

# Michigan Law Review

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Volume 56 | Issue 2

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1957

## Constitutional Law - Executive Powers - Use of Troops to Enforce Federal Laws

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### Recommended Citation

Robert H. Elliott Jr., S.Ed. & Richard I. Singer S.Ed., *Constitutional Law - Executive Powers - Use of Troops to Enforce Federal Laws*, 56 MICH. L. REV. 249 (1957).

Available at: <https://repository.law.umich.edu/mlr/vol56/iss2/5>

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## COMMENTS

CONSTITUTIONAL LAW—EXECUTIVE POWERS—USE OF TROOPS TO ENFORCE FEDERAL LAWS—The recent use of federal troops in Little Rock, Arkansas to enforce the order of a federal district court re-

quiring school integration has occasioned widespread controversy throughout the nation. It is the purpose of this comment to examine the constitutionality of such action and to consider its broader implications with respect to federal-state and congressional-executive relationships.

## I. *Preliminary Considerations*

### A. *Factual Background*

The order of the federal district court requiring integration in Little Rock's high school culminated in the use of troops by the President in the face of state opposition. From the first, Governor Faubus contended that the integration of Central High School would lead to rioting and bloodshed. Therefore, in order to preserve the safety of the people of Arkansas he ordered the National Guard to prevent integration and thus to deny, at least temporarily, the right of the Negro children to equal protection of the laws of the state. His action brought into issue the conflict of state and federal power.

On September 20, 1957, Judge Davies held a hearing on an application for an injunction ordering Governor Faubus, General Clinger and Colonel Johnson to cease using National Guard troops to prevent integration at Central High School or otherwise interfering with the Negro children's constitutional right to attend the school. Attorneys for the governor, in their brief, challenged the right of a federal court to examine the judgment of a state governor in matters relating to public peace within the state.<sup>1</sup> At the hearing the district court took evidence on the question of possible violence that might have occurred if integration had proceeded as originally scheduled. In its opinion granting the injunction<sup>2</sup> the court recognized that a governor has a broad area of discretion in matters relating to public welfare and safety within his state. The court, however, found as a fact that the governor was acting outside his area of authority. This finding relied at least in part on evidence that at the time of the governor's decision there had been no actual violence and on indications that "... the Arkansas National Guard, which is composed of 10,500 men, could have

<sup>1</sup> N.Y. TIMES, Sept. 21, 1957, p. 10.

<sup>2</sup> The full text of the court's findings of fact and injunction order are set out at p. 56, N.Y. TIMES, Sept. 22, 1957.

maintained peace and order without preventing the eligible colored students from attending Central High School."

### B. *The Governor's Power*

It is clear that in certain circumstances the governor of a state has the right to protect the safety and welfare of the people of his state at the expense of rights guaranteed by the Fourteenth Amendment. In *Moyer v. Peabody*<sup>3</sup> the Governor of Colorado imprisoned a labor leader for two and one-half months without charge during an insurrection growing out of a labor dispute. Justice Holmes, speaking for the Supreme Court, held that the imprisoned man could not recover damages for the imprisonment since, "Public danger warrants the substitution of executive process for judicial process."<sup>4</sup> On the other hand, it is equally clear that a state governor's judgment as to when he is justified in taking such steps is not final, but rather is subject to review by a federal court. In *Sterling v. Constantin*<sup>5</sup> a Texas state commission placed limitations on the production of oil from wells within the state. The oil producers obtained an injunction from a federal district court against the enforcement of this limitation on the ground that it was unreasonably low and thus constituted a taking of property without due process of law. The Governor of Texas contended that if the limitations were not enforced mobs would take over and enforce them. Therefore, he declared certain counties in revolt and then used National Guard troops to enforce the limitations on production which had been previously enjoined by the federal court. In upholding an injunction against the governor's use of troops to enforce the limitation the Supreme Court refused to allow these economic rights protected by the Fourteenth Amendment to be overridden by "executive fiat" and held that the allowable limit of the governor's discretion was a judicial question. The facts in the *Sterling* case are strikingly similar to those in the Little Rock incident. In both instances (1) no actual violence had occurred, and (2) the result of the governor's action was to accomplish what a federal court had already proscribed. Since the Court in recent years has tended to give greater protection to civil rights than to economic rights the discretionary power of a state governor to interfere with civil rights might receive even closer scrutiny than

<sup>3</sup> 212 U.S. 78 (1909).

<sup>4</sup> *Id.* at 85.

<sup>5</sup> 287 U.S. 378 (1932).

the *Sterling* case, which involved only economic rights, would indicate. Thus this decision would appear to provide precedent of considerable value in resolving the recent dispute.

If the rights guaranteed by the Fourteenth Amendment are to have any substance they cannot be subject to uncontrolled power in state authorities to suspend them. When the state police power comes into conflict with federal enforcement of the Fourteenth Amendment the determination as to which power controls must be made in the federal courts on the basis of the facts of each incident. Frustration of the court's determination raises the problem of the power of the Executive to use federal troops to enforce the decree.

### C. *Settings for the Exercise of Presidential Power*

Implicit in the generally recognized doctrine that the federal government is one of delegated powers which derive their vitality only from the Constitution is the rejection of any theory of "inherent powers" in the governmental branches.<sup>6</sup> But since the Constitution does not speak specifically on every question which arises under its express provisions, the legality of a particular action often turns upon a finding by the Supreme Court of a further power to be implied from express authorizations.

Under Hohfeldian analysis, the whole of the *active* powers of government have been divided between the President and Congress. It then follows, as indicated by Justice Jackson's classification in the *Steel Seizure* case,<sup>7</sup> that presidential action in a given area will of necessity fall into one of three categories: (1) where Congress has authorized the President to act in an area of concurrent jurisdiction; (2) where the President decides to act alone, without the benefit of expressed concurring authorization from Congress; and (3) where the President acts contrary to the expressed will of Congress in an area where both are constitutionally authorized to act. Of necessity, the quantum of presidential power must diminish as we descend from the first context to the third.

<sup>6</sup> See dictum in *Ex parte Quirin*, 317 U.S. 1 at 25 (1942): "Congress and the President, like the courts, possess no power not derived from the Constitution." But see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), where the Court chose to base its decision on a finding of an "inherent power" in the President to conduct foreign affairs. The *Curtiss-Wright* case is criticized by Kauper, "The *Steel Seizure* Case: Congress, the President and the Supreme Court," 51 MICH. L. REV. 141 (1952), and the observation is made there that the "inherent power" doctrine finds little support in later cases.

<sup>7</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 at 634 (1952).

These three situations will be discussed in this comment in the following order: (1) where the President is acting solely under authorization of powers implicit in the office of the chief executive; (2) where Congress has expressed a contrary will; (3) where Congress has indicated approval of the executive action.

## II. *Implied Power of the President as Chief Executive*<sup>8</sup>

Article II, section 3 of the Constitution imposes upon the President the duty to "take Care that the Laws be faithfully executed. . . ."<sup>9</sup> This obligation necessarily carries with it the power of effectuation.<sup>10</sup>

The breadth of powers inuring to the President by virtue of Article II, section 3, has, however, never been completely delineated. This lack of adequate definition is largely due to the existence of legislation covering presidential action that would otherwise appear to rest directly in Article II.<sup>11</sup> Certain fundamental notions, however, as to the extent of Article II, section 3, powers have been clarified by the courts. (1) The power to execute the laws of the nation contemplates not only the enforcement of acts of Congress or treaties, but includes "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of government under the Constitution."<sup>12</sup> Execution of a federal court order is obviously within the purview of such an interpretation.<sup>13</sup> (2) The presidential power to execute the laws does not depend upon statutory authorization or implementation<sup>14</sup> by Congress. (3) The President has wide discretion as to the manner in which he shall carry out

<sup>8</sup> The investigation here is primarily concerned with the scope of the President's implied powers where Congress has not yet expressed its will.

<sup>9</sup> U.S. CONST., art. II, §3, referred to hereinafter as the "duty-to-execute" clause.

<sup>10</sup> See *Myers v. United States*, 272 U.S. 52 at 117 (1926), where the Court said: "The vesting of the executive power in the President was essentially a grant of the power to execute the laws."

<sup>11</sup> The President since 1792 has been authorized by statute to use troops to enforce the law in situations where normal enforcement procedures are not adequate; therefore there has not been much opportunity to challenge his capacity to act independently in such circumstances.

<sup>12</sup> In *re Neagle*, 135 U.S. 1 at 64 (1890). The statement quoted from the *Neagle* case was made in the form of a rhetorical question. The answer of the court was obviously "yes."

<sup>13</sup> See part IV-B, *infra*, for fuller discussion of this problem in a statutory context.

<sup>14</sup> In *re Neagle*, 135 U.S. 1 (1899), which held that under the "duty to execute" clause the President had power without aid of statute to provide protection for federal judges. See also Chief Justice Vinson's dissent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

his duty to execute the laws of the nation, even to the use of force in appropriation situations.<sup>15</sup>

Thus, if we assume the existence of a valid and subsisting federal court order, and further assume that Congress has in no way expressed itself on the subject of executive enforcement of judicial decrees, then the conclusion which must be drawn from these broad principles is that the President, at his discretion, has the constitutional power to use troops to compel compliance with the terms of such a decree. This authority arises directly from the "duty to execute" clause as a necessary concomitant of the obligation imposed by it upon the Executive.<sup>16</sup>

### III. *Power of the President Acting Contrary to Congress' Expressed Will\**

The broad grants of the "executive"<sup>17</sup> powers to the President and the "necessary and proper"<sup>18</sup> clause powers to the Congress must be rationalized in deciding whether Congress could lawfully impose restraints upon the President's use of troops to enforce the law. In order to consider the problem in more specific terms, suppose a statute prohibiting the use of military force to execute Fourteenth Amendment rights. The constitutionality of such a statute would turn upon: (1) a balancing of congressional powers

<sup>15</sup> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." In re Debs, 158 U.S. 564 at 582 (1895). See also Ex parte Siebold, 100 U.S. 371 at 395 (1879), where the Court said: "We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."

<sup>16</sup> See CORWIN, THE PRESIDENT: OFFICE AND POWERS 165 (1948). See also CLEVELAND, THE INDEPENDENCE OF THE EXECUTIVE 14, 15 (1913): "Therefore we find that the Constitution supplements a recital of the specific powers and duties of the President with this impressive and conclusive additional requirement: 'He shall take care that the laws be faithfully executed.' This I conceive to be equivalent to a grant of all the power necessary to the performance of his duty in the faithful execution of the laws."

\* Since the writers have concluded that Congress has authorized the use of troops, this section is presented in more summary form than would otherwise be the case. It is intended only to suggest possible approaches should Congress consider abolishing the power of the President to use troops to enforce Fourteenth Amendment rights.—Ed.

<sup>17</sup> "The executive Power shall be vested in a President of the United States of America." U.S. CONST., art. II, §1; "he shall take Care that the Laws be faithfully executed," id., §3.

<sup>18</sup> "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST., art. I, §8.

versus executive powers, and (2) a consideration of the limitations imposed by the Fourteenth Amendment on congressional powers.

### *A. Interaction of Executive and Legislative Powers*

The "separation of powers"<sup>19</sup> doctrine is the judicial standard for resolving legislative-executive disputes.<sup>20</sup> It requires legislative supremacy on legislative matters and executive supremacy on executive matters.<sup>21</sup> The doctrine is more easily stated than applied, however. The line between legislative and executive matters is not always clear. In areas of doubt a finding that a particular act is primarily legislative or primarily executive is more likely to be a policy determination as to which branch of the government should dominate rather than the result of a clear constitutional mandate.

The question which must be resolved is who shall determine the manner in which the President shall enforce Fourteenth Amendment rights. While enforcement of the law is undoubtedly an executive function,<sup>22</sup> at least arguably regulation of the manner in which the President is to carry out this duty when essential to some overall legislative policy is a legitimate legislative end.<sup>23</sup> As such it can be accomplished in the exercise of congressional Fourteenth Amendment powers "to enforce, by appropriate legislation, the provisions of this article."<sup>24</sup>

<sup>19</sup> Under the Constitution, three separate and distinct departments of the government are established. To each is delegated various powers for that department to carry out. It is essential to an orderly execution of these governmental duties and functions that each department refrain from undertaking the powers delegated to the other two. This notion stated simply is the "Separation of Powers" doctrine, which reiterates the principle that the powers delegated to one governmental branch are separate from those given the others, and that each department is restricted to the exercise of its own powers. See *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Field v. Clark*, 143 U.S. 649 (1891).

<sup>20</sup> See *Myers v. United States*, 272 U.S. 52 (1926); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In both cases the "separation of powers" doctrine formed the mainstay of the Court's opinion in condemning infringements by one branch of the government upon the powers of the other branch.

<sup>21</sup> But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the Court was in disagreement as to whether absolute separation of powers was required by the Constitution or merely supremacy of power. See also Kauper, "The Steel Seizure Case: Congress, the President and the Supreme Court," 51 MICH. L. REV. 141 (1952), for an analysis of the opinions of the members of the Court.

<sup>22</sup> Cf. *Myers v. United States*, 272 U.S. 52 (1926).

<sup>23</sup> But see 5 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 104-105 (1897), where President Fillmore argued that any restraint upon the President's ability to employ the armed forces to enforce the law was unconstitutional.

<sup>24</sup> U.S. CONST., AMEND. XIV, §5. See *Virginia v. Rives*, 100 U.S. 313 at 318 (1879), where the Court said: "Congress, by virtue of the fifth section of the Fourteenth Amendment,



The problem must be considered in two separate phases: (1) at the statutory level, and (2) at the constitutional level. If the prohibition on the use of troops to enforce Fourteenth Amendment rights applies only to statutory programs enacted by Congress, then it can be argued that Congress, having the power to withhold these statutory rights completely, should be able to limit their scope in whatever manner it desires, and that a limitation on the method by which they may be enforced is simply a limitation on the scope of the right granted. In certain instances congressional power to regulate the enforcement of its statutory program may even be considered essential to securing its overall success. At the constitutional level the argument is weaker. Fourteenth Amendment rights exist independently of congressional implementation;<sup>25</sup> therefore there is no basis for arguing that it should be able to define their scope completely. But the interaction between statutory Fourteenth Amendment rights and their constitutional counterparts is obvious. If Congress needs the power to regulate enforcement of its statutory civil rights program to make it successful, then it would seem also to need power to regulate the enforcement of the constitutional rights on which it rests.

The weak points of this analysis are of course the underlying assumptions that constitutional interpretation is a matter of strict logic, and that where there is a need there is a power. It may be that Congress has not the power to effectuate its programs at executive expense, and the Supreme Court may well distinguish between the laying down of a substantive legislative policy and control of the agencies which are to carry it out. The really basic question, at both the statutory and constitutional levels, in determining whether our hypothetical statute is constitutional, appears to be whether the limitation on enforcement of Fourteenth Amendment rights imposed by our statute forms a substantive part of a congressional policy laid down in the exercise of section 5 powers, or whether it is merely an attempted usurpation of executive pow-

may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion." The Court, however, was considering state-federal relationships rather than the interaction of federal powers.

<sup>25</sup> For example, "Equal Protection" rights do not require congressional implementation. See *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), which is but one of many cases where the Supreme Court without aid of statute found that state action of a particular nature constituted a denial of equal protection.

ers.<sup>26</sup> If part of a legitimate congressional program, then a choice must be made between the carrying out of a valid legislative policy and protection of the integrity of the constitutional power vested in the President. If it is usurpation of executive power, such a statute would seem to be unconstitutional.<sup>27</sup>

*B. Limitations Imposed on the Powers of Congress  
by the Fourteenth Amendment<sup>28</sup>*

The Fourteenth Amendment does not operate as a direct limitation upon federal powers.<sup>29</sup> We must determine at the outset, therefore, what restrictions, if any, it imposes upon the national government. It appears that this particular problem has never been considered by the courts. Its solution requires a reconciliation of the rights insured to the people under the Fourteenth Amendment with the constitutional powers of Congress.

It should be initially recognized that Fourteenth Amendment rights do not exist in any absolute sense.<sup>30</sup> It also seems clear that whatever the nature of the limitation imposed on federal power by the Fourteenth Amendment, Congress could act to limit Fourteenth Amendment rights in any case where a state could do so. It can hardly be contended that the Fourteenth Amendment could

<sup>26</sup> See *United States v. Klein*, 13 Wall. (80 U.S.) 128 at 145, 146 (1871), where the Court held a statute unconstitutional because it was directed toward the accomplishment of an unconstitutional end. "Undoubtedly the legislature has complete control over the organization and existence of that court [Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. . . . But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."

<sup>27</sup> See cases cited in note 20 supra. See also *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1866); *United States v. Klein*, 13 Wall. (80 U.S.) 128 (1871); *Springer v. Philippine Islands*, 277 U.S. 189 (1928), all instances where legislative invasions of executive power have been held unconstitutional.

<sup>28</sup> We are primarily concerned with the rights arising under the due process, and equal protection clauses. U.S. CONST., AMEND. XIV, §1.

<sup>29</sup> "State Action" is an essential element of a Fourteenth Amendment violation. See note 71 infra.

<sup>30</sup> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." *Breard v. Alexandria*, 341 U.S. 622 at 642 (1951).

operate to restrict congressional powers where no Fourteenth Amendment rights exist.<sup>31</sup>

It is obvious also that Congress cannot sap the Fourteenth Amendment of all vitality by rendering its enforcement impossible. The prohibitions of the Fourteenth Amendment are introduced by the phrase "No state shall. . ."<sup>32</sup> But if Congress could impose enough restrictions upon the manner in which the rights accruing under the amendment could be enforced, at some point it would lose all effectiveness as a deterrent to state action.<sup>33</sup> The practical significance of upholding such restrictions would be to allow Congress by legislative coup to contravene the Constitution.

Finally it remains to inquire on what theory such legislative enactments would be struck down and what standards would be used to test their constitutionality. As we have observed, the Fourteenth Amendment does not directly restrain the exercise of federal power. If such restraints do exist they must arise in some other manner. Three possibilities may be suggested: (1) the Fifth Amendment "due process" clause,<sup>34</sup> (2) indirect action of the Fourteenth Amendment itself,<sup>35</sup> and (3) construction of section 5 of the Fourteenth Amendment as a limitation on congressional power.<sup>36</sup> As to standards of constitutionality, if civil rights cases in other areas offer any reliable indicia as to what the Supreme Court's general approach to such a problem might be, it seems likely that whatever mechanism the Court adopts to justify its decision, federal power to defeat Fourteenth Amendment rights will be tempered by that old, yet modern Supreme Court standby, the standard of "reasonableness."<sup>37</sup>

<sup>31</sup> Although the Fourteenth Amendment normally requires the states to provide some adequate review procedure for due process questions, in the circumstances of *Moyer v. Peabody*, 212 U.S. 78 (1909), suspension of the writ of habeas corpus by the state executive was not considered a violation of the Fourteenth Amendment. In effect, a state governor was temporarily allowed to suspend a Fourteenth Amendment right.

<sup>32</sup> U.S. CONST., Amend. XIV, §1.

<sup>33</sup> To take an extreme example, if Congress were to pass a statute to the effect that the President will not enforce by any means any court order based on a denial of equal protection.

<sup>34</sup> Deprivation of the constitutional right to be protected against state action violative of the Fourteenth Amendment without due process of law.

<sup>35</sup> The Fourteenth Amendment says, "No state shall. . ." Congress cannot be allowed to accomplish what is effectively a nullification of the amendment by preventing its enforcement.

<sup>36</sup> The grant of authority to "enforce by appropriate legislation" the Fourteenth Amendment rights refutes the idea that Congress is to have the power to hamper their enforcement.

<sup>37</sup> The concept of "reasonableness" is borrowed from cases dealing with congressional power to intrude to some extent upon constitutional rights which are protected against

It is plain that a statute prohibiting the use of troops to enforce Fourteenth Amendment rights cuts down the protection afforded by these rights. The "reasonableness" of such a restriction affecting personal liberties is determined for the most part through a balancing process. The breadth of the infringement is weighed against the need for regulation in order to determine constitutionality.<sup>38</sup>

It would seem that a statute of the type hypothesized, if not part of some overall legislative program and given no other mitigating circumstances, is unconstitutional;<sup>39</sup> but it must be reiterated that there is virtually no precedent directly considering the problem of legislative authority to regulate the Executive's obligation to enforce the law or to limit the scope of Fourteenth Amendment rights, and the dangers implicit in applying ideas developed in less sensitive constitutional areas to Fourteenth Amendment cases must be kept in mind when any attempt at generalization is made.

#### IV. *Power of the President Acting With Approval of Congress*

##### A. *Legislative Basis for Use of Troops*

The proclamation which ordered rioters to cease resistance to the federal court order and the later Executive Order, which ordered troops to be used, both referred to "the Constitution and statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly Sections 332, 333 and 334 thereof. . . ."<sup>40</sup> Thus the President considered the authority of his office to be supported by both the Constitution and specific congressional legislation. It is in this situation that the President's power is strongest.

the federal government (e.g., Fifth Amendment rights). Cf. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944). Indeed, it would seem incongruous not to impose the standard of reasonableness as the nature of the barrier which the Fourteenth Amendment presents to federal power, since this is the extent of the protection which the amendment offers against state power. Cf. *Moyer v. Peabody*, 212 U.S. 78 (1909); *Breard v. Alexandria*, 341 U.S. 622 (1950).

<sup>38</sup> See cases cited in note 37 *supra*. See also Hastie, "Judicial Method in Due Process Inquiry," *GOVERNMENT UNDER LAW* (Harvard University Law School) p. 326 (1956).

<sup>39</sup> As an example of a situation in which our hypothetical statute would probably be held constitutional; suppose that the national government was short of funds, and further suppose that the statute was passed in order to make best use of the troops available, the thought being that equal protection cases generally involve a small number of people and that the use of troops should be forbidden, because of expense, except in situations approaching insurrection. For a situation in which congressional action would clearly be unconstitutional, see note 33 *supra*.

<sup>40</sup> *N.Y. TIMES*, Sept. 24, 1957, p. 1; *id.*, Sept. 25, 1957, p. 16.

Prior to the enactment of the Civil Rights Act of 1957 four sections of the United States Code authorized the use of troops by the President: Title 10 U.S.C. (Supp. IV, 1957) §§331, 332, 333 and Title 42 U.S.C. (1952) §1993. The effect of each upon the recent controversy will be considered separately.

Section 332 of Title 10,<sup>41</sup> on which the President relied, stems directly from the first statute authorizing federal use of the state militia.<sup>42</sup> This act, passed in 1792, required that a federal judge first notify the President of obstruction to enforcement of the laws and that, before employing the troops, the President issue a proclamation ordering the insurrectionists to conform to the laws. The requirement of notice by a federal judge was stricken from the law in 1795,<sup>43</sup> but the requirement of a warning proclamation still exists in Title 10, section 334<sup>44</sup> and gave rise to the proclamation by President Eisenhower on September 24, 1957. In 1807 Congress granted to the President the right to use federal troops to prevent obstruction of the laws in any circumstance where the militia could be used.<sup>45</sup> As recently as 1956 Congress with only slight modifications reenacted the essential provisions of the Acts of 1792 and 1807 as section 332 of Title 10.<sup>46</sup>

Section 333 of Title 10<sup>47</sup> was enacted as part of a statute passed

41 "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." 10 U.S.C. (Supp. IV, 1957) §332.

42 Act of May 2, 1792, 1 Stat. 264, §2. It was under this statute that troops were used to put down the Whiskey Rebellion.

43 Act of Feb. 28, 1795, 1 Stat. 424, §2.

44 "Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." 10 U.S.C. (Supp. IV, 1957) §334.

45 Act of March 3, 1807, 2 Stat. 443.

46 70A Stat. 15, 10 U.S.C. (Supp. IV, 1957) §332.

47 "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."

in 1871 implementing the Fourteenth Amendment.<sup>48</sup> This section obviously covers much the same ground as section 332 but allows the use of troops in the event that a state does not protect the rights, privileges and immunities associated with national citizenship or the equal protection of the laws guaranteed by the Fourteenth Amendment to all persons. It defines a denial of equal protection so as to include the failure, refusal or inability of the state to give equal protection to its citizens. The constitutionality of such a definition is considered in the later discussion of "state action."

Prior to the order that federal troops be used, Governor Faubus suggested on at least one occasion that federal troops could not be used in Little Rock except at his request.<sup>49</sup> This opinion apparently was based on another section of Title 10 of the United States Code authorizing the President to use troops—section 331.<sup>50</sup> This section also originated in the Militia Act of 1792.<sup>51</sup> It is aimed at the suppression of revolt against a state government and requires a request on the part of the legislature or governor of a state before the President is empowered to act. It obviously is limited only to this situation and is not a limitation on the language of the other sections of Title 10 allowing the President to use federal troops under other circumstances.

Section 1993 of Title 42<sup>52</sup> was first enacted as a part of the original civil rights legislation which followed the close of the Civil War and allowed the President to use troops to enforce the provisions of that bill. Senator Russell of Georgia and several other Southern Senators pointed out that since Part III of the Civil Rights Act of 1957 was phrased in terms of an amendment to the United States Code section conferring jurisdiction on federal dis-

<sup>48</sup> Act of April 20, 1871, 17 Stat. 13.

<sup>49</sup> N.Y. TIMES, Sept. 24, 1957, p. 1.

<sup>50</sup> "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

<sup>51</sup> Act of May 2, 1792, 1 Stat. 264, §1.

<sup>52</sup> "It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under sections 1981-1983 or 1985-1992 of this title, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of sections 1981-1983 and 1985-1994 of this title." The sections alluded to by this statute set up, among other things, civil damage actions for invasions of civil rights.

strict courts for cases arising under the Civil Rights Act of 1871, the President would have specific authorization, under section 1993, to use troops to enforce the proposed Civil Rights Act of 1957—a result which they considered undesirable. As a concession to the Southern Senators and in an effort to clarify debate on the bill, the Senate unanimously amended the bill on the floor so as to repeal section 1993.<sup>53</sup>

It could be argued that the intent of Congress in repealing section 1993 was to remove the President's power to use troops in any matters involving civil rights. During the discussion on the floor of the Senate, however, it was pointed out that there were other statutes which would allow the President to use force in the event of "wholesale resistance" to the laws.<sup>54</sup> Senator Russell recognized this but insisted that the enforcement of civil rights should be on the same basis as enforcement of all other laws.<sup>55</sup> Senator Russell's language makes it fairly clear that Congress did not intend to affect other Code sections dealing with the use of troops by repealing section 1993.

In addition to various statutes lending positive support to the President's action, lay writers<sup>56</sup> have cited the present Title 18, section 1385 of the United States Code<sup>57</sup> as expressly prohibiting the use of troops at Little Rock. This statute, which by its terms prevents the use of troops as a posse comitatus,<sup>58</sup> is the result of the historical requirement that the President issue a proclamation

<sup>53</sup> Civil Rights Act of 1957, §122, P.L. 85-315, Sept. 9, 1957.

<sup>54</sup> During the floor debates Senator Clark of Pennsylvania said, "Under article 1, section 3 of the Constitution, the President of the United States is required to see to the faithful enforcement of the laws. Since 1795 the President has had full power to use the military forces of the United States to execute the laws if wholesale resistance is encountered. . . .

"So I shall support the pending amendment, knowing full well that after the amendment is agreed to, the President will still have, as he has always had, adequate authority to enforce the laws of the United States." 103 CONG. REC. 11,129 (July 22, 1957).

<sup>55</sup> Senator Russell of Georgia: "There is a vast difference between the employment of troops under a specific statute to carry out a specific judgment of a court, and the general powers of the President of the United States to quell insurrection within this land." 103 CONG. REC. 11,134 (July 22, 1957).

<sup>56</sup> See Lawrence, U.S. NEWS AND WORLD REPORT, Oct. 11, 1957, p. 144.

<sup>57</sup> "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 not more than \$10,000 or imprisoned not more than two years, or both. This section does not apply to Alaska." 18 U.S.C. (Supp. IV, 1957) §1385.

<sup>58</sup> "Posse comitatus" is a term of art derived from a common law rule which gave a sheriff the right to enlist the aid of all able-bodied men over the age of fifteen in carrying out his duties. 16 OAG 162 (1878); 17 OAG 333 (1882).

prior to using the troops. President Fillmore attempted, without success, to get the proclamation requirement repealed because notice of the arrival of troops rendered them ineffective in making arrests.<sup>59</sup> Later, Attorney General Cushing solved this problem by having a local federal marshal summon the troops to act as a posse comitatus.<sup>60</sup> The effect of section 1385, Title 18 is to prevent this evasion of the proclamation requirement.<sup>61</sup> The use of United States troops under orders from the President to enforce a federal court order can hardly fall within the term "posse comitatus." Even if the posse comitatus were to comprehend such a situation, the statute further allows the use of troops even as a posse where Congress or the Constitution specifically authorize it. Sections 332 and 333 would seem to constitute such an authorization.<sup>62</sup>

This summarizes the possible statutory justification for the President's action: Title 42, section 1993 was specifically repealed by the Civil Rights Act of 1957; Title 10, section 331 requires a request by a state governor before the President can act; but sections 332 and 333 of Title 10 are currently valid enactments of long standing which appear to support the use of the troops at Little Rock.

### B. *The Meaning of "Laws of the United States"*

Both section 332 and section 333 are aimed at obstructions to the enforcement of the "laws of the United States." Troops were used in Little Rock to prevent obstructions to the enforcement of a federal court order. Serious attack has been made on the President's use of troops at Little Rock on the ground that the phrase "laws of the United States" is not broad enough to comprehend a federal court order arising from the Fourteenth Amendment.<sup>63</sup> No direct authority on either side has been cited and the debates surrounding passage of these sections are unenlightening on this point. The case of *In re Neagle*,<sup>64</sup> however, involved the same statutory language and gives some basis for analogy. In that case Neagle was assigned, on orders from the attorney general, to guard Justice Field from a man who had made repeated threats on the justice's life. Neagle subsequently shot and killed the man,

<sup>59</sup> 5 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 104-105 (1897).

<sup>60</sup> 6 OAG 466 (1854).

<sup>61</sup> CORWIN, THE PRESIDENT: OFFICE AND POWERS 169 (1948).

<sup>62</sup> 19 OAG 570 (1890).

<sup>63</sup> Schweppe, U.S. NEWS AND WORLD REPORT, Nov. 1, 1957, p. 121.

<sup>64</sup> 135 U.S. 1 (1890).



was held for trial on a murder charge by the state of California, and sought release from California custody by a writ of habeas corpus to the federal courts. The federal habeas corpus statute at that time provided, "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless . . . he . . . is in custody for an act done or omitted in pursuance of a law of the United States. . . ." <sup>65</sup> The Supreme Court in upholding Neagle's release held that the phrase "a law of the United States" was not limited to statutes but in this case included what was, in effect, an order of the executive branch of the government. On the authority of this case a very strong argument could be made for the proposition that since "a law of the United States" includes an executive order for the protection of a federal judge it also would include a federal court order enforcing the Fourteenth Amendment.

A somewhat more attenuated analogy might be drawn from the famous case of *Erie R. Co. v. Tompkins*. <sup>66</sup> That case involved the interpretation of section 34 of the Federal Judiciary Act of 1789 <sup>67</sup> which provided that, "the laws of the several states" were to be binding on federal courts. The earlier case of *Swift v. Tyson*, <sup>68</sup> holding that this referred only to state statutes, was overruled and the Court specifically held that the word "laws" was not limited to statutes but extended to judge-made common law as well.

In light of the *Neagle* and *Erie* cases it seems highly probable that sections 332 and 333 of Title 10 give the President the power to use troops to enforce federal court orders. Furthermore, the decision as to what constitutes an obstruction to federal law is left solely to the President under both sections. <sup>69</sup>

### C. The Requirement of State Action

Previous consideration of the statutory authority for the use of troops to enforce integration at Little Rock omitted any consideration of the constitutionality of the statutes or of particular actions under them. This complex problem must now be faced. Although this matter will be discussed in terms of the constitu-

<sup>65</sup> U.S. Rev. Stat. §753 (1875). The provision first appeared in 4 Stat. 634 (1833).

<sup>66</sup> 304 U.S. 64 (1938). The Court relied heavily on Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 (1923).

<sup>67</sup> 28 U.S.C. (1952) §1652.

<sup>68</sup> 16 Pet. (41 U.S.) 1 (1842).

<sup>69</sup> As to §332, see the express words of the statute, note 41 supra, and *Martin v. Mott*, 12 Wheat. (25 U.S.) 19 (1827). The same was held to apply to §333 in *Consolidated Coal and Coke v. Beale*, (S.D. Ohio 1922) 282 F. 934.

tionality of the statutes, the same constitutional considerations would apply to any action of the President under his implied powers as Chief Executive.

The rights protected by the Fourteenth Amendment are protected, not as against the world, but rather only against the states,<sup>70</sup> and the Supreme Court has consistently held that the Constitution requires "state action" for enforcement of the Fourteenth Amendment.<sup>71</sup> Because of this requirement, a court order enforcing integration under the Fourteenth Amendment can be directed only at the state and not at individuals. In the Little Rock situation the original court order directing integration of the schools was addressed to the state in the form of the school board.<sup>72</sup> The later injunction prohibiting the use of the National Guard by Governor Faubus to prevent integration was also clearly aimed at state action.<sup>73</sup>

The President then, however, ordered troops to enforce the court order, not against the state, but rather against individual Arkansas citizens who had formed mobs to obstruct federal law. Such a situation clearly raises a new aspect of the Fourteenth Amendment state action requirement, i.e., can a court order enforcing the Fourteenth Amendment solely against the state be constitutionally protected from obstruction by individuals? This basic question has two distinct aspects. Is state action required in the *enforcement* phase of a court order? If it is, was state action present in the mob at Little Rock? Because of the lack of precedent in this area the answers to these questions are necessarily speculative.

1. *Is State Action Required in the Enforcement Phase?*—A strong argument can be made for the proposition that, once a federal court has issued a valid order against state action, that order can be protected from obstruction against anyone. Thus the requirement of state action would be a limitation on the persons to whom the order could be directed, but not a limitation on the persons against whose action the decree could be protected. Indeed, if the requirement of state action extends not only to a court order implementing the Fourteenth Amendment but also to efforts by the federal government to enforce that order, then individuals

<sup>70</sup> U.S. CONST., Amend. XIV.

<sup>71</sup> E.g., *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>72</sup> N.Y. TIMES, Sept. 4, 1957, p. 1.

<sup>73</sup> N.Y. TIMES, Sept. 21, 1957, p. 11.

are invited to obstruct the order with impunity since no federal power can be brought to bear on them. Such a result could make certain rights under the Fourteenth Amendment mere legal fictions, existing in theory but in fact unobtainable.

If, however, the Supreme Court were to hold that the sovereignty of the federal government gives it the power to protect all federal court decrees, irrespective of the nature of the rights upon which they are founded, as a part of the general duties of the President and Congress to execute the laws, then a variety of devices might be available for enforcement of Fourteenth Amendment rights. Congress would have the power to enact legislation making it a crime to interfere with a federal court order. The courts, themselves, could directly enjoin rioters from obstructing the orders of the court and could use contempt powers to enforce these injunctions. Surely under such an analysis sections 332 and 333 of Title 10, United States Code, giving the President power to use troops in enforcing federal law, which includes federal court orders, would clearly be constitutional.

The foregoing analysis is not, however, without weakness. To the extent that rights guaranteed by the Fourteenth Amendment are protected from depredations by individuals, the traditional view of state action is inescapably undercut. In the Little Rock incident troops were, as a practical matter, used to enforce the court orders, not against state officials but against individual Arkansas citizens.

The possible implications of the suggested reasoning are even more extreme. If a federal court order can be protected from obstruction by individuals, would it not follow that a congressional civil rights statute aimed at state officials could also be protected from obstruction by individuals? One could then consider a congressional statute providing that states shall integrate all schools by a given date and providing a criminal penalty. Troops could be used to prevent obstruction to the implementation of this statute by individuals, just as they were used against mobs obstructing a court order having the same effect in Little Rock. The extreme to which this logic might be extended can be illustrated by a second hypothetical statute making it a crime for an individual to obstruct the first statute requiring integration of the schools. The result of such legislation would be to allow Congress to do in two statutes what it clearly could not do in one: disregard state action by allowing direct enforcement against individuals of the Four-

teenth Amendment right to equal protection of the laws in the form of integrated schools.

It might be possible to limit enforcement against individual action to the enforcement of court orders. There is no readily apparent logical basis for such a distinction, however, and a court would find it difficult to justify such a differentiation.

In addition to the previous analysis, a recent Eighth Circuit case, *Brewer v. Hoxie School District No. 46*,<sup>74</sup> suggests another analytical approach that would not require state action. In that case the school board had voluntarily integrated the schools without any court order. After initially successful integration, agitation against the school board developed and as a result of mob action the school board closed the schools. The board then obtained an injunction against the individuals who had led the mob.<sup>75</sup> The court of appeals upheld the injunction and found that the school board had a constitutional duty to give equal protection to Negro students in the form of integrated schools and that the board, therefore, had a federal right to be free from interference while carrying out its constitutional duties. The court apparently conceived of this as a privilege or immunity of United States citizenship and subject to protection against individuals as well as states. Thus, state action would not be required.

Historically, only those rights essential to the functioning of the federal government have been held to be privileges or immunities of United States citizens. This has included, among others, the right to vote for the election of federal officers,<sup>76</sup> the right to protection against violence while in the custody of a federal marshal<sup>77</sup> and the right to inform the United States authorities of breaches of federal law.<sup>78</sup> The facts of the *Hoxie* case do not reveal any such close association between the operation of the federal government and the action of the mob as to justify the court's reasoning, particularly in view of the fact that there had been no federal court order to the school board to integrate. However, in a case where a federal court order has been issued a persuasive argument can be made that interference with the order is so inimi-

<sup>74</sup> *Brewer v. Hoxie School District No. 46 of Lawrence County, Arkansas*, (8th Cir. 1956) 238 F. (2d) 91. Cited with approval in *Kasper v. Brittain*, (6th Cir. 1957) 245 F. (2d) 92.

<sup>75</sup> *Hoxie School District No. 46 v. Brewer*, (E.D. Ark. 1956) 137 F. Supp. 364.

<sup>76</sup> *Ex parte Yarbrough*, 110 U.S. 651 (1884).

<sup>77</sup> *Logan v. United States*, 144 U.S. 263 (1892).

<sup>78</sup> *In re Quarles*, 158 U.S. 532 (1895).

cal to the operation of the federal government as to give rise to a privilege as a citizen of the United States to be free from such interference. However, here again, if the Supreme Court were to accept this analysis it would have taken a big step toward reading the state action requirement out of the Fourteenth Amendment.

The *In re Debs*,<sup>79</sup> *In re Neagle*, and *Ex parte Siebold*<sup>80</sup> cases suggest still another argument which can be advanced to bypass the "state action" requirement. Those cases indicate that there is a "peace of the United States" which the chief executive is obligated to preserve, by use of force if necessary, in every part of the United States. In each of these cases the federal government was acting to preserve some function intimately associated with the existence and operation of the national government. The *Neagle* case held that the federal government was authorized to provide protection for its judges in order to insure the continued operation of its courts. In *Siebold* the federal government's right to employ its marshals to keep the peace at national elections was upheld. The *Debs* case approved the President's action in using troops to keep open the channels of interstate commerce, and specifically to prevent interference with the mails. Each of these cases involved a conflict of federal-state powers in a situation where the Fourteenth Amendment "state action" requirement was not of concern. Nevertheless, it might well be contended on the authority of these cases that the President's use of troops in Little Rock to keep the peace in order that the court decree could effectively be carried out was lawful, on the grounds that making its decrees effectual is necessary to a proper functioning of the courts. It should be pointed out, however, that in these cases force was used directly against the officers of the United States who were in the process of attempting to execute their duties. In Little Rock no force was directed against the court itself, but against private persons attempting to comply with the court order. Applying the doctrine of these cases to cover the Little Rock situation would represent an extension of the "peace of the United States" concept.

2. *Was State Action Present in the Mob?*—If on the basis of the previous discussion it should be concluded that a federal court order implementing the Fourteenth Amendment could be en-

<sup>79</sup> 158 U.S. 564 (1895).

<sup>80</sup> 100 U.S. 371 (1879).

forced only against the state, the further question is presented of whether a mob, for at least constitutional purposes, can be the state. If the answer to this question is no, then sections 332 and 333 of Title 10 are unconstitutional, at least insofar as they give the President authority to act directly against mobs in enforcing court orders.

The easiest case which might be supposed is one in which state officials were responsible for organizing and directing the mob. In such a case there would be little difficulty in concluding that the mob was, in fact, acting as an agent of the governor of the state and thus the mob would embody state action.

Even without the aid of such a theory of identity, it might still be possible to support an argument that mob action constituted state action. Somewhat akin to the case of actual collusion between the state and a mob would be a situation in which the state intentionally fails to act when state officials have reason to believe the civil rights of some person are going to be infringed. It might well be argued that under such circumstances, state inaction is a form of state action. Failure of a state to give reasonable protection to a person's civil rights because of his race would seem to be a classic example of denial of "equal protection."<sup>81</sup> Furthermore, insofar as the state intentionally allows a mob to infringe the civil rights of any person, a court would be justified in reasoning that, since the state has permitted the action, the mob is acting for the state. Thus federal power in the form either of court injunctions, congressional statutes, or executive action could be brought to bear directly on the mob.

The result of such an interpretation of the words, "No State shall," is to transform them into the affirmative command that "every state must" give positive protection to civil rights. Such an interpretation does not, however, seem unreasonable in light of the purpose of the Fourteenth Amendment. Indeed, it would be unfortunate to allow particular phrasing to cause willful inaction on the part of the state in the face of mob action to go unchallenged.

An even more difficult problem would be posed, however, by a case in which a state had made an honest effort to control the action of a mob, but found itself unable to do so. Is this "state"

<sup>81</sup> The Court's opinion in the case of *Shelley v. Kraemer*, 334 U.S. 1 at 19 (1948), pointed out that that case did not involve state inaction.

action? The word "State" as used in the Fourteenth Amendment need not necessarily be limited to properly elected state officials. Illustratively, if the people of a state were collectively to revolt against the state government so as to render it ineffective, no great imagination would be required to consider those in actual control of the state, i.e., the insurrectionists, as the state. Furthermore, revolt against a state government would not have to be state-wide. The governor of a state can declare a county in revolt.<sup>82</sup> By this reasoning it seems that a mob which cannot be controlled by state power and which is thus, to some extent, in control of a limited area of the state, might be for limited purposes and for that limited area the state, and its actions might constitute "state action." If a court were persuaded by this argument, and the facts justified it, it would follow that federal action could be aimed directly against the mob.

The Supreme Court has never been forced to consider any of the suggested interpretations of state action, and it is impossible to predict what the court's reaction might be. It is suggested that these are possible means by which presidential action aimed at curbing mob rule could be supported.

#### *D. Is Prior Judicial Determination Required?*

Quite apart from any requirement of state action, the use of troops to enforce a federal court order raises constitutional problems that would not be raised by enforcement through contempt proceedings in a federal court. If the members of the mob were to be cited for contempt before a federal court they would be given an opportunity to raise questions as to the applicability of the order to them, perhaps as to its propriety,<sup>83</sup> and certainly as to whether they have in fact breached the court's order. When the order is enforced by troops, the President, without a hearing, resolves these questions.<sup>84</sup> It would be possible to argue that when troops in Little Rock blocked the sidewalks and streets and refused to allow mobs to gather, they were depriving the citizens of Little

<sup>82</sup> See the fact situations in *Moyer v. Peabody*, 212 U.S. 78 (1909), and *Sterling v. Constantin*, 287 U.S. 378 (1932).

<sup>83</sup> But cf. *United States v. United Mine Workers of America*, 330 U.S. 258 at 293 (1947).

<sup>84</sup> The President's decision would of course be subject to later judicial review. This might be accomplished by suit for an order to remove the troops.

Rock of liberty and perhaps property without due process of law in contravention of the Fifth Amendment.<sup>85</sup> This would raise a question whether the President, with or without a supporting congressional statute, can constitutionally use troops without a prior determination by a court that a proper court order has been breached.

In support of presidential action without such a judicial foundation, it is possible to analogize the use of troops to a situation where enough force, in the form of federal marshals, is used to make a court order effective in the face of opposition. For example, if a federal court ordered property seized by a marshal and a person, not a party to the action which gave rise to the order, forcibly prevented the marshal from seizing the property, that person would presumably be guilty of contempt of the court.<sup>86</sup> The court could have him arrested and try him for criminal contempt.<sup>87</sup> If instead of this the marshal took with him enough help to prevent any intervention it would seem absurd to argue that the party that had contemplated interfering has a right to carry out the interference so that he may obtain judicial determination (1) of the applicability of the order to him and (2) the fact that he has breached it.

In a very real sense the troops in Little Rock can be said to have been officers of the court taking the place of United States marshals. Their efforts were not aimed at forcing any positive action on the mob but rather at preventing the mob from interfering with what the court had ordered. It would seem equally absurd in such a situation to say that the members of the mob had a right to breach the court order and thereby to force a judicial determination that they had in fact breached the order.

In short, it would seem that enforcement of a decree by the use of troops does not differ significantly from enforcement by

<sup>85</sup> U.S. CONST., Amend. V.

<sup>86</sup> 1 BAILEY, HABEAS CORPUS 294 (1913).

<sup>87</sup> This analysis assumes, however, that the equity court could have found the members of the mob guilty of contempt. Space limitations prevent extensive analysis of the extent of an equity court's jurisdiction. Suffice it to say that there is some doubt as to whether the equity court's injunction against Governor Faubus or order to the school board would bind the mob. Compare *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934) and *Alemite Mfg. Corp. v. Staff*, (2d Cir. 1930) 42 F. (2d) 832, with *In re Lennon*, 166 U.S. 548 (1897) and *In re Reese*, (8th Cir. 1901) 107 F. 942. It might well be that the court would have had to serve and separately enjoin the individual members of the mob in this type situation before they would have become guilty of contempt.



other executive means, i.e., federal marshals, and thus statutes authorizing the use of troops for the enforcement of federal law are not unconstitutional under the Fifth Amendment.

### V. *Conclusion*

With reference to the presidential action in Little Rock, it seems clear that authorization existed to take action to enforce the district court order with military force. Authority can be gleaned from both the Constitution and congressional enactments. The difficulty in determining the constitutionality of the President's action lies not in the "authorization" but in the "state action" problem. The limitation on federal power imposed by the requirement of state action in Fourteenth Amendment cases must be met before the use of military force in Little Rock can be found constitutional. This can be accomplished either by finding that the state action was present in the mobs, or that state action is not required in the enforcement phase of the court's order.

Should this question reach the Supreme Court, the actions of the President will probably be upheld on one or the other of the above theories. As a practical matter the Court could not reasonably afford to do otherwise. A holding that military force could not be used to enforce federal court orders would constitute an invitation to mob action replete with judicial blessing.

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