seems to have led to neglect of the fundamental and substantive point of law that the whole posse comitatus theory of troops use had been devised to preserve; see text accompanying notes 27–37 supra.
in fewer domestic circumstances; but it did insure that, when they were so used, they would be used purportedly under the aegis of the statutes in Title 10, and thus as a distinctively military rather than as a civilian force. 89

While both the old and the new Civil Disturbance Regulations recognize that the Posse Comitatus Act places some limits upon the domestic use of troops, the new regulations view the Act as significantly more restricted in its impact. For example, the Act as it has stood since 195690 refers only to the use of the Army or the Air Force. Nevertheless the 1968 regulations declared that

[Although the Navy and Marine Corps are not expressly included within its provisions, the act is regarded as national policy applicable to all military services of the United States.91]

The new regulations make no such concession, and apparently maintain that only the Army and the Air Force are affected by the Act.92

Even more significant is another difference between the old and the new regulations in their treatment of the Posse Comitatus Act. The old regulations said that the Act precluded any use of troops to enforce the laws "except as Congress may authorize."93 The new regulations, on the other hand, say that the Act precludes such use of troops "except as authorized by the Constitution or Act of Congress."94 Superficially, the new regulations are closer to the terms of the Act itself in this regard, for the Act refers to "the Constitution or Act of Congress;"95 but the point is much more subtle than this. The only express provision in the Constitution dealing with the domestic use of any troops is Article I, section 8, clause 15,96 and that clause only gives Congress power to

89. A happier remedy for the abuses over which the 1878 Congress was concerned might have been legislation preserving the posse comitatus practice but reasserting, and providing machinery to insure, that in such employment the military personnel are distinctly civilian in character, subordinate to ordinary civilian laws and institutions, and not governed by any military law.

90. It was placed in its present form in Title 18 by the Act of August 10, 1956, ch. 1041, § 18 (a), 70A Stat. 626.

91. 32 C.F.R. § 187.4(b) (1971).


93. 32 C.F.R. § 187.4(b) (1971).

94. 32 C.F.R. § 215.4(b) (1973) (emphasis added).


96. That clause gives Congress power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." The other principal clause in point, article IV, § 4, which provides that "[t]he United States . . . shall protect each of [the States] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence," does
provide for calling forth the militia. Moreover, the Constitution gives to the Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," as well as the power "[t]o provide . . . for governing such Part of [the militia] as may be employed in the Service of the United States . . . ." The text of the Constitution itself, therefore, seems to refute the suggestion that any domestic use of troops could be made without authorization by an Act of Congress. Indeed, even in the absence of such a clear reference of these powers to the legislative branch, it would be difficult to argue for any inherent executive power to utilize troops in the face of the direct prohibition contained in the Posse Comitatus Act. It is therefore quite accurate to say, as did the old regulations, that the Posse Comitatus Act precludes any domestic use of federal troops except as authorized by Congress. The suggestion made in the new regulations that there are constitutional exceptions to the prohibition of the Posse Comitatus Act, independent of any Act of Congress, is a foretaste of the extravagant new claims of inherent executive power contained in those new regulations.

It is notable that the new regulations describe the Posse Comitatus Act as prohibiting the use of Army or Air Force troops to enforce the laws "except as authorized by the Constitution or Act of Congress." This is a departure from the wording of the Act itself, which prohibits their use "except in cases and under circumstances expressly authorized

not expressly authorize the use of military troops, as distinguished from a civilian force such as federal marshals, or (but for the bar of the Posse Comitatus Act) federal marshals employing troops in a civilian capacity as their posse.

98. U.S. CONST. art. I, § 8, cl. 16.
99. Recall Justice Jackson's famous concurring opinion in the Steel Seizure Case, where he said:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.


100. 32 C.F.R. § 215.4(b) (1973) (emphasis added).
by the Constitution or Act of Congress." Indeed, it is the adverb "expressly" that captures the essence of the controversy between President Grant and the Congress that led to enactment of the Posse Comitatus Act in the first place. The Act was adopted specifically as a repudiation of claims to an inherent executive power to utilize military troops for law enforcement.

The Bases of the New Regulations

Both the old and the new Civil Disturbance Regulations, as has already been noted, rely upon the three statutes discussed above, 10 U.S.C. §§ 331, 332, and 333. The problems of constitutionality and construction of those statutes have an obvious bearing upon the validity of the regulations, but those problems were the same under the old regulations as they are under the new.

Unlike the old regulations, however, the new regulations are not content to rely upon these three statutory exceptions to the prohibition imposed by the Posse Comitatus Act. The new regulations assert that

[the Constitution and Acts of Congress establish six exceptions, generally applicable within the entire territory of the United States, to which the Posse Comitatus Act prohibition does not apply.]

Of the three additional exceptions now claimed, one purports to be based upon another congressional enactment, and two purportedly derive from the Constitution without the benefit of legislation.

House Joint Resolution 1292

The additional statutory authorization for the use of military troops claimed by the new regulations is House Joint Resolution 1292 of June 6, 1968. Although the resolution had been adopted prior to promulgation of the 1968 regulations, those old Civil Disturbance Regulations did not claim it as any authority for the use of military troops. The resolution in fact does not refer expressly to any military personnel or resources at all. It says:

Hereafter, when requested by the Director of the United States Secret Service, Federal Departments and agencies,

102. See text accompanying notes 78–85 supra.
103. 32 C.F.R. § 215.4(c) (1973) (emphasis added).
unless such authority is revoked by the President, shall assist
the Secret Service in the performance of its protective duties
under section 3056 of title 18 of the United States Code and
the first section of this joint resolution. 105

An “Interdepartmental Agreement Between the Department of Defense
and the Department of the Treasury Concerning Secret Service Protec-
tive Responsibilities,” 106 signed a few days after House Joint Resolu-
tion 1292 was adopted, and subsequently implemented by a Department
of Defense Directive, 107 deals only with the providing of motor vehicles,
communications, aircraft and crews, medical service, and other logistical
assistance to the Secret Service. Assistance of this type had been pro-
vided to the Secret Service by the Department of Defense for some years
even before House Joint Resolution 1292 was adopted, and this practice
seems never to have been considered as affected by the Posse Comitatus
Act. The Interdepartmental Agreement makes no provision for the
employment of troops.

If equipment and logistical support were all that could be claimed
to be within the scope of House Joint Resolution 1292, there would be
little cause for alarm. But an extremely broad authorization for the
utilization of troops might also be asserted. The resolution, if it is to
be taken to authorize the employment of military troops at all, authorizes
them to “assist the Secret Service in the performance of its protective
duties under section 3056 of title 18 of the United States Code . . . .” 108
Title 18 U.S.C. § 3056 enumerates many duties for the Secret Service,
not all of which can be fit within the resolution’s reference to “protec-
tive” duties. One enumerated duty that clearly does fit that description,
however, is the Secret Service’s duty to “detect and arrest any person
violating any of the provisions of [section] . . . 871 of this title . . . .” 109
Title 18 U.S.C. § 871 is the statute forbidding and punishing threats
against the President or Vice President.

Murmurings against the President have been heard before in
times when economic and other domestic problems seemed to be going
untended or at least unsolved. Radical groups might even put together
organized plots, or might be suspected of so doing. The broad power
conferred by 18 U.S.C. § 3056 to “detect and arrest” any persons threat-

106. The Interdepartmental Agreement, signed June 10–11, 1968, is on file with
the INDIANA LAW JOURNAL.
108. See text accompanying note 105 supra.
ening the President could be taken to justify extensive surveillance and enforcement activities by the Secret Service in such circumstances. The Secret Service is broadly authorized to “execute warrants issued under the authority of the United States,” to “offer and pay rewards for services or information looking toward the apprehension of criminals,” and to

make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.\textsuperscript{100}

If House Joint Resolution 1292 does indeed authorize military assistance to the Secret Service in that function, extensive and widespread military involvement in the management and suppression of political dissent is an ominous possibility.

It is noteworthy that the new Regulations specifically point out that, unlike in the circumstances covered by 10 U.S.C. §§ 331, 332, and 333, the utilization of military troops pursuant to the authority claimed to derive from House joint Resolution 1292 does not require any “personal Presidential action.”\textsuperscript{111} All that is required is the request of the Director of the Secret Service.

It bears repeating that House Joint Resolution 1292 does not “expressly” authorize the utilization of military troops; it simply refers to “Federal Departments and agencies.” The Posse Comitatus Act prohibits the use of troops in law enforcement “except in cases and under circumstances expressly authorized” by Congress.\textsuperscript{112} Thus, any claim that the resolution authorizes the use of military troops to aid in the Secret Service’s law enforcement activities is highly attenuated, to say the least.

\textit{The Constitutional Exceptions}

In addition to asserting this new role for military intervention under House Joint Resolution 1292, the new Civil Disturbance Regulations claim two “constitutional exceptions” to the Posse Comitatus Act’s prohibition. These “constitutional exceptions” are said to be

based upon the inherent legal right of the U.S. Government

\textsuperscript{110} Id.
Neither of these purported constitutional exceptions deals with circumstances in which the utilization of military troops is "expressly authorized by the Constitution," as the Posse Comitatus Act requires. If they are indeed exceptions to the prohibition of that Act, therefore, it must be on the view that the use of troops in such circumstances is a prerogative of the executive branch with which even a statute so straightforward as the Posse Comitatus Act cannot interfere. These purported "constitutional exceptions" to the Act, in other words, represent assertions of inherent executive power, beyond regulation by the Congress, and it would seem to follow, beyond restraint by the judiciary as well. It will be remembered that it was precisely to repel any such claim of inherent power to employ troops that the Posse Comitatus Act was adopted in 1878.

One of the "constitutional exceptions" claimed by the new regulations pertains to "protection of Federal property and functions." It purportedly

[a]uthorizes Federal action, including the use of military forces, to protect Federal property and Federal governmental functions when the need for protection exists and duly con-

111. 32 C.F.R. § 215.4(c) (1) (1973).
112. This is not the first assertion of an illimitable inherent executive power to use troops. For example, the last published opinion of Attorney General Herbert Brownell, Jr., who had advised President Eisenhower with regard to his use of federalized National Guardsmen and federal troops in connection with the school integration crisis in Little Rock, Arkansas in 1957, although it relied chiefly upon the provisions of 10 U.S.C. §§ 332 and 333, also said:

There are in any event grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate. However, that consideration was not reached because of the express congressional authority for the action taken.
41 Op. Att'y Gen. 313, 331 (1957). The same thesis was advanced by Judge Advocate General of the Army G. Norman Lieber in his book, THE USE OF THE ARMY IN AID OF THE CIVIL POWER (1898); see note 72 supra. Neither Lieber nor Brownell, however, could offer any decisional support for their claims. Nor did they attempt to deal with the substantial body of precedent that supports the contrary view. The most they could do was rely upon dicta and misapplied quotations from a few cases, such as those dealt with in note 117 infra. Beyond that, their argument was a naked appeal to seeming expediency buttressed by suggestions that otherwise there might be no result but tyranny—an argument which denigrates both the vigor of civilian institutions and the good sense of Congress in making legislative provision for emergencies.

115. See text accompanying notes 77-85 supra; see also note 99 supra.
CIVIL DISTURBANCE REGULATIONS

stituted local authorities are unable or decline to provide adequate protection.\textsuperscript{116}

There is language in some cases supporting a power of self-protective armed force for the federal government, but that language does not necessarily support a resort to distinctively military force as an inherent executive power beyond regulation or restraint by either of the other branches.\textsuperscript{117} The old regulations, too, had contemplated the use of military troops to protect federal property and federal activities,\textsuperscript{118} but those regulations had considered this self-protective power to be conferred upon the executive by 10 U.S.C. § 332. Whether that statute can serve as a sufficient authorization raises a serious constitutional question, as has already been discussed;\textsuperscript{119} but at least the old regulations made no claim that the power to use troops to protect federal property was inherent in the executive branch and beyond regulation or restraint by Congress or the courts.

The other purported "constitutional exception" claimed by the new regulations is far more sweeping, and substantially more unsettling in its implications. It is boldly captioned "The emergency authority," and it purportedly authorizes

prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters,

\textsuperscript{116} 32 C.F.R. § 215.4(c) (1) (ii) (1973).
\textsuperscript{117} The two passages most frequently relied upon are a holding in \textit{Ex parte Siebold}, 100 U.S. 371 (1879), and a dictum in \textit{In re Debs}, 158 U.S. 564 (1895). In \textit{Siebold} the Court said:

\textit{We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.}

\textsuperscript{118} U.S. at 395. The facts of \textit{Siebold}, however, involved federal marshals, not military troops at all, and nothing the Court said in any way supports the application of distinctively military force. The dictum in \textit{Debs} declared:

\textit{The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care . . . . If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.}

\textsuperscript{119} 32 C.F.R. § 187.5(a) (1) (1971).
\textsuperscript{119} \textit{See} text accompanying notes 47-55 \textit{supra}.
or calamities seriously endanger life and property and dis-rupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.120

The 1968 regulations contained nothing at all comparable to this bold claim of inherent executive power to employ federal military force, taking over from civil authorities both federal and state, without any request from civilian officials either federal or state, and without legislative and presumably without judicial restraint. This startling claim of the new Civil Disturbance Regulations to a so-called "emergency authority" requires close and sober scrutiny.

Exertion of this inherent power is said to be appropriate when "civil disturbances, disasters, or calamities" endanger life and property (whether or not federal property) and "disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations." The term "civil disturbances" is given a broad definition for purposes of the new regulations, to include not only "group acts of violence" but also other "disorders prejudicial to public law and order.""121 "Disorder," which is not defined in the regulations, is a term susceptible of many interpretations. So also is the word "calamities," which is not defined in the regulations. There may be political or economic or social "calamities"—"disturbances" of the established political order—that do not involve "group acts of violence" or any of the characteristics commonly connoted by terms such as "riot," "tumult," and "unlawful assembly" at all.

This inherent power may be invoked, according to the new regulations, when a disorder is serious enough to "disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations." The reference to "duly constituted local authorities" makes it evident that the purported power is to be invoked when normal state or local governmental functions are disrupted, and not merely when federal activities are disrupted. Yet there is no detail given in the regulations as to what constitutes "normalcy" of governmental functions, what constitutes their "disruption," or what might constitute "inability" on the part of local authorities to control a situation. The statutory machinery of 10 U.S.C. § 331 provides for federal assistance at the request of the states;122 but this purported extra-
statutory "emergency authority" would support federal military intervention in a state without any request from the state at all, even where the intervention was purportedly for the purpose of enforcing state law. The judgment as to whether local authorities are able to control a situation is to be made, not by local or state governmental officials, but by the federal official or officials designated elsewhere in the regulations. 128

Moreover, according to the new regulations the role that the federal troops are to play in such situations is not a subordinate role of assistance to civil authorities in their own enforcement of the laws. Rather, on the premise that the local civil authorities are "unable to control" the situation, the troops are given a free hand to "restore governmental functioning and public order . . . " 124

It is therefore important to determine just who, according to the new regulations, is to make these critical judgments in the context of this so-called "emergency authority:" what constitutes a "civil disturbance," "disorder," or "calamity"? When is life or property endangered? When have governmental functions been disrupted sufficiently to justify the use of federal troops? And, once federal troops have intervened on these grounds, when have public order and governmental functioning been sufficiently "restored" to warrant withdrawal of the military forces? The claim of inherent executive power upon which this purported "emergency authority" regulation is based excludes the Congress and apparently also the courts from either making or reviewing these judgments. Neither is it contemplated, however, that these critical judgments ordinarily will be made by the President. The regulations specifically provide that instances within this "emergency authority" are exceptions to the rule that military intervention "will normally be predicated upon the issuance of a Presidential Executive order or Presidential directive . . . . " 125 They are exceptions also to the rule that directives for the use of troops will be restricted to the restoration of law and order "in a specific State or locality." 126

Each of the statutes in Title 10 of the United States Code, whatever its faults in other respects, at least requires some personal act of the President before federal troops as a distinctly military force may be employed. The new Civil Disturbance Regulations, in contrast, not only

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123. See the final section of this article, SUPERVISION, COMMAND AND CONTROL, infra.


125. Id. § 215.5(a).

126. Id.
purport to increase substantially the variety of circumstances in which federal troops may be employed by contriving new exceptions to the Posse Comitatus Act, but they also maintain that the critical decisions concerning their use in these new circumstances are to be made, not by the President at all, but by inferior and even by military officials. The new regulations' provisions on supervision, command and control are examined in the next section of this article.

SUPERVISION, COMMAND AND CONTROL

General supervisory responsibility for planning and coordinating the use of military troops in civil disorders is vested by the new regulations in the Secretary of the Army (or the Under Secretary of the Army, as his designee). With regard to situations falling within the scope of 10 U.S.C. §§ 331, 332, or 333, the Secretary of the Army is delegated "any and all of the authority of the President" which may be otherwise delegated to the Secretary of Defense. This delegation, however, does not eliminate the requirement of "personal Presidential action" as a prerequisite to the use of troops under any of those three statutes. Beyond the limits of those three statutes, however, and in all circumstances in which according to the new regulations no "personal Presidential action" is required, the Secretary of the Army is designated to serve as "Executive Agent for the Department of Defense" for all civil disturbance matters. In this capacity as Executive Agent the Secretary of the Army, or the Under Secretary as his designee, is responsible for establishing policies, plans, procedures, command arrangements and intelligence data to facilitate civil disturbance control activities by the military.

Actual operational control of any troops, however, is to be under the direction of uniformed military commanders. Military resources are to be made available by the military departments upon the call of the Secretary of the Army as Executive Agent; but thereafter the Secretary's authority to direct the troops is to be exercised "through the Chief of Staff, U.S. Army . . . ." Under the Army Chief of Staff there is created a "Directorate of Military Support" composed of military officers; and it is this Directorate, according to the regulations, that "will plan, coordinate, and direct civil disturbance operations."

127. *Id.* § 215.5(c).
128. *Id.* § 215.4(c) (2) (i).
129. *Id.* § 215.6(a).
130. *Id.* §§ 215.6(a) (1), (3), (7), (10), and (13).
131. *Id.* § 215.7(a) (1).
With respect to on-the-scene command and control, the regulations make no provision for civilian supervision. There is an exhortation to "DOD components and their subordinate activities" to coordinate with local civil authorities or local military commanders as appropriate, to assure mutual understanding of the policies and procedures to be adhered to in an actual or anticipated civil disturbance situation, but coordination is not to be understood as the subjection of federal troops to any civilian command. Quite to the contrary, in fact, the regulations specifically provide that

> [a]t objective areas, designated task force commanders will exercise operational control over all military forces assigned for employment in the event of civil disturbances.

In sum, what is contemplated by the Civil Disturbance Regulations is not at all the utilization of military personnel under the command of civilian law enforcement officials as a civilian force, subject to civilian laws, in the nature of a posse comitatus. What is contemplated, instead, is a distinctively military force, under uniformed military commanders in a chain of command culminating at the military Directorate under the Army Chief of Staff, governed not by civilian but by military law, and subordinated to no local or state official nor to any federal civilian official except the Secretary of the Army. Even the Secretary of the Army's role of "[e]xercising . . . the direction of military resources committed or assigned for employment in the event of actual or potential civil disturbances" does not assure any significant civilian supervision of operations, because this direction is to be exercised only "through designated military commanders"—the military Directorate, and under the Directorate, the military task force commanders.

The fact that the regulations provide for military response even to "potential" civil disturbances is important. Most of the constitutional authorities actually maintain that distinctly military force may not lawfully be employed until after an armed assault against the institutions of civilian government has been successful, a fait accompli. In con-
trast, the Civil Disturbance Regulations purport to authorize the application of distinctly military force, not only in instances of actual disorder falling short of genuine insurrection, but even in instances of "potential" civil disturbances. With "civil disturbances" defined by the regulations in such broad and indefinite terms as "disorders prejudicial to public law and order," and with an inherent executive power being claimed to deal with undefined "calamities," the attempt to justify military action in cases of "potential" civil disorders goes far, far beyond anything that can find colorable support in constitutional jurisprudence.

For dealing with "potential" civil disturbances, the regulations authorize "prepositioning predesignated ground forces . . . ." However efficient prepositioning may seem as a means of facilitating prompt suppression of disorder when it occurs, it is also true that the prepositioning of troops can intimidate citizens and chill the exercise of constitutional rights. It will be recalled that President Grant's defense of prepositioning was unpersuasive to the Congress in the 1870's, and that Congress enacted the Posse Comitatus Act in large part because of the intimidation they felt voters must have suffered because of soldiers prepositioned to prevent potential disorders at the polls. Nonetheless, the Civil Disturbance Regulations specifically provide for prepositioning of federal troops. Prepositioning in one place of "more than a battalion-sized unit" may be undertaken only after a request for prepositioning has been addressed to the Attorney General and approved by the President; but units as large as a battalion may be prepositioned on the order of military commanders alone whenever, in the judgment of those military commanders, circumstances of so-called "potential civil disturbances" might warrant.

The regulations also provide for Pentagon control of the release of information concerning civil disturbance operations of the military. Apparently this information control applies to preparations and prepositioning for "potential civil disturbances" as well as to activities after troops have been deployed.

It is therefore quite possible that highly significant action could be taken, distinctively military in character, including the prepositioning of

139. 32 C.F.R. § 215.3(a) (1973).
140. Id. § 215.4(c) (1)(i).
141. Id. § 215.6(a)(6).
142. See text accompanying note 77 supra.
143. See text accompanying note 71 supra.
144. 32 C.F.R. § 215.5(g) (1973) (emphasis added).
145. Id. § 215.6(f).
battalions of troops in different places as well as the actual employment of troops, in order to deal with actual or merely potential situations thought by military commanders to come within the new regulations' vague and expansive concepts of "civil disturbances" and "the emergency authority." This could be done without any Presidential participation in the critical decisionmaking at all. In fact, it seems, all of this could be done on the decision of no one higher than the military Directorate, or its superior commander, the Army Chief of Staff, without the participation of any civilian official at all.

The President, of course, remains Commander-in-Chief. As such he could certainly exert his superior command power to order troops withdrawn, or otherwise to countermand inferior officers' orders. Ought-right insubordination to the Commander-in-Chief would be a greater breach of discipline than American military officers are likely to indulge. The real military threat to civilian institutions arises from possibilities less remote—possibilities of military intervention for which there is colorable authority in law, and in particular, in the new Civil Disturbance Regulations. Even under a President devoted to free civilian procedures, confident of the political process, tolerant of vigorous dissent, and suspicious of military power, the risk of untoward military intervention under color of the new regulations would warrant grave concern. The danger would be far greater under a President seriously deficient in any of those traits. The danger also seems enhanced by the presence in major positions of policy responsibility within the civilian government, of individuals with strong military ties. The most intimate presidential advisor during the last fifteen months of the Nixon administration was a career military man, a four-star general who had been Vice-Chief of Staff of the Army, and who retired from active duty only after a controversy was raised over his appointment in the face of a statutory prohibition. It is

146. Title 10 U.S.C. § 973(b) (1970) provides that
Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

The incumbent Attorney General, William Saxbe, whose functions include receiving and passing on any requests for the prepositioning of troops, 32 C.F.R. § 215.5(g) (1973), also has a military background. Now inactive as a Colonel in the Ohio National Guard, he was active in the Guard throughout his political career until 1968 when he joined the United States Senate. He recounted his military ties at his confirmation hearings, and chose to be sworn in to martial music by the United States Army Band, the oath being administered by a judge of the Military Court of Appeals.
worth recalling that some of the most notable excesses of military intervention in domestic affairs in this nation's prior history occurred a century ago during the Presidency of a career military general, Ulysses S. Grant.\textsuperscript{147}

CONCLUSION

The new Civil Disturbance Regulations do provide a cover of seeming legality for extreme measures of military intervention in domestic civilian affairs. It would be foolish to assume that, despite these provisions, the kind of military intervention and military domination of civilian government that has been experienced in some other erstwhile democratic countries is somehow impossible here. Perhaps political leaders will be successful in averting any occasion for such extremes of intervention here as would amount substantially to a military takeover. The possibility, however, at least serves to underscore the profound seriousness of the legal issues raised by the new regulations, and also by the statutes upon which, in part, they purport to rely.

Judicial challenge to the statutes and regulations concerning domestic use of troops is impracticable. Attempts to obtain declaratory or injunctive relief in advance of some actually imminent situation founder all too easily on case or controversy grounds.\textsuperscript{148} While disorder is rampant and troops are actually deployed, it would be a bold and uncommon judge who would dare interpose his judgment. And after the fact, unless cognizable damages are claimed, the bar of mootness may be raised. Even where damages are claimed to have been suffered, as in the Kent State Cases involving state military troops, the tendency of courts is to seek a narrow ground for decision, and to make only muted reference to the constitutional tradition that is at stake.\textsuperscript{149} Judicial outcries like those that denounced Lincoln's excesses of militarism at the time of the Civil War\textsuperscript{150} have been rare, although significant.

This is a field, consequently, in which restoration and protection of the constitutional due process tradition, which forbids the intervention of distinctly military force in domestic situations short of genuine insurrection, is primarily the responsibility of Congress. A congressional repudiation of the claims of inherent executive military powers claimed in the new Civil Disturbance Regulations, together with a thorough-

\begin{itemize}
  \item \textsuperscript{147} See text accompanying notes 69–80 supra.
  \item \textsuperscript{148} See, e.g., Gilligan v. Morgan, 413 U.S. 1 (1973).
  \item \textsuperscript{149} See, e.g., the excerpt quoted in the text accompanying note 2 supra.
  \item \textsuperscript{150} See note 48 supra.
\end{itemize}
going revision of 10 U.S.C. §§ 331, 332, and 333, is required. If Congress does not act, one of the oldest and dearest principles of our constitutional heritage will continue to wither—and may very soon perish—from neglect.

151. An informed revision of the Posse Comitatus Act would also be useful. Such a revision could make available the personnel and resources of the Department of Defense to assist in the control of civil disorders, for example, and to enforce state or federal law, while insuring compliance with the essential requisites of the constitutional tradition of due process in a fashion comparable to Lord Mansfield's doctrine. The "posse" model might today seem quaint, but its essence can be preserved. What is essential is the recognition and enforcement of the principles that whenever military personnel are utilized domestically in less than a genuine insurrection, they are civilian and not military in character; they are not subject to the Uniform Code of Military Justice or any other principles of military law; they are subject to the control and direction of the civilian officials who would have charge of the situation if the military personnel had not been employed; they are governed by the same rules of law and standards of liability that apply to nonmilitary personnel in the same situation; and they are seriously in need of retraining, because these are not the standards to which federal military troops for the past several years have been trained.