THE IMPOSITION OF MARTIAL LAW

IN THE UNITED STATES

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REPORT DOCUMENTATION PAGE	Form Approved OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	3.Jan.00	MAJOR REPORT

4. TITLE AND SUBTITLE
THE IMPOSITION OF MARTIAL LAW IN UNITED STATES

5. FUNDING NUMBERS

6. AUTHOR(S)
MAJ DAVIES KIRK L

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
JA GENERAL SCHOOL ARMY

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)
THE DEPARTMENT OF THE AIR FORCE
AFIT/CIA, BLDG 125
2950 P STREET
WPAFB OH 45433

10. SPONSORING/MONITORING AGENCY REPORT NUMBER
FY99-603

11. SUPPLEMENTARY NOTES

12a. DISTRIBUTION AVAILABILITY STATEMENT
Unlimited distribution
In Accordance With AFI 35-205/AFIT Sup 1

12b. DISTRIBUTION CODE

13. ABSTRACT *(Maximum 200 words)*

DISTRIBUTION STATEMENT A
Approved for Public Release
Distribution Unlimited

14. SUBJECT TERMS			15. NUMBER OF PAGES 61
			16. PRICE CODE
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

> "Necessity hath no law. Feigned necessities, imaginary necessities . . . are the greatest cozenage that men can put upon the Providence of God, and make pretenses to break known rules by."
>
> Oliver Cromwell
> September 12, 1654[1]

I. Introduction

Imagine the following frightening scenario: Members of an American militia group enter a major metropolitan airport and attach small aerosol-like devices in several restrooms throughout the concourse. These devices release deadly amounts of smallpox bacteria into the air, infecting hundreds of Americans travelling through the airport. Within days, citizens around the country begin to display the horrific symptoms of smallpox.[2] Soon public health workers determine the nature of the epidemic and release the information to the press. Widespread panic results. Civilian public health agencies attempt to educate the public on how to control the spread of the disease. But despite police efforts to control the populace by establishing quarantine areas, the civilian infrastructure is quickly overwhelmed. Chaos

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[1] JOHN BARTLETT, FAMILIAR QUOTATIONS 247 (16th ed. 1992).

[2] A recent Frontline series episode discussed in detail the possibilities and ramifications of biological warfare. *Plague War* (PBS television broadcast, Oct. 13, 1998). In conjunction with the television series, PBS maintains a comprehensive web site, which includes a transcript of the broadcast, Frequently Asked Questions, texts of interviews not aired on the broadcast, and other resource materials (*available at* <http: www.pbs.org/wgbh /pages/frontline/ shows/plague) [hereinafter Frontline Internet Site]. The site offers the following information regarding smallpox:

> Smallpox is a virus. It is highly contagious transmits through the atmosphere very easily and has a high mortality rate. A worldwide vaccination program eliminated smallpox in the 1970s. Both the United States and the former Soviet Union officially maintained small quantities of the virus at two labs. However, there is the suspicion that it may have been or is still researched and developed at other labs either within Russia or in other countries, thus increasing the concern of smallpox being used as a biological weapon.

See Frontline Internet Site at <http: www.pbs.org/wgbh/pages/frontline/ shows/plague/etc/faqs.html>.

results. Finally, the President declares martial law in an attempt to restore order in the nation.

This unwelcome scenario is but one example of a crisis that could quickly rip apart America's social structure.[3] Even though civilian disaster relief and law enforcement agencies regularly prepare for emergencies, Americans as individuals and as a society are woefully unprepared to face this kind of serious disaster.[4] Michael Osterholm, State Epidemiologist for the Minnesota Department of Health, and Chair of the Committee on Public Health and the Public and Scientific Affairs Board, has been an outspoken advocate of developing a national emergency preparedness program for biological attack. He recently stated:

> Several of my colleagues and I have tried to walk though these [disaster] scenarios time and time again. We've looked at them as we would handle any other public health disaster, as we've done in the past. Unfortunately, each and every time, given the resources we have now, given the kinds of authorities we have now, we come down to basically complete chaos and panic. In many instances, the only thing that would probably prevail is martial law. I don't think this country has yet prepared to realize that we may face that in the future.[5]

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[3] Other possible scenarios might include one, or more, of the following conditions: wide-spread terrorist attacks with chemical or biological weapons, nuclear attack, cyber-attack on critical national computer systems, or conventional war waged within our own borders. The purpose of this article is not to explore the relative likelihood of any of these scenarios. Instead, the author uses the biological attack scenario merely as a tool to illustrate the possible conditions that could lead to martial law.

[4] This paper is not intended as an analysis of the American civil defense program. However, a layman's comparison of current U.S. civil defense activities with those of the Cold War era when Americans regularly participated in nuclear attack exercises supports this conclusion. Illustrative of the past attention given to civil preparedness was an exercise conducted by President Dwight D. Eisenhower in 1955. OPERATION ALERT, 1955 included evacuation of government buildings in Washington D.C. and a "proclamation" of martial law by the President. *See* N.Y. TIMES, June 16, 1955, at 1. It is difficult to image the federal government now conducting such an extensive exercise.

[5] Frontline Internet Site, *supra* note 2, at < http: www.pbs.org/wgbh/pages/frontline/ shows/plague/interviews/osterholm.html>.

Given the relative easy availability of biological and chemical weapons, and considering the number of groups[6] who would conceivably use such weapons, it really is not difficult to imagine a disaster scenario where the President would feel compelled to restore order by imposing martial law.

The term "martial law" has an ominous ring to it, especially in a country founded upon notions of civil liberties and individual rights. Considering our national predilection for demanding "our rights," and in view of the constitutional separation of powers, a President who imposed martial law would certainly face strong political and legal opposition. Even if our population faced a severe disaster, like the one described above, it is entirely predictable that many Americans would rebel against a President who took such drastic action, despite the President's good intentions.

It seems axiomatic that the President, as the chief executive, would have authority to respond to national emergencies outside of any authorization from the Congress. The extent to which the President may constitutionally or lawfully employ military force to react to an internal, national crisis is not at all clear. The Constitution does not explicitly grant any emergency powers to the President. Perhaps the clause that requires the President to "take Care that the Laws be faithfully executed . . ."[7] could be interpreted to allow the President some authority to respond to national emergencies or crises. But relying only on that authority to employ military force to impose martial law is problematic since the Constitution

[6] International terrorists organizations, militia groups, millennial "dooms-day" cults, and right-wing hate groups, to name a few.

[7] U.S. CONST. art. II, § 3.

grants the *Congress* the authority to "call[] forth the Militia to execute the Laws of the Union...."[8]

The trend in recent years has seen the President and Congress directing the military into more and more operations that are traditionally civilian in nature.[9] Several factors could combine to continue this trend. First, the threats against national security have become more complicated and diverse.[10] Second, the military is viewed as possessing critical expertise for responding to the varied threats previously mentioned.[11] Third, the military is the only governmental organization whose members are not only trained to do dangerous jobs, but who can also be ordered into life-threatening situations.[12] Finally, as federal funds remain

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[8] U.S. CONST. art. I, § 8, cl. 15.

[9] *See generally* Colonel Charles J. Dunlap, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994); DAVID JABLONSKY, *The State of the National Security States, in* U.S. NATIONAL SECURITY, 36 (Jul. 26, 1997) (citing James Dubik, *"The New Logic. The U.S. Needs Capability-Based, Not Threat Based Military Forces,"* ARMED FORCES J. INT., Jan. 1997, 43; WILLIAM S. COHEN, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS, 5-11 (Apr. 1997).

[10] For example, who should respond to an attack against a sophisticated computer system, like one controlling air traffic or the national banking system? The Federal Bureau of Investigation or the Department of Defense? Who is best suited to respond to terrorist-sponsored chemical weapon attack? The Department of Justice, who is authorized to do so, (*see infra* note 23 and accompanying text), or the Department of Defense? This blurring of the traditional threat could lead the nation to continue to interject the military into roles that previously were handled by civilians. *See* Tom Bowman, *Clinton Suggests Budget Increase to Deal With Modern Terrorism*, THE BALT. SUN, Jan. 23, 1999, at 3A ("We must be ready; ready if our adversaries try to use computers to disable power grids, banking, police, fire and health services, or military assets.")

[11] Because of this expertise, the military has been tasked with training groups of civilians around the country on the proper response to chemical and biological attacks. *See generally The Threat of Chemical and Biological Weapons, Before the Subcomm. of Tech., Terrorism and Gov't, Information Comm. on the Judiciary, and Select Comm. on Intelligence,* United States Senate (1998), 1998 WL 11516695, (statement of Janet Reno, Attorney General); *Federal Spending on Anti-Terrorism Efforts, Before the Subcommittee on National Security, Veterans Affairs, and International Relations, Committee on Government Reform,* House of Representatives (1999), 1999 WL 8085480 (statement of Henry L. Hinton, Jr., Assistant Comptroller General, National Security and International Affairs Division.) Beyond their expertise and training in dealing with chemical and biological weapons, the military is currently under an anthrax inoculation program. These kinds of activities make the military the obvious best choice in responding to the scenarios envisioned by this article.

[12] Recently military members have been ordered to receive the anthrax vaccination, in preparation for facing future threats. Some have resisted such vaccinations, but their resistance has been met with direct orders and threats of punishment. *See Airman in Anthrax Dispute,* AP Online, Jan. 21, 1999, *available in* Westlaw, 1999 WL 0733650; Charlie Goodyear, *Trouble in Ranks Over Anthrax*, S.F. CHRON., Jan. 22, 1999, at A17.

very limited, Congress and the President will most likely wish to capitalize on the money they've already spent on military training, rather than expend additional dollars on civilian training and supplies.

This trend to grant the President more statutory authorization to regularly involve the military in civilian law enforcement and disaster relief roles creates serious risks for the military and the nation. For purposes of this paper, the risk inherent in this slow, but steady, move is that it may push the military closer to fulfilling a role not envisioned by our founding fathers. A significant offshoot of this trend is whether Congress has so altered the role of the military that they have granted the chief executive implied authority to act in response to severe emergency crises, even in the absence of specific authorization from either the Constitution or the U.S. Congress. If so, the leap to a lawfully imposed condition of martial law is not so far as otherwise imagined.

Those facing the risks associated with declaring martial law would extend beyond the President and his close circle of advisors. Military commanders who swear to uphold the Constitution of the United States[13] *and* who are required to follow the President's orders,[14] would find themselves in an equally challenging predicament. Under declared martial law, the President would expect military commanders to follow his orders and execute the day-to-day duties associated with martial law. But in a commander's mind, the President's orders may appear to stand in direct opposition to the commander's oath to uphold and defend the nation's Constitution. Under normal conditions, following the commander-in-chief's orders

[13] 5 U.S.C.A. § 3331 (West 1998). *See also* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 187 n.22 (1998).

[14] UCMJ art. 92 (1998).

and directives do not usually raise these kinds of constitutional dilemmas. Martial law, however, would be anything but "normal." Under such conditions, commanders would unfortunately be placed in the difficult position of wondering whether their actions were protected under the law.

A. A Roadmap.

This paper addresses in the issue of martial law in the following manner: First, as a necessary precondition to a declaration of martial law, this paper presumes that America's civilian agencies would be unable to adequately respond to certain crises. Accordingly, the paper looks briefly at how America's civilian agencies may respond to these types of scenarios.

This paper then looks at the military's role in America and how that role has developed from the early days of our nation's history to present-day. It also considers briefly the President's authority as commander-in-chief under our constitutional scheme, and how the constitutionally imposed separation of powers affects the military. The paper then addresses how various statutes and regulations impact on military operations, particularly in the area of emergency response activities.

Next, the paper explores the topic of martial law itself. It develops a definition of martial and discusses whether or not martial law can ever be considered lawful. To help in that analysis, the paper then reviews Supreme Court cases in two areas: those that address the issue of martial law and those that address the extent of the President's emergency authority. The paper looks briefly at how a military commander should respond to the unusual order to

execute a presidential declaration of martial law, and finally, the paper integrates the various statutes, rules and case law and develops an approach for analyzing an executive proclamation of martial law.

B. The Civilian Agencies' Response.

One can easily construct a crisis scenario that overwhelms the capabilities of civilian law enforcement and relief agencies.[15] For example, during the 1992 Los Angeles riots, civilian law enforcement agencies were unable to cope with the widespread rioting and relied upon National Guard and Federal troops to help restore order.[16]

According to a Department of Defense (DOD) directive, "[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the State and local government."[17] Within the federal government, the Federal Emergency Management Agency (FEMA) is the lead federal agency for domestic disaster relief. Under FEMA's Federal Response Plan, DOD has assigned responsibilities during disaster response operations.[18] FEMA's primary responsibilities lie in the area of disaster or consequence management. As an agency, they are neither trained, nor manned, to handle scenarios involving insurrection. In such a severe crisis, if the President would be inclined to

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[15] This article does not address whether or not the military would, under such circumstances, be prepared to restore law and order within the community. Although the military may be *better prepared* to handle certain situations, it may also be seriously unprepared to impose and administer martial law.

[16] *See* Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the Military in Civilian Law Enforcement Operations*, 26 Loy. L.A. L. Rev. 1291 (1993).

[17] U.S. DEP'T OF DEFENSE, DIR. Directive 3025.12, para D(1)(c), MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb 94) [hereinafter DOD DIR. 3025.12].

[18] Assignment of Emergency Preparedness Responsibilities, Exec. Order No. 12656, 53 Fed. Reg. 47, 49 (1988).

streamline the operational chains of command, resulting in removing FEMA from its primary role in consequence management, for DOD taking over the process under a proclamation of martial law.[19]

A recent Presidential initiative reflects the Administration's belief that the nation is poorly prepared to respond to the kinds of non-traditional attacks envisioned in this article.[20] In the area of biological attack, FEMA officials maintain they have inadequate funding[21] to

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[19] As the country pays more attention these issues, it is obvious the military will play a central role in whatever course the nation ultimately takes. For example, the DOD is "stationing 10 Rapid Assessment and Detection Teams (RADT), each composed of 22 specially trained Air Force and Army National Guard personnel, in 10 states to respond to chemical and biological weapons attacks." Jim Landers, *U.S. Quietly Upgrading Homeland Defense Plan*, THE DALLAS MORNING NEWS, Feb. 9, 1999 at 1A. Besides the military taking a more central role, some factors indicate that FEMA is not prepared to properly execute its statutorily authorized role to control disasters. One author states:

> In practice, nobody knows who would do what if American city-dwellers faced a lethal cloud of anthrax or nerve gas. An exercise in March, designed to test the authorities' response to a genetically engineered virus spread by terrorists on the Mexican-American border, led to bitter squabbling among rival agencies. "There is no clear demarcation line between the FEMA, and knowledge about disease and hazardous materials is spread over a broad array of institutions," says Zachary Selden, a germ-warfare boffin. "Somebody is needed to sit on top of these operations."

The National Guard in a Brave New World, THE ECONOMIST, May 9, 1998, at 25.

[20] *See* John M. Broder, *President Steps Up War On New Terrorism*, N.Y. TIMES, Jan. 23, 1999, at 14. (discussing the President proposing new steps to defend against unconventional warfare, including creation of 25 "urban medical emergency teams to respond to germ weapons attacks.") *See also* Landers, *supra* note 19; Paul Mann, *White House Shed Inertia on Germ War*, AVIATION WEEK & SPACE TECH., May 4, 1998, at 36.

[21] Mann, *supra* note 20.

> Stephen Sharro, Acting director of FEMA's terrorism coordination unit, said his agency has very little funding for WMD or terrorism specifically. Total dedicated funding amounts to $6.8 million . . . Sharro noted, however, that "FEMA is not the responder, it is the coordinator of the federal response. So I would think the real shortfall [is in] agencies like Public Health Service [and the] Health and Human Services [Dept.], who are struggling mightily to deal with these kinds of threats, and how you prepare a nation this size for this new threat."

For additional comments regarding the federal government's failure to properly allocate funds to preparing to counteract this threat, *see* Osterholm interview, *supra* note 5.

respond to these types of emergencies, even though in recent years the federal government has initiated large-scale training programs.[22]

An obvious natural response to severe disasters may be rioting, insurrections, or other serious disturbances that would hamper efforts to counteract the effects of the disaster. The authority to direct the federal response to civil disturbances lies with the Attorney General of the United States.[23] The federal response to terrorist attack falls under the direction of the Department of Justice and the Federal Bureau of Investigation.[24] The Department of Justice can enlist the support of DOD when conditions warrant.[25] In recognition of the threat, recent

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[22] The 1996 Defense Against Weapons of Mass Destruction Act of 1996, known as Nunn-Lugar, *see* National Defense Authorization Act For Fiscal Year 1996, Pub. L. No. 104-106, §1201, 110 Stat. 186, 469 (1996) has provided millions of dollars (funded through DOD) to train local communities on how to respond to nuclear and biological attacks. DOD trainers are an integral part of the program. Under this legislation, DOD and other federal agencies have established teams who teach local forces how to deal with explosives, as well as nuclear, chemical and biological attacks. *See Federal Response to Terrorist Incidents Involving Weapons of Mass Destruction: Status of Department of Defense Support Program, Before the Subcomm. on Research and Development of the House Comm. On Nat'l Security,* 105th Cong., 1997 WL 697573 (1997) (statement of Mr. James Q. Roberts, Principal Director to the Deputy Assistant Secretary of Defense (Policy and Missions), Office of the Assistant Secretary of Defense (Special Operations/Low-Intensity Conflict). *See also* Skip Thurman, *Cities Learn How to Handle Terrorists' Chemical Attacks*, THE CHRISTIAN SCIENCE MONITOR, Aug. 26, 1997, at 3; Karen Ann Coburn, *Rehearsal for Terror*, GOVERNING MAGAZINE, Feb. 1998, at 22; Otto Kreisher, *Pentagon to Create More Chemical-bio Response Teams*, COPLEY NEWS SERVICE, Mar. 17, 1998; and Frontline interview with William S. Cohen, United States Secretary of Defense, Frontline Internet Site, *supra* note 5, at <http://www.pbs.org/wgbh/pages/frontline/shows/plague/ interviews/cohen.html>.

[23] *See* U.S. DEP'T OF DEFENSE, DIR., 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993), para D(1)(d), [hereinafter DOD DIR. 3025.1].

[24] *See* DOD DIR. 3025.12, *supra* note 17, para D(8)(a)(1-2).

[25] It is hard to predict how the President would react in a severe national crisis like the ones considered in this article. But it is not entirely unpredictable that the prescribed method of response would not be followed, for a variety of reasons. Realistic training scenarios increase the likelihood that these kinds of last minute changes would not take place.

> We do not want to be in a posture where the only thing which you can do at that time is turn it into martial law because we haven't done the process of . . . working out those standing arrangements with FBI and working it out with local civil defense people and emergency preparedness people. If none of that takes place . . . that is far more likely to lead to an unacceptable role of the military in our society.

Jonathan S. Landay, Delicate Task of Rallying Public About Threat of Terrorism, THE CHRISTIAN SCIENCE MONITOR, Feb. 3, 1999, at 2 (quoting a senior Pentagon official).

years have seen an increased attention to funding and training, on a nation-wide basis. DOD plays a critical role in this training.[26] It is this very funding and training that causes civil rights activists to be alarmed about the likelihood that the President will eventually use the military, equipped with this training and resources, in a way that violates American's civil and Constitutional rights. In other words, martial law.

II. The Military's Role in America

The U.S. Armed Forces currently enjoy a relatively high level of respect within our country.[27] Along with this increased popularity, the American military establishment has become increasingly involved in domestic affairs.[28] Despite these recent trends to the contrary, Americans have historically shown a strong aversion to military involvement in civil affairs.[29] Given this traditional distaste for military involvement in civil affairs, it is likely that Americans would not merely grumble about the rigors of living under martial law. Instead, it is quite possible that citizens would actively resist the President's and the military's action under a martial law regime, regardless of the stated purpose or intended outcome.

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[26] *See generally* statement of Mr. James Q. Roberts, *supra* note 22, the Nunn-Lugar-Domenici legislation and subsequent counter-terrorism actions).

[27] *See* Rowan Scarborough, *Poll Gives Military Its Top Rating, Sex Scandals, Accidents Fail to Lessen Public Confidence*, THE WASH. TIMES, Feb. 17, 1998.

[28] *See generally* Dunlap, *supra* note 9, at n.121.

[29] *See* Duncan v, Kahanamoku, 327 U.S. 304, 320 (1946).

A. Traditional Views

The traditional American dislike for a strong military role in society has its genesis in the American Revolution. The Declaration of Independence, which set out a multitude of the colonists' grievances against the King of Great Britain, listed several complaints against his use of the military, including:

> He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.
>
> He has kept among us, in times of peace, Standing Armies, without the consent of our legislatures.
>
> He has affected to render the Military independent of and superior to the Civil power.[30]

One renowned commentator has noted that "[a]ntimilitarism arose in colonial America for two primary reasons: first, the belief that professional soldiers were the agents of oppression and, second, the loathsome reputation of the soldiers themselves."[31]

According to some national opinion polls, the U.S. military has by and large cast off this negative reputation.[32] After U.S. Armed Forces displayed their new, improved military skills

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[30] THE DECLARATION OF INDEPENDENCE para. 15-17 (U.S. 1776) (*available at* <http://www.law.indiana.edu/uslawdocs/declaration.html>.

[31] *See* Dunlap, *supra* note 9, at 344 (citing generally RICHARD H. KOH, EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 3-9 (1975)).

[32] According to a recent poll on the amount of confidence individuals held for 14 public and private entities, "[t]he military scored the highest ranking, 44 percent, for the category of 'a great deal of confidence,' outpolling medicine, the Supreme Court, colleges, the media and other well-known institutions. *See* Scarborough, *supra* note 27. *See also* Dunlap, *supra* note 9, at 354. "The American public no longer views the armed forces with the fear and loathing that produced the antimilitarism that provided the intellectual infrastructure for civilian control of the military in this country. In 1993 the steadily climbing approval rating for the military reached a

during the Persian Gulf war, the President and Congress rewarded them by assigning them a host of new responsibilities.[33] These non-traditional roles include enforcing peace in such places as Bosnia and Haiti and conducting counter-narcotics operations in Central and South America.[34] These typically non-military operations have earned the military a new reputation as a sort of "go-to" guy for the United States. Thus, the military's improved reputation probably has less to do with the an increased appreciation for the role of the military in contemporary society and more to do with the common perception that when asked, the military gets the job done.

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twenty-seven-year high." (citing *Public Confident About Military*, SOLDIERS, June 1993, at 5 (reporting results from a Harris poll)).

[33] *See generally FY2000 Appropriations, the Air Force Posture, Before the Comm. on Appropriations, Subcomm. on Defense*, United States Senate, 1999 WL 8085693 (1999) (statement of F. Whitten Peters, Secretary of the Air Force and General Michael E. Ryan, Chief of Staff):

> In 1998, the Air Force flew more than 2,200 missions in the Balkans, 27,000 missions over Southwest Asia, and 30,000 airlift missions. During this same period, Air Force members participated in over 1,600 exercises in 35 countries, and conducted almost 300 military-to-military contact visits in Europe and the Pacific. Additionally, Air Force airlifters conducted almost 100 Denton Amendment humanitarian relief missions to 30 countries, and supported numerous joint force deployments throughout the year.

See also Brian Mitchell, *Air Force Heads for Bumpy Ride*, INVESTOR'S BUSINESS DAILY, Sept. 25, 1998, at A1 (noting the recent high number of mission requirements for the Air Force). Even though the Air Force is specifically referenced in this article, presumably similar facts could be produced for the other Services.

[34] John Yoo, *War Powers: Where Have All the Liberals Gone?*, THE WALL ST. J., Mar. 15, 1999:

> When it comes to the use of American military, no president has a quicker trigger finger than Mr. Clinton. Since December 1995, some 20,000 American troops have implemented the peace accords in Bosnia, American planes and missiles attack Iraq on an almost daily basis, as well as enforce a no-fly zone. Last summer, Mr. Clinton used cruise missiles to bomb terrorist targets in Sudan and Afghanistan. In 1994, he ordered 16,000 troops into Haiti to enforce its transition to civilian government. In 1993, Mr. Clinton expanded the goals of the 28,000 American troops in Somalia, originally deployed by Mr. Bush for humanitarian reasons, but then withdrew them after the deaths of soldiers in combats. On Mr. Clinton's watch American troops have participated in U.S. peacekeeping mission in dangerous places such as Macedonia and Rwanda.

Despite an improved reputation in society, many institutions in America ardently object to any notion that the military should further increase its involvement in traditional civilian functions. While Americans may recognize and appreciate the military's ability to competently respond to a variety of national and international crises, there remains a strong distrust of the military crossing too far into the traditionally taboo territory of civilian law enforcement. This attitude was evident in the response to President Clinton's recent announcement regarding increased Federal funding to fight biological, chemical and computer attacks where many groups decried the President's move to increase the military's role in civil law enforcement.[35] Americans may now applaud the military's entering into such popular battles like the fight against illegal drugs, but once the "enemy" becomes the average American under strict conditions of martial law, that applause would likely be quickly silenced.

B. Constitutional Roles

When the founders drafted the Constitution, they weakened the possibility of a military with a dominant role in society by subordinating the military to civilian control. The

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Id. at A19. *See also* Christopher Walker, *Long-Term Solution Needed in Kosovo*, NEWSDAY, Mar. 3, 1999, at A39 (noting that 7,000 American troops still remain in Bosnia).

[35] "The danger is in the inevitable expansion of that authority so the military gets involved in things like arresting people and investigating crimes....It's hard to believe that a soldier with a suspect in the sights of his M-1 tank is well positioned to protect that person's civil liberties." Dith Miller, *Pentagon Seeks Anti-Terrorism Role*, PORTLAND OREGONIAN, Jan. 30, 1999, at A14 (quoting Gregory Nojeim, legislative counsel on national security for the American Civil Liberties Union, Washington D.C.) *See* Mr. Nojeim's further comment in Landay, *supra* note 25, at 2 ("The best way to convince the public that the military isn't crossing the line into civilian law enforcement is to draw the line darker and heavier, not to blur it as the administration proposes yet again.") *See also* Bradley Graham, *Pentagon Plans Domestic Terrorism Team*, THE WASH. POST, Feb. 1, 1999, at 2.

Constitution placed the military subordinate to a civilian President, who serves as the Commander-in-Chief of the Armed Forces.[36] But clearly under our constitutional scheme, the President's title as commander-in-chief does not accord him full authority over the military and its operations. In fact, the Constitution ensures civilian control of the military, not only through appointing the President as its civilian head, but by allowing the other two branches of the government to exercise control or influence over the armed forces.

Of the other two branches of government, Congress has the most practical authority to exercise influence over the military.[37] Interestingly, the Framers gave Congress, not the President, the authority to declare war.[38] Congress also has the authority to raise and support an Army[39] and a Navy.[40] The Congress may make rules and regulations for the military[41] and call forth the militia.[42] Congress must provide advice and consent to the President's appointment of officers.[43] Perhaps most significant, is the constitutional requirement that Congress "raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years."[44] This limitation on long-term military funding ensures that

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[36] U.S. CONST. art. II, § 2.

[37] *See* United States v. Weiss, 36 M.J. 224, 236 (C.M.A. 1992), aff'd. 114 S. Ct. 752 (1994) (quoting Lawrence Tribe, American Constitutional Law 353-56 (2d ed. 1988)) ("Because of national security interests and concern for unforeseen military exigencies, it was the intent of the framers to vest very great authority over these matters in Congress.")

[38] U.S. CONST. art. I, § 8, cl. 11.

[39] *Id.* at cl. 12.

[40] *Id.* at cl. 13.

[41] *Id.* at cl. 14.

[42] *Id.* at cl. 15.

[43] U.S. CONST. art. II, § 2, cl. 2.

[44] U.S. CONST. art. I, § 8.

the Congress maintains an active, regular role in regulating the affairs of the military.[45] Clearly, the Constitution envisions a strong, regular involvement by the Congress in military affairs.[46]

Under our Constitutional scheme the executive branch's conduct through the military is subject to judicial oversight.[47] But traditionally, the Court has deferred to the military's judgment, either calling the military a "separate society"[48] that merits at times more relaxed scrutiny when it comes to judicial review, or by refusing to interject itself into matters that

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[45] *See generally* Elia V. Pirozzi, *The War Power and a Career-Minded Congress: Making the Case of Legislative Reform, Congressional Term Limits, and Renewed Respect for the Intent of the Framers*, 27 SW. U.L. REV. 185 (1997).

[46] *But see* Corn, *supra* note 13 at 183 (noting that even though the Constitution envisions "congressional predominance" over the war power, "primary authority over the war power has shifted from that representative body to the executive branch.")

[47] A complete discussion of the history of the Supreme Court's exercise of judicial review of the executive branch is beyond the scope of this paper. The precedent for such a practice was established in the historic case *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Numerous authors have discussed the *Marbury* decision, resulting in a diverse body of opinion on the meaning of the case. *See generally* Orrin G. Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891 (1989); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, SUP. CT. REV. 329 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is.*, 83 GEO. L.J. 217 (1994).

[48] Parker v. Levy, 417 U.S. 733 (1974) (holding that a lower expectation of privacy existed in the military, a separate society with unique needs). *See also* Able v. United States, 155 F.3d. 628 (1998).

> Deference by the courts to military-related judgments by Congress and the Executive is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain. For example, the Supreme Court has upheld Congress's delegation of authority to the President to define factors for the death penalty in military capital cases; Congress's authority to order members of the National Guard into active federal duty for training outside the United States; the President's authority as Commander in Chief to "control access to information bearing on national security;" Congress's decision to authorize registration only of males for the draft; Congress's regulation of the conduct of military personnel under the Uniform Code of Military Justice; and the President's discretion as Commander in Chief to commission all Army officers.

Id. at 633 (citations omitted).

the Court does not believe are best decided by the judicial branch.[49] Justice Frankfurter reflected this attitude when he stated that the Framers "did not make the judiciary the overseer of our government."[50] Despite the fact the Court has granted deference to the President in some situations, the Court's repeated willingness to review actions taken by the President presumably indicates a belief and willingness not only to review, but even to overturn, executive and military action when constitutionally required.

C. Statutes and Regulations Covering the Military's Involvement in Civilian Affairs

An intricate array of statutes, directives and regulations govern the military's activities in the civilian arena—whether acting in law enforcement activities or in disaster relief roles.[51] Even though some of these rules attempt to limit certain types of military activity, taken as a whole, they show that the President and military commanders have substantial authority to involve our armed forces in a wide array of civilian activities.

1. Posse Comitatus

In 1878, the U.S. Congress enacted the Posse Comitatus Act.[52] Congress passed this Act "[i]n response to the military presence in the Southern States during the Reconstruction

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[49] *See infra* note 182 and accompanying text.

[50] *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, 594 (1952).

[51] This article is not intended as a comprehensive treatise on all of these rules. They are presented merely as support for the article's overall proposition that Congress has, in recent years, given explicit and implicit endorsement to the military's increased involvement into non-traditional rules.

[52] Army Appropriations Act, ch. 263, 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C.A. § 1385 (West 1999)).

Era"[53] and the perceived abuses of involving the military in various civilian responsibilities. The Act's primary purpose is to forbid military personnel from executing the laws or having any direct involvement in civilian law enforcement activities. The Act states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[54]

Determining when the military is in violation of the Act can be difficult.[55] However, considering the Act's punitive provisions, commanders have an obvious interest in ensuring they do not disobey it.[56] Over time, Congress has authorized relatively significant exceptions to the Act's sweeping prohibitions. None of the exceptions has specifically granted the military a domestic law enforcement role, but arguably the obvious pattern is to accord the military an greater role in civilian affairs than that previously envisioned.

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[53] Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 953 (1997). *See also* Colonel Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. LAW REV. 109 (1984).

[54] 18 U.S.C.A. § 1385 (West 1999).

[55] In reviewing the military's actions under the Act, Courts have developed three tests for determining whether the military has violated the Act. The first test asks whether the military's actions were "active" or "passive." *See* United States v. Rasheed, 802 F. Supp. 312 (D. Hawaii 1992); United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988); United States v. Red Feather, 392 F. Supp. 916, 921 (W.D.S.D. 1975). The second test asks whether the use of the armed forces "pervaded" the activity of civilian law enforcement officials. *See* Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990); United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) *cert. denied*, 459 U.S. 1170 (1983). The third test, and perhaps the most common test, looks at whether citizens were subject to military power that was either regulatory, proscriptive or compulsory. *See* United States v. Kahn, 35 F.3d 426 (9th Cir. 1994); United States v. Casper, 541 F.2d. 1274 (8th Cir. 1975), *cert. denied*, 30 U.S. 970 (1977).

[56] 18 U.S.C.A. § 1385 (West 1999).

a. Law Enforcement

Congress has granted the Department of Defense (DOD) some authority to support civilian law enforcement activities.[57] Military support to civilian law enforcement agencies is governed by several different regulations, the application of which depends upon the nature of the crisis involved.[58] These exceptions to the Posse Comitatus Act allow the military to provide support to civilian law enforcement agencies by sharing information,[59] loaning equipment,[60] and by providing expert advice and training.[61]

Perhaps the broadest exception to the Posse Comitatus Act is Congress's relatively recent move to direct the military to join civilian law enforcement agencies in the fight against illegal drugs.[62] Under a variety of statutes, directives, and regulations the Department of Defense's counter drug mission primarily includes "detection and monitoring of aerial and maritime transit of illegal drugs into the U.S."[63] The use of the military in these diverse roles

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[57] 10 U.S.C. §§ 371-382 (West 1999).

[58] DOD DIR. 3025.1, *supra* note 23, is the umbrella directive for dealing with civil emergencies and attacks and governs all of DOD's planning an response for civil defense or other support to civil authorities, except, military support to law enforcement. U.S. DEP'T OF DEFENSE, DIR., 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES, (18 Feb. 1997) [hereinafter DOD DIR. 3025.15.], governs military support to law enforcement. U.S. DEP'T OF DEFENSE, DIR., 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, (15 Jan. 1986) [hereinafter DOD DIR. 5525.5], provides additional guidance in this area. Note also, that law enforcement scenarios involving other federal agencies may implicate the Economy Act, 31 U.S.C.A. § 1535 (West 1999) if the request calls for sharing goods and services. *See generally* Winthrop, *infra* note 78, at 14.

[59] 10 U.S.C.A. § 371 (West 1999).

[60] Id. § 372.

[61] Id. § 373.

[62] 10 U.S.C.A § 124 and 10 U.S.C. § 371-382 (West 1999), also known as the Defense Drug Interdiction Assistance Act, Pub. L. No. 99-570, Title III, Subtitle A, § 3051, 100 Stat. 3207-74, (1986).

[63] THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, Chapter 19, p. 13 (1998 ed.).

has been the subject of a fair amount of criticism, yet despite the concerns, the Congress and the President appear to remain committed to them.

b. Civil Disturbances

Congress has also granted the President specific statutory authority to use federal troops in a law enforcement role in the case of national emergency involving civil disturbances,[64] even though responsibility for quelling such rebellions lies primarily with State and local governments.[65] These statutory exceptions to the Posse Comitatus Act include insurrections within a state (upon the Governor's request);[66] rebellions which makes it impracticable to enforce federal laws;[67] or any insurrection or violence which impedes the state's ability to protect citizens of their constitutional rights, and the state is unable or unwilling to protect those rights.[68]

Perhaps the President already has the authority to act in situations involving maintenance of public order, even without congressional authorization. According to the Code of Federal Regulations, "[t]he Constitution and Acts of Congress establish six exceptions,[69] generally applicable within the entire territory of the United States, to which the Posse Comitatus Act

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[64] 10 U.S.C.A. §§ 331-334 (West 1999). *See also* DOD DIR. 3025.12, *supra* note 17.

[65] *See* 32 C.F.R. 215.4(a).

[66] 10 U.S.C.A. § 331 (West 1999).

[67] 10 U.S.C.A. § 332 (West 1999).

[68] 10 U.S.C.A. § 333 (West 1999). For a detailed discussion of DOD's rules relating to this topic, *see* DOD DIR. 5525.5, *supra* note 58 and THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, Chapter 19 (1998 ed.).

[69] Besides the two constitutional exceptions, the Code of Federal Regulations lists the statutory exceptions to the Posse Comitatus Act. They include three statutory exceptions found in 10 U.S.C.A. §§ 331-333, previously

prohibition does not apply."[70] The Code cites two constitutional exceptions. The first is an emergency authority to prevent lost of life or property during serious disturbances or calamities.[71] The second authority exists to allow the use of military forces to protect Federal property and governmental functions.[72]

Obviously, the Code of Federal Regulations are not the source of the President's emergency response authority.[73] However, when considering whether Congress has granted

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discussed, and another for assisting the Secret Service in providing protection to governmental officials and political candidates. 32 C.F.R. § 215.4(c)(2)(i)(a-d).

[70] 32 CFR § 215.4(c).

[71] 32 C.F.R. § 215.4(c)(1)(i) states:

> The emergency authority. 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, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.

[72] 32 C.F.R. § 215.4(c)(1)(ii) states:

> Protection of Federal property and functions. Authorizes Federal action, including the use of military forces, to protect Federal property and Federal governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protections.

[73] It is interesting to note that the Code of Federal Regulations also define martial law. *See* 32 C.F.R. § 501.4. It states, in relevant part:

> Martial law depends for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration...In most instances the decision to impose martial law is made by the President, who normally announces his decision by a proclamation, which usually contains his instructions concerning its exercise and any limitations thereon...When Federal Armed Forces have been committed in an objective area in a martial law situation, the population of the affected area will be informed of the rules of conduct and other restrictive measures the military is authorized to enforce...Federal Armed Forces ordinarily will exercise police powers previously inoperative in the affected area, restore and maintain order, insure the essential mechanics of distribution, transportation, and communication, and initiate necessary relief measures.

the President either "express or implied"[74] authority to use military troops in a domestic crisis, evidence of a federal regulation that recognizes such a constitutional basis for authority is extremely relevant, especially if Congress takes no action to modify or interpret the language of the code.

2. Disaster Relief

Under the Stafford Act,[75] the President may commit federal troops to assist state governments in their disaster relief operations.[76] Under this Act, the President may use military troops to perform work "essential for the preservation of life and property."[77] It should be noted, however, that the Stafford Act is not an exception to the Posse Comitatus Act, primarily because activities under the Act should not involve law enforcement activities. Preconditions to federal support under the Act's various sections include a natural catastrophe or major disaster, a request from the state's governor to provide support, and a finding that the state needs additional help beyond what it is able to provide.[78]

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[74] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

[75] 42 U.S.C.A. §§ 5121, et seq. (West 1999).

[76] 42 U.S.C.A. § 5121, et seq., as amended (West 1999). *See also* DOD DIR. 3025.1, *supra* note 23, and DOD DIR. 3025.15, *supra* note 58.

[77] 42 U.S.C.A. § 5170b(c) (West 1999).

[78] For a more detailed discussion of the Stafford Act, *see generally* Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA),* ARMY LAW., July 1997.

3. The Military's Inherent Emergency Response Authority

In recent years, Department of Defense personnel have taken some civilian-related actions in emergency situations without any specific statutory authorization. They have done so under a theory of "emergency response authority."[79] An example of the military acting under this immediate response authority occurred in Oklahoma City after a bomb explosion practically destroyed the Alfred P. Murrah federal building.[80] In that case, local authorities asked military troops to provide support to the investigation in the form of bomb detection dogs, medical transportation, and "various military personnel."[81] This support was provided under the theory of the commander's "immediate response authority."[82]

As mentioned, the immediate response authority is mentioned in two Department of Defense Directives, one relating to disaster relief support to civil authorities,[83] and the other relating to support for civilian agencies during civil disturbances.[84] Under these provisions, commanders, without prior authorization from the President, may take necessary action to

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[79] This authority does not technically fall under any of the categories previously discussed although it is mentioned in of all the main DOD Directives that cover support to civilian authorities. These Directives recognize the authority in the context of the scenarios they cover. *See* DOD DIR. 3025.1, *supra* note 23, para D5(a); DOD DIR. 3025.12 D2(b), *supra* note 17; DOD DIR. 5525.5, *supra* note 58, Restrictions on Participation of DOD Personnel in Civilian Law Enforcement Activities, para A2(c).

[80] *See generally* Winthrop, *supra* note 78.

[81] *Id.* at 4.

[82] *Id.*

[83] DOD DIR. 3025.1, *supra* note 23, para D5. Under this directive, the military must first receive a request for support from civil authorities before providing any emergency support.

[84] DOD DIR. 3025.12, *supra* note 17, para D2(b). This directive states no requirement to first receive a request for support from civilian authorities.

prevent human suffering, save lives, or mitigate great property damage.[85] The necessary precondition appears to be an emergency that "overwhelms the capabilities of local authorities."[86]

The "most commonly cited rationale to support Immediate Response actions is the common law principle of necessity."[87] From a humanitarian, common sense perspective, it seems obvious that a military commander ought to be able to quickly use available resources to alleviate human suffering, without first requiring a bureaucratic permission slip. Arguably, that is why Department of Defense directives articulate the authority. Interestingly, even though Congress undoubtedly is aware of the military's actions under the Department of Defense directives governing such actions, congressional leaders have taken no action to limit a commander's authority to act in these types of scenarios.

D. Summary

It appears that the traditional bias against military involvement in civil affairs may be on the decline. The evidence of that decline is manifest in Congress's willingness to create exceptions to the Posse Comitatus rules,[88] broader rules allowing for military support during of law enforcement activities,[89] and the President's continued use of the armed forces in

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[85] Under these authorities, military commanders receive some guidance on the types of actions they can take. For example, under DOD DIR. 3025.12, *supra* note 17, commanders are limited to providing support in the form of emergency medical care, clearance of debris, and recovery and identification of the dead. However, the list also includes taking actions to safeguard, collect and distribute food, and "facilitating the reestablishment of civil government functions." DOD DIR. 3025.12, *supra* note 17, para D5(d).

[86] Winthrop, *supra* note 78 at 6. *See also, e.g.,* DOD DIR. 3025.12, *supra* note 17, para D2(b)(1).

[87] Winthrop, *supra* note 78 at 6.

[88] *See* discussion *supra* Part II.C.1.

[89] *See* discussion *supra* Part II.C.1.a.

these roles.[90] Whatever the reason, it seems increasingly clear that Congress, whether directly or by implication, has allowed the military increasing authority in the civilian domain and Presidents have not hesitated to use that authority.[91] As will be discussed, this trend has serious implications for the legality of the President's actions under a proclamation of martial law.

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[90] *See 21st Century Security Threats Before the Senate Armed Services Committee, Hearing on Transnational Threats,* United States Senate, 1998 WL 11515924 (1998) (statement of Walter B. Slocombe, Under Secretary of Defense for Policy) (discussing the involvement of military personnel in domestic anti-terrorism training programs):

> The Department of Defense has prepared to play a. significant role in supporting other government agencies like the Federal Bureau of Investigation for crisis response and the Federal Emergency Management Agency for consequence management. DOD possesses significant assets, including active forces, National Guard and other reserve components, that, at the onset of a domestic NBC terrorism incident, can be integrated into a coordinated Federal response.
>
> [T]he Department is also implementing the Domestic Terrorism Preparedness Program to train and exercise local first responders, including firemen, law enforcement officials, and medical personnel. Two parallel efforts are ongoing: first, training responders in the nation's largest 120 cities; second, developing training modules and establishing mechanisms to provide federal expertise to every community in the nation, using mass media formats such as the Internet, video and CD-ROM.

Id. at Part C5.

[91] Jill Elaine Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 KAN. J.L. & PUB. POL'Y 129 (1996).

> While Clinton has had great difficulty controlling a military made powerful and enormous by the Cold War, he too is attracted to the ease and efficiency of emergency procedures. In the wake of the April 19, 1995 terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, the most lethal act of terrorism in the nation's history, Clinton has advocated amending the Posse Comitatus Act, whose enactment finally ended Civil War crisis government. Clinton's proposed amendment would allow military personnel and equipment to be used to help civilian authorities investigate crimes involving "weapons of mass destruction," such as chemical or biological weapons. This exemption may be narrowly drawn and reasonable, but there are good reasons for concern about such a mingling of civil and military police responsibilities. Beyond the possibility of military usurpation of civilian authority, servicemen are unfamiliar with the constitutional rights which guide domestic police work. Perhaps more significantly, delegating domestic functions to the military appears to be an implicit acceptance of the current size, power, and resources of the military, all of which are products of the Cold War.

Id. at 142.

III. Martial Law

Ideally, the President will never have to declare martial law in response to a severe national crisis.[92] The best scenario envisions the nation responding to such a crisis with civilian agencies in the forefront and the Department of Defense in its traditional support role. However, should civilian agencies become overwhelmed in an environment of chaos and panic, one of the President's obvious options for restoring order would be to declare martial law. Such a response lies at the extreme end of the spectrum of the President's available options, well beyond what is contemplated under statutes relating to disaster response actions or limited military support to civilian law enforcement authorities.

A. What is Martial Law?

Martial law has been federally proclaimed in our country on only a few occasions.[93] Some scholars suggest that martial law is not really law at all. Blackstone described martial law as:

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[92] It is important to note that the President clearly has the authority to respond with force to an armed attack upon the United States. "An early draft of the Constitution vested in Congress the power to 'make' war rather than the power to 'declare' war. The change from "make" to "declare" was intended to authorize the President the power to repel sudden attacks and to manage, as Commander-in-Chief any war declared by Congress." *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886, 893 (1970) (Justice Douglas, dissenting). *See also* Jane E. Stromseth, *Collective Force and Constitutional Responsibility*, 50 U. MIAMI L. REV. 145, 158 (1995) ("To be sure, the President as Commander in Chief clearly has the authority under the Constitution (and under Article 51 of the U.N. Charter) to repel sudden attacks against the United States and its forces.") For purposes of this article, it is assumed the President's authority to respond to civil disorder or crisis, either as a response to external attack (by a terrorist or nation state) or an internal attack (as in a biological or chemical agent) is not an offshoot of this "repel" authority.

[93] Martial law has been imposed on the state level on numerous occasions, generally in the context of "labor strikes or other civil turmoil." Harry N. Scheiber and Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i*, 19 U. HAW, L, REV. 480, (1997) (citing Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942)).

> [T]emporary excrescences bred out of the distemper of the state, and not any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, *is . . . in truth and reality no law*, but something indulged rather than allowed as a law.[94]

Some scholars prefer to use the term "martial rule," avoiding the use of the term "law" in this context.[95] In fact, Fairman, one of the most noted authors on the subject of martial law, insists on referring to it a martial rule, thus eliminating the possibility of inferring the condition is in fact lawful.[96] He states:

> Martial law [in the sense we are using it] is more accurately described as *martial rule,* which obtain in a domestic community when the military authority carries on the government, or at least some of its functions. Martial rule may exist *de facto;* the term is noncommittal as to its legality.[97]

Martial law, as can be expected, has been defined in various manners. Essentially, it is "the rule which is established when civil authority in the community is made subordinate to military, either in repelling invasions or when the ordinary administration of the laws fail to

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[94] 2 W. Blackstone, Commentaries 413 (quoted in DYCUS ET AL., NATIONAL SECURITY LAW, 398 (1990)).

[95] For some, the distinction between "martial rule" and "martial law" may be a distinction without a difference, however, for others the terminology is important because of the underlying message sent by each term.

> People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial . . . Let us call the thing by its right name; it is not martial law, but martial rule.

CHARLES FAIRMAN, THE LAW OF MARTIAL RULE 28 (2 ed. 1943) (quoting David Dudley Field in his argument before the Supreme Court in *Ex parte Milligan*, 4 Wall. 2, 35 (1866)).

[96] For purposes of this article, the author prefers to use the more common term, "martial law," in order to avoid confusion. However, he agrees that "martial rule" is a more desirable term for describing the condition of military imposed rule.

[97] FAIRMAN, *supra* note 95, at 30. *See also* ROBERT S. RANKIN, WHEN CIVIL LAW FAILS, 174 (1939).

secure the proper objectives of the government."[98] The Supreme Court has defined martial law as "the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary, but it must be obeyed."[99]

Scholars consistently agree that necessity is a mandatory precondition to imposing the state of martial law.

> Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or public calamity. What constitutes necessity is a question of fact in each case.[100]

The Code of Federal Regulations practically mirrors this definition of martial law. In pertinent part, they state: "Martial law depends for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration."[101]

In comparison to the civil disorder statutes, which allow the President restricted authority under limited circumstances, martial law grants the executive broad emergency powers. The civil response statutes put some restrictions on the President that he must meet before he can

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[98] Charles Warren, *Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal*, THE AM. L. REV., LIII (March-April, 1919), 201-202, quoted in Rankin, *supra* note 97, at 173.

[99] United States v. Diekelman, 92 U.S. 520, 526 (1876).

[100] FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940). *See also* Fairman, *supra* note 95, at 22; Rankin, *supra* note 97, at 191.

[101] 32 C.F.R. 501.4.

commit federal troops to any given crisis.[102] On the other hand, practically the only limitation on the actions a commander can take under martial law is the continued state of necessity that prompted its imposition in the first place.[103] The declaration of martial law allows the military broad authority to "do all acts which are reasonably necessary for the purpose of restoring and maintaining public order."[104] These acts include taking actions over individuals to restrict their movement, impose punishment through military trials, and to suspend other fundamental rights.[105]

B. Is It Lawful?

Regardless of the phraseology used, it seems logical that to preserve the nation a President should be justified in imposing martial law, even if not constitutionally mandated. President Lincoln echoed this sentiment when he asked, "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[106] Indeed, the President in his oath of office states: *I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability,*

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[102] *See* discussion *infra* Part II.C.

[103] Of course an obvious exception to this general rule is that federal troops may not, even in the name of national emergency, take extreme actions, like torture, murder and rape, that would violate Americans' human rights. *See* discussion *infra* n.190.

[104] 53 Am. Jur. 2d, Military and Civil Defense § 441 (1996). *But see* Wiener, *supra* note 100, at 15 ("[T]he purpose of martial law is not to replace the civil administration of law but to support it by brushing aside the disorders which obstruct its normal operation.")

[105] This article is not intended to explore the scope of a commander's authority while operating under a proclamation of martial law. But for a thorough discussion of what a commander may do under such circumstance, *see generally* FAIRMAN, *supra* note 95, RANKIN, *supra* note 97, and WIENER, *supra* note 100.

[106] President Abraham Lincoln, July 4, 1861, to a special session of Congress (quoted in WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE (1998)).

preserve, protect and defend the Constitution of the United States.[107] In addition, the Constitution requires the President take care to ensure that the laws are faithfully executed.[108] Accordingly, it seems the President should have the inherent authority, in fact the *responsibility*, to preserve the nation, even if it means taking extreme actions not specified in the Constitution. A review of the prevailing views on this topic during the 18th century may provide some insight into why the Constitution does not more explicitly define the President's emergency powers.

Some scholars suggest that the executive may be justified in acting outside the Constitution's explicit authority, when required by the nation's best interests.[109] This type of power (as opposed to authority) was apparently accepted by classical thinkers in the 18th Century.

> Classical liberal theory thus divides executive action into two spheres: normal constitutionals conduct, inhabited by law, universal rules and reasoned discourse; and a realm where universal rules are inadequate to meet the particular emergency situation and where law much be replaced by discretion and politics . . . . liberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form

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[107] *Available at* <http://www.whitehouse.gov/WH/kids/inside/html/spring97-2.html#lang>.

[108] U.S. CONST. art. II, § 3.

[109] William C. Banks and Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1 (1993).

> [L]iberal constitutional thought in the 18th century separated lawful from lawless government by simply positing a boundary line: "separate spheres of emergency versus non-emergency governance." . . . Through the doctrine of prerogative, [John] Locke's version of executive emergency powers was their extra-legal character. The prerogative was to act "according to discretion, for the publick [sic] good, without the prescription of the law, and sometimes even against it."

Id. at 10.

> while providing the executive with the power, but not legal authority, to act in an emergency.[110]

Accordingly, if acting under this justification the executive has not violated the Constitution, even though acting outside its express language.

President Abraham Lincoln also embraced this theory when he stated:

> [M]y oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which the Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.[111]

It seems evident that the President does have some inherent powers to preserve the nation, although that subject has been the topic of vigorous scholarly debate.[112] The

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[110] Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1390, (1989).

[111] Letter to A. Hodges (April 4, 1864), in VII Collected Works 281 (R. Basler ed. 1953-1955) (quoted in, DYCUS, *supra* note 68, at 83).

[112] Regardless of the lack of explicit Constitutional authority, society appears to recognize the fact that the chief executive possesses some authority to preserve the nation during a time of crisis. Interestingly, among all of the Supreme Court cases (*see* discussion *infra* Part IV) that have addressed martial law, none have stated that it is completely unlawful for the President to declare it. Instead, they focus on the preconditions necessary for its imposition. Alexander Hamilton stated:

> [I]t is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of means which may be necessary to satisfy national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

THE FEDERALIST, No. 23, at 153 (Alexander Hamilton) (quoted in Oren Gross, "Once More Unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 Yale J. Int'l L. 437, 439 (1998)). *But cf.* Henry Paul Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

difficulty comes in determining when the President may wield that power, as in the case of martial law, to deprive citizens of their constitutional rights. Fairman has stated:

> Our constitutional system contains within itself all that is essential to its own preservation. It is adequate to all the exigencies which may arise. When force becomes necessary to repress illegal force and preserve the commonwealth, it may lawfully be exerted. Martial rule depends for its justification upon this public necessity. It is not a thing absolute in its nature, a matter of all or nothing. On the contrary, it is measured by the needs of the occasion. What appeared reasonably necessary under the circumstances will be justified upon the great first principle that the nation has power to maintain its own integrity. The reason of the law, as the judges often said, is compressed in the maxim *Quod enim necessitas cogit, defendit.*[113]

Perhaps the more difficult question, at least for a military commander who is executing the President's orders, comes in determining whether the President is properly operating within his "power" even though technically beyond his "legal authority."[114] A review of Supreme Court case law provides some useful guidance.

IV. The Supreme Court and Martial Law.

In the United States, martial law has been federally imposed only a few times.[115] As a result, developing helpful rules to follow or legal standards to apply under martial law is extremely difficult because the United States Supreme Court has issued very few decisions on the subject. Perhaps the best way to predict how the Court would deal with a case of martial law is to analyze the few existing martial law cases, along with some Court decisions relating to the issue of executive power. Even here, though, the "decisions of the Court . . .

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[113] FAIRMAN, *supra* note 95, at 47. (Translation: That which, in fact, you know you need, defend.)

[114] Lobel, *supra* note 110, at 1390.

[115] Scheiber and Scheiber, *supra* note 93, at 478.

have been rare, episodic, and afford little precedential value for subsequent cases."[116] Taken together, the Supreme Court cases that deal with martial law and executive power reveal some important principles.

First, even though the Court has held unconstitutional certain activities that took place under the umbrella of declared martial law, it has never held that martial law itself is per se unconstitutional or unlawful. Second, the Court has held that martial law is allowable under only the most extreme circumstances. Finally, the Court has recognized that the President may possess powers beyond those specifically enumerated in the Constitution. How and when the President may lawfully exercise those powers will be discussed below.

A. Youngstown Sheet & Tube Co. v. Sawyer[117]

Youngstown Sheet & Tube is likely the most important Supreme Court declaration on the principle of the Constitution and executive power. The case arose in the context of a threatened nation-wide strike in the national steel industry during the Korean War. President Harry Truman, concerned that the "proposed work stoppage would immediately jeopardize"[118] national defense, issued an Executive Order directing the "Secretary of Commerce to take possession of most of the steel mills and keep them running."[119] The steel

[116] Dames & Moore v. Regan, 453 U.S. 652, 661 (1981).

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

[118] *Id.* at 583.

[119] *Id.*

companies protested the Secretary's actions and brought "proceedings against him in District Court."[120]

Against this backdrop, the mill owners argued that "the President's order amount[ed] to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President."[121] The government argued that a steel strike would "endanger the well-being and safety of the Nation that the President had 'inherent power' to do what he had done—power supported by the Constitution, by historical precedent, and by court decisions'" [122] and that the order was necessary to "avert a national catastrophe which would inevitably result from a stoppage of steel production."[123] The Court rejected the Government's position, holding that under the Constitution, the President did not hold such broad authority.[124]

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[120] *Id.*

[121] *Id.* at 582.

[122] *Id.* at 584.

[123] *Id.* at 582.

[124] Central to the majority opinion, and indeed to the concurring opinions, was the fact the Congress had specifically refused to grant the President seizure authority.

> [T]he use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was though that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in the Act did not provide for seizure under any circumstances.

Id at 586 (citations omitted).

Unfortunately, the Court did not speak with a unified voice.[125] Justice Black, who wrote the opinion of the Court, viewed the issue in quite simplistic terms: if the President had authority to take such an action, it was derived either from an act of Congress or the Constitution itself.[126] Justice Black found no legislation granting the President seizure authority. He also rejected the argument that the President enjoyed any powers that could be "implied from the aggregate of his powers under the Constitution."[127]

Obviously, a majority of the Court joined Justice Black in his belief that the President's actions were unconstitutional. But the other justices who comprised the majority must have also agreed in principle with Justice Frankfurter who stated that the "considerations relevant to the legal enforcement of the principle of separation of powers . . . more complicated and flexible"[128] than what Justice Black had expressed in his opinion. As a result, the Court issued numerous concurring opinions, opinions which provide important guidance to a discussion of martial law.[129] Of all of these concurring opinions, Justice Jackson's provides the most useful, pragmatic, approach to analyzing these issues.[130]

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[125] Besides Justice Black's opinion, the case includes five concurring opinions and a dissent signed by three members.

[126] *Id* at 585.

[127] *Id.* at 587.

[128] *Id.* at 588.

[129] At least six members of the Court (including the three dissenters), would agree that the President *does* enjoy some inherent emergency powers. Even though concurring with the majority, Justices Frankfurter, Burton and Clark, all expressed opinions that gave credence to the position that the President, as the chief executive, enjoys emergency powers not expressed in the Constitution. Justice Frankfurter stated:

> In short, a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by sec. 1 of Art. II.

Justice Jackson established a three-tiered approach to analyzing executive power under our Constitutional scheme. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."[131] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his on 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."[132] Finally,

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Id. at 610 (Frankfurter, J., concurring). Justice Burton stated:

> The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations.

Id. at 659 (Burton, J., concurring). Justice Clark also stated:

> In my view—taught me not only by the decision of Chief Justice Marshall in *Little v. Barreme*, but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself. As Lincoln aptly said, "(is) it possible to lose the nation and yet preserve the Constitution?" In describing this authority I care not whether one calls it "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise. I am of the conviction that those who have had the gratifying experience of being the President's lawyer have used one or more of these adjectives only with the utmost of sincerity and the highest of purpose.

Id. at 661 (Clark, J., concurring) (citations omitted).

[130] Justice Rehnquist notes that "Justice Jackson in his concurring opinion in *Youngstown* . . . brings together as much combination of analysis and common sense as there is in this area . . . ." Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

[131] *Youngstown,* 343 U.S.at 635.

[132] *Id.* at 637. Jackson goes on to note the important aspect that congressional action may have on such a determination.

> Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Id.

"[w]hen 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."[133]

Justice Jackson was careful to emphasize his view that the President's emergency powers are derived from the Constitution,[134] and are essentially shared with the Congress: "Presidential powers are not fixed but fluctuate, *depending upon their disjunction or conjunction with those of Congress* . . . ."[135] And even though Jackson was willing to give these powers broad interpretation,[136] he was unwilling to go so far as to declare the Executive possesses an inherent emergency power. [137]

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[133] *Id.*

[134] Justice Jackson stated:

> In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of national emergency.

Id at 652. (Jackson, J., concurring).

[135] *Id.* at 635. (Jackson, J., concurring).

[136] "However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times." *Id.* at 640 (Jackson, J., concurring).

[137] He stated:

> The appeal, however, that we declare the existence of inherent powers *ex necissatate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies . . . . I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so. . . .

Id. 649-650 (Jackson, J., concurring).

Key to Justice Jackson's analysis is how Congress's action or inaction affects Presidential authority. On that point, *Dames & Moore v. Regan*,[138] is an important companion case to *Youngstown*, because it provides some guidance on how to apply the *Youngstown* test. In *Dames & Moore*, Justice Rehnquist noted:

> Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.[139]

This analysis is complicated by the difficult in ascertaining whether a particular statute should be viewed as a specific or implied grant of authority to the President, or whether Congress intended the law to limit the President's actions within certain boundaries. *Dames & Moore* assists the practitioner in making that determination:

> As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval of action taken by the Executive." On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.[140]

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[138] Dames & Moore v. Regan, 453 U.S. 654 (1981).

[139] *Id.* at 669 (citations omitted).

[140] *Id.* at 653-654.

Under this analysis, Congress, either through legislative action, or indeed, inaction, may inadvertently grant the President broader authority to proclaim and execute martial law.

The *Youngstown* opinion, read together with *Dames & Moore*, provides important guidance to any analysis of the President's authority to declare martial law. First, in dicta, Justice Jackson specifically excludes martial law from his analysis of executive emergency powers.[141] Even though martial law was not at issue in the *Youngstown* case, any Supreme Court recognition, albeit in dicta, that implicitly recognizes the validity of martial law, adds some strength to the argument that the President may lawfully impose it.

Second, in addition to Justice Jackson's implicit expression that the President may have the authority to impose martial law, his three-tiered analysis is extremely useful in any analysis of how and when that authority may be exercised. Since martial law is clearly at the extreme end of the President's emergency powers and considering the paucity of opinions relating directing to martial law, any guidance on the exercise of executive authority is very useful, even if that guidance is not directly on point.

Finally, even if the President does have authority to declare martial law, the *Youngstown* opinion shows that exercise of any emergency authority must be assessed in light of several factors, including, Congressional action (or inaction), the Constitution, and the prevailing circumstances at the time.

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[141] Justice Jackson mentioned that "[a]side from the suspension of the privilege of habeas corpus" the framers made "no express provision for exercise of extraordinary authority because of a crisis." *Youngstown,* 343 U.S. at 650. In a footnote to that comment, he wrote: "I exclude, as in a very limited category by itself, the establishment of martial law." *Id.* (citing *Ex parte Milligan*, and *Duncan v. Kahanamoku*) (citations omitted) discussed *infra* Parts IV.B and IV.C).

B. Ex parte Milligan[142]

In July 1862, President Lincoln's Secretary of War, Edwin M. Stanton issued an order under the President's authority, suspending the writ of habeas corpus for "persons arrested for disloyal practices."[143] Another order, issued the same day, directed U.S. marshals to arrest disloyal persons and stated that military commissions would try such persons. In September, 1862, President Lincoln issued another proclamation which provided authority to subject to martial law and punishment by courts-martial or military commissions those individuals who were found "discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels."[144]

In March, 1863, Congress added to the proclamation by "[p]assing a law which authorized the President to suspend the writ whenever he thought necessary and to detail those persons under arrest by the military authorities without interference by the civil courts."[145] But Congress specified that in jurisdictions where the civil courts were still open, the names of those who violated these laws should be provided to the federal courts for presentation to a grand jury for indictment. If this procedure was not followed, the person

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

[143] REHNQUIST, *supra* note 106, at 60 (citations omitted). *See generally* Hasday, *supra* note 91, for a discussion of President Lincoln's actions relating to the suspension of the writ of *habeas corpus* during the Civil War.

[144] REHNQUIST, *supra* note 106, at 60. For a complete text of the proclamation, *see* RANKIN, *supra* note 97, at 55-56.

[145] RANKIN, *supra* note 97, at 56 (noting that the President then issued another proclamation on Sept. 15, 1863, suspending the writ).

should be discharged. This aspect of Congress's rule was important to the Court's ultimate holding in the Milligan case.[146]

Lambdin P. Milligan, a lawyer from Huntington, Indiana, had been active in Democratic politics and was sympathetic to the confederate cause.[147] Milligan, along with several other defendants, was tried for treason by a military commission in 1864.[148] The Commission found Milligan guilty and sentenced him to be hanged. Milligan appealed his conviction to the Circuit Court of Indiana who certified the case to the Supreme Court.[149]

At the Supreme Court, Milligan argued that the military commission did not have jurisdiction over him as he was not a member of the armed forces.[150] The government

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[146] *See generally Milligan,* 71 U.S. at 115-118.

[147] REHNQUIST, *supra* note 106, at 89.

[148] Milligan and the other defendants were suspected of making plans to "stage an uprising and free the eight thousand Confederate prisoners at nearby Camp Douglas." *Id.* at 83.

[149] RANKIN, *supra* note 97, at 54.

[150] According to Chief Justice Rehnquist, a defendant tried before a military commission would lose some procedural protections that he would have otherwise enjoyed in the civil courts:

> [A] defendant before a military court at this time was not accorded some of the important procedural rights possessed by a defendant in a civil court. But if a military commission could simply decide for itself what acts were criminal, and what sentence was appropriate upon conviction, a defendant before such a commission suffered an additional and equally serious deprivation, compared with his counter part in a civil court.

REHNQUIST, *supra* note 106, at 85-86. Not only did the defendant receive fewer procedural protections at a trial by military commission, he was also subject to greater potential punishment. After a review of the then-existing federal treason statutes, Rehnquist states:

> The charges before the military commission, on the other hand, included offenses covered by these statues but swept more broadly in several instances. But the greatest contrast was not in the acts that were proscribed but in the maximum penalties authorized. Both of the statutes quoted above set maximum imprisonment terms at ten years and six years, respectively. But, as mentioned, the military was authorized by a two-thirds majority to impose a sentence of death.

Id. at 88.

argued that as a result of the necessities of war, the President and the Congress had suspended the writ of *habeas corpus.* They argued that the declaration of martial law justified the government's use of the military commission in the Milligan case. The Court rejected this argument, stating:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.[151]

In overturning Milligan's conviction, the Court rejected the government's argument that the laws of war justified the use of military commissions under the circumstances present in Milligan's case.[152] The Court seemed to base its logic around the fact that the civil courts

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[151] *Milligan,* 71 U.S. at 120-121.

[152] In a later case, *ex parte Quirin,* 317 U.S. 1 (1942), the Supreme Court "cut back on some of the extravagant dicta favorable to civil liberty in *Milligan.*" REHNQUIST, *supra* note 106, at 221. In that case the Court upheld the conviction by a military commission of seven men, six of which were German citizens, who were apprehended during a failed secret attack mission against the United States. Citing *Milligan,* the defendants contended that since the civil courts were open, and since there had been no invasion of the country, the military commission was without jurisdiction. In response, the Court found that *Milligan* was limited to its facts, holding that:

> The Court's opinion is inapplicable to the case presented by the present record. We have no occasion to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries.

Quirin, 317 U.S. at 221.

This judicial attitude seems more consistent with Court's later attitude in the Japanese cases, where they refused to interject themselves into the area of war-making, and analyzed the presidential and Congressional actions by a reasonableness standard. *See* discussion *infra* Part IV.D. In fact, the *Quirin* Court had no trouble accepting the Government's argument that one of the defendants, arguably a U.S. citizen, had abandoned his American citizenship and was, therefor, subject to the laws of war. It appears the atmosphere of war-time crisis that prevailed in the nation at the time influenced the Court's opinion.

had remained open, despite the suspension of the writ of *habeas corpus* and the proclamation of martial law. Further, the Court was plainly concerned that in Milligan's case, the authorities had not followed the Congressionally mandated procedures for suspending the writ. They stated:

> This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service . . . One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress.[153]

Since Congress had established procedures for suspension of the writ, Milligan's conviction by military commission was clearly in direct opposition with Congress's stated intention.[154]

If we applied these facts to Justice Jackson's three-tier approach in *Youngstown*, the President's actions would likely fall into the third tier. By trying Milligan at a military commission, without following the procedures established by Congress, the President was taking "measures incompatible with the expressed or implied will of Congress."[155] Under a

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Perhaps even more meaningful to a discussion of martial law was the Court's acceptance that under certain narrow circumstances a non-belligerent would be subject to the law of war. Those circumstances would be "constitutionally established" martial law. *Quirin*, 317 U.S. at 45. Thus the Court recognizes that martial law may be not only legally supportable, but also goes so far as to suggest that it may even be constitutional.

[153] *Milligan,* 71 U.S. at 122.

[154] "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety require it." U.S. CONST. art. I, § 9, cl. 2. The Constitution does not explicitly grant Congress the authority to suspend the writ. But since the authority is found in Article I, the legislative section, presumably, the Framers intended Congress to exercise that power. During the civil war, Congress had delegated the authority to the President, but pursuant to the procedural restrictions mentioned above.

[155] *Youngstown,* 343 U.S. at 635.

Youngstown analysis, then, the President's actions must be supportable under "his own constitutional powers, minus any constitutional powers of Congress over the matter."[156] So, even under Justice Jackson's theory in *Youngstown*, Milligan's conviction would likely have been overturned.[157]

In the *Milligan* decision, the Court also provided guidance, albeit in dicta, for determining when, if ever, martial law would be justified.[158] The Court noted that the Constitution only provides for the suspension of one enumerated right—the *writ of habeas corpus*.[159] Beyond this constitutional grant of authority to suspend rights, the Court implicitly recognized that there may be situations where martial law would be needed. But

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[156] *Id.* at 637.

[157] The Court in *Milligan* was not only concerned that Milligan's trial was in contravention of Congress's will, but they were also concerned that Milligan's conviction violated some of his most basic constitutional rights, like a trial by jury. *Milligan,* 71 U.S. at 122-123.

[158] Actually, the Court seems to indicate at one point that martial law is unconstitutional.

> It is claimed that martial law covers with its broad mantle the proceedings of this military commission . . . . The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"– the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in conflict, one or the other must perish.

Milligan, 71 U.S. at 124.

[159] In Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861 (No. 9487), Chief Justice Taney, sitting as a circuit judge, held that only Congress had the authority to suspend the writ of habeas corpus. In that case Merryman had been seized after President Lincoln had signed an order suspending the writ. Interestingly, Lincoln ignored Taney's opinion and Merriman remained in prison.

even as the Court stated that necessity is a prerequisite for martial law they repeated their earlier assertion that in order to declare martial law, the courts must be closed.[160]

According to the *Milligan* Court, "proper" martial law can only be allowed under narrow circumstances, i.e., under a) strict conditions of necessity, b) during war (foreign invasions or civil war), c) when the courts are closed,[161] and c) only in the area of the "actual war."[162] Perhaps the most important point to be learned from *Milligan*, though, is that any exercise of emergency power by the President must be viewed in conjunction with congressional will. The Court did not declare unlawful the President's proclamation of martial law. It was the

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[160] The Court focused on necessity and the Courts being closed: "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." *Milligan,* 71 U.S. at 127.

[161] According to Rankin, this provision of the *Milligan* decision has been routinely misinterpreted. He states:

> The *Milligan* case, in late years, has been called upon to prove that when the civil courts are open, martial law cannot be used. Such an interpretation is erroneous. The "open" court must have unobstructed exercise of its jurisdiction, and it is possible that the court might be open and yet its jurisdiction be obstructed. Therefore, to make the broad statement that, by the *Milligan* case, martial law cannot be established when the civil courts are open is incorrect, for the courts must also be unobstructed and functioning in the proper manner.

RANKIN, *supra* note 97, at 63.

[162] The Court stated:

> It follows, from what has been said on this subject, that there are occasions when marital rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free courts. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Milligan, 71 U.S. at 127.

exercise of that power, in a manner contrary to Congressional mandate, that caused the Court to opine that "[n]o graver question" had ever been considered by that Court.[163]

C. *Duncan v. Kahanamoku*[164]

Shortly after the 1941 Japanese attack on Hawaii's Pearl Harbor, the Governor of Hawaii, Joseph B. Poindexter, declared martial law and suspended the writ of habeas corpus. [165] Besides declaring martial law, Poindexter authorized the commanding general of the Military Department of Hawaii, Lieutenant General Walter Short, to "exercise all of the powers normally exercised by the judicial offers and employees" of the territory.[166] Military rule lasted in Hawaii for nearly three years, until it was revoked by President Franklin D. Roosevelt.[167]

In overruling the convictions in *Duncan*,[168] Justice Black, like his later opinion in *Youngstown*[169], looked primarily at whether Congress had authorized the trial of civilians[170]

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[163] *Id.* at 118.

[164] Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[165] *See generally* J. GARNER ANTHONY, HAWAII UNDER ARMY RULE, (1955) and REHNQUIST, *supra* note 106, at 212. Governor Poindexter relied on the authority of the Hawaii Organic Act, the charter of the territory, enacted by Congress in 1900. Hawaii Organic Act §67, ch. 339, 31 Stat. 141, 153 (1900).

[166] ANTHONY, *supra* note 165, at 5-6 (citing *Ex Parte White*, 66 F. Supp. 982, 989, 990 (U.S.D.C. Hawaii 1944).) For a complete text of the Governor's proclamation, see Appendix A, at 127.

[167] See REHNQUIST, *supra* note 106, at 214.

[168] *Duncan* actually involved two petitioners. Petitioner Duncan was arrested for and convicted of assaulting two armed marine sentries at the Honolulu Navy Yard where he worked. Petitioner White, a civilian stockbroker having not connection with the military, was arrested and convicted for embezzling stocks belonging to another civilian.

[169] *See* discussion *supra* Part IV.A.

by military commission under a declaration of martial law.[171] Justice Black noted that the Organic Act[172] did have a provision for placing the territory[173] under martial law. But since the Act did not define the term "martial law," Justice Black looked to the legislative history to determine whether Congress intended to grant the military such broad authority.[174] Finding no such authority, Justice Black looked to "other sources"[175] to determine the meaning of the term martial law.

Justice Black did not clearly articulate a constitutional analysis of the executive's constitutional authority under martial law, perhaps since the Constitution does not mention martial law,[176] he found that question irrelevant. In looking at the other "sources" to interpret

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[170] The court noted that at the time Duncan was arrested, "[c]ourts had been authorized to 'exercise their normal jurisdiction.' They were once more summoning jurors and witnesses and conducting criminal trials." However, there were exceptions for cases like Duncan's, which involved violations of military orders. *See generally Duncan,* 327 U.S. at 310.

[171] Like *Milligan*, critical to the Court's opinion must have been summary manner in which the military commissions disposed of the petitioner's cases.

> [T]he military proceedings in issue plainly lacked constitutional sanction. Petitioner White was arrested for embezzlement on August 20, 1942, by the provost marshal...On August 25 he was convicted and sentenced to five years in prison. Petitioner Duncan was accorded similar streamlined treatment by the military. On February 24, 1944, he engaged in a fight with two armed sentries at the Navy Yard at Honolulu. He was promptly tried without a jury in the provost court on March 2 and was sentenced to six months at hard labor, despite his plea of self-defense. Both the petitioners were civilians entitled to the full protection of the Bill of Rights, including the right to jury trial.

Duncan, 327 U.S. at 326. (Justice Murphy, concurring.)

[172] Hawaii Organic Act §67, ch. 339, 31 Stat. 141, 153 (1900).

[173] Recall that at the time the incidents in this case took place, Hawaii was still a territory, not a State.

[174] *Duncan*, 327 U.S. at 316.

[175] *Id.* at 319.

[176] *Id.* at 315.

the meaning of martial law, Justice Black stated that the "answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act."[177] Justice Black ultimately decided that under these other authorities, the meaning of martial law did not include the trial of civilians by military commission, at least under the circumstances described in *Duncan*.[178]

The Court ultimately held that even though the Hawaii Organic Act authorized martial law, Congress had not intended to replace civilian courts with military jurisdiction.

> We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.[179]

How the *Duncan* case would fare under Justice Jackson's three-tier approach is an interesting question. Since Congress had authorized the use of martial law, the actions taken

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[177] *Id.* at 319. Here, Justice Black reviews some early American history along with some Supreme Court precedent to support his position that such broad authority under martial law is unacceptable. *See generally id.* at 319-324. Justice Black does make some brief references to constitutional authority for his position. *See, id.* at 323, especially footnote 21, discussing President Johnson's post-civil war veto of legislation that would have supplanted civil courts with military tribunals.

[178] Accordingly, the *Duncan* court mirrored the *Milligan* opinion, holding that the American "system of government clearly is the antithesis of total military rule." *Duncan*, 327 U.S. at 322. Further the Court reemphasizes the necessary preconditions acting under martial law, holding that "martial law" is only intended to authorize the military to act in such a manner in the cases where the courts are closed and when there exists an "actual or threatened rebellion or invasion." *Id.* at 110.

[179] *Id.* at 324.

would arguably fall into the first tier.[180] In addition, besides passing the Organic Act, Congress was arguably aware that Hawaii had been placed under martial law by Admiral Poindexter. Accordingly, the case likely fits best under Justice Jackson's first tier. But considering the facts of the cases, upholding the convictions would not seem fair, even in light of Congress's possible authorization of such trials.

Considering the quick rush to judgment in the *Duncan* case, perhaps the way to support the finding (under the three-tiered analysis) would be to argue that even though the President's authority is at its fullest in the first tier, his actions must still be supported by the pre-condition of necessity. In *Duncan*, the courts were open and operating and the defendants were civilians who posed no real threat to security. Balancing those circumstances with the clear violation of the defendant's constitutional rights, it appears that the use of the military commission under these circumstances was not really necessary and could still fail under the three-tier analysis, even if falling within the first tier.[181]

D. The World War II Japanese Cases

In analyzing the relevant Court decisions in the area of executive emergency authority, it is hard to underestimate the importance of Congress's actions, taken together with the circumstances that exist at the time of the President's actions. The cases arising from the Japanese interments during World War II aptly illustrate this point. Even though martial law

[180] Indeed, Justice Black's belief that the Congress didn't intend to authorize the imposition of *real* martial law, even though it was plainly stated in the statute, seems somewhat strained. At worst, even if you accept Justice Black's contention that Congress didn't intend this type of action under martial law, the case would fall into the second tier.

[181] Or, like the analysis in *Milligan*, the Court could find that the imposition of martial law was within the first tier, but the execution of the law was contrary to Congress's intent, and therefore, within the third tier. Under the facts in *Duncan*, it would be hard to arrive at this conclusion.

was not declared on the mainland of the United States during the war, the United States government took extreme actions to intern and relocate thousands of Japanese civilians who lived within the borders of the United States.

In two cases,[182] the Supreme Court considered the legality of those government actions. In both of these cases, the defendants were charged with violations of orders, orders which excluded them from certain areas or imposed certain curfews.[183] These rules applied to persons of Japanese ancestry, regardless of their citizenship status or evidence of loyalty to the United States. In both cases, the Court upheld the government's extreme actions.

Fundamental to the Court's analysis in both cases was its view that in the arena of war-making, the Court should not substitute its judgment for those who have been authorized by the Constitution to make such decisions. In *Hirabayashi*, the Court stated:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or to substitute its judgment of theirs . . . .[184]

The Court went on to emphasize the great amount of discretion they afforded the constitutionally appointed decision-makers in the area of war powers.

> Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the

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[182] *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

[183] It is important to note that both cases involved Executive Orders, issued by the President. Those executive orders were later authorized by an Act of Congress, which attached a criminal penalty for violating the orders. *See Hirabayashi,* 320 U.S. at 87; *Korematsu*, 323 U.S. at 216.

[184] *Hirabayashi*, 320 U.S. at 93.

> challenged orders and statue afforded a reasonable basis for the action taken in imposing the curfew . . . In this case, it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decisions which they made. Whether we would have made it is irrelevant.[185]

Despite widespread violations of citizens' most basic constitutional rights, the Court refused to interject itself into an area that they believed beyond their authority.[186]

Korematsu and *Hirabayashi* are not martial law cases, but they are helpful in determining how the Court might view similar actions under a declaration of martial law.[187] First, the Court implicitly recognized the principle of necessity, and would apparently allow otherwise unacceptable actions when conditions warranted. Second, the court recognized that the severity of the actions must relate to the level of the threat, stating that "when under

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[185] *Id.* at 101-102. In *Korematsu*, the Court further noted:

> The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the government is "the power to wage war successfully." Hirabayashi v. United States. Therefore, the validity of action under the war power must not be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless....To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war.

Korematsu, 323 U.S. at 224-225 (Justice Frankfurter, concurring).

[186] Even though the Court recognized the existence of such emergency powers under the circumstances of "modern warfare," it is difficult to ascertain what standard the Court would apply to determine the legality of future actions. In *Korematsu*, the Court stated, ". . . exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the *gravest imminent danger* to the public safety can constitutionally justify either." *Korematsu,* 323 U.S. at 218 (emphasis added). Later the Court added an additional standard, stating that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of *direct emergency and peril*, is inconsistent with our basic governmental institutions." *Id.* at 119-220.

[187] The actions taken in these cases are similar to those envisioned under a regime of martial law, i.e., imposing curfews, restricting movement, and etc.

conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[188] Finally, the Court judged the case in the context of the executive and legislative branches operating together and did not elaborate on the outcome if the actions had been taken by the President in the absence of congressional authorization.

Additionally, even though not a martial law case, the dissent in *Korematsu* does offer us another small hint that the Court would, under proper circumstances, approve a regime of martial law. The dissent stated that excluding persons of Japanese ancestry from the Pacific Coast, "on a plea of military necessity in the *absence of martial law* ought not be approved."[189] By implication, then, Justice Murphy would approve similar actions when necessity dictated and martial law had been properly declared.

E. Summary

None of the Supreme Court cases cited above directly discusses the source of the President's authority to impose martial law. But from these cases we can glean some legal principles relating to the proper imposition of martial law.

First, the Supreme Court has never declared martial law, per se, unlawful or unconstitutional. Second, the Supreme Court has recognized some presidential emergency

[188] *Id.* at 220. In other words, the greater the threat the more willing the Court would be to accept violations of rights otherwise unacceptable under our Constitution.

[189] *Id.* at 233 (Murphy, J., dissenting) (emphasis added).

authority. Third, the President's authority to act in emergencies is not unfettered.[190] Fourth, the President's actions are more likely to survive scrutiny if he seeks Congressional approval.

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[190] Regardless of whether our nation, through its courts or its political processes, would accept imposition of martial law, international law may still condemn actions taken under martial law. The United States, either through treaty or through customary international law, is bound to accord its citizens certain human rights. Imposition of martial law could violate these rights, subjecting the President or military commanders to liability.

The Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights." Article 1. Articles from the Declaration which are pertinent this discussion are:

Article 3 – Everyone has the right to life, liberty and the security of person.

Article 7 – All are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 8 – Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9 – No one shall be subjected to arbitrary arrest, detention or exile.

Article 10 – Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 13 – Everyone has the right to freedom of movement.

Universal Declaration of Human Rights, G.A. res. 217 (AIII), U.N. Doc. A/810 at 71 (1948).

The American Convention on Human Rights reiterates the Universal Declaration on human rights and sets forth certain civil and political rights, including (among other things) the right to life, right to humane treatment, right to personal liberty, the right to a fair trial, right to of peaceful assembly, freedom of association, right to equal protection and the right to judicial protection. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series, No. 36, at 1, OEA/Ser. L./V/II.23 doc. rev. 2. *Entered into force* July 18, 1978.

The American Convention also contains a derogation clause. Article 27, Suspension of Guarantees, states that in "time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation...." The exception does not apply to all rights. Specifically, the clause states that any discrimination can not be based upon "race, color, sex, language, religion, or social origin. Further, the Article states that several articles may not be suspended. Relevant to this article are: Article 3 (Right to Juridical Personality), Article 5 (Right to Humane Treatment), and Article 23 (Right to Participate in Government).

The prerequisite for suspending these rights appears to also be necessity. According to one scholar:

> In addition to the overarching requirement of temporary duration and effect, several factors are considered when giving specific content to the principle of exception danger. First, the particular crisis must be actual or imminent. Derogation may not be used as a purely preventive mechanism unless an imminent danger exists. Second, normal measures available to the state should be manifestly inadequate and insufficient to respond effectively to the crisis . . . . Third, the threat must have nationwide effects . . . The threat must endanger the

And fifth, the more extreme the circumstances, the more extensive the power Court would likely accord the President.[191]

V. Where Does this Leave a Military Commander?

A presidential decision to impose martial law raises the most profound legal, ethical and moral questions imaginable. But once the order is issued, the President must rely on the military, through its various levels of command, to execute the order. If the President's decision to issue the order is later questioned or held unlawful, the ramifications for the President lie both in the political and judicial realms: public criticism, impeachment, removal from office, injunction or reversal by the Supreme Court. For the military commander, the ramifications could be criminal.

Under the Article 92 of the Uniform Code of Military Justice,[192] a military member may be held criminally liable for failure to obey lawful orders and for dereliction of duty.[193]

> whole population and either the entire territory of the state or significant parts thereof. Finally, the emergency must threaten the very existence of the nation, that is, the "organized life of the community constituting the basis of the State."

Gross, *supra* note 112, at 453-454 (1998).

The principle of proportionality also applies to this derogation regime. According to the American Convention, the derogation regime applies, "to the extent and for the period of time strictly required by the exigencies of the situation." Article 27. So, like martial law, necessity guides the executive's ability to rely on the derogation clause.

[191] Chief Justice Rehnquist notes that "[w]ithout question, the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war . . . ." REHNQUIST, *supra note* 106, at 218.

[192] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶16 (1998) [hereinafter MCM].

[193] The punishment options range from dishonorable discharge (or dismissal for an officer) and 2 years confident for disobedience of a lawful general order to a bad conduct discharge and 6 months confinement for willful dereliction of duty. Uniform Code of Military Justice art. 92 (1998) [hereinafter UCMJ].

Depending on the circumstances, a commander who violates orders may also be punished for conduct unbecoming an officer and a gentleman.[194]

Military members are required to obey *lawful* orders. They are not required to obey unlawful orders, but they disobey them at their own peril.[195] When a military member receives an order, he presumes it to be lawful, unless "patently illegal" or one that "directs the commission of a crime."[196] According to the Manual for Courts-Martial, an order is "lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it."[197]

A military commander is unlikely to breeze by the terms "contrary to the Constitution" or "laws of the United States" because all military officers, upon entering active duty service, swear an oath to "uphold and defend the Constitution of the United States."[198] Military commanders understand the obligation to honor individuals' constitutional freedoms and receive indoctrination on role of the military in a democracy (i.e., Posse Comitatus). These commanders will naturally pause before executing an order that both involves them directly

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[194] Article 133, UCMJ. The maximum punishment available under Article 133 is a dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense when the punishment is prescribed in the Manual, or if not prescribed, one year.

[195] The infamous *Calley* court-martial made it clear that the defense of "just following orders" would not exonerate an officer for unlawful behavior. *See* United States v. Calley, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

[196] MCM, *supra* note 192, pt. IV, ¶ 14c(2)(a). It states: "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime."

[197] MCM, *supra* note 192, pt. IV, ¶ 16c(1)(c).

[198] The officer and enlisted oaths of office vary slightly. Officers swear to uphold the Constitution. 10 U.S.C.A. § 3331 (West 1999). Enlisted members swear to uphold the Constitution and to obey the orders of the officers who are appointed over them. 10 U.S.C.A. § 502 (West 1999).

in civilian law enforcement and which requires systematic violation of citizens' constitutional rights.

Considering the legal standard established in the Manual for Courts-Martial, the commander who receives a martial law execute order should obey the order. Unless "patently illegal," like the extremely unlikely order to conduct mass executions or to torture suspected criminals,[199] there is sufficient evidence to support the Commander-in-Chief's authority to proclaim martial law. In the end, the commander's best option would be to obey the order.

VI. Analysis

This paper cannot resolve all the legal questions that would swirl around a declaration of martial law. But integrating the cases already discussed, along with the other principles mentioned above, result in a type of template that could be useful in determining whether the President has the authority to move the military into such an expanded role during an emergency.

This paper presumes that the President enjoys inherent authority to declare martial law, outside the powers granted him by the Constitution. But just as emergencies do not "create power"[200] and "unenumerated powers do not mean undefined powers"[201] the President's power to impose martial law must not be limitless. Certain the ability to exercise such power

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[199] *See supra* note 190 and accompanying text.

[200] *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 703 (1952).

[201] *Id.* at 610.

must be subject to certain limitations. Those limitations are derived from the Congress, balanced upon conditions of necessity, and tempered by other constitutional considerations.

The best method for analyzing the legality of a proclamation of martial is to integrate the three-tier standard set forth in *Youngstown Sheet & Tube v. Sawyer*[202] with some of the principles articulate in the other cases discussed above. But even before the *Youngstown* three-tier analysis, first a precondition of "necessity" is an indispensable prerequisite to any declaration of martial law. Meeting this requirement increases the likelihood a court will favorably view the President's exercise of discretion under trying circumstances. Moreover, even if the President is operating under the first-tier, with implied or express congressional approval, without meeting the necessity precondition, his actions will likely fail judicial scrutiny.

The more dire the circumstances (hence, the greater the necessity), the more direct action the President can take. For example, in *Milligan,* the Court based part of its rationale upon the fact that the courts were not closed. Arguably, this is because the military was going beyond just population control and was inserting itself into the judicial realm, and area where there existed no need for the military to operate. So, the standard of necessity was *not* met in that case, at least to the extent the military wished to try civilians in military commissions. Consider the Japanese cases. There the Court upheld the President's emergency actions because of his ability to articulate why wartime conditions justified such extreme actions. The conclusion we can draw from all these cases is that the principle of necessity is not

[202] *Id.* at 579.

limited to only the declaration of martial law, but must also be matched against the type of action the President has taken under the umbrella of his newly declared authority.

Under the *Youngstown*[203] first tier, congressional action (or inaction) becomes the most critical part of the analysis. Obviously, Congress has never acted to grant the President explicit authority to impose martial law. But there is ample evidence that the Congress has granted both express and implied authority to the military act in certain law enforcement roles. Contrary to years of tradition, the Posse Comitatus Act now is less like a road block, and more like a speed bump, between the Armed Forces and ever-increasing law enforcement roles. New legislation and initiatives geared to face the emerging threats have charged the military with a central role in the planning, training and execution phases of our readiness plans. All of these together create a strong legal basis for the President to argue that Congress, upon conditions of necessity, would accept a proclamation of martial law.

The second tier perhaps presents the most difficult legal analysis. Here, looking to congressional intent would be fruitless so the President must act upon his "own independent powers."[204] However, when operating within this "zone of twilight"[205] where distribution of power is "uncertain,"[206] the President may be invited to exercise "independent presidential responsibility."[207] It is here that the President's inherent authority is arguably at its fullest. But the President can be guided here by some factors. First, the actual events, or elements of

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[203] *Id.* at 635.

[204] *Id.* at 637.

[205] *Id.*

[206] *Id.*

[207] *Id.*

necessity, should be key in determining the President's authority and,[208] second, the extent to which the President is exercising his power must be considered.[209] Finally, in the second tier, not only can the President take some reassurance in knowing that he is not acting contrary to congressional intent, but also from the fact that no Supreme Court opinion specifically denounces the constitutionality of martial law.

If the President acts directly contrary to congressional will, he is squarely within the third tier of Justice Jackson's template. Even accepting the President possesses inherent, extra-constitutional authority to "preserve"[210] the nation, that power is not unfettered. Here, the President is taking the greatest risk, both politically and legally. And even though the Supreme Court is generally disinclined to involve itself in these types of matters, acting contrary to the stated will of Congress appears to be exactly the kind of "case" or "controversy" that falls directly within the Supreme Court's authority to adjudge.[211]

Finally, we have to look at where this leaves the military commander. The martial law "rubber hits the road" when military authorities impose the President's orders upon individual citizens. Under these circumstances, the commander's authority is derived from the President's authority. If the President is justified in taking action, that justification will flow down to support the military's actions taken under the President's orders.

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[208] *Id.* ("In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.")

[209] As Justice Frankfurter implied, the President's authority may be greater if for a "short, explicitly temporary period, to be terminated automatically unless Congressional approval were given. *Id.* at 597 (Frankfurter, J., concurring).

[210] *See* discussion *supra* note 111.

[211] U.S. CONST., art. III, § 2.

The commander faces numerous dilemmas under these circumstances. Besides facing a hostile population, the commander must weigh duties to obey orders against obligations to uphold the Constitution. Even if the commander believes the order is lawful, he must still remain vigilant to not violate the most basic human rights of the citizens he is trying to protect. Unfortunately, the lack of training and preparation for such an eventuality probably leaves most commanders ill-prepared to handle such a crisis.[212]

VII. Conclusion

In 1998, Americans were again exposed to the concept of martial law in the form of a hit movie, The Siege.[213] The movie depicted the aftermath of a terrorist attack on New York City where the government declared martial law and rounded up thousands of Arab-Americans and put them in internment camps.[214] Unfortunately, sometime in the future, life may imitate art and America's experience with martial law may extend outside the movie theater into reality. It seems obvious that a number of anti-American groups exist both

[212] It has been the author's experience that military attorneys receive little, if any, training on the subject of martial law. In addition, the author has not participated in any military training exercise that focused on dealing with civilians in the context of martial law. Even if such emergency plans exist, they are infrequently used in the context of military exercises.

[213] THE SIEGE (Twentieth Century Fox 1998).

[214] As expected, the movie was extremely controversial. Most of the controversy focused on the improper stereotyping of Arab-Americans, but the issue of whether our country could ever face martial law also received a fair amount of attention. *See* Cindy Pearlman, *Terrorism Message to Teach Tolerance; Director Zwick Has Moral Lesson*, THE CHICAGO SUN-TIMES, Nov. 1, 1998, at SHO Section, p.3.

within and without our borders that would not hesitate to employ terrorist-like tactics that could result in upheaval and, perhaps, anarchy within our country.[215]

The circumstances that would prompt a declaration of martial law are so horrendous that they are almost beyond contemplation. But that dreadful eventuality should not translate into a lack of preparation, for if we are prepared, we are less likely to fear even the most awful possibilities.

Those who worry about the profound legal, moral and social implications of declaring martial law should contemplate Thomas Jefferson's insightful words:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to

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[215] One extremist group, led by Japanese cult leader Shoko Asahara, has already used chemical weapons against civilian targets. Others seriously contemplate the possibility. Consider the following exchange between a member of an American white supremacist group and a television interviewer:

LARRY WAYNE HARRIS: My view of the future is that we are facing now a biological apocalypse. It is coming. The Bible says that it is coming.

NARRATOR: Larry Wayne Harris, a member of the white supremacist group Aryan Nation, has been in constant trouble with the law for his attempts to obtain plague bacteria and anthrax through the mail. Harris has written a manual for do-it-yourself biological warfare, and he claims it is easy to acquire these deadly agents.

. . . .

INTERVIEWER: Could you personally use biological organisms offensively, if you have to?

LARRY WAYNE HARRIS: Most definitely. I – I hope I never have – we never have to, but most definitely.

INTERVIEWER: Do you believe, looking into the future, that you may have to?

LARRY WAYNE HARRIS: I hope and pray that I never have to.

INTERVIEWER: That's not the question, Mr. Harris.

LARRY WAYNE HARRIS: Yes.

Frontline Internet Site, *supra* note 2.

lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means . . . . The officer who is called to act on this superior ground does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk . . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.[216]

[216] Lobel, *supra* note 84, at 1393 (citing Letter from Jefferson to Colvin, Sept. 20, 1810, in 11 *The Works of Thomas Jefferson* 146, 148-149, (P. Ford e. 1905)).