

## Soldiers on the Home Front

By William C. Banks, Director, Institute for National Security and Counterterrorism

*(Paper given at the Jan. 6, 2017, AALS National Security Law Section Program)*

In 1955, early in the Cold War, the federal government conducted a civil defense drill called Operation Alert. The premise of the exercise was that a Soviet atomic attack on 61 U.S. cities had just killed 8 million people. To the utter astonishment of everyone involved, President Eisenhower's very first act was to proclaim martial law "throughout the United States, its territories and possessions." Carefully rehearsed response plans for federal agencies were ignored.

The president takes an oath to "preserve, protect, and defend the Constitution of the United States." A similar oath for commissioned military officers binds them to "protect and defend the Constitution of the United States against all enemies, foreign and domestic." Just what does it mean for the military to defend against "domestic enemies"? What could troops do to "protect and defend the Constitution" without undermining its core protections for citizens? These questions have been addressed only rarely, and never comprehensively, by the nation's courts. And Congress has responded only episodically and in very general terms.

The military's answer comes in part in the Pentagon's 2014 *Quadrennial Defense Review*, which states that the Defense Department's first priority is to deter and defeat attacks on the United States. But it does not say precisely to what lengths it might go in defending the homeland. Martial law is the predictable response to a worst-case scenario, because only troops might be thought capable of maintaining some semblance of order.

But martial law also *is* a worst-case scenario. It is the product of a failure of planning—when conditions allow the use of force to replace the rule of law. The result may be utterly unpredictable and even unprincipled. Government is conducted ad hoc by a military commander based entirely upon his or

her opinion of what is needed to meet the emergency, with no transparency or public participation, and perhaps no accountability afterward.

What do U.S. laws say about emergencies? The institution of martial law is not mentioned in the Constitution. The Framers did provide for suspension of habeas corpus in cases of rebellion or invasion “when the public safety may require it.” The Constitution also authorizes Congress to provide for military forces to repel an invasion or suppress insurrections, and even to execute the laws and quell domestic violence at the invitation of a state. [Art. I § 8, cl. 15, Art. IV §4] The first Congress adopted measures for the deployment of militias to help execute the laws, suppress insurrections, repel invasions, and quell domestic violence, but there is no evidence that the wholesale displacement of civilian government by military forces was contemplated. Rather, it was understood that soldiers would do only what civilian officials could not do for themselves, and that their role in those circumstances was to be strictly limited in every respect by necessity.

No statute tells the Department of Defense when and how it may deploy troops domestically in advance of authorization from the president or secretary of defense. The fear of showing up too late to help in an emergency has prompted the Pentagon to assert a nonstatutory “immediate response” or “emergency” authority for troops in the field to act quickly without approval from the chain of command, but only for a limited time, in order to save lives or property, or to restore governmental function and public order.

It is generally agreed that the president may exercise inherent power, using troops, to repel attacks on the United States, although the precise scope and limits of this power are unknown. Some say the president has even broader, unspecified powers as commander in chief to use troops at home in emergencies. Such a sweeping claim is based on no clear judicial precedent, and is legally extremely doubtful. And because it would involve an arrogation of power with no discernable limits, it is also dangerous. More importantly, except in a repel-attack scenario (and maybe even then), congressional acts

in this area have the effect of limiting the president's power, either directly, as the Posse Comitatus Act does, or by implication. Thus, preconditions for the deployment of troops spelled out in the Insurrection Act also prevent deployments without first satisfying those conditions, unless permitted by another statute.

Some crises are too urgent for such a deliberate process. A DOD regulation thus provides "immediate response authority" for a local commander to respond quickly, upon the request of a civilian official, without relying on the Insurrection Act or waiting for approval from her chain of command, in order to "save lives, prevent human suffering, or mitigate great property damage." The response may not, however, "subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory"—that might, in other words, violate the Posse Comitatus Act.

Another regulation provides for "emergency authority" to act without either presidential approval or a request from civilian officials, to "quell large-scale, unexpected civil disturbances" that threaten "significant loss of life or wanton destruction of property," in order to "restore governmental function and public order," or to protect "Federal property or Federal governmental functions." This regulation would apparently allow troops to help enforce the law, in spite of the strictures of the Posse Comitatus Act.

In very nearly the worst possible case, the president and other government leaders would be killed or rendered powerless (or perhaps merely incommunicado) by a terrorist attack, contagious disease, or some great natural disaster. In such a catastrophe, the civilian government would be severely compromised, and without a viable response plan confusion and chaos would likely ensue.

Until recently, plans for "continuity of government" in this kind of existential crisis have been among this nation's most closely guarded secrets. A 2007 presidential directive, however, spelled out "a cooperative effort among the executive, legislative, and judicial branches of the Federal Government . . . to preserve the constitutional framework under which the Nation is governed and the capability of all three branches of government to execute constitutional responsibilities and provide for orderly succession . . .

during a catastrophic emergency.” The secretary of homeland security is designated as “lead agent for coordinating overall continuity operations and activities of executive departments and agencies.” The only role specifically assigned to the military is provision of secure communications to various government entities. Martial law is not mentioned in the portions of the document available to the public.

Future prospects for martial law are unknown and, possibly, unknowable. Throughout the Cold War, the president was rumored to carry with him at all times a comprehensive secret plan, called “Plan D,” for responding to the threat of a nuclear attack. One element of that plan, Presidential Emergency Action Directive No. 21, apparently included a draft executive order declaring martial law, ready for the president’s signature on a moment’s notice. But the very existence of Plan D was a closely guarded secret.

Since 9/11 the Pentagon has participated in a series of complex annual training exercises, code-named Ardent Sentry, each based on one or more of the fifteen disaster scenarios developed by FEMA. In 2013 the exercise included three notional hurricanes, a theft of nuclear weapons, a train derailment, a tornado, the collapse of a high-rise building, and a federal call-up of National Guard troops.

In 2005 NORTHCOM reportedly also began a series of secret military exercises, code-named Vital Archer, at least some of which have involved active-duty military in lead roles. These exercises are said to rehearse classified war plans for confronting fifteen attack scenarios that may or may not relate to the DHS scenarios, although some of them apparently contemplate simultaneous terrorist strikes in different locations. Military responses range from modest crowd-control missions to an assumption of total control if civilian resources are overwhelmed. Details are set forth in two documents that have not been made public.

It is possible, of course, that in the next great domestic crisis the president or a military commander will, like Lincoln or Jackson, decide to take matters into her own hands, ignore the law, do whatever she thinks is necessary to protect the nation and its people, and face the legal or political consequences later.

Any court test of her actions will almost certainly be retrospective. And even if courts remain open and operating during military rule, judges have always been reluctant to second-guess the military, especially during wartime.

From the beginning of the Republic we have struggled to maintain a military that could keep us safe at home without jeopardizing fundamental freedoms, and without surrendering civilian control of the troops. One near constant throughout this history has been the military's determination to respect civilian authority and respond to civilian orders. Only rarely have military officers acted on their own domestically. While some observers caution that "today's armed services are professional and increasingly disconnected, even in some ways estranged, from civilian society," the U.S. military's continuing commitment to civilian leadership is steadfast and remarkable.

Yet the military's civilian leaders have not always remained so committed to the principle that troops should only be called out when civilian authorities are unable or unwilling to ensure the safety of Americans at home. Even before the Civil War, presidents yielded to the temptation to deploy military personnel for blatantly political purposes, something the Framers never imagined.

The concern is what former career officer Andrew Bacevich calls "militarized civilians, who conceive of the world as such a dangerous place that military power has to predominate, and constitutional constraints on the military need to be loosened."

In the wake of the 9/11 terrorist attacks, for example, President George W. Bush relied on his commander-in-chief power to arrest and detain suspected terrorists without charges, access to counsel, or other due process protections. His military order of November 13, 2001, was designed to prevent imprisoned suspects from seeking relief in U.S. courts. He also ordered the National Security Agency, part of the Defense Department, to intercept domestic telephone and email traffic without judicial warrants. These actions almost surely violated constitutional guarantees of habeas corpus, free expression under the

First Amendment, privacy under the Fourth Amendment, and due process under the Fifth Amendment. The president also threatened the separation of powers by ignoring express statutory limits on surveillance and detention, and by denying the right of courts to examine the legality of his actions.

To be sure, the courts and Congress are far from blameless here. Congress has enacted more than 50 standby emergency statutes that permit the President to act in ways that would be impermissible in the absence of a crisis. In the last 40 years, Presidents have declared national emergencies more than 50 times, each time triggering one or more standby statutory authorities by the declaration. While President Bush suffered several stunning setbacks in the Supreme Court, lower courts have more often followed the long tradition of judicial deference to the executive in cases implicating national security. These actions appear to send a message that the military does not labor under the same legal obligations that other government actors do.

So far, the Defense Department's planning, directives, and exercises generally describe a military respectful of civilian authority, and of statutory and constitutional limits on its domestic operations. But without the clear commitment of civilian leaders to the same limits, we cannot be sure that military forces will not be used in the future to sacrifice fundamental liberties unnecessarily in the name of security.