4 MAY 8 1958

No 1 Copeland

7

CONFIDENTIAL

MEMORANDUM

Authority of President to keep troops in Little Rock (a) in absence of any specific court order which needs to be supported; and(b) in event court makes finding that troops are not needed to maintain order, but President finds upon facts before him that they are needed.

The question has been raised whether the President has power to retain troops in Little Rock in the case of disorder or anticipated disorder under two conditions:

1. In the absence of any specific court order which needs to be supported. (This assumes a possible modification of the original order of Judge Davies. In Little Rock, the troops were sent in to assure that the orders of the Federal Court were carried out, although they were not sent at the request of the Federal Judge).

2. In the event that the court makes a finding of fact that the troops are not needed to maintain order. (This assumes that the information of the President would be decidedly different from that on which the court acted and therefore the President must discharge his duty based on all information made available to him).

For the consideration of these two questions, we are told also to assume that any possible action of the Executive would be based on thorough factual analysis of the situation indicating the high probability of serious disorder if the troops were removed at the time the Executive decision had to be made.

For reasons to be discussed hereafter, it is my opinion:

1. That the President has authority to act in the absence of court order, if he anticipates and finds that serious disorder will ensue if the troops were removed; and

2. That it is doubtful that the President has authority to act in the event the court makes a finding of fact that the troops are not needed to maintain order, if the President finds

as a fact that they are needed.

In event that the Federal District Court enjoined the Federal troops from maintaining order, the President should obey the restraint until it is lifted by an appellate court, or the court's order stayed pending appeal.

13 I

10 7

The President has authority, in the absence of a specific court order, to maintain troops in Little Rock, based on thorough factual analysis of the situation indicating the high probability of serious disorder if the troops were removed.

Regardless of whether a specific court order has been issued, the President is authorized to maintain troops in Little Rock if the facts before him indicate the high probability of serious disorder if the troops were removed.

4 A. Statutory Authority

10 7 Title 10 U.S.C. (1952 Ed. Supp. IV) 332 provides as follows:

10 7 "Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

Thus Section 332 authorizes the President to use such of the armed forces and state militia as he considers necessary to enforce "the laws of the United States", whenever he considers that unlawful obstructions, etc., make it impracticable to enforce such laws by the ordinary course of judicial proceedings. This Section presupposes that no court order has been issued or that if issued, it would be ineffective for enforcement of the federal laws. (See, Pollitt, Presidential Use of Troops to Execute the Laws, 36 N.C. L. Rev. 117, 130-131 (1958)).

Another statute which may be relied on in exercise of this authority is 10 U.S.C. (1952 Ed. Supp. IV) 333 which provides:

> "The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it--
>
> "(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> "(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
>
> "In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution."

Section 333(1) is directly related to enforcing the protection of the Fourteenth Amendment. Also it is in the conjunctive authorizing the President to call out troops when the execution of both the laws of the State and the United States are hindered, and the states do not afford this constitutional protection. Section 333(2) authorizes troops (without regard to whether the execution of state laws is affected) where the execution of the laws of the United States is obstructed or the laws of the United States are impeded.

Both Sections 332 and 333 authorize Presidential action regardless of whether there has been any request for assist-

ance by state authorities./1/

We have been told to assume a possible modification of the original order of Judge Davies. It may be well to refer briefly to the orders issued in Little Rock so that there is no misunderstanding of the order which may possibly be modified.

1. On August 28, 1956, Judge Miller entered an order approving a gradual plan of integration for Little Rock, the court retaining jurisdiction (Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956).

2. On April 26, 1957, the Court of Appeals upheld this order as a good-faith prompt start toward the end of school segregation (243 F.2d 361 C.C.A. 8. 1957). Under the order as affirmed integration in the high school level was to start in the fall of 1957.

3. On September 3, 1957, Judge Davies ordered that integration proceed in accordance with the plan of school integration previously approved.

4. On September 7, 1957 the Court denied the application of the Little Rock School District for a stay of the Court's order of September 3, 1957.

4. On September 20, 1957, Judge Davies entered the preliminary injunction restraining the Governor and other persons from preventing the negro students from attending the school and obstructing the Court's orders of August 28, 1956 and September 3, 1957.

It would seem that the original orders of Judge Davies which may possibly be modified are those of September 3, 1957 and September 20, 1957. This would still leave in existence the order of August 28, 1956 of Judge Miller as affirmed by the Court of Appeals, and if required, troops could be called out to prevent obstruction of this order.

In proper context, "the laws of the United States" may include not merely acts of Congress but also the Constitution and its interpretation given in judicial proceedings. (See, Stoffel

FN1

44/ 1/ Another provision (Act of August 10, 1956, 70 A Stat. 15, 15 U.S.C. (1952 Ed. Supp. IV 331) authorizes the President to use the armed forces to suppress an insurrection against the government of a state upon the request of its legislature or governor.

v. W. J. McCahan Sugar Refining & Molasses Co., 35 F.2d 602, 603 (E.D. Pa.). The case of In re Neagle, 135 U.S. 1 construes the phrase "a law of the United States" as used in the federal statute to include an obligation derived from the Constitution. In that case Neagle was assigned on orders from the Attorney General to guard Justice Field and in doing so killed a man who threatened the justice's life. Release from state custody was obtained under the federal habeas corpus statute for an act done in pursuance "of a law of the United States." The Court said (p. 59):

> "In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. * * *"

Marbury v. Madison, 1 Cr. 137, 178, describes the Constitution "as a paramount law. * * *" Erie Railroad Co. v. Tompkins, 304 U.S. 64 holds that "laws of the several states" as used in the Judiciary Act of 1789 includes court decisions as well as statutes. See too, Warren v. United States, 340 U.S. 523, 526-7 (1951)/2/

Perhaps the best source for determining the context in which "laws of the United States" is used in Sections 332 and 333(2) is the legislative history of the statutes from which those sections are derived.

1. Legislative history of 10 U.S.C. (1952 Ed. Supp. IV)332.

Title 10 U.S.C. (1952 Supp. IV) 332 is an outgrowth of laws dating from 1792./3/ As early as 1795, Congress removed the requirement of the 1792 Act that the President should first be

44/ ##FN2

2/ Schweppe in his "Enforcement of Federal Court Decrees", 44 A.B.A.J.113 (1958) disagrees with the Supreme Court's decision in the Tompkins case, that law includes court decisions, but makes no persuasive argument for disregarding that decision.

44/ ##FN3

3/ Rich, "The Presidents and Civil Disorder" (Ed. 1941) 195. Note "Use of Troops to Enforce Federal Powers", 56 Mich. L.Rev. 249, 260(1957); Pollitt, supra, 36 N.C. L.Rev. at 131.

notified by the Federal judge that the execution of the laws of the United States was being obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.

Another limitation on use of troops was removed by the Act of July 29, 1861. It eliminated the provision in the Act of 1795 which restricted to three months the period for which state militias might be required to serve at the call of the President. The bill passed the House after a brief debate in which Representative Bingham, in charge of the Bill for the Committee on the Judiciary, said:

> "The principle, Mr. Speaker, in short, of all this legislation, is this: that the institutions, the Constitution and laws of this country, repose for their security, and look for their enforcement against resistance and rebellion, to the whole loyal people. This bill, sir, simply unfetters the hands of the Executive of the Government, so that when the Constitution is assailed by rebels and traitors, the people may come to its rescue, and assert its obligation against all combinations of men; and that, too, in obedience to and in conformity with the requirements of law"(56 Cong. Globe 146). [Italics supplied.]

The bill passed the Senate without amendment or debate (56 Cong. Globe 277-8).

Accordingly, this legislative history indicates that the Act of July 29, 1861, and section 332, its successor, authorize the President to use the armed forces to enforce the Constitution, not merely Acts of Congress, when its enforcement is obstructed by unlawful combinations, assemblages, etc.

And it would appear reasonable to say, that Section 332 also authorizes exercise of this Presidential power to enforce the Constitution as it has been most recently construed by the Supreme Court, and implemented by orders of the District Court.

2. Legislative history of 10 U.S.C. (1952 Ed. Supp. IV)333.

The legislative history of 10 U.S.C. (1952 Ed. Supp. IV) 333 is also instructive of the broad authority which Congress conferred upon the President to putting down civil disorder with the states.

Its predecessor is the Act of April 20, 1871./4/ Enactment of this latter Act was requested by President Grant in the following message (March 23, 1871):

"A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.

"Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States."

President Grant's use of the phrase "life, liberty, and property and the enforcement of law" indicates that he was concerned with enforcing rights granted by the Fourteenth Amendment as well as those provided by Acts of Congress.

Pursuant to this message, a select committee of the House reported a bill (H.R. No. 320, 42d Cong., 1st sess.) "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes" (98 Cong. Globe 317). The third section of the bill made it the duty of the President to use the militia and the armed forces to suppress insurrection, domestic violence, unlawful combinations, or conspiracies which so far obstruct or hinder the execution of the laws of any state as to deprive any portion or class of the people of that state of the rights, privileges, or immunities secured by the Constitution of the United States, where the constituted authorities of the state fail or refuse to protect such rights and fail to apply to the President for aid;

4/ See Pollitt, supra, 36 N.C.L. Rev. at pp. 136-137.

and such facts are to be deemed a denial by the state of the equal protection of the laws under the Fourteenth Amendment (98 Cong. Globe 317, 366).

In the debate in the House, Congressman Shellabarger, in charge of the bill, quoted the due process and equal protection clauses of the Fourteenth Amendment; referred to Section 5 of that amendment, which specifically gives Congress the power to enforce it by appropriate legislation; and pointed out that under section 3 of the bill the refusal of state authority to call for United States aid, where a state of violence deprives the people of their rights under the Fourteenth Amendment, is made a denial of the equal protection of the laws (99 Cong. Globe App. 71).

Similarly, several Congressmen, speaking in support of the bill, referred to it as a measure to enforce, pursuant to the "appropriate legislation" clause, the equal protection clause of the Fourteenth Amendment (98 Cong. Globe 322, 334, 375, 390). Other supporters of the bill also indicated their understanding that its purpose was to protect and enforce rights given by the federal Constitution, particularly the Fourteenth Amendment. See 98 Cong. Globe 393, 428-9, 439, 448, 459, 475-7.

From these statements it is clear that the theory of section 3 of the bill was that in the South the state authorities were unable or unwilling to enforce state laws against the Ku Klux Klan and others who were resorting to terror and violence to prevent the Negroes and their white supporters from exercising their rights to vote and participate in political affairs; that this failure of state law enforcement constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment; and that this section of the bill was "appropriate legislation" to enforce this constitutional guarantee. As stated by Congressman Stoughton:

> "When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect

is therefore given to section five, which declares that 'Congress shall have power to enforce by appropriate legislation the provisions of this article' (98 Cong. Globe 322)."

See also 98 Cong. Globe 332-3, 339-41, 367-70, 374-6, 384, 390-2, 412-5, 425-9, 436-40, 442-51, 456-61.

In the course of the debate in the House, Congressman Shellabarger offered an amendment to section 3 which added, after the original provision that the domestic violence, etc., so far obstruct or hinder the execution of the laws of a state, the phrase "and of the United States" and continued (as in the original bill)--as to deprive any portion or class of people of such state of their constitutional rights (98 Cong. Globe 477). Congressman Shellabarger explained this amendment as follows:

"In the third section of the bill as reported by the committee, at the end of the third line, are added the words 'and of the United States;' so that the obstructions or combinations which effect the obstruction of the 'laws thereof' (meaning the State laws) shall be so extended as to include obstructions of the laws of the United States. That is rather a verbal amendment.

* * *

"* * * The third section is so changed as to require that the authority of the United States must also be invaded and defied (98 Cong. Globe 478)."

The supporters of the bill continued to treat it as one to enforce the Fourteenth Amendment, without any indication that this proposed amendment of section 3 made any significant change (98 Cong. Globe 481-4, 485-6, 487-8, 508, 514, 516-8). The bill passed the House with Congressman Shellabarger's amendment to section 3 (98 Cong. Globe 521-2).

The Senate Committee on the Judiciary added, without objection, the words "the Constitution," so as to make the bill

cover domestic violence, etc., which deprived persons of rights, privileges, or immunities, or protection "named in the Constitution and secured by this act * * *" (99 Cong. Globe 703). The Senate also adopted a committee amendment striking from the bill the requirement that the President could act only if the state authorities failed to apply to him for aid in protecting such rights (99 Cong. Globe 703).

The Senate then agreed to a committee amendment which authorized the President to take action not merely when the domestic violence, etc., obstructed the execution of the laws of the state and of the United States, but also "whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same * * *" (99 Cong. Globe 703).

The House accepted the Senate amendments to section 3 of the bill (Journal of the House of Representatives, 42d Cong., 1st Sess., p. 165).

Accordingly, this legislative history makes it plain that the Act of April 20, 1871, and 10 U.S.C. (1952 Ed. Supp. IV) 333, its successor, authorize the President to use the armed forces to enforce decrees of the federal courts securing rights under the Fourteenth Amendment, when such decrees are obstructed by domestic violence.

As Rich notes in "The Presidents and Civil Disorder" (1941) (p. 199):

> "Into the hands of the president is placed the power of determining whether, by insurrection, domestic violence, unlawful combinations or conspiracies, any portion or class of the people of a state is being deprived of the 'rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws . . .' If the president finds the existence of such a deprivation within a state, that state will be deemed guilty of denying the equal protection of the laws. Under such circumstances the president is authorized to use the military forces of the United States to correct the evil. The president can intervene, not to prevent conspiracies, unlawful combinations, domestic violence, or insurrection, as such,

but to guard the 'rights, privileges, or immunities or protection named in the Constitution and secured by the laws for the protection of such rights, privileges, and immunities.'"

Thus, it would appear that the President may act under various circumstances:

1. When unlawful obstruction against Federal authority make it impracticable to enforce the laws of the United States in any state (10 U.S.C. Sec. 332);

2. When there is interference with both State and Federal law depriving a person of his constitutional rights, and the state fails to protect such rights (10 U.S.C. Sec. 333(1));

3. When the execution of the Federal laws is obstructed, and the course of justice under those laws impeded (10 U.S.C. Sec. 333(2)).

It could be urged that once Judge Davies' specific orders are vacated, there are no federal laws or decisions which are being obstructed, and therefore no basis for use of Federal troops.

It is true that the Supreme Court's decisions in the segregation cases are not self-executing in every part of the country, even though its principles apply everywhere. It contemplates implementation of its opinion by separate orders and decrees for different situations, thereby establishing a reasonable method by which the transition to integration could take place. (Brown v. Board of Education, 349 U.S. 294 (1955)). This was done in full recognition of the delicate social adjustments to be made in many areas, although the Court made it clear "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

Here, we have two sets of orders implementing the Supreme Court's decision. The first is Judge Miller's order which was affirmed by the Court of Appeals. This puts into effect an appropriate plan to bring the public school system of Little Rock into compliance with the law of the land. Interference

by mob rule in Little Rock tended to obstruct the execution of the Federal law as represented by Judge Miller's order. Judge Davies' orders were issued further to protect Judge Miller's order. Withdrawal of Judge Davies' order would still leave Judge Miller's order intact. The advantage of Judge Davies' order is that the Federal Government could deal specifically by contempt with persons flouting it. Withdrawal of the order would deprive the United States of a prompt and effective sanction. But Judge Davies' order neither added to, nor detracted from the President's authority to enforce the execution of the Federal law as represented by Judge Miller's order affirmed by the Court of Appeals. In such a case, the President as the guardian of the executive powers which authorize him to take care that the laws be faithfully executed, may vindicate the supremacy of law by overcoming lawless force with armed strength.

Finally, a word may be added as to whether Section 122 of the Civil Rights Act of 1957 (Act of Sept. 9, 1957, 71 Stat. 634, 637) repealed the authority of the President to use the armed forces under 10 U.S.C. (1952 Ed. Supp. IV) 332,333. This contention was advanced in the Court of Appeals for the Eighth Circuit upon appeal from the order of Judge Davies in Jackson v. Kuhn, No. 15899, decided April 28, 1958. However, since the Court dismissed this action for lack of the jurisdictional amount, it did not reach this question. In the related appeal Faubus v. United States, No. 15904, decided April 28, 1958, 26 U.S. L. W. 2554, the Court of Appeals upheld the preliminary injunction restraining the Governor of Arkansas and the commanding officers but was not called upon squarely to decide whether the Civil Rights Act of 1957 repealed the authority of the President to use the armed forces under 10 U.S.C. (1952 Ed. Supp. IV 332, 333. However, it seems manifest from the legislative history of the repealer, that there was no intention to deprive the President of such authority. Rather, the repealer was intended merely to take away the President's authority to use the armed forces to enforce the Civil Rights Act where the normal judicial processes were adequate to cope with the situation. (See, 103 Cong. Rec. (Temporary Edition) 10105-10108, 10215, 10220, 10816-7, 10934).

13 II

The second question is whether the President may keep the troops in Little Rock in the event that the court makes a finding that the troops are not needed to maintain order.

From the facts before us, it is not clear in what connection the Federal District Court would be called upon to make such finding. Apparently, we may assume that it is a finding in some pending suit before it in which officials of the United States have been made parties defendants.

Although the provisions of 10 U.S.C. (1952 Ed. Supp. IV) Sections 332 and 333 suggest that the finding as to the need for troops is one for the President to make, the Supreme Court's decision in Sterling v. Constantin, 287 U.S. 378 (1932) to be discussed hereafter, would appear to indicate that the Federal Court may review the executive's finding and if the Court finds from the evidence that there is no such need, restrain their use.

In his work, "The Presidents and Civil Disorder", Rich discusses the rule both before and after Sterling v. Constantin. As to the rule before this decision, Rich says (p. 197):

10 "In enforcing federal law, as in aiding distressed states, the president's determination as to the need for troops has, since the Whiskey Insurrection, been exclusive and final. At that time judicial notification was necessary before the president could call forth the militia. This provision of the law was subsequently changed to make the president the sole judge of the exigency. In the case of Martin v. Mott, (12 Wheat. 19,(1827)), growing out of the War of 1812, Justice Story, speaking for the Supreme Court, stated that 'the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.'"

See too, Corwin, "Martial Law, Yesterday and Today", 47 Pol. Sci. Q. 95 (1932).

Another case in point is Consolidated Coal and Coke Co. v. Beale et al., 282 Fed. 934 (S.D. Ohio, E.D. 1922). There, the plaintiff, a coal company on strike applied to the court for an order directing the marshal to guard plaintiff's property and a certificate to the President that a state of insurrection exists. In denying the application, the court ruled that it will not issue a certificate to the President that insurrection exists under Rev. St. Sec. 5299 (Now Sec. 333 of 10 U.S.C.). The Court said (p. 936):

"In Martin v. Mott, 12 Wheat. 19, 6 L.Ed. 537, the Supreme Court of the United States determined that the authority to decide whether the exigencies contemplated in the Constitution of the United States and the act of Congress of 1795 (1 Stat. 424), in which the President has authority to call forth the militia to execute the laws of the United States, suppress insurrections, and repel invasions that have arisen, is exclusively vested in the President. The court, speaking by Mr. Justice Story, said:

"'The power thus confided by Congress to the President is doubtless of a very high and delicate nature.'

"And again:

"'Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.'

"Therefore it is thought that this court should not undertake to make in advance a decision of that which is solely for the determination of the President of the United States; that is to say, the necessity of using troops in a state in any given emergency. Orderly administration of the affairs of the government is never more important than in difficult times. In such orderly administration the function which this court is now asked to exercise belongs exclusively to the executive, and not to the judicial, branch of the government."

See too, 31 Mich L.R. 988-990(1933) authorities cited fns. 2 and 3.

A more difficult case would be presented if the President keeps the troops in Little Rock, and if in a suit brought in the Federal District Court against the commander in charge, the court found that the troops are not needed to maintain order and directed the commander to withdraw them.

It may be urged from the ruling in Sterling v. Constantin, 287 U.S. 378 (1932) that while the President in the first instance has authority to make the decision as to whether to call out troops, his decision of military necessity is not binding on the Court; that the troops must be withdrawn where the Court finds as a fact that there is no disorder or apparent necessity for armed force, and these findings are fully supported by the evidence.

In view of the importance of this decision, it is fully discussed below.

* In Sterling v. Constantin, supra, private persons brought suit against state officials to enjoin them from enforcing orders of the state Railroad Commission limiting oil production, on the ground that the orders denied the plaintiffs due process of law. The district court issued a temporary restraining order against the state officials. Thereupon, the Governor of Texas, finding that the area was in "a state of insurrection, tumult, riot, and a breach of peace," that "if the state government could not protect the public's interest they would take the law into their own hands," and that this condition had caused threats of acts of violence, directed the state Adjutant General, as commanding officer of the Texas National Guard, "to enforce and uphold the majesty of the law" and to limit oil production in accordance with the orders of the Railroad Commission (287 U.S. 387-9).

The plaintiffs then filed an amended complaint making the Texas governor and Adjutant General parties defendant and alleging that their action was in violation of the plaintiffs' rights under the federal Constitution. The district court took evidence and found that military force had not been exerted to put riots or mobs down; that there was no evidence of actual violence or threat of violence, no failure of the civil authorities to maintain peace and order; and that even if violence by the public had occurred it "would have resulted merely breaches of the peace to be suppressed by the militia as civil force" (287 U.S. at 388, 390-2). The district accordingly enjoined the governor and the Adjutant Gen. Texas from enforcing the orders of the Railroad Commiss U.S. at 386).

In affirming that injunction, the Supreme Court refuted the contention that an order of the governor calling out the militia ostensibly to maintain peace and order is not reviewable by the Federal Courts (287 U.S. at 397-8):

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts".

The Supreme Court recognized that the Constitution of Texas vested the Governor "with the discretion to determine whether an exigency requiring military aid" to cause the laws to be faithfully executed had arisen and that his decision to that effect was conclusive; "that there is a permitted range of honest judgment" as to measures to be taken in suppressing violence and that such measures "conceived in good faith in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace" (287 U.S. at 399-400), but said:

"It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. * * * There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity.

"* * * Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection, or tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. In the place of judicial procedure, available in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal. In particular, to the process of the federal court actually and properly engaged in examining and protecting an asserted federal right, the Governor interposed the obstruction of his will, subverting the federal authority. The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court" (387 U.S. at 400-2).

Finally, in affirming the authority of the district court to enjoin a State governor in such a situation, the Supreme Court said:

"If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case. Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded and the adequacy of the remedy at law. If the court finds that the limits of executive authority have been transgressed, and that in view of the character of the injury equitable relief by injunction is essential in order to afford the protection to which the injured party is entitled, it can not be said that the judicial power is fettered because the injury is attributable to a military order.

"In the present case, the findings of fact made by the District Court are fully supported by the evidence. They leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful. Complainants had a constitutional right to resort to the federal court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared. It is also plain that there was no adequate remedy at law for the redress of the injury and, as the evidence showed that the Governor's orders were an invasion under color of state law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction" (387 U.S. at 403-4).

In his work "The Presidents and Civil Disorder", Rich concluded that Sterling v. Constantin, supra might apply not only against a governor of a state but also as against a President who called out troops where there was in fact no such disorder as required the use of armed force. Rich says (p. 197-198):

10

> "In spite of the generally accepted doctrine of conclusiveness, there is ground for the argument that the president's decision as to the necessity of troops is not necessarily final. In the Pullman strike at least three governors, in addition to Altgeld, protested against Cleveland's policy, but none of them took the matter to the courts. In numerous cases prior to 1932, the judiciary had upheld the finality of a governor's decision to use armed force, but in that year the Supreme Court wrought a decided change in the picture. In Sterling v. Constantin the Court, speaking through Chief Justice Hughes, placed very definite restrictions on the military activities of a governor in instances where there was in fact no disorder or apparent necessity for armed force. State governors, however, have made bold use of their military prerogatives, whereas the sobering presidential office has caused the domestic military power to be handled more seriously. Against a president who was not so affected by his office, the restrictions of Sterling v. Constantin might be applied."

The ruling in the Sterling case has been followed in the lower federal courts, and in every state court where the question has arisen in situations involving military interference with property interests under conditions of peace and quiet. Thus, the courts have enjoined the use of military force to curtail oil and gas production (Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P. (2d) 582), or to influence a primary election (Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn.)), or to remove highway commissioners (Heeren v. Calus, 178 S.C. 381, 183 S.E. 13; Miller v. Rivers, 31 F. Supp. 540 (M.D. Ga.), reversed as moot, 112 F. (2d) 439). Similarly,

they have struck down as void action taken pursuant to illegal military coercion, as where martial law was employed to force a city council to enact an unconstitutional segregation ordinance. Allen v. Oklahoma City, 175 Okla. 421, 52 P. (2d) 1054.

The test of the propriety of the use of military force, as these cases show, is whether there has been actual violence or an imminent threat thereof, endangering the public safety which requires the use of troops for its suppression and for the restoration of order. If there is no such violence, actual or imminently threatened, then the use of military force will be enjoined. Similarly, where the means employed bear no reasonable relation to the end sought, as where measures of martial law were used to close a factory in order to settle a strike, the property owner is entitled to injunctive relief. Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn.). Where, however, there is violence in fact, the courts will not interfere (Cox v. McNutt, 12 F. Supp. 355 (S.D. Ind.)), even though the court may disagree with the executive as to the wisdom of the measures employed. Powers Mercantile Co. v. Olson, 7 F.Supp. 865 (D. Minn.).

The basis of these decisions is that an executive proclamation of emergency or of martial law will not legalize the use of military force when in fact there is no violence or disorder to occasion the use of such force. The executive's fiat does not shut off judicial review; a bogus martial law situation affords no justification for military interference. The contrary contention--that an executive declaration of martial law has "the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government,"--was made in Sterling v. Constantin, supra, only to be decisively rejected. See 287 U.S. at 397-398, 402-403.

None of these decisions involved the President, who concededly has a wide range of discretion under the Constitution and under 10 U.S.C. (1952 Ed. Supp. IV) 332 and 333 to enforce and execute the Federal laws. But, as we know, not even the President is above the law.

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579(1952), the Steel Seizure case, the Court did not attempt to enjoin the President directly, but its decree was issued and upheld against the Secretary of Commerce to restrain him from carrying out the President's order which was held to be beyond the latter's authority. Although Sterling v. Constantin was not cited in the majority opinion, significantly Chief Justice Vinson attempted to distinguish this landmark authority in his dissent as follows (343 U.S. at 709):

"There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency. Compare Sterling v. Constantin * * *."

True, there have been a few instances in our history where a President has either ignored or defied a federal decree. There is the legend that President Jackson declared of the Supreme Court's decision in Worcester v. Georgia, 31 U.S. 515 (1832), "Well, John Marshall has made his decision, now let him enforce it."[5] During the Civil War, a writ of habeas corpus issued by Chief Justice Taney was defied by the military authorities, acting upon President Lincoln's express orders.[6] These instances of judicial defiance are understandably rare in our history. If the President himself did not recognize the law of the land as announced by the Supreme Court, he could scarcely expect the people to abide by it.

For this reason, theoretical discussion as to the extent of the President's broad power under the Constitution to "take care that the laws be faithfully executed" would not be too fruitful here. Nor is it helpful to suggest that in the Steel Seizure case the President attempted to usurp legislative authority, whereas here in Little Rock, he would be acting under the statutory authority of 10 U.S.C. (1952 Supp. IV) Sections 332-333. In either event, a serious question respecting the validity of these statutes would be presented if it were claimed that Presidential action under them was not reviewable by the Federal Court regardless of how arbitrary the action was alleged to be. (See, Sterling v. Constantin, supra, 287 U.S. at 399-401; Fairman, "Martial Rule in the Light of Sterling v. Constantin", 19 Corn. L.Q. 20, 33-34 (1933)).

##FN5

5/ Corwin, "The President, Office and Powers" (1957 Ed.) 64.
6/ Schwartz, "American Constitutional Law" (1955 Ed.) 146.

##FN6

Another question that may be presented is whether the disorder is of the kind which requires protection by state authorities rather than by federal authorities. (See, United States v. Williams, 341 U.S. 70 (1951)); Collins v. Hardyman, 341 U.S. 651 (1951); United States v. Cruikshank, 92 U.S. 542 (1875); Hodges v. United States, 203 U.S. 1 (1906)). Obviously, not every assault, however violent, not every threat, however strong, is a subject for Federal intervention. There is a category of constitutional rights which the Federal government may properly protect from interference either by a state or by individuals; and there are other rights safeguarded by state constitutions and laws which may be vindicated only in state courts by state officials. Sometimes, it is true these boundaries are not marked out plainly in black and white. The applicable law may, as in many other areas, hinge on the specific facts of the case. The distinction was well made in Collins v. Hardyman, supra.

In that case, a suit was brought to recover damages under 8 U.S.C., Sec. 47(3). Plaintiffs were members of a political club seeking to hold a meeting. The defendants proceeded to plaintiff's meeting place, and by threats and violence broke up the meeting. In sustaining a judgment dismissing the case, Mr. Justice Jackson, speaking for the Court said (341 U.S. at 661-662):

> "What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by the law, or their equality of privileges and immunities under the law. There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it. The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs'

rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights under the laws and to protection of the laws remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob.

"We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws. Indeed, the post Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so. * * * But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens. California courts are open to plaintiffs and its laws offer redress for their injury and vindication for their rights."

Unquestionably, in Little Rock the situation was one which previously called for Federal intervention. It may be claimed by the state that the situation has now changed and can be brought under control through state enforcement machinery. Absent further violence or facts supporting a threat of renewal, a Federal court may feel justified in withdrawing the original order. If some isolated violence ensued, it would not necessarily mean that Federal intervention was promptly required. The state authorities might be able to cope with it, and it may be argued, at least should have the opportunity to do so. If the matter got out of hand, then a determination could be made whether Federal troops were again required. Some innocent persons may be hurt in the meantime. But that is the risk we must

run it may be argued, where the Constitution provides for dual sovereignty. Moreover, if the state fails in its duty, it makes out a better case for resumption of Federal intervention--one which is more likely to stand up upon appeal.

These considerations would seem to suggest that if the Federal court made a finding that the troops are not needed to maintain order and restrain federal troops, even though the President's information is to the contrary, we should obey the Court's order, and if we think it erroneous, apply for a stay pending appeal. Any disorder following denial of a stay would constitute the basis for renewal of the application for a stay.

Consideration should be given to making as good a record before the Federal District Court, as might conceivably be made to the President. It will not be of any aid to the Federal Government on appeal from an adverse judgment, if essential facts that are disclosed to the President are withheld from the Court. As we know, an appellate court generally will consider only what is in the record. Although the President may have a thorough factual analysis of the situation indicating the "high probability of serious disorder if the troops were removed," we can scarcely expect the Federal Court to uphold his action in maintaining the troops, unless an equally compelling factual analysis is presented to the Court. In this connection, we have not overlooked the difficulty of making out a case for keeping the troops in Little Rock without disclosure of information given in confidence and without accompanying embarrassment to citizens cooperating with the Federal Government. This must be weighed against the other alternative of continued disorder and denial of constitutional rights to the school children of Little Rock.

These considerations also suggest the inadvisability of removing all the troops during the summer. Once removed, it would make it easier for the District Court to conclude that they are not required when the fall session begins. Moreover, once the troops are removed, difficult problems may arise whether a new Executive order is necessary and whether new proceedings to enforce such order must be instituted if disorder is resumed. These problems may be avoided by maintainir a token force throughout the summer.

13 Conclusion

Summarizing our study of the problem under the hypothetical facts furnished, it is submitted:

1. The President has authority under 10 U.S.C. (1952 Supp. IV) Section 332 and 333 to retain troops in Little Rock in the case of disorder or anticipated disorder, in the absence of a specific court order which needs to be supported. In view of what appears to be fairly clear statutory authority, no attempt has been to explore to what extent the President could exercise constitutional powers for this purpose if statutory authority were lacking.

2. In event that the court, in a suit in which officials of the United States were parties, made a finding of fact that the troops are not needed to maintain order, we would have a different situation. Conceivably, with an abundance of evidence to the contrary in his possession, the President may feel that he acted properly in maintaining the troops; that the decision as to the need for them is one for the President to make under the Federal statutes; and that this decision is binding in any judicial proceeding.

Sterling v. Constantin, 287 U.S. 378 suggests that while the Executive has the initial discretion in sending the troops to suppress disorder, broad as that discretion may be, it is subject to judicial review. If the court finds as a fact that there was no such exigency as required the calling of military forces by the Executive, and if there is evidence fully supporting this finding, the Supreme Court may uphold the judgment of the District Court.

It is true that in Sterling v. Constantin, it was a Governor of a state, not the President, that was enjoined, and that the Governor had no statutes of Congress to rely on from which it could be urged that Congress intended to preclude judicial review. In my opinion, however, the broad principles laid down in Sterling v. Constantin may possibly be said to apply as well to similar Presidential action which overstepped the authority vested in the Chief Executive. The Steel Seizure decisions also make plain that high officials acting directly pursuant to the President's instructions are not above the law when they exceed their lawful authority.

If the statutes are to be construed as foreclosing judicial review where such important constitutional rights are involved as affect the states under the Tenth Amendment, and persons and property under the Fifth Amendment, grave constitutional questions may be presented, which should if at all possible, be avoided.

3. There are vital questions of policy also involved. These are: (a) Let us take the extreme case first in which the court has directed the troops to be withdrawn. Possibly, the President may, as has been done on rare occasions in our history, disregard the Court's decision and keep the troops in Little Rock. It seems to me that any such flouting of a federal court decree would be a bad precedent to establish for a law-abiding nation. It should be ruled out.

Instead, application for a stay of the injunction should be made pending appeal, and if denied, application should forthwith be made to the Court of Appeals and if necessary, to the Supreme Court. If again denied, although this is unlikely in view of Little Rock's past history, I see no alternative but to withdraw the troops. If disorder re-occurs and state enforcement agencies are unable to cope with it, an application for a stay should be renewed in order to permit the troops to return.

While this course of action may result in injury to some innocent persons, and may also have severe public relations reactions so far as the Administration is concerned, in the long run this would appear to be the sound legal and commonsense course of action, and the one most likely to succeed from a broad public interest standpoint in the future. (b) If the Court withdraws the existing order, the President may keep the troops in Little Rock until he is assured that resumption of disorder is unlikely. In this event state officials or other aggrieved citizens of the state may sue to enjoin the troops.

In any suit for injunction to direct the withdrawal of troops, the Attorney General will be faced with a difficult dilemma. If Government witnesses are called to testify of possible disorder, they may either refuse to do so out of fear of reprisal, or if compelled to testify turn into hostile witnesses. Moreover, these witnesses have probably given their testimony to the FBI under a strict promise of secrecy. Dis-

closure of their testimony may dry up future sources of information. On the other hand, if their testimony is not produced, the Government's case may be lost.

Careful consideration should therefore be given whether a sound enough case can be established from the testimony of FBI agents and any other persons who voluntarily wish to testify. Whether others should be called who may be reluctant or hostile will unquestionably be a matter for determination by the United States Attorney in Little Rock after conference with appropriate officials of the Department.

These risks and other considerations make clear the need of maintaining the status quo under which the United States presently has in its favor an order affirmed by a court of appeals, sustaining the right of the President to call out the troops. Any weakening of this position, as by calling out all the troops during the summer, which may later require a new Executive order, new proceedings to enforce it and a possible adverse court decision from a judge hostile to integration would, in my opinion, be most unwise.

If we were dealing with a normal situation, we could rely upon the State to do effectively what customarily lies within its competence--namely to enforce law and order and suppress domestic violence. For the Federal Government generally has a duty to refrain from doing those things which the states have the authority, the will and the ability to do. Unfortunately, we have no such assurance here. Based upon recent newspaper and magazine reports, the Governor of the State apparently has not abandoned his efforts to thwart the Supreme Court's decision requiring an end to segregation in the public schools. On the contrary, it appears that he is prepared to continue to exploit mob rule for his personal interest and political ambition. In such a case the Federal Government, acting under the President's orders, has the responsibility to perform, within the limits of its constitutional authority, those public functions, which otherwise because of the State's failure to act, would obstruct the execution of the laws of the United States or impede the course of justice under those laws.