

## Martial Law

# Working for the Clampdown

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By James Bovard

**H**ow many pipe bombs might it take to end U.S. democracy?

Far fewer than it would have taken a year ago. The Defense Authorization Act of 2006, passed on September 30, empowers President George W. Bush to impose martial law in the event of a terrorist "incident" or if he or other federal officials perceive a shortfall of "public order" or even in response to antiwar protests that get unruly as a result of government provocations.

The media and most of Capitol Hill ignored or cheered on this grant of nearly boundless power. But now that the president's arsenal of authority is swollen and consecrated, a few voices of complaint are being heard. Even the *New York Times* recently condemned the new law for "making martial law easier."

It took a few paragraphs in a \$500 billion, 591-page bill to destroy one of the most important limits on federal power. Congress passed the Insurrection Act in 1807 to severely restrict the president's ability to deploy the military within the United States. The Posse Comitatus Act of 1878 tightened these restrictions, imposing a two-year prison sentence on anyone who used the military within the U.S. without the permission of Congress. But there was a loophole: Posse Comitatus is waived if the president invokes the Insurrection Act.

Section 1076 of the John Warner National Defense Authorization Act for Fiscal Year 2007 changed the name of the key provision in the statute book from Insurrection Act to Enforcement of the Laws to Restore Public Order Act. The Insurrection Act of 1807 stated that the president could deploy troops within the United States only "to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy." The new law expands the list to include "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition"—and such "con- dition" is not defined or limited.

These new pretexts are even more expansive than they appear. FEMA proclaims the equivalent of a natural disaster when bad snowstorms occur and Congress routinely proclaims a natural disaster when there is a shortfall of rain in states with upcoming elections. A terrorist "incident" could be something as stupid as the flashing toys scattered around Boston last fall.

The new law also empowers the president to commandeer the National Guard of one state to send to another state for up to 365 days. Bush could send the New York National Guard to disarm the residents of Mississippi if they resisted a federal law that prohibited private ownership of semiautomatic weapons. Governors' control of the National Guard can be trumped with a simple presidential declaration.

The story of how Section 1076 became law demonstrates how expanding government power is almost always the correct answer in Washington. Some people have claimed the provision was slipped into the bill in the middle of the night. In reality, the Administration signaled its intent and almost no one in the media or Congress tried to stop it.

The Katrina debacle appears to have drowned Washington's resistance to military rule. Bush declared, "I want there to be a robust discussion about the best way for the federal government, in certain extreme circumstances, to be able to rally assets for the good of the people."

His initial proposal generated only a smattering of criticism and there was no "robust discussion." On August 29, 2006, the Administration upped the ante, labeling the breached levees "the equivalent of a weapon of mass effect being used on the city of New Orleans." Nobody ever defined a "weapon of mass effect," but the term wasn't challenged.

Section 1076 was supported by both conservatives and liberals. Sen. Carl Levin (D-MI), the ranking Democratic member on the Senate Armed Services Committee, co-wrote the provision, along with committee chair Sen. John Warner (R-VA). Sen. Ted Kennedy (D-MA) openly endorsed it and Rep. Duncan Hunter (R-CA), then-chair of the House Armed Services Committee, was an avid proponent.

Every governor in the country opposed the changes and the National Governors Association repeatedly and loudly objected. Sen. Patrick Leahy (D-VT), the ranking Democrat on the Senate Judiciary Committee, warned on September 19 that, "We certainly do not need to make it easier for Presidents to declare martial law," but his alarm got no response. Ten days later, he commented in the *Congressional Record*: "Using the military for law enforcement goes against one of the founding tenets of our democracy." Leahy further condemned the process, declaring that it "was just slipped in the defense bill as a rider with little study. Other congressional committees with jurisdiction over these matters had no chance to comment, let alone hold hearings on, these proposals."

*Congressional Quarterly's* Jeff Stein wrote an excellent article in the December issue on how the provision became law with minimal examination or controversy. A Republican Senate aide blamed the governors for failing to raise more fuss: "My understanding is that they sent form letters to offices. If they really want a piece of legislation considered they should have called offices and pushed the matter. No office can handle the amount of form letters that come in each day."

Thus, the Senate was not guilty by reason of form letters. Plus, the issue was not on the front page of the *Washington Post* within the 48 hours before the Senate voted on it. Surely no reasonable person can expect senators to know what they were doing when they voted 100 to 0 in favor of the bill? Apparently, they were simply too busy to notice the latest coffin nails they hammered into the Constitution.

This expansion of presidential prerogative illustrates how every federal failure redounds to the benefit of leviathan. FEMA was greatly expanded during the Clinton years for crises like the New Orleans flood. It, along with local and state agencies, floundered. Yet the federal belly flop on the Gulf Coast somehow anointed the president to send in troops where he sees fit.

"Martial law" is a euphemism for military dictatorship. When foreign democracies are overthrown and a junta establishes martial law, Americans usually recognize that a fundamental change has occurred. Perhaps some conservatives believe that the only change when martial law is declared is that people are no longer read their Miranda rights when they are locked away. "Martial law" means obey soldiers' commands or be shot. The abuses of military rule in southern states during Reconstruction were legendary, but they have been swept under the historical rug.

Section 1076 is Enabling Act-type legislation—something that purports to preserve law-and-order while formally empowering the president to rule by decree. The Bush team is rarely remiss in stretching power beyond reasonable bounds. Bush talks as if any constraint on his war-making prerogative or budget is "aiding and abetting the enemy." Can such a person be trusted to reasonably define insurrection or disorder?

Bush can commandeer a state's National Guard any time he declares a "state has refused to enforce applicable laws." Does this refer to the laws as they are commonly understood—or the laws after Bush fixes them with a signing statement? Some will consider concern about Bush or future presidents exploiting martial law to be alarmist. This is the same reflex many people have had to each administration proposal or power grab, from the USA PATRIOT Act in October 2001 to the president's enemy-combatant decree in November 2001 to setting up Guantanamo prison in early 2002 to the doctrine of preemptive war. The Administration has perennially denied that its new powers pose any threat even after evidence of abuses—illegal wiretapping, torture, a global network of secret prisons, Iraq in ruins—became overwhelming. If the Administration

does not hesitate to trample the First Amendment with “free speech zones,” why expect it to be diffident about powers that could stifle protests en masse?

On February 24, the White House conducted a highly publicized drill to test responses to Improvised Explosive Devices (IEDs) going off simultaneously in ten American cities. The White House has not disclosed the details of how the feds responded, but it would be out of character for this president to let new powers he sought to gather dust. There is nothing to prevent presidents from declaring martial law on a pretext than there is to prevent them from launching a war on the basis of manufactured intelligence.

Senators Leahy and Kit Bond (R-MO) are sponsoring a bill to repeal the changes. Leahy urged his colleagues to consider the Section 1076 fix, declaring, “It is difficult to see how any Senator could disagree with the advisability of having a more transparent and thoughtful approach to this sensitive issue.”

He deserves credit for fighting hard on this issue, but there is little reason to expect most members of Congress to give it a second look. The Section 1076 debacle exemplifies how the Washington establishment pretends that new power will not be abused, regardless of how much existing power has been mishandled. Why worry about martial law when there is pork to be harvested and photo ops to attend? It is still unfashionable in Washington to worry about the danger of the open barn door until after the horse is two miles down the road.

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