

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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February 2, 2009

Congressional Research Service

Report RS21024

Martial Law and National Emergency

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January 7, 2005

Abstract. Crises in public order, both real and potential, often evoke comments concerning a resort to martial law. While some ambiguity exists regarding the conditions of a martial law setting, such a prospect, nonetheless, is disturbing to many Americans who cherish their liberties, expect civilian law enforcement to prevail, and support civilian control of military authority. An overview of the concept of, exercise of, and authority underlying martial law is provided in this report.

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CRS Report for Congress

Received through the CRS Web

Martial Law and National Emergency

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Summary

Crises in public order, both real and potential, often evoke comments concerning a resort to martial law. While some ambiguity exists regarding the conditions of a martial law setting, such a prospect, nonetheless, is disturbing to many Americans who cherish their liberties, expect civilian law enforcement to prevail, and support civilian control of military authority. An overview of the concept of, exercise of, and authority underlying martial law is provided in this report, which will be updated as events warrant.

Occasionally, when some national emergency or crisis threatens public order in the United States, the comment is made that the President may ultimately resort to imposing martial law in order to preserve discipline and good behavior. Such was the case when it was thought that year 2000 (Y2K) technology problems might result in situations threatening life, property, or the general welfare in American society. The almost flawless transition to the year 2000, of course, rendered such an action unnecessary. More recently, at least one newspaper erroneously reported that the September 14, 2001, declaration of a national emergency by President George W. Bush in response to terrorist attacks in New York City and Washington, DC, “activated some 500 dormant legal provisions, including those allowing him to impose censorship and martial law.”¹ In accordance with the requirements of the National Emergencies Act, the President’s declaration actually activated nine selective provisions of statutory law, identified in his proclamation, pertaining to military and Coast Guard personnel.²

Such comments, nonetheless, suggest a consideration of what martial law constitutes, as well as when and how it might be invoked. According to one definition, martial law “exists when military authorities carry on government or exercise various degrees of control over civilians or civilian authorities in domestic territory.” More significantly, it “may exist either in time of war or when civil authority has ceased to function or has

¹ See Frank J. Murray, “Wartime Presidential Powers Supersede Liberties,” *Washington Times*, Sept. 18, 2001, pp. A1, A12.

² See Proclamation 7463, *Federal Register*, vol. 66, Sept. 18, 2001, pp. 48197-48199; the provisions of the National Emergencies Act may be found at 50 U.S.C. 1601-1651.

become ineffective.”³ Constitutional scholar Edward S. Corwin agrees with this understanding, but also offers important qualifications.

A regime of martial law may be compendiously, if not altogether accurately, defined as one in which the ordinary law, as administered by the ordinary courts, is superseded for the time being by the will of a military commander. It follows that, when martial law is instituted under national authority, it rests ultimately on the will of the President of the United States in his capacity as Commander-in-Chief. It should be added at once, nevertheless, that the subject is one in which the record of actual practice fails often to support the niceties of theory. Thus, the employment of the military arm in the enforcement of the civil law does not invariably, or even usually, involve martial law in the strict sense, for ... soldiers are often placed simply at the disposal and direction of the civil authorities as a kind of supplementary police, or *posse comitatus*; on the other hand, by reason of the discretion that the civil authorities themselves are apt to vest in the military in any emergency requiring its assistance, the line between such an employment of the military and a regime of martial law is frequently any but a hard and fast one.⁴

The Record of Practice

Probably utilized by the federal government for the first time in 1814 when proclaimed by the victorious General Andrew Jackson, martial law was not part of the experience of a great many Americans in the period prior to the Civil War, and, therefore, its potentially arbitrary and authoritarian nature was not especially fearsome to the populace. In this regard, an observation by historian James G. Randall might be recalled.

That martial law was not always considered oppressive is shown by the fact that citizens sometimes petitioned for it. Some Philadelphians, for instance, requested the President to declare martial law in their city at the time of [Confederate General Robert E.] Lee’s invasion to enable them to put the city in a proper state of defense. Nor should we suppose that the existence of martial law necessarily involved a condition of extensive or continuous military restraint. Beginning with September, 1863, the District of Columbia was subjected to martial law, and this state of affairs continued throughout the war, but it should not be supposed that residents of the capital city were usually conscious of serious curtailment of their liberties. The condition of martial law was here used as a means of military security. That martial law should be declared in areas of actual military operations was, of course, not remarkable.⁵

As territory of the Confederacy was overtaken by Union forces, it was governed under military authority and martial law. This state of affairs in the South, with regard to martial law, continued into the Reconstruction period. “Since the Civil War era,” notes Joseph E. Kallenbach, “there have been no proclamations of martial law by Presidents directly on behalf of the national government, although President Hayes very seriously

³ Henry Campbell Black, *Black’s Law Dictionary*, 6th edition (Saint Paul, MN: West Publishing, 1990), p. 974.

⁴ Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th revised edition (New York: New York University Press, 1957), p. 139.

⁵ James G. Randall, *Constitutional Problems Under Lincoln*, revised edition (Urbana, IL: University of Illinois Press, 1964), p. 170.

considered issuing such a proclamation during the railroad strike crisis of 1887. There have been conditions of limited martial law established with the explicit or implicit approval of the President by officers in the field, however,” he adds.⁶

These occasional invocations of martial law during the post-Civil War period occurred most often in labor disputes, but, as one chronicler recounts, other disturbances of the public order were involved as well.

Qualified martial law was twice declared ... by federal military officers in the period after the [first] World War when presidential control of troop activities was so greatly relaxed. According to the report of the Secretary of War, as a result of the race riot in Omaha, Nebraska, General Leonard Wood “took personal charge of the situation, and on October 1, 1919, proclaimed the city under qualified martial law.” Five days later, because of the danger of violence in Gary, Indiana, during the steel strike, General Wood, after conferring with the municipal authorities, placed that city also under qualified martial law.

There have been other instances where the modified form of martial law existed in fact, though undeclared. General Merriam placed restrictions on travel into and out of the mining camps of Idaho’s Coeur d’Alene in 1899. In the Colorado disturbance of 1914, saloons were closed (a common practice), the sale of arms was forbidden, arms and ammunition were seized, and the opening of mines was forbidden as was also the importation of strike-breakers. Public assemblies were forbidden and arms were taken in the West Virginia strike zone in 1921.⁷

The military has been utilized on a number of occasions since World War I when Presidents have sought to maintain public order, but have not invoked martial law. Such examples include the routing of the Bonus Army in 1932 in the District of Columbia; maintaining public order during desegregation efforts at Little Rock, AR, in 1957, the University of Mississippi in 1962, and the University of Alabama the following year; and quelling civil disturbances within Washington, Detroit, Chicago, and Baltimore during 1967 and 1968.

With the bombing of Pearl Harbor on December 7, 1941, the territorial governor declared a condition of martial law, which “was approved by the President.”⁸ The action was authorized by the Organic Act of the Territory of Hawaii, which provided for a declaration of martial law by the governor, with the President being informed of such action.⁹ The military remained in control of the islands until October 24, 1944.

On February 19, 1942, President Franklin D. Roosevelt issued E.O. 9066, which authorized the Secretary of War “and the Military Commanders whom he may from time

⁶ Joseph E. Kallenbach, *The American Chief Executive: The Presidency and the Governorship* (New York: Harper and Row, 1966), p. 553.

⁷ Bennett M. Rich, *The Presidents and Civil Disorder* (Washington: Brookings Institution, 1941), p. 210 (footnotes omitted).

⁸ Robert S. Rankin and Winfried R. Dallmayr, *Freedom and Emergency Powers in the Cold War* (New York: Appleton-Century-Crofts, 1964), p. 47.

⁹ 31 Stat. 141 at 153.

to time designate” to establish “military areas” from which “any or all persons” might be excluded in order to prevent espionage and sabotage.¹⁰

The following day secretary of War Henry L. Stimson delegated this authority to Lieutenant General J. L. DeWitt, commanding the so-called Western Defense Command. General DeWitt in his turn established by proclamation “Military Areas Nos. 1 and 2,” consisting of three westernmost states and part of Arizona. By a series of 108 separate orders he then, with the aid of the troops under his command and the War Relocation Authority (established by another executive order on March 18, 1942), proceeded to remove all persons of Japanese ancestry from these two areas.¹¹

This action did not involve martial law, although martial law was established within at least one of the internment camps.¹² Roosevelt issued the order as President and Commander in Chief in fulfillment of his statutory responsibilities to protect national defense material, premises, and utilities from espionage and sabotage.¹³

Since the conclusion of World War II, martial law has not been presidentially directed or approved for any area of the United States. Federal troops have been dispatched to domestic locales experiencing unrest or riot, but in these situations the military has remained subordinate to federal civilian management. Technological corrections and adjustments averted the need to invoke martial law due to Y2K failures and resulting public disorder. The September 11 terrorist attacks on the World Trade Center in New York City clearly demonstrated that civilian law enforcement authorities were adequate to managing the situation without resort to martial law or even the introduction of federal troops.

Relevant Authority

In fulfilling constitutional responsibilities to put down insurrection, rebellion, or invasion, the President may resort to invoking martial law. His action, in this regard, is subject to judicial review.¹⁴

The President may also exercise certain authority to create a condition similar to, but not actually one of, martial law. In the event “the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States in any State

¹⁰ 3 C.F.R., 1938-1943 Comp., pp. 1092-1093.

¹¹ Clinton L. Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, NY: Cornell University Press, 1951), pp. 42-43 (footnotes omitted).

¹² Robert S. Rankin and Winfried R. Dallmayr, *Freedom and Emergency Powers in the Cold War*, p. 46n.

¹³ Prior to full-scale implementation of the President’s order, congressional approval of its intent was sought and obtained with the legislating of supporting criminal penalties; see 56 Stat. 173; these penalties, codified at 18 U.S.C. 1383, were repealed by the National Emergencies Act in 1976, 9 Stat. 1255 at 1258.

¹⁴ See, for example, *Ex parte Milligan*, 31 U.S. 2 (1866); *Sterling v. Constantin*, 287 U.S. 378 (1932).

or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.”¹⁵ Such use of troops may be under the management of federal civilian authorities, such officials of the Department of Justice, or, in the event circumstances so merit, under armed forces command, in which case the commanding officer in the field may be ordered, at least temporarily, to invoke martial law. The President may order units of the Ready Reserve to active duty status¹⁶ or call units of the National Guard into federal service.¹⁷ As active duty military, these forces could also be deployed to enforce federal law.

While some ambiguity exists regarding the conditions of a martial law setting, such a prospect, nonetheless, is disturbing to many Americans who cherish their liberties, expect civilian law enforcement to prevail, and support civilian control of military authority. As long ago as 1962, sensitivity to these values was apparent when the Kennedy Administration reportedly instructed a high-level emergency planning committee that “nationwide martial law is not an acceptable planning assumption” in preparing for the survival of the nation following a nuclear attack.¹⁸ Veteran news correspondent Walter Cronkite stated the case a few years later when he wrote that “we must not merely prepare for the survival of individuals but also for the survival of our democratic system,” and, indeed, “to be certain that everything is done to preserve the post-war population’s confidence in government.”¹⁹

¹⁵ 10 U.S.C. 332.

¹⁶ 10 U.S.C. 12302.

¹⁷ 10 U.S.C. 12405-12406.

¹⁸ Edward Zuckerman, *The Day After World War III* (New York: Viking, 1984), p. 216.

¹⁹ Walter Cronkite, “Introduction,” in Eugene P. Wigner, ed., *Who Speaks for Civil Defense?* (New York: Charles Scribner’s Sons, 1968), p. 11.