California Department of Public Health
MEMORANDUM

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TO: Public Health Law Workgroup

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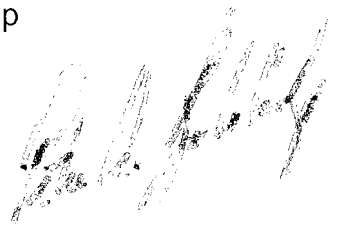

SUBJECT: Martial Law

Several questions have been raised lately by local emergency planners about when, during an emergency, "martial law" may be proclaimed. These questions were asked in the context of all-hazards emergency planning. This suggests that there is an assumption that, when the military is mobilized in response to a disaster, it is synonymous with "martial law." However, this is not necessarily the case. Accordingly, some discussion about "martial law" may be helpful to planners. It may also be helpful to discuss how the armed forces or state militia may become involved in emergency response.

What is "Martial Law"?

As the Supreme Court of the United States expressed in *Duncan v. Kahanamoku* (1946) 327 U.S. 304, 315:

> "[T]he term 'martial law' carries no precise meaning. The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times."

In the case of *In Re Milligan* (1866) 71 U.S. 2, at page 9, counsel for the United States defined "martial law" as follows:

> Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler.

Another perspective of "what is called martial law" was made by counsel for the petitioner in the same case at page 23:

> "I say what is called martial law, for strictly there is no such thing as martial law; it is martial rule; that is to say, the will of the commanding officer, and nothing more, nothing less. . . . On this subject, as on many others, the incorrect use of a word has led to great confusion of ideas and to great abuses. People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial."

In this sense, "martial law" is different from "military law." The latter consists of the rules that govern the members of the armed forces and others associated with the armed forces. These laws are authorized by Congress. Military law is enforced through a separate system of justice referred to as "courts-martial." The jurisdiction of courts-martial is specific and limited to classes of persons serving in or connected with the armed forces or state militias. Consequently, this jurisdiction does not extend to ordinary civilians unconnected with the armed forces. So, if an ordinary civilian unconnected with the military is tried before a military officer, commission or tribunal, the proceeding is not a court-martial.

Historically, the imposition of "martial law" in the United States has been related to the administration of areas in which armed military conflict is occurring, or has recently occurred and the area is under military occupation. Perhaps the best examples occurred during the American Civil War (1861-1865) and Reconstruction following the war. Another example occurred in Hawaii following the attack on Pearl Harbor in 1941. However, these examples have provided us with rules governing the imposition of "martial law." The principal rule is as follows:

> "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." (*In Re Milligan* (1866) 71 US 2, 127.)(Emphasis added.)

Therefore, the fact that military personnel are assisting in emergency response or patrolling the streets does not signify the existence of martial law. As discussed below, circumstances can arise in which the military can be called forth to execute the law, with soldiers serving as peace officers, making arrests and detaining suspects. The controlling factor whether martial law exists, however, is whether the civil administration is still functioning. If it is, then there can be no martial rule under the United States Constitution.

Under what circumstances can martial law exist? As the Court stated in *Milligan*;

> "[T]here are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power." (*In Re Milligan* (1866) 71 U.S. 2, 127.)
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> However, the Court also stated:
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> "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." (*In Re Milligan* (1866) 71 U.S. 2, 127.)

There is no reference to martial law in the California Constitution, and only a single reference in statute. Government Code section 8574 provides:

> "None of the provisions of [the Emergency Services Act] shall limit, modify, or abridge the powers vested in the Governor under the Constitution or statutes of the state by proclamation, to declare any county, city and county, or city, or any portion thereof to be in a state of insurrection or to proclaim the existence of martial law and to exercise all the powers vested in him thereunder independent of, or in conjunction with, any of the provisions of [the Emergency Services Act]."

There appear to be no reported cases confirming that the Governor in fact possesses the power to proclaim martial law under the state's constitution, or under what circumstances he may proclaim it. However, inasmuch as the California Constitution specifically provides that the military is subordinate to civil power,[1] and further provides for the right to a trial by jury[2] and other rights to judicial due process relied upon by the Court in

[1] Cal. Const., art. 1, §5.
[2] Cal. Const., art. 1, §16.

Milligan,[3] it stands to reason that the Governor could not proclaim martial law anywhere in the state where the civil courts are open.

Under the Government Code, the courts have the ability to conduct their business in locations other than the courthouse where it is made necessary by some public calamity.[4] Thus, the fact that the courthouse itself is closed does not mean that the courts themselves are closed.

In response, therefore, to the question as to when "martial law" may be imposed, it appears limited to those rare occasions when civil authority is overthrown, the military has been called in to preserve or restore order, and the imposition of such rule is necessary for the protection of military personnel and civilians, but only until such time as the civil authorities are restored.

What Distinguishes "Martial Law" from Using the Military During Emergencies?

As discussed above, "martial law" is the imposition of military rule in the active theatre of military operations according to the dictates of necessity, but only where and for as long as the civil authorities do not function. Thus, there may be many circumstances where the presence of the military does not signify the existence of "martial law." For example, during an emergency the National Guard may be called up to assist in emergency response. However, this does not necessarily mean that martial law exists.

In order to appreciate how the military can become involved in a disaster and what this means, it is necessary to first discuss the various military organizations that exist under federal and state law, and how they can be used during emergencies. This is because different organizations are subject to different rules about engaging in law enforcement, as opposed to providing rescue, logistical and other forms of support in response to the emergency. The following is a very general description of the military organizations that might be employed during an emergency.

Military forces in the United States can be generally divided into the federal armed forces (Army, Navy, Marines, Air Force, and Coast Guard) and the militia.[5] The statutes

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[3] See Cal. Const., e.g., the right to equal protection of the laws, to due process of law (art. 1, §7), to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her (art. 1, §15), to be free from unreasonable searches and seizures (art. 1, §13), to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense (art. 1, §15), and to not suffer the imposition of cruel or unusual punishment (art. 1, 17).

[4] Govt. Code, §68115.

[5] The authority for these organizations is separately set forth in the United States Constitution. In Article I, section 8, Congress is authorized to do the following:

governing the armed forces are contained in Titles 10[6] and 14[7] of the United States Code. Title 10 also describes the militia as consisting of all able-bodied male citizens and intended citizens of 17 to 45 years of age. The militia is divided into the organized militia (the National Guard and the Naval Militia), and the unorganized militia, consisting of all the aforementioned males who are not in the National Guard or the Naval Militia.[8]

Typically, in an emergency, if military units are involved in the response they are elements of the National Guard. The National Guard is organized by Congress within each state and specified territories of the United States, and consists of the Army National Guard and the Air National Guard.[9] The statutes governing the National Guard are found in Title 32 of the United States Code. Each state may fix the location of its headquarters and units.[10]

The California Constitution makes the Governor the Commander in Chief of a militia that is required to be provided by statute.[11] This same constitutional provision provides that the Governor may call the militia forth "to execute the law."[12] That militia, echoing federal law, consists of all able-bodied male citizens and intended citizens of 17 to 45 years of age, and is divided into the organized, active militia (National Guard and Naval Militia) and the unorganized militia.[13] The Governor may order the active militia to:

1. Perform military duty of every description;[14]

2. enter into active service in case of war, insurrection, rebellion, invasion, tumult, riot, breach of the peace, public calamity or catastrophe, including, but not limited to, catastrophic fires, or other emergency, or imminent danger thereof, or resistance to the laws of this state;[15] and

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"To raise and support Armies";
"To provide and maintain a Navy";
"To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

[6] Army, Navy (including the Naval Militia), Marines and Air Force.
[7] Coast Guard, which is designated as an armed force and in wartime becomes part of the Navy. Otherwise, the Coast Guard is part of the Department of Homeland Security.
[8] 10 U.S.C., §311.
[9] 32 U.S.C., §103.
[10] 32 U.S.C., §104.
[11] Cal. Const., art. 5, §7.
[12] Cal. Const., art. 5, §7, cl. 2.
[13] Mil.&Vets. Code, §120.
[14] Mil. & Vet. Code, §142.
[15] Mil. & Vet. Code, §146.

3. enter into active service whenever he is satisfied that rebellion, insurrection, tumult or riot exists in any part of the state or that the execution of civil or criminal process has been forcibly resisted by bodies of persons the United States.[16]

This means that the militia, particularly the National Guard, can be called forth to provide law enforcement, as well as providing logistical support to the civil authorities. The Penal Code specifically provides that, if called up under Military and Veterans Code section 143 and 146 or directly assisting the civil authorities in the situations described by those sections, members of the National Guard are peace officers with the power to arrest for any public offense.[17]

The ability of the National Guard to perform law enforcement functions distinguishes it from the federal armed forces. Under the "Posse Comitatus Act," the use of the "Army or Air Force as a *posse comitatus*[18] or otherwise to execute the laws" is punishable by fine or imprisonment, unless such use is expressly authorized by the Constitution or an act of Congress.[19] By policy of the Department of Defense, this restriction also applies to the Navy and Marine Corps.[20] It does not apply to the Coast Guard unless operating as part of the Navy, or to the National Guard, unless those forces are federalized under Title 10.

This does not mean that the federal armed forces cannot under any circumstance act in support of civilian law enforcement agencies. The courts have drawn distinctions based upon whether the role of the federal military personnel was active or passive.[21] Thus, armed forces equipment, supplies and materiel can be used to support civil law enforcement under the Posse Comitatus Act.[22]

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[16] Mil. & Vet. Code, §143.

[17] Penal Code, §830.4. The Attorney General has opined that to do so, the National Guard members must complete basic Peace Officers Standards and Training. (85 Ops. Cal. Atty. Gen. 203 (2002).)

[18] Latin for "power of the county," referring to the county sheriff's power to round up a "posse" to enforce the law and keep the peace.

[19] 18 U.S.C. §1385.

[20] DoD Directive 5525.5, Enclosure 4, paragraph E4.3 (January 15, 1986; reissued December 20, 1989.).

[21] See U.S. v. Red Feather (1975) 392 F. Supp. 916.

[22] In a relevant aside, the District Court in *Red Feather* observed:

> "In passing, this Court notes that this holding is not only dictated by the statute and its legislative history, but from a practical economic standpoint, this holding is supported by common sense. During and after any natural disaster in this country whether due to flood, heavy snowstorms, earthquake, tornado or otherwise, there is always the possibility of looting and other acts of civil disorder. Most of this nation's smaller governmental units simply cannot maintain an inventory of emergency vehicles and other equipment adequate to meet such a crisis. If the affected municipality or county requests and receives, and law enforcement officers are using Department of Defense equipment or supplies to aid in enforcing the laws, and the elements of a civil disorder as defined by 18 U.S.C. § 232 are present and arrests are made, it would violate common sense and do violence to the intent of Congress in passing 18 U.S.C. § 1385 to hold that those arrested

In addition, if an insurrection occurs in any State, the President may, upon request of the legislature, or the governor if the legislature cannot be convened, call up the militia of other states and use the armed forces as he considers necessary to suppress the insurrection.[23] Thus, in cases of insurrection, the armed forces can be employed in an active role to enforce the law by suppressing the insurrection.

What is the relationship of suspending the writ of habeas corpus to martial law?

As a final note, it may be useful to address whether the suspension of the privilege of *habeas corpus* signals the imposition of "martial law." The term "*habeas corpus*" is a reference to a writ of ancient origins, issued by a court in the name of the sovereign in response to a petition by or on behalf of a person whose liberty is claimed to be restrained contrary to law. The writ is issued to the person restraining or imprisoning the petitioner, commanding him or her to produce the prisoner before the court. If the restraint is found to be unlawful, the court may order the prisoner discharged from custody.

Both the United States Constitution and the California Constitution acknowledge the existence of this writ by stating that the privilege afforded by it may not be suspended, unless the public safety requires the suspension in cases of rebellion or invasion.[24] The writ is provided by California Penal Code section 1473:

> "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

In California, it is a misdemeanor to fail to produce the restrained person in response to a writ of habeas corpus,[25] to continue to restrain a person who has been discharged upon a writ of habeas corpus,[26] or seeks to evade compliance with such a writ.[27]

As previously indicated, both the Constitutions of the United States and the State of California allow this privilege to be suspended in cases of rebellion or invasion. The

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for criminal acts must be released because law enforcement officers were using military equipment to aid in executing the law."

[23] 10 U.S.C. 331.
[24] U.S. Const., art. 1, §9; Cal Const., art. 1, §11.
[25] Penal Code, §362.
[26] Penal Code, §363.
[27] Penal Code, §364.

circumstances in which such a suspension could occur were discussed in the *Milligan* case, above.

> "It is essential to the safety of every government that, in a great crisis . . . there should be a power somewhere of suspending the writ of *habeas corpus*. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the period to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*." (at page 125.)

Historically, the suspension of the privilege of *habeas corpus* has been accompanied by some form of actual or attempted imposition of "martial law." However, the fact that persons may be detained without resort to a writ of *habeas corpus* does not necessarily mean that "martial law" applies. Unless the circumstances that justify the imposition of "martial law" also exist (see above), the individual detained retains the right to trial by the civil authorities, and to all the protections afforded by the Constitution. As stated in *Milligan*:

> "The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it." (at p. 126.)

Accordingly, it appears that the suspension of the privilege of *habeas corpus* and the imposition of martial law are not necessarily synonymous. The former may accompany the latter, but may also exist independently.