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THE RELATIONSHIP BETWEEN MILITARY AND CIVIL POWER IN OHIO

JOHN KULEWICZ*

I. INTRODUCTION

STATE LAW HAS STRUCK AN UNCONSTITUTIONAL BALANCE between military and civil power in Ohio. The Strict Subordination clause of the Ohio Constitution provides, "the military shall be in strict subordination to the civil power." Nevertheless, the statutes that govern deployment of the state militia allow commanders of the state's military forces to eclipse civil power. This article examines the law enforcement role of the state militia and recommends several measures by which the General Assembly can implement the constitutionally prescribed relationship between military and civil power in Ohio.

II. BACKGROUND: PURPOSE AND EFFECT OF THE STRICT SUBORDINATION CLAUSE

Since the founding of the state, the Strict Subordination clause of the Ohio Constitution has defined the relationship of state military forces to civil government in Ohio. The first state constitution contained the declaration that "the military shall be kept under strict subordination to the civil power." The clause in its present form is traceable to the Ohio Constitution of 1851, which is still in effect. The only serious attempt to alter its current language was a proposal made at the constitutional convention of 1912, upon which action was not taken.

Although Ohio courts have rarely construed the Strict Subordination

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1 Ohio Const. art. I, § 4.

2 Id.

3 Ohio Const. of 1802, art. VIII, § 20.

4 See note 1 supra and accompanying text.

5 The Constitutional Convention of 1850, at which the Constitution of 1851 was drafted, adopted the Strict Subordination clause without comment or debate, and apparently without dissent. See 2 Ohio Constitutional Debates and Proceedings 826-31 (1850).

6 The proposal, offered by Mr. Thomas of Cuyahoga County and known as Proposal No. 3, would have considerably strengthened the language. In its third section, Proposal No. 3 read in part as follows: "The military shall at all times be held in strict subordination to the civil authorities. Civil government in this state shall never be replaced or suspended by martial law." See Proceedings and Debates of the Constitutional Convention of the State of Ohio 85, 91, 747, 1404 (1912).
clause,\(^7\) certain principles can be deduced from the text of the clause. The first principle, which arises by implication, stands for the proposition that the military shall not be superior to the civil government. As one Ohio court explained, "[t]he military are called out to aid the civil authority, not to usurp its functions or to take its place. They are ... subject to the absolute and exclusive control and discretion of the ... civil officers designated in the statutes."\(^8\) This first principle confirms the ascendancy of civil government over the military.

The second implicit principle of the clause prohibits the existence of an autonomous military force. Early in the history of the state, the Ohio Supreme Court recalled the concern of the framers of the Ohio Constitution that "troops in any degree independent of the civil authority [are] dangerous to liberty."\(^9\) The court reasoned that the militia was merely a means by which the executive could enforce the laws.\(^10\)

The language of the Strict Subordination clause forbids either military or political officials to relocate the decisionmaking power. The clause provides subordination of the military to civil authorities "shall" exist in Ohio. Thus, the militia "may exercise none of the functions of the civil power, nor ... supercede or take the place of the civil power."\(^11\) Likewise, a civil government official "may not delegate his authority to the military force ... or vest in the military any discretionary power."\(^12\)

The clause requires rigid observance by both military and civilian officials and it is only in the absence of civil authority that the military may unilaterally control the use of armed forces.\(^13\) In addition, the clause requires that this subordination of the military to civilian authorities be strictly adhered to.\(^14\) Courts and legislatures normally balance even the


\(^8\) State v. Coit, 8 Ohio Dec. 62, 63 (C.P., Pickaway County 1897).

\(^9\) State v. Coulter, Wright's Reports 421, 424 (1833) (emphasis in original).

\(^10\) Id. See Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911). "The military cannot in any state of case take the initiative or assume to do anything independent of the civil authorities." Id. at 242, 134 S.W. at 488. See also the Declaration of Independence which states that one reason for the colonies' severance from England was that the king "has affected to render the Military independent of and superior to the Civil Power."


\(^12\) Id. See Ela v. Smith, 71 Mass. 121, 140 (1855) (rendering a like interpretation of a similar constitutional clause).

\(^13\) See Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924). "There can be no martial law or martial rule, in time of peace, in any place where the civil authority is acting ... . Civil power is supreme while acting and military power is subordinate thereto." Id. at 309-10, 200 N.W. 280-81. See also Griffith v. Wilcox, 21 Ind. 370 (1863).

\(^14\) See note 1 supra and accompanying text.
most absolute of constitutional pronouncements against competing values, yet the Strict Subordination clause strikes a balance that weighs heavily in favor of civilian control.

The civil authority to which the constitution subordinates the militia includes more than just the state government. In Ohio, "the civil power" consists not only of the state government, but also the county and municipal governments to which the people have allocated a part of their sovereignty. The reference of the Strict Subordination clause to "the civil power", thus must include local governing units. As repositories of the popular sovereignty, the various levels of government in Ohio, so long as they function, together supervise the militia.

The Strict Subordination clause preserves the monopoly that government necessarily must hold on the management of force in Ohio. Governments come to power by showing a superior ability to protect society from external danger and internal instability. This includes the use of force. But only by dominating the use of force in society can a government maintain its status; uncoordinated use of force could undermine governmental efforts to protect, thereby jeopardizing the supremacy of the government. The Strict Subordination clause, by prohibiting the existence of an autonomous or superior military in Ohio, safeguards the exclusiveness of government's management and control.

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15 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 582-89, 748 (1978) (use of balancing in speech cases and reapportionment decisions of federal courts).

16 OHIO CONST. art. X, § 1.


18 The survival of government by controlling the military is not a recent idea. See I. RICHARDS, THE REPUBLIC OF PLATO 154 (2d ed. 1942).

19 See R. NOZICK, ANARCHY, STATE, AND UTOPIA 12-17, 336-37 (1974).


21 See R. NOZICK, supra note 19, at 12-13.

22 See notes 8-14 supra and accompanying text.

23 It reflects the significance of the Strict Subordination clause to note that the constitution of every state except New York declares in some formula of words closely approximating those used by the Ohio Constitution that the military shall be subordinate to civil power. See ALA. CONST. art. I, § 27; ALASKA CONST. art. I, § 20; ARIZ. CONST. art. II, § 20; ARK. CONST. art. II, § 27; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 22; CONN. CONST. art. I, § 16; DEL. CONST. art. I, § 17; FLA. CONST. art. I, § 7; GA. CONST. art. I, § 2-205; HAWAI'I CONST. art. I, § 14; IDAHO CONST. art. I, § 12; ILL. CONST. art. XII, § 2; IND. CONST. art. I, § 33; IOWA CONST. art. I, § 14; KAN. BILL OF RIGHTS § 4; KY. CONST. § 22; LA. CONST. art. XII, § 2; ME. CONST. art. I, § 17; MD. CONST. art. XXX; MASS. CONST. art. XVIII; MICH. CONST. art. I, § 7; MINN. CONST. art. I, § 14; MISS. CONST. art. III, § 9; MO. CONST. art. I, § 24; MONT. CONST. art. III, § 22; NEB. CONST. art. I, § 17; NEV. CONST. art. I, § 11; N.H. CONST. art. I, § 24; N.J. CONST. art. I, § 15; N.M. CONST. art. I, § 9; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § 12; OKLA. CONST.
III. The State Militia: Ultimate Enforcer of State Laws

The state militia is a standby reserve of citizens upon which the state government ultimately relies to enforce its laws.24 State law divides the militia into two branches: the organized militia and the unorganized militia.25 The organized militia is at the top of the state's law enforcement hierarchy, and is comprised of the Ohio National Guard, the Ohio Naval militia, and the Ohio Defense Corps.26 The unorganized militia includes nearly every other "able-bodied" Ohio citizen who is between seventeen and sixty-seven years of age.27 When calling out the militia,


24 The United States Constitution prohibits the states "without the Consent of Congress [to] keep Troops, or Ships of War in time of Peace." U.S. Const. art. I, § 10. Fear of the "dangers to the Union from the separate possession of military forces by the States" prompted the drafters of the federal constitution to ban standing armies under control of the states. The Federalist No. 25 (A. Hamilton) 164 (C. Rossiter ed. 1961). Accordingly, the Constitution of Ohio declares that "standing armies, in time of peace, . . . shall not be kept up." Ohio Const. art. I, § 4.

The drafters of the federal constitution, however, contemplated the occasional need for the states to have control of military forces. The Federalist No. 25, supra this note, at 164. Hence, the federal constitution allows Congress to "provide for organizing, arming, and disciplining the Militia." U.S. Const. art. I, § 8, cl. 16. When employed in federal service, under the command of the President, the militia must conform to standards set by Congress. Id. The militia may be employed in the federal service, however, only "to execute the laws of the Union, suppress Insurrections, and repel Invasions." U.S. Const. art. I, § 8, cl. 15. The Constitution reserves to the states the power to appoint militia officers, id. at cl. 16, and to govern activities of the militia when the militia is not engaged in federal service. Id. The Militia Clauses of the United States Constitution thus represent an accommodation of federal and state government needs. See generally The Federalist Nos. 8, 25, 26, 27, 29 (A. Hamilton); No. 43 (J. Madison); Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181 (1940).


26 Id.

27 Id. The Ohio Constitution provides that "[a]ll citizens, residents of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law." Ohio Const. art. IX, § 1. Pursuant to the constitution, the revised code has exempted the following persons from membership in the militia: 1) citizens who are not "able-bodied," Ohio Rev. Code Ann. § 5923.01 (Page 1977); 2) officials of all three branches of the state government, and
the governor is required by law to order members of the organized militia into service before summoning the unorganized militia.28

Ordinarily, Ohio National Guard units perform the law enforcement duties of the organized militia. The National Guard is a quasi-federal organization created by Congress to act as a reserve for the regular armed forces of the nation.29 Congress has allocated funds to each state for the recruitment, training, and discipline of a National Guard.30 When necessary, the President of the United States can order the Guard into federal service.31 When not enrolled in federal service, the National

executive and judicial officers of the United States government, id. § 5923.02; and 3) Ohioans who conscientiously hold religious beliefs that interdict military service. The latter may claim exemption only from combatant responsibilities. id. Standards for exemption from militia service for religious reasons are the same as those prescribed by the United States Department of Defense for "conscientious objectors." Conscientious Objectors, 32 C.F.R. § 75.5 (1978). All other citizens of Ohio between the ages of seventeen and sixty-seven are, by law, members of the state militia.

28 OHIO REV. CODE ANN. § 5923.21 (Page 1977). Ohio law implicitly rejects the possibility that the unorganized militia will ever be activated. No provision is made for organizing the unorganized militia in the event of necessity. Cf. LA. REV. STAT. ANN. § 29.6 (West 1975) (setting forth the organizing powers of the governor); ME. REV. STAT. tit. 37-A, § 209 (1964) (providing for training of unorganized militia and for determining exactly who shall be in the organized militia); MISS. CODE ANN. § 33-5-13 (1972) (providing for draft of unorganized militia); NEB. REV. STAT. § 55-118 (1978) (draft of unorganized militia to be apportioned equitably among the counties); N.H. REV. STAT. ANN. § 110-a:4 (1977) (establishing priority of classes in draft of unorganized militia).

Several states are more clear than Ohio in specifying who is "able-bodied." See, e.g., KAN. STAT. § 48-102 (1976) ("incapacitated persons, mentally ill persons, and persons convicted of infamous crimes" are exempt from militia duty). Other states have provided for parental consent procedures to allow younger citizens who are ineligible for service, yet eager to serve in the militia, to do so. See, e.g., IDAHO CODE § 46-102 (1977); MASS. ANN. LAWS ch. 33, § 2 (Michie/Law Co-op 1973).


30 Total federal funds spent in Ohio during the fiscal year 1978 in direct support of the Ohio National Guard equalled $81,647,025. ADJUTANT GENERAL OF OHIO, ANNUAL REPORT viii (1978) [hereinafter cited as ANNUAL REPORT]. The State of Ohio provided $6,612,105. Id. Congress has created and funded the National Guard pursuant to Article I, section 8, clause 16 of the United States Constitution. See note 24 supra.

31 10 U.S.C. §§ 331, 332 (1975). The state-federal shared nature of the National Guard was especially evident at the time of the Little Rock, Arkansas public school desegregation crisis. Originally, Governor Orval Faubus used the Arkansas National Guard units at his command to prevent the court ordered entrance of black students into Central High School. President Eisenhower upstaged
Guard is a state force under the control of the governor.  

IV. LOCAL CONTROL OF THE USE OF FORCE

The state government has delegated much of its monopoly on the use of force to various units of local government. These units include: the county, which is the focal unit of the state’s distribution of law enforcement power; the cities and villages, which have incorporated parts of each county; and the townships, the unincorporated territory that remains. State law confers responsibilities upon a particular officeholder in each jurisdiction to manage the use of force.

A. Functions and Duties of the Local Officials

The sheriff, elected quadrennially by the voters, is the chief law enforcement officer of each county. At the sheriff’s command are deputy sheriffs appointed by the sheriff. In addition, the sheriff may “call to

Faubus by federalizing the Arkansas National Guard and using the same troops to enforce the federal court desegregation order. See 41 Ops. Ark. Atty Gen. 313 (1957).

The potential strength of the Ohio National Guard far exceeds that of the Ohio State Highway Patrol. The Ohio National Guard consists of the Army National Guard, the Air National Guard, and its own reserve force. Currently, 11,993 officers, warrant officers, and enlisted personnel are enrolled in the Army National Guard. ANNUAL REPORT, supra note 30, at 1. A total of 5,229 officers and airmen compose the Air National Guard. Id. at 45.

When the President has federalized the National Guard, the Ohio Defense Corps assumes the Guard’s responsibilities. OHIO REV. CODE ANN. § 5920.01 (Page 1977). There are forty-eight active Defense Corps units located in various cities throughout the state. The Defense Corps is divided into four infantry brigades, a military police battalion, and a band, to which 483 officers, warrant officers, and enlisted members belong. ANNUAL REPORT, supra note 30, at 57.

In practice, the capability of the Guard to control domestic unrest may not be as effective as the numbers suggest. The Ohio National Guard has designated sixteen of its units as “Civil Disturbance Mission Units.” The Guard has equipped these units, trained according to United States Army standards, with a diverse array of civil disorder gear. See Ohio Adjutant General’s Department, Training and Evaluation of Forces for Civil Disturbances, AGO REGULATION No. 350-1 (Army). Yet, local officials normally must anticipate a six to eight hour delay after gubernatorial authorization before the National Guard is able to commit a significant number of these units to the disorder. See OHIO ADJUTANT GENERAL’S DEPT., EMERGENCY PROCEDURES FOR LOCAL AUTHORITIES SEEKING STATE ASSISTANCE IN EMERGENCIES B-2 (1977) [hereinafter cited as EMERGENCY PROCEDURES]. Additionally, if disorders in Ohio require the presence of other units, the Guard may be completely unable to respond. Fully 75.4% of the Ohio National Guard’s units are unprepared or only marginally ready to perform their mission. ANNUAL REPORT, supra note 30, at 9-10.

OHIO REV. CODE ANN. § 703.01 (Page 1979).

Id. § 503.01.

Id. § 311.01.

Id. § 311.04.
his aid such persons or power of the county as is necessary”37 to allow him to maintain order.

Within the incorporated cities of each county, the mayor bears general responsibility for law enforcement.38 The state has authorized cities to create their own police departments and auxiliary police forces40 to aid the mayor's law enforcement efforts. Under the administrative aegis of the city director of public safety,41 each municipal police force consists of a chief of police and the officers, patrolmen, and other employees for whom the city council provides.42 The mayor may appoint additional officers and patrolmen to serve temporarily during a riot.43

Likewise, the mayor, elected by the citizens of each village, also bears responsibility for law enforcement within village boundaries.44 As "chief conservator of the peace,"45 the village mayor names a marshall, and may select a deputy marshall, policemen, night watchmen, and special policemen for the village.46 It is the statutory duty of the marshall to "suppress all riots, disturbances and breaches of the peace."47 In fulfilling his obligations, the marshall may also summon village citizens to his aid.48

In the townships of each county, the constable, designated by the board of township trustees,49 performs the law enforcement functions. The constable, like a village marshall, has the duty to "suppress riots, and keep and preserve the peace within the county."50

In order to maintain decentralized management of external force, state law attempts to integrate local law enforcement efforts. If riot, insurrection, or invasion overtaxes his or her forces, a sheriff may seek assistance from the sheriffs of adjoining counties and from the mayors and chairpersons of the board of township trustees in the same and adjacent counties.41 Similarly, the mayor of an incorporated city, in the event of riot or other emergency, may demand aid from the sheriff,

37 Id. § 311.07(A).
38 Id. § 733.03.
39 Id. § 737.05.
40 Id. § 737.051.
41 Id. § 737.02.
42 Id. § 737.05.
43 Id. § 737.10.
44 Id. § 733.30.
45 Id. § 733.24.
46 Id. §§ 737.15-.16.
47 Id. § 737.19(C).
48 Id.
49 Id. § 509.01.
50 Id. § 509.05.
51 Id. § 311.07.
mayors, and trustees' chairpersons of the same and adjoining counties.\textsuperscript{52} Township constables and village marshalls may call the county sheriff or deputy sheriffs to their aid in "state cases."\textsuperscript{53} In each case, the neighboring official must supply whatever added force is necessary to allow the overburdened sheriff or mayor to carry out his or her duties.\textsuperscript{54} Only when the loss of such forces would jeopardize police protection within his or her own jurisdiction may a neighboring official deny the request.\textsuperscript{55}

The state's reliance on a localized structure for the management of force is a sound policy.\textsuperscript{56} The people of Ohio have accorded sovereignty to county and local governments,\textsuperscript{57} it would minimize the effectiveness of home rule to deny to these units of government the authority to preserve order. In addition, local authorities are generally best suited to appraise the context in which disorders arise. Indeed, political and administrative experience within the community intimately acquaints elected local officials with the rights and expectations of the residents. With presumed knowledge of the causes of disorder and the urgency of the unrest, local authorities are better equipped to enforce laws with the least expense of lives, property, and liberty.

Local control of force also maintains community values. The primary concern of remote military and political authorities is to enforce a law. Thus local values are generally of minimal importance. Military commanders need not worry about securing the approval of the community either before acting or in the aftermath of the deployment of force. The same holds true for the governor, for adverse local political reaction will have minimal effect so long as a majority of voters elsewhere in the state support his actions. Local authorities, on the other hand, normally must live and continue to seek office in the affected community. The prospect of an upcoming election could encourage a local official to refrain from transgressing community mores, and instead enforce the law in a manner that will conform to community standards. Predominant reliance on local officials thus makes possible a more sensitive use of force.\textsuperscript{58} The same considerations support the state's formal reliance

\textsuperscript{52} Id. § 737.10.
\textsuperscript{53} Id. § 509.06.
\textsuperscript{54} Id. §§ 311.07(B), 737.10.
\textsuperscript{55} Id.
\textsuperscript{56} See generally Aumann, \textit{The Ohio Law Enforcement System}, 21 U. CINN. L. REV. 1, 24-30 (1952). Although the governor may institute judicial proceedings to oust local officials who refuse or willfully neglect to enforce the law, \textit{OHIO REV. CODE ANN. §§ 3.07-08} (Page 1978), local officials are accountable only to the citizens within their jurisdictions.
\textsuperscript{57} See notes 16-17 supra and accompanying text.
\textsuperscript{58} This concept of decentralized autonomy is affected by internal problems. First, conflicts of authority may occur between the county sheriff and municipal or township officials when disturbances occur within the political subdivisions of
on local civil authorities to manage the state forces that come to their aid.59

B. Deployment of the State Militia

The state maintains a reservoir of two forces: the Ohio State Highway Patrol and the state militia. Beleaguered local officials may call upon the governor for assistance from these agencies. State law provides that the Highway Patrol and militia units dispatched by the governor shall, under most circumstances, act in aid of local authorities.60

Local authorities must request Highway Patrol assistance before the governor can dispatch the troopers.61 When and if the governor provides Patrol assistance,62 the Patrol supplements the forces of the local authorities.63 Troopers remain under the direct control of the superintendent and his field commander at the scene of the disturbance.64 These officials are responsible for coordinating the troopers' activities with the needs of the local officials.65

the county. It is likely, however, that the sheriff in such cases will conserve his scarce resources until the mayor or township officials invite his assistance.

Secondly, where community values condone local exercise of what state officials would regard as excessive force, the parochiality of the concept of decentralized autonomy may work to the disadvantage of participants in local civil disorders. Despite this problem, state control itself cannot be said to be superior to local control of the militia.

59 See notes 35-55 supra and accompanying text.
60 OHIO REV. CODE ANN. § 5923.22 (Page 1977).
61 OHIO REV. CODE ANN. § 5503.02(B) (Page Supp. 1979). The mayor has exclusive authority to initiate requests for Patrol assistance in cities in which the sheriff does not provide exclusive police services under contract. In cities in which the sheriff does provide exclusive police services and in villages and unincorporated areas of a county, it is the sheriff who has authority to make requests for Patrol aid. Id. When making the request for Patrol assistance, the requesting official must notify the law enforcement authorities in contiguous communities and the sheriffs of each county in the troubled area. Id.
62 Under current procedures the governor will dispatch the Patrol to civil disorder duty only when unrest has exceeded or is about to exceed the control of local authorities "operating at their maximum capability." EMERGENCY PROCEDURES, supra note 32, at 3-1.
63 Id.
64 Id.
65 Id. The Patrol is trained to engage in civil disorder control. Civil disorder control, though, is a secondary task of the Highway Patrol. Normally the Patrol, under the supervision of the Superintendent and the Director of the Department of Highway Safety, OHIO REV. CODE ANN. § 5503.01 (Page Supp. 1979), enforces state vehicle and highway laws throughout Ohio. Id. § 5503.02(A). In addition, the Patrol enforces the criminal laws on state property. Id. When riots, civil disorders, or insurrections occur or impend state law authorizes use of the Patrol to enforce criminal laws within the entire affected area. Id. § 5503.02(B). Every trooper has undergone at least fifty hours of special civil disturbance instruction during basic training. EMERGENCY PROCEDURES, supra note 32, at B-1; Letter
When circumstances have engrossed the resources of all local forces and the Highway Patrol, the governor will entertain requests by local authorities for militia assistance. In contrast to the procedure for requesting the Highway Patrol, the governor need not await a request by local officials before he deploys the militia. Use of the militia is entirely a matter of the governor's discretion subject only to limited judicial review. After the governor commits the militia to a scene, the heads of the Highway Patrol and state militia mutually agree on a schedule to phase out the Patrol's participation. Thereafter, the militia acts at the behest of local officials.

If "any breakdown of law and order impends," the governor may assume personal control of law enforcement in the affected area. Whether the need for such gubernatorial involvement exists is again, generally a matter of the governor's discretion. If the governor so determines, he may issue a proclamation announcing his assumption of control. Under command of the governor, rather than local officials, the

from Col. Adam G. Reiss, Superintendent, Ohio Highway Patrol, to John Kulewicz (Mar. 20, 1979) (on file with author) [hereinafter cited as Reiss letter]. In addition, each trooper annually attends two seminars on control of civil disorders. Id. In less than one hour the Patrol, operating from eleven headquarters located throughout the state, allegedly is capable of gathering 175 troopers at the site of a civil disorder. Id. The Patrol can place its total force of nearly 1110 on "immediate response alert" if the disorder is anticipated. Id.

66 EMERGENCY PROCEDURES, supra note 32, at 4-1. In general, local authorities are expected to request assistance from the Highway Patrol before seeking the aid of the state militia. Id. at 1-1. See generally, Aumann, supra note 56, at 6-9.


68 See note 71 infra.

69 EMERGENCY PROCEDURES, supra note 32, at 1-1.


71 The Court has repeatedly asserted that the actions taken by a governor after issuing a martial rule proclamation are subject to limited judicial review. See Scheuer v. Rhodes, 416 U.S. 232, 248-49 (1974); Laird v. Tatum, 408 U.S. 1, 14-16 (1972). These cases repudiate the notion, enunciated in Moyer v. Peabody, 212 U.S. 78, 85 (1909), that the actions of a governor during a time of martial law were unreviewable. Instead, courts will examine a governor's martial law actions to discern whether "the exertion of state power has overridden private rights secured by the Constitution." Scheuer v. Rhodes, 416 U.S. at 249, quoting Sterling v. Constantin, 287 U.S. 378, 398 (1932). See also E. BECKWITH, LAWFUL ACTION OF STATE MILITARY FORCES 45-47 (1944); J. BISHOP, JUSTICE UNDER FIRE 236-51 (1974); R. RANKIN, WHEN CIVIL LAW FAILS 159-72 (1939); F. WEINER, A PRACTICAL MANUAL OF MARTIAL LAW 16-27 (1940); Mutter, Some Observations on Military Involvement in Domestic Disorder, 29 FED. B.J. 59, 62 (1969); Note, Martial Law and the National Guard, 18 N.Y.L.F. 216, 219-29 (1972); Note, Preserving Order in the State: A Traditional Reappraisal, 75 W. VA. L. REV. 143, 158-59 (1972); Comment, The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations, 59 KY. L.J. 547, 558-69 (1970); Comment, 42 So. CAL. L. REV. 546, 550-55 (1969).

militia thereafter would execute the law and keep the peace in the designated area.\textsuperscript{73}

A state of qualified martial law exists after the governor has assumed control of local peacekeeping efforts.\textsuperscript{74} Ohio statutes do not allow the use of full-fledged martial law under which a military commander establishes military courts to try offenses under whatever rules he might issue.\textsuperscript{75} The present statutory provision for qualified martial law\textsuperscript{76} gives the militia no power to issue directives and prosecute violators. Instead, the militia is limited to executing the laws and keeping the peace within an affected area.\textsuperscript{77} Militia authorities eventually must deliver any

\textsuperscript{73} Id.

\textsuperscript{74} See R. Rankin, \textit{supra} note 71.

Whenever disorders have occurred and the use of troops has become necessary, there have been three distinct classifications in which the soldiers might find themselves: 1) when the militia has been called out for the purpose of aiding the civil authorities, martial law has not been declared and the troops have simply acted as peace officers; 2) when qualified martial law has been declared, either the soldiers have turned offenders over to the civil courts for trial or have kept them in detention until the restoration of peace; and 3) when punitive martial law has been declared and the military commander has been permitted to establish military courts for the trial of offenders against whatever rules that might be established, the troops have been limited only by the orders of superior officers.


\textsuperscript{75} "Martial law" is not identical to "martial rule." Disagreement exists over exactly what each term means. See F. Weiner, \textit{supra} note 71, at 9-10; Fairman, \textit{supra} note 74 at 775. This paper adopts the following definition: "martial law," for which the Ohio statutory scheme provides, is characterized by military replacement of civil authorities in the administration and enforcement of civil government laws. By contrast, "martial rule," for which Ohio law makes no provision, is characterized by military dictation of \textit{ad hoc} rules and regulations. \textit{But see} National Defense, 32 C.F.R. \textsection 501.4 (1978) (reversing the meaning of the terms). The Adjutant General of Ohio observes the federal procedures for the execution of the state militia's martial law responsibilities. \textit{Annual Report}, \textit{supra} note 30.

\textsuperscript{76} \textit{Ohio Rev. Code Ann.} \textsection 5923.231 (Page 1977).

\textsuperscript{77} Id. The statute requires the governor to designate the area in which the militia is to act, but fails to confine militia units to operating within the boundaries of the state, or to provide for circumstances under which the militia may cross into other states. See, \textit{e.g.}, \textit{Minn. Stat. Ann.} \textsection 190.025 (West 1962) (state militia under direction of the governor and officer in immediate command may continue in "fresh pursuit" of insurrectionists, saboteurs, enemies, or enemy forces beyond the borders of the state into another state until the fugitives are captured or forces of the other state or of the United States have had reasonable opportunity to take up the pursuit; provided, that the appropriate official in the other state has authorized the pursuit); \textit{N.J. Stat. Ann.} \textsection 38 A:16-1 (West 1968).
civilian whom they arrest or detain to the proper civil authorities.\textsuperscript{78} Local officials may continue to participate in law enforcement efforts, but only under the auspices of the governor. The significance is that martial law in Ohio thus shifts to remote civil officials the responsibility for directing law enforcement activities, activities traditionally performed by local officials.\textsuperscript{79}

V. THE AUTONOMY OF THE STATE MILITIA

Contrary to the described statutory scheme,\textsuperscript{80} four statutory shortcomings allow the militia to become a self-directing force when dispatched by the governor to aid local officials. Under the militia deployment law, local civil authorities have absolutely no control over militia tactics.\textsuperscript{81} In addition, members of the militia are not held by law to the same standard of tort liability to which other law enforcement personnel are subject.\textsuperscript{82} Recalcitrant military commanders can take advantage of ambiguities in the martial law statute to seize the policymaking initiative operating in the service of other states may enter Ohio, or provide a means by which the state government may authorize or forbid the entrance. See, e.g., GA. CODE ANN. § 86-117 (1979) (fresh pursuit); IDAHO CODE § 46-110 (1977) (only governor authorized to give permission); S.C. CODE § 25-1-90 (1977) (same provisions).

\textsuperscript{78} OHIO REV. CODE ANN. § 5923.231 (Page 1977).

\textsuperscript{79} As a last resort, the state may call upon the United States government to send federal troops and militia units of other states to Ohio for the purpose of restoring order. The United States Constitution provides that "[t]he United States shall . . . protect each [state] against domestic Violence," U.S. CONST. art. IV, § 4, upon application of the legislature or, when the legislature cannot be convened, of the chief executive of the affected state. Pursuant to this Guarantee Clause, Congress has provided for federal military aid to beleaguered state governments. 10 U.S.C. § 331 (1976). Statutes also provide for presidential use of militia and armed forces to enforce federal law, id. § 332, or to prevent interference with state and federal law, id. § 333. In addition, the president is required, before using federal troops domestically, to issue a proclamation that orders the "insurgents to disperse and retire peaceably to their abodes within a limited time." id. § 334. See Note, Riot Control and the Use of Federal Troops, 81 HARV. L. REV. 638 (1968).

The constitutional authority of the president to act on his own initiative to execute the laws may exceed the limits of these statutes. See 41 OPS. ARK. ATTY GEN. 313 (1957) (indicating "grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate"). Similar doubts, founded on the separation of powers concept, may also apply to the constitutional authority of a state legislature to define the limits of gubernatorial power to use the state militia. See Woodbridge, A History of Separation of Powers in Ohio, 13 U. CINN. L. REV. 191, 240-42 (1939); Comment, Martial Law, 42 SO. CAL. L. REV. 546, 556 n.59 (1969).

\textsuperscript{80} See notes 60-79 supra and accompanying text.

\textsuperscript{81} OHIO REV. CODE ANN. § 5923.23 (Page 1977).

\textsuperscript{82} Id. § 5923.37.
from local officials. State law prevents civilians from attaining militia leadership positions. A final, non-statutory shortcoming derives from the current civil disorder control policies of the governor's office. The emergency procedures used by the governor's office allow a militia commander, rather than a civilian official, to control coordinating efforts at the command post established at the site of militia interventions.

The infirmity of civilian authority results in part from the statutory restriction on local civil control of militia tactics. When the governor sends militia units to the aid of a local government, the civil authorities may only "designate in general terms" what they want the militia to do. Currently, the state suggests that local officials merely specify that they want the militia to "provide assistance to the Police of this city to aid in restoring and maintaining law and order." State law provides that after the civilian official has stated the mission of the militia, "[t]he mode and means of execution shall be left to the discretion of the commanding officer." Local civil authorities, thus, do not have power to control the tactics of the militia.

By withdrawing from civilian officials the power to control tactics, the statute reduces civil authority over the militia to a mere momentary nexus. On a university campus, for example, the university president normally retains primary responsibility for preserving order. The president may direct the militia to secure a campus building, yet it is the military commander, not the university president, who determines whether and to what degree force shall be used.

Civil preeminence is not guaranteed simply because the governor retains his power over the militia as commander-in-chief. The governor has no statutory authority over the militia after sending in units to aid local governments. Only by declaring a state of martial law, due to the "breakdown of law and order," does the governor assume actual command of militia efforts. Statutory restriction of local civil power over militia tactics thus provides the militia a wide-ranging license to act independently in its own pursuit of law and order.

If the militia were subject to the same standard of liability as local law enforcement officers, the virtual displacement of formal civil authority might not be as flagrant. At least the militia would have to

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83 Id. §§ 5913.021-.06.
84 EMERGENCY PROCEDURES, supra note 32, at 1-1.
85 OHIO REV. CODE ANN. § 5923.23 (Page 1977).
86 EMERGENCY PROCEDURES, supra note 32, at D-1.
87 OHIO REV. CODE ANN. § 5923.23 (Page 1977).
88 Id. See Krause v. Rhodes. 471 F.2d 430 (6th Cir. 1972).
89 OHIO REV. CODE ANN. § 5923.231 (Page 1977). This statute allows the governor to issue a proclamation ordering cessation of the duties given to the militia, but does not give the governor control over the militia during the interim period.
90 Id.
observe the limits that the courts have imposed on the conduct of regular law enforcement officers under the control of civil authorities. Yet, an indulgent statute⁹¹ has freed the militia from even this degree of deference to local civil power.

Militia members operate within a much looser standard of liability than regular police officers. Generally, police officers incur personal liability for negligent or wrongful acts that cause personal injury or death.⁹² Members of the organized militia, however, are not answerable in a civil suit for any military act they perform, unless the act is one of willful or wanton misconduct.⁹³ Thus, in the gap between negligence and willful or wanton misconduct, the militia is immune from accountability to any civil authority, including the courts.

The statutory procedure for invoking martial law further reduces the effectiveness of local civil authority. The martial law procedure paradoxically places on local officials the burden of cooperating with the militia commander in defining the mission of the militia units.⁹⁴ If the military commander and the civil official disagree over the proper goals for the militia to pursue, the frustrated commander can plead to the governor that conditions are ripe for a "breakdown of law and order." The governor then has it within his discretion to declare martial law.

Nowhere does the martial law statute define the meaning of a "breakdown of law and order."⁹⁵ Moreover, the governor may complete the transfer of enforcement power even before the "breakdown" occurs.⁹⁶ Indeed, the governor can severly restrict standing local governments. Having sent the state militia into a situation, the governor has a strong incentive to promote maximum efficiency by removing whatever local obstacles exist which could impede the militia. It thus behooves local civilian officials to accede to the wishes of military commanders.

By law, the person who shapes militia policy must be a veteran

⁹¹ Id. § 5923.37.
⁹³ Ohio Rev. Code Ann. § 5923.37 (Page 1977). Moreover, any civil proceeding alleging an act of wanton or willful misconduct performed by a member of the organized militia in the line of duty must be brought within two years after performance of the alleged act. Id. § 5923.36.
⁹⁴ Id. § 5923.23.
⁹⁵ Id. § 5923.231.
⁹⁶ Id. The judiciary, of course, has asserted its authority to review the actions taken by a governor after he or she has instituted martial law. See note 71 supra. In reviewing the governor's response to an emergency, the courts will question whether there was a "direct relation" between the actions taken and the goal of restoring order. Note, Preserving Order in the State: A Traditional Reappraisal, supra note 71, at 159.
military officer. At the policymaking and administrative head of the organized militia is the Adjutant General of Ohio. The Adjutant General is subject only to the direct authority of the governor. The governor must select the Adjutant General from the pool of federally recognized officers of the Ohio National Guard, who have served more than five years as a commissioned Guard officer and who have attained at least the rank of colonel. The militia, thus, is a self-contained institution, impervious to ongoing civilian influence except at the ex officio gubernatorial level.

The militia further overrides civil authority at the command post established by the governor at the scene of each militia intervention. At the command post are representatives of affected local law enforcement agencies, the militia, and the Highway Patrol. Each representative has authority to act for his agency. Yet, under wider current command post procedures, it is the National Guard Task Force Commander, not a local civilian official, who coordinates the joint efforts of all forces. Specific missions are assigned by consensus of all parties involved; the local civil authorities have influence only in direct proportion to their presence at the command post. This procedure for the distribution of power at the command post further evinces the militia's dominant role.

VI. SUBORDINATING THE MILITIA: A PROPOSAL FOR STATUTORY REFORM

To effectuate the Strict Subordination clause, the law must recognize more clearly the surrogate role of the state militia in Ohio law enforce-
ment. As a first step towards reform, local officials should be given statutory authority to control the tactics of the militia units sent to their aid. Local civil authorities, of course, do not constantly make such decisions for their own police departments, yet, no statute precludes them from so doing. It is especially urgent in the highly-charged atmosphere that usually surrounds militia interventions that officials who

97 OHIO REV. CODE ANN. § 5913.01 (Page 1977). The Adjutant General also is chief-of-staff to the governor. Id. Along with the Adjutant General, the military staff of the governor consists of an assistant adjutant general for the army, an assistant adjutant general for air, an assistant quartermaster general, and four aides-de-camp. Id. § 5913.02. Like the Adjutant General, these persons hold office at the pleasure of the governor, and must be active officers of the Ohio National Guard at the time of their appointment. Id. §§ 5913.021-06.

98 Id. § 5913.01.
99 Id. § 5913.021.
100 Id.
101 EMERGENCY PROCEDURES, supra note 32, at 1-1.
102 Id.
103 Id.
104 Id.
are attuned to local conditions and non-military values be able to control the use of force. Local officials, moreover, can coordinate the operations of militia units with the local police departments. Such reform could make it vitally important for local officials to understand the capabilities of the militia.

The militia also should operate under the same standard of liability that governs regular local forces. To be sure, the disorders that militia units seek to control are normally more furious than the situations encountered by police forces. The increased magnitude of violence would at first seem to justify the broader scope of permissible militia conduct, however the presence of the militia compensates for the greater intensity of lawlessness. In the absence of other reasons justifying reduced liability, militia members in the performance of their duties should incur liability for any negligent or wrongful acts.

To ensure the efficacy of civil power, the conditions under which the governor may declare martial law also should be clarified. The ill-defined and expansive provision for martial law under present Ohio law can put local authorities at a disadvantage in dealing with strong-willed militia commanders. It would strengthen the resolve of local officials if the martial law statute clearly delineated what constituted a "breakdown of law and order," and limited gubernatorial proclamations to such occasions. Ideally, a "breakdown" would consist only of the complete routing of local authorities. In no other situation is there a conspicuous need for gubernatorial control.

In addition, the Adjutant General of Ohio should come from the civilian population. Like the Secretary of Defense of the United States, the Adjutant General coordinates defense operations and serves as liaison between military forces and a civilian chief executive. Both the Defense Secretary and the Adjutant General function as administrative and policymaking heads of defense forces; they act as advocates of military power to their respective chief executives. Yet, in contrast to the Secretary of Defense, who may never have served as a commissioned officer in the regular military for at least ten years prior to his appoint-

105 See note 92 supra and accompanying text.

106 See Engdahl, A Comprehensive Study of the Use of Military Troops in Civil Disorders, 43 Colo. L. Rev. 399 (1972); Engdahl, Soldiers, Riots, and Revolutions: The Law and History of Military Troops in Civil Disorders, 57 Iowa L. Rev. 1 (1971). Engdahl argues that so long as civilian institutions are capable of functioning, military personnel may be utilized to deal with civilians only as a supplemental civilian force. The militia personnel should be completely under the control and discretion of local civilian officials, subject to the rules and restraints of civilian law, and neither bound nor protected by the rules of military law. Engdahl's argument supports not only the proposal for an identical liability standard for police officers and militia members, but also the recommendation presented herein regarding civilian control of militia tactics, and the arrangement of power at the command posts.
ment, the Adjutant General of Ohio must possess current military credentials. Installation of a civilian as chief policymaker of the state militia would infuse civilian considerations directly into militia activities. Institution of direct civilian control of the organized militia would reinforce the constitutional commitment to civil authority.

The state should also recognize the paramount authority of civilian officials at the command post. Current command post procedures give excessive power to militia and Highway Patrol chiefs. Rather than retaining control of operations, these non-civilians should act as advisors to the decisionmaking heads of affected civil governments. The directives of local civil officials, not a joint agreement of all parties at the command post, should assign missions. Likewise, a civil official should coordinate command post activities. Rearranged in this manner, the command post would reflect the constitutional ranking of authority.

VII. Conclusion

The Ohio General Assembly should act at once to correct the inverted relationship between military and civil power in Ohio. So long as the militia deployment statutes remain as they are, militia commanders are free to override civil authority. The prospect of civil subordination to the military is repugnant not only to the principles of the Ohio Constitution, but also to the values of our democratic society.

108 See notes 97-100 supra and accompanying text.
109 Not every state requires that its Adjutant General come from the military. See ALASKA STAT. § 26.05.160 (1978); IND. CODE ANN. § 10-2-2-7 (Burns 1972); VT. STAT. ANN. tit. 20, § 363. But see N.C. GEN. STAT. § 127A-19 (Cum. Supp. 1977) (adjutant general of military background is head of militia and serves at the pleasure of the governor); S.C. CODE § 25-1-320 (1976) (adjutant general chosen at statewide election).
110 See notes 101-104 supra and accompanying text.