FROM MARTIAL LAW TO THE WAR ON TERROR

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This article explores the transformation of martial law into emergency powers. In so doing it presents an argument about the liberalization of martial law and the constitutionalization of emergency powers. In showing the ways in which the powers of martial rule have become normalized within liberal democracies the article points to an ideological circuit between emergency powers and the logic of security, a circuit most apparent in the current "war on terror."

"Foundations are in place for martial law in the US."[1] This particular headline from July 2002 was no different in substance to many in the period. The initial months, and now years, since the introduction of new "security measures" following the attacks of September 11, 2001, alerted many to the likely dangers from the new laws, regulations, and police powers being rushed through. This was true not just of the U.S., but of many Western liberal democracies, especially the UK. These new dangers were thought to be as wide as they are varied, and a full list would have to include the increased patterns of surveillance, the militarization of domestic security, an increasing shift of power from legislatures to executives, the concerted attempts by state officials and lawyers (and, it should be noted, political philosophers) to justify torture, and detention without trial in spaces, camps, or prisons controlled by the military.

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1. Ritt Goldstein, Foundations Are in Place for Martial Law in the US, Sydney Morning Herald, July 27, 2002, available at http://www.smh.com.au/articles/2002/07/27/1027497418339.html.

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In that sense to say that foundations are in place for martial law in the US hardly seems like scaremongering. And yet as a recent Congressional Report on the question of martial law notes, "since the conclusion of World War II, martial law has not been presidentially directed or approved for any area of the United States."[2] The obvious question to ask, then, is how such practices can be carried out without a declaration of martial law on the part of those sovereign entities promulgating the new laws, regulations, and police powers.

What I want to do here is to try and answer this question by taking a rather long route through some of the history of martial law. In so doing I aim to suggest that while the current war on terror appears to be using some of the key features of martial law, "martial law" is itself not quite the category at stake and may in some senses even be misleading. It is misleading because what is at stake is less the move to martial law and much more the mechanisms by which the principle of martial law and its key practices have seeped into the political and legal systems of liberal democracies. What I aim to show, in other words, is the *liberalization* of martial law. This liberalization occurred through the generation of new concepts which permitted the key practices of martial law to be carried out under a conceptual form more easily defended on liberal terms. The concepts I have in mind are emergency powers and national security.

To trace a line from martial law to the war on terror therefore requires an unravelling of some of the overlapping themes and assumptions in two ideas which animate the new liberal authoritarianism—the state of emergency and national security—and to situate these in the history of martial law; indeed, to situate them both *as part* of the history of martial law and at *the heart* of contemporary state power and global governance. This article is thus not intended as an extensive overview of either martial law or emergency powers but, rather, aims to explore the ways in which martial law powers have found their strategic primacy in an *ideological circuit* between security and emergency. This circuit, I will suggest, has come to dominate the political landscape and the world of law, operating not on the site of the battlefield, and not even at the level of the state or city, but on the level of the entire world.

2. Harold C. Relyea, Martial Law and National Emergency, Congressional Research Service Report RS21024, at 4 (Jan. 7, 2005).

I. A LITTLE INDULGENCE

Until around the 1830s martial law was equated with military law—the rules for governing armed forces in the field. In its original meaning the term thus referred to jurisdiction over soldiers of the crown and jurisdiction over alien enemies. The Petition of Right of 1628, for example, sought to limit the abuse of monarchical powers by making martial law applicable only to soldiers, and thus held that the Crown had no authority to administer military law within the realm during a time of peace. Likewise, the Mutiny Act of 1689 permitted the trial and punishment of soldiers by courts martial and allowed the King to "proclaim martial law" for the government of the army during peace and war. Although there was some debate about the nature and extent of martial law powers—martial law had on occasion been used to prosecute poachers, vagabonds, and rioters, for example, while the Petition of Right applied in England but not Ireland[3]—Sir Matthew Hale's position in 1713 was the widely accepted one:

> Touching the Business of Martial Law, these Things are to be observed, viz.
>
> *First*, That in Truth and Reality it is not a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army is that only which can give those Laws a Countenance . . . .
>
> *Secondly*, This indulged Law was only to extend to Members of the Army, or to those of the opposite Army, and never was so much indulged as intended to be (executed or) exercised upon others. . . .
>
> *Thirdly*, That the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be permitted in Time of Peace, when the King's Courts are open for all Persons to receive Justice, according to the Laws of the Land. This is in Substance declared by the Petition of Right.[4]

In other words, martial law applied only to the members of the armed forces and its jurisdiction ended at the battleground—"as is used in Armies in Time of War," as the Petition of Right put it. Civilians within the area of battle might be temporarily subject to the martial law in question, but martial law could not be exercised in times of peace, which many

3. See J.V. Capua, Early History of Martial Law in England from the Fourteenth Century to the Petition of Right, 36 Cambridge Law Journal 152 (1977).

4. Sir Matthew Hale, The History of the Common Law of England 26–27 (1971).

took to be illustrated by the fact that the courts were open.[5] In other words, the position into the late-eighteenth century was that martial law did not apply to citizens.

In the first half of the nineteenth century, however, the concept gradually took on a new meaning. The use of the military during the Gordon riots of 1780 had led many to claim that this was an imposition of martial law. But in response the Lord Chief Justice claimed that since the constitution had not been suspended and all those tried for offenses had been tried in the ordinary courts, martial law had not in fact been declared. The major factor behind the new meaning was an increasing use of martial law in governing occupied territories in the early nineteenth century. Where on the mainland the British state could muddle through well enough with sporadic use of the Riot Act to maintain order and, as in the case of the Gordon riots, fudge the issue of whether the use of the military internally was a form of martial law, it was quite clear that martial law most definitely *was* being used in that standard locale of political experimentation, the colonies: in Barbados in 1805 and 1816; Demerara in 1823; Jamaica in 1831–32 and 1865; Canada in 1837–38; Ceylon in 1817 and 1848; Cephalonia in 1848–49; Cape of Good Hope in 1834–35, 1849–51, and 1852; the Island of St. Vincent in 1863; and on several occasions in Ireland.[6] As such declarations increased it became apparent that martial law seemed to involve a kind of suspension of law; that certain "liberties" were being taken with the "indulgence" in question. In this context some constitutional authorities began to argue that in times of crisis constitutional norms might indeed have to be abandoned. Henry Hallam, in his widely read *Constitutional History of England* (1827) commented that "there may indeed be times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel the temporary abandonment of constitutional forms. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction."[7] In other

5. Id.

6. Charles Fairman, The Law of Martial Rule 52–53 (1930); Nasser Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law (2003); Charles Townsend, Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940, 25 Hist. J. 167 (1982).

7. 1 Henry Hallam, Constitutional History of England from the Accession of Henry VII to the Death of George II, at 258 (1827).

words, what was emerging was an understanding that martial law might be applicable not simply to the military, but to the use of the military to maintain "order" more generally.

Once this principle was established it took little effort for what Foucault calls the boomerang effect to occur, in which the mechanisms of violence used in the colonies become integrated back into the juridical regime and political practices of the colonizing state.[8] What emerged in this particular boomerang effect was the belief that such a form of governance had two dimensions. First, that martial law involved the suspension of some fundamental liberties and thus the law per se. In a heated debate in the House of Commons in April 1851 concerning the repression of rebellion in Ceylon, for example, the Duke of Wellington and Earl Grey agreed that because martial law is neither more nor less than the will of the general who commands the army, martial law means no law at all.[9] For this reason some have suggested that we should better speak of "martial rule" than "martial law."[10] The second dimension was that such exercises of martial law powers could be justified on the grounds of necessity: that public order and the security of the state *necessitated* the suspension of basic liberties. "Martial law is a rule of necessity," the Judge Advocate General put it in a Commons committee debate in 1849.[11] These two dimensions are perhaps best combined in a comment from Cromwell which resonates through the judicial and political debates about martial law—"necessity hath no law"[12]—although many writers saw the roots of this argument in the concept of prerogative and the arbitrary powers it appeared to allow.

A parallel to this development in Britain can also be traced in the U.S. context. Indicators of the gradual shift in meaning can be found early in the nineteenth century, for example over General Andrew Jackson's

8. Michel Foucault, Society Must be Defended 103 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003).

9. 105 Parl. Deb., H.C. (3d ser.) (1851) 880–81.

10. Fairman, supra note 6, at 29–31; Charles Fairman, The Law of Martial Rule, 22 Am. Pol. Sci. Rev. 591 (1928).

11. 1 Sir James Fitzjames Stephen, A History of the Criminal Law of England 213 (1883) (quoting Sir David Dundas responding to questions from Peel and Gladstone about the case of Ceylon).

12. Speech to Parliament, 12 September, 1654, in Cromwell's Letters and Speeches 74 (1870).

proclamation of martial law in New Orleans in December 1814, but the substantive change came following the attempt by militant Rhode Islanders to adopt a written constitution for the state in 1841. Their desire for popular sovereignty led them to assemble a popularly elected convention, draft a constitution, submit it for ratification, and then declare it ratified, following which they elected officials to a people's government under Thomas Wilson Dorr and scheduled for inauguration in May 1842. The response to "Dorr's rebellion" by the authorities was the mobilization of the state militia across the entire state; in other words, to declare martial law against the insurgent radicalism of a popular democratic movement. Hundreds were arrested without warrant and detained without a clear statement of charges. Many Rhode islanders believed that since the military was being used in a way never before seen in American history—even General Jackson's declaration of martial law for New Orleans in 1814 relied on the fact that the nation was threatened with an "enemy" invasion—this clearly would not stand the test of being subject to real law, and so they instituted two suits in late 1843 and early 1844, one of which focused specifically on the legitimacy of the substitution of military for civilian authority and the deliberate suspension of due process. The Circuit Court dismissed the cases after cursory hearings, with Justice Story holding that the situation in 1842 had been so urgent that the Rhode Island legislature resorted to the use of martial law as a matter of necessity. But the issue at stake was deemed so important that it made it to the Supreme Court in 1849.

In the intervening years, a debate took place concerning the definition of martial law. Two books published in 1846, William C. De Hart's *Observations on Military Law* and John Paul Jones O'Brien's *Treatise on American Military Laws*, sought to distinguish martial from military law and argue that the Constitution in fact sanctioned martial law as the only means of defense when the civil institutions were closed or suppressed by emergency conditions. In the meantime the war in 1846 substantially increased the size of the Union, which now contained a considerable "alien" population supposedly unfamiliar with American institutions and apparently incapable of self-government. The obvious question arose: surely martial law might be appropriate for such a situation and such people? By the time the Rhode Island case came to the Supreme Court in 1849, the political implications of the debate about martial law were clear for all to see. The decision which emerged came, ironically, in the context

of an attempt by Chief Justice Taney to separate "political" questions from "justiciable" ones, and to argue that declarations of martial law are government actions which should not be questioned in a court of law.[13] In the process Taney argued that the declaration of martial law to subdue the Rhode Island insurrection was acceptable, not least because the insurrection constituted "a state of war."[14] This decision—the *Luther* decision, following a trial in which Luther originally challenged the search on his house and being placed under arrest[15]—altered the understanding of martial law in America, ratifying a process that had been taking place since the early 1830s: martial law now appeared to refer to the establishment of prerogative governmental powers for dealing with situations thought to constitute some kind of crisis or emergency. Taney had specifically argued that the plaintiffs had been wrong to refer to ancient meanings of martial law in trying to show the wrongness of the government's actions. Ancient usage could not be compared "in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defense. . . . "[16] And since such "self-defense" must of necessity include defense from insurrection, itself a form of war, martial law is an appropriate measure. Fundamental liberties can rightfully—and *necessarily*—be suspended in pursuit of order. It did not take much to see that Taney's reasoning was easily applicable at the federal level. After all, the Constitution itself provided for the suspension of habeas corpus in cases of rebellion or invasion and allowed for Congress to call forth the militia to suppress rebellions and invasions.[17] It was thus easy for the *Luther* decision to be invoked throughout the nineteenth century, as for example by Lincoln in the Civil War when he declared rebels and insurgents to be subject to martial law and courts martial.[18]

13. Michael A. Conron, Law, Politics, and Chief Justice Taney: A Reconsideration of the *Luther v. Borden* Decision, 11 Am. J. Legal Hist. 377 (1967).

14. Luther v. Borden, 48 U.S. 1 (1849). Also see George M. Dennison, Martial Law: The Development of a Theory of Emergency Powers, 1776–1861, 18 Am. J. Legal Hist. 52 (1974).

15. Luther v. Borden, 48 U.S. at 1.

16. Id. at 46.

17. U.S. Const. art. I, § 9, cl 2; id. § 8, cl. 15.

18. Hence the Taney ruling was invoked in the landmark case of Ex parte Milligan, 71 U.S. 2 (1866).

What we find, then, is an enormous historical shift taking place in the nineteenth century concerning the logic and focus of martial law, a shift which allowed the state to avail itself of the right to use special, constitutionally prescribed powers in situations in which "public security and order" was thought to be in danger. The emerging political and juridical logic was that these powers involved an increase in executive power vis-à-vis the legislature and judiciary—"a trial by martial 'law' is a purely executive act"[19]—a shift of power to military authority, and the suspension of basic liberties and rights including the power of detention. "Martial law" shifted gradually from a military to a political register, referring less and less to military encounters with enemy forces and more and more to questions of internal security and public order. Thus the history of the idea of martial law is the history of a shift from regulation *of* the military within the state to regulation *by* the military of the social order on behalf of the state, especially in times of rebellion or for the suppression of insurrection. "Martial law" moves from being a code for the internal governance of military power to being a rationalization for the use of military power across the face of society in which basic liberties and rights and possibly even the law *tout court* appear to be suspended. This was comfortably in place by the late-nineteenth century. Dicey, for example, in his *Introduction to the Study of the Law of the Constitution* (1885) held that martial law as government through military tribunals is not known to English law, but that if by "martial law" we mean the common law right of Crown and its servants to maintain public order by repelling invasion and insurrection then martial law certainly is part of the law of England.[20] A more or less identical position was held by Sir James Fitzjames Stephen in his *History of the Criminal Law* (1883) and by F. W. Maitland in his *Constitutional History of England* (1888).[21]

19. J.H. Morgan, Martial Law, in 14 Encyclopaedia Britannica 984 (14th ed., 1929). Also note Sir James Fitzjames Stephen's comment that "courts-martial, as they are called . . . are not, properly speaking, courts-martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government." Stephen, supra note 11, at 216.

20. A.V. Dicey, An Introduction to the Study of the Law of the Constitution 288, 291 (10th ed., 1959).

21. Stephen, supra note 11, at 208 and 215; F. W. Maitland, The Constitutional History of England 491 (1950).

The extent to which this view was now in place can also be seen in a number of landmark cases. In 1902, in *Ex parte Marais*, the applicant sought release from detention without trial under martial law, claiming that not only had he committed no crime but that even if he had he should have been tried before the civil courts. The Judicial Committee of the Privy Council found that because war had become so extended and the conditions of emergency so diverse, the rule that martial law only applied when the ordinary courts could no longer physically convene was no longer operative. Moreover, the fact that for some purposes the courts were still in operation did not mean that war was not taking place. In addition, the committee held that the Petition of Right is applicable only to conditions of peace.[22] For Frederick Pollock writing in the *Law Quarterly Review*, the judgment tried to "keep alive the fallacious notion that martial law is identical or logically connected with military law," when in point of fact it was that "martial law" is now simply the name for "acts done by necessity for the defence of the Commonwealth when there is war within the realm."[23] Similarly, in the U.S. Governor Peabody declared martial law in Colorado in 1903 and 1904, suspending habeas corpus, imposing a curfew, and detaining without trial the president of the miners union Charles Moyer. Moyer bought a suit for damages for being detained without trial, alleging that he had been deprived of liberty. The Supreme Court in *Moyer v. Peabody* affirmed the dismissal of the action, suggesting that the governor is rightly the final judge and that, in the words of Justice Holmes, "when it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of the individual must yield to what he deems the necessities of the moment."[24] In so doing the Court transformed much of the 1849 Taney judgement into binding law.

To reiterate: what was at stake in these judgments was the possibility of using martial law during times of "peace" or, rather, reconceptualizing "war" so that broader moments of crisis, rebellion, or insurrection could be easily brought under its remit—if these constituted "wars" of sorts then

22. A.C. 109 (1902).

23. Fredrick Pollock, What is Martial Law?, 18 L.Q.R. 152, 156 (1902).

24. Moyer v. Peabody, 212 U.S. 78 (1909). See Dennison, supra note 14, Jason Collins Weida, A Republic of Emergencies: Martial Law in American Jurisprudence, 36 Conn. L. Rev. 1397 (2004).

surely there could be no objection to the use of martial law powers? But what is also important to note is that these ideas were coming to the fore in states which were developing into liberal democracies. Now, on the one hand this means that through martial rule (or, in civil law countries, the "state of siege," which had undergone a similar transformation in the same period)[25] liberal democracies were handed a political maneuver that provided a means of simultaneously liberating executive power from constitutional restraints and suspending basic liberties. Martial law was thus a solution to the increasing number of rebellions and insurrections that seemed to be taking place. On the other hand, however, the ruling class recognized that within the broader context of an increasingly democratized polity, declarations of martial law were becoming increasingly inflammatory to the new citizenship. Martial law was a solution, then, but also a problem.

The initial way this problem was dealt with was to consider its modern employment a "qualified" form of martial law. In the case of *Commonwealth v. Shortall* the Pennsylvania Supreme Court argued that calling out the militia to maintain order even though the courts were still open was "a declaration of qualified martial law."

> Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open. . . . But within its necessary field, and for the accomplishment of its intended purpose it was martial law with all its powers.[26]

In other words, the ordinary courts remained open and so liberty in general appeared untouched—the key issue in the landmark case of *Ex parte Milligan* in 1866[27]—but it was, in effect, martial law: a form of rule

25. See Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (1948); Lieutenant Colonel Joseph B. Kelly & Captain George A. Pelletier, Jr., Theories of Emergency Government, 11 S.D. L. Rev. 42 (1966); Brian Loveman, The Constitution of Tyranny: Regimes of Exception in Spanish America (1993).

26. Commonwealth ex. rel. Wadsworth v. Shortall, 55 A. 952 (Pa. 1903). For discussion see Henry Winthrop Ballantine, Qualified Martial Law, A Legislative Proposal, 14 Mich. L. Rev. 102, 197 (1915); F. David Trickey, Constitutional and Statutory Bases of Governors' Emergency Powers, 64 Mich. L. Rev. 290 (1965–66).

27. In the *Milligan* case the Supreme Court held that "martial rule can never exist where the courts are open." Ex parte Milligan, 71 U.S. at 127.

declared *necessary* even though the state *was not formally at war*.[28] One might also note here the huge symbolic effect of the courts being open. As the twentieth century progressed, however, as western states became more democratic and incorporated more and more of the working class into the system, even a "qualified martial law" sounded a little too harsh, a little too violent, a little too undemocratic: a little too, well, martial. So new forms of policing "disorder" seemed to be required which used some of the key practices of martial law but eschewed the label. What was needed was a new form of language, less obviously violent and without the military overtones, that allowed the exercise of martial law powers, in other words, but in times of peace. The initial move was found in the logic of emergency.

II. A LARGE EMERGENCY

At the end of May 1922 it was suggested at a meeting of the British Cabinet that martial law should be introduced in Northern Ireland to deal with the emergency in the province following the partition. The suggestion was rejected on the grounds that martial law powers were, in effect, already being exercised.[29] But how? How could martial law be exercised without being declared? The initial problem appears to have been the fact that despite the declaration of martial law for several counties in southern Ireland in December 1920 through to July 1921, the military tribunals and martial law system generally did not supercede the statutory system but acted more as an "overlay" in conjunction with which the statutory system continued to operate.[30] But in fact the cabinet was revisiting a problem it had faced for the whole of Ireland for several years prior to partition. In 1916 martial law had been declared for Ireland, and yet even then Prime Minister Asquith insisted in the Commons that despite the formal

28. Indeed, the court held that it was an error to think that a state must be either at peace or war: "There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, it is not distinguishable . . . from actual war." Wadsworth v. Shortall, 55 A. at 955.

29. Fabian Tract, Emergency Powers: A Fresh Start, An Informal Group Fabian Tract No. 416, 5 (1972).

30. Colin Campbell, Emergency Law in Ireland, 1918–1925, at 33, 51, 85–87, 145 (1994).

declaration, "martial law has never been put in force for any practical or effective purpose in Ireland." Rather, he suggested, "there is no proceeding which has been taken [in Ireland] which could not be justified by the Defence of the Realm Act."[31] His reference was to the sweeping regulatory powers granted by the Defence of the Realm Act, 1914 (DORA),[32] including the use of detention and courts-martial for anyone contravening the new regulations. These powers meant that many at the time thought of DORA as establishing "martial law and something more"[33] or, in the words of a later commentator, "a hurriedly devised translation of martial rule and prerogative concepts into statutory provisions."[34] But of course the powers were not *called* martial law, but simply "regulations" for the "defence of the realm."

For the following years the powers granted by DORA were integral to the running of the UK. At the same time, the aura and ideology surrounding martial law began to be transformed; hence Asquith's claim that martial law had not really been put in force in Ireland. This explains the rather bizarre situation, pointed out by the military governor at the time, General Sir John Maxwell, that martial law had been proclaimed and extended in Ireland even though virtually all the public bodies were at the time passing resolutions condemning martial law.[35] In a range of memos, Maxwell pointed out that martial law *sensu stricto* had not been put into operation anywhere, even in Dublin, and put his finger on the key issue: that discussion of martial law merely encouraged public grievances and so fanned the flames of the struggles taking place. Or as General Sir Neville Macready put it in a meeting between the cabinet and the Irish Executive in May 1920, "the difficulty behind martial law is that you would put certain persons in prison and they would hunger-strike. What would the people in England say?"[36] More to the point, a decision as inflammatory

31. 84 Parl. Deb., H.C. (5th ser.) (1916) 2143.

32. 4 & 5 Geo. V, c. 29 (1914).

33. Harold M. Bowman, Martial Law and the English Constitution, 15 Mich. Law Rev. 93, 98 (1916).

34. Cornelius P. Cotter, Constitutionalizing Emergency Powers: The British Experience, 5 Stan. L. Rev. 382, 384 (1952–1953).

35. Charles Townshend, Political Violence in Ireland: Government and Resistance since 1848, 311 (1983).

36. 3 Thomas Jones, Whitehall Diary, Ireland 1918–1925, at 19–20 (1971). Jones was Deputy Secretary to the cabinet.

as declaring martial law was unnecessary given that the practices of martial law could be conducted under DORA, as they were in Ireland; hence the rebels were eventually tried and executed under DORA, not by military tribunals under martial law. In other words, the *effect* of martial law could be achieved without its declaration and possibly even without using the term. As Asquith commented in a cabinet meeting, "all the trials and sentences have been carried out under the statutory powers of the Defence of the Realm Act. There is no single case in which it has been or is likely to be necessary to resort to what is called 'Martial law' and there is no adequate ground for its continuance."[37] And so when the Judge Advocate General prepared a memorandum on martial law for the Chief Secretary for Ireland in July 1920, he could simply remind the secretary that "a form of Statutory Martial Law already exists in Ireland under the Defence of the Realm Acts and Regulations."[38]

What this convoluted and sometimes confused way of thinking about and using martial law powers to govern Ireland in this period tells us is that this was a crucial period in the development of the powers in question, in the sense that DORA can be read as a bridging moment between martial law and emergency powers doctrine in Britain.[39] Following this, measures that *seemed* like martial law could be introduced under the new logic of "emergency powers." The really fundamental move therefore came with the first Emergency Powers Act (EPA) passed in October 1920.[40] The EPA granted to the executive extensive use of the military to preserve security and order and, within this, the suspension of basic rights and liberties. They were, formally, emergency powers, but the use of martial law was still recent enough for most people to recognize them for what they were: when they were being exercised during the General Strike, the former Solicitor General for the Labour government commented that the government had

37. Memorandum by Prime Minister (May 19, 1916), cited in Townshend, supra note 35, at 310.

38. Letter from the JAG to Chief Secretary for Ireland (July 19, 1920), cited in Campbell, supra note 30, at 134.

39. In this sense Clinton is right to divide the history of crisis government in Britain into two periods-before and after 1914. However, this rather crude cut-off does not really do justice to the gradual, convoluted, and sometimes rather subtle ways in which the shift came about.

40. 10 & 11 Geo. V, c. 55 (1920).

introduced "what is really martial law."[41] The language of "emergency," in other words, was increasingly supplanting the language of "martial law." Symptomatically, the sister legislation for Northern Ireland conferring on the police and security services powers to impose curfews; proscribe organizations; censor literature; restrict individual movement; stop, search, and seize any vehicle and detention without trial—in other words, the usual mish-mash of martial law powers—was understood as granting "special" powers.[42] So while the language of martial law was being supplanted, the powers in question were being re-presented in a new guise.

There was, however, one noticeable change occurring. For all the talk about the need for such powers in times of "war," the focus of the legislation was very clearly industrial disputes and labor revolts. In the UK the immediate postwar years were a period of intense class conflict, with strikes throughout 1919 and into 1920. These reached their climax on October 16, 1920, with a strike by miners, who were joined in sympathy by the railway workers on October 21. The Emergency Powers Bill was presented to the Commons on October 22 and rushed through Parliament in a week. Although the government claimed that introducing the bill at this point in time was the result of a long commitment to such a bill, it was abundantly clear to everyone that the new act was intended to be used against the strikers. The emergency regulations introduced with the act allowed "for the preservation of the peace" and for "any other purposes essential to the public safety and the life of the community"—in essence allowed for military intervention and increased police powers during periods of strike action. And so the powers granted by the EPA came to be exercised not in military engagement but, instead, through the key industrial disputes for the rest of the century, such as the miners strike of 1921, the transport workers' strike of 1924, and the General Strike of 1926 (in which the state of emergency ran for eight months even though the strike itself lasted only a few days).[43] This pattern continued following the war, which had seen a panoply of additional emergency powers acts pushed

41. K.D. Ewing & C.A. Gearty, The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945, at 184 (2000).

42. Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (SPA).

43. Gillian S. Morris, The Emergency Powers Act 1920, Public Law 317 (1979); Jane Morgan, Conflict and Order: The Police and Labour Disputes in England and Wales 1900–1939 (1987).

through Parliament, such as the Emergency Powers (Defence) Act, 1939, the Emergency Powers (Defence) Act, 1940, and the Emergency Powers (Defence) (No. 2) Act, 1940, all reinforced by some 377 Defence (General) Regulations passed between August 1939 and May 1945. Although passed during the war, the powers were employed largely for policing industrial conflict in the second half of the twentieth century, such as during the 1948 and 1949 strikes by dock workers; the 1955 strike by railway workers; the 1966 strike by seamen; the 1970 strike by power workers; the 1972 strikes by miners and dock workers; the 1973 strikes by miners, power workers, transport workers, and Glasgow fire workers; the 1975 strike by refuse collectors; and the 1977–78 strike by fire workers.[44] In other words, if it was war for which the powers were to be used, then it was *class* war and not international conflict. A similar pattern can be traced in the U.S., where the bulk of cases dealt with as martial law and/or emergency powers concerned labor unrest and socialist agitation.

What we see developing with this use of emergency powers is thus part and parcel of what was martial rule, namely the use of such powers to put down rebellions and uprisings. But such powers were used not just to suppress industrial actions and socialist unrest, but also the more generalized political administration of capital and the policing of civil society.[45] This helped broaden the definition of what constitutes an emergency, taking the notion well beyond military conflicts and crises and contributing to a drastic increase in the scope of emergency powers. This broadening and extension built on the limited understanding of an emergency situation as one involving violent conflict, but the use of such powers as a political instrument ultimately foreshadowed the open employment of emergency power *during peacetime*; indeed, they played a key role in eliding any differences between war and peace.[46] As such, what also develops is an increased dependence on legislation giving police carte blanche to behave in whatever way "necessary" to "keep the peace," often in conjunction with the military. These would turn out to be powers which the police and

44. House of Commons Library Research Division, Emergency Powers, 1979, Background Paper 66, at 3.

45. Mark Neocleous, The Problem with Normality, or, Taking Exception to "Permanent Emergency," 31 Alternatives 191 (2006).

46. William E. Scheuerman, The Economic State of Emergency, 21 Cardozo L. Rev. 1869 (1999–2000); William E. Scheuerman, Globalization and Exceptional Powers: The Erosion of Liberal Democracy, 93 Radical Phil. 14 (1999).

military were unwilling to relinquish once the strikes had ended. And for these reasons emergency powers come to be exercised as a *permanent* feature of the political landscape and not in "states of exception," as the powers granted in "states of emergency" constantly found their way into "regular law"—not least since the economy would always need "regulating" and some crisis always need "managing."

This can be seen most starkly by returning to the U.S. context, where the language and logic of "emergency" was likewise beginning to supplant the debate about martial law. Indeed, it has been said that the bulk of the "martial law" cases after *Milligan* were in fact dealing with a more broadly conceived set of "emergency powers."[47] But the crucial moment came with the New Deal. In his inaugural address of March 4, 1933, Roosevelt commented that he was assuming "the leadership of this great army of our people dedicated to a disciplined attack upon our common problems." The military analogy did not stop there, for the disciplined attack was to be accomplished by "treating the task as we would treat the emergency of a war." Hence Roosevelt was prepared to use "the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency."[48] As if the language of emergency was not enough, two days after his speech, and without congressional approval, Roosevelt formally declared a state of emergency. Ostensibly this aimed at a "bank holiday" in order to resolve the fiscal problems, but Roosevelt was later explicit about its use:

> The full meaning of that word "emergency" related to far more than banks: it covered the whole economic and therefore the whole social structure of the country. It was an emergency that went to the roots of our agriculture, our commerce, and our industry; it was an emergency that had existed for a whole generation. . . . It could be cured only by a complete reorganization and a measured control of the economic structure. It could not be cured in a week, in a month, or a year.[49]

This logic of emergency underpinned a series of proclamations, promulgations, and institutional developments throughout the 1930s. The

47. Charles Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. Rev. 1253 (1942); Weida, supra note 24.

48. Franklin D. Roosevelt, Inaugural Address, March 4, 1933, available at http://www.presidency.ucsb.edu/ws/index.php?pid=14473.

49. Franklin D. Roosevelt, On Our Way 35 (1934).

Emergency Banking Act and the Agricultural Adjustment Act of 1933 both begin with statements or declarations of emergency, claiming that the emergency was undermining the public interest through adverse effects on the market. Combined with the National Recovery Act of the same year they gave the president a more or less unlimited right to issue regulations concerning industry. Congressional records also show that there were some thirty-one labor disputes from 1933 to 1935 in which the military intervened on the grounds of emergency.[50] The New Deal, in other words, was emergency rule writ large, a version of the new form of the political administration through emergency powers being carried out not only in the UK but also in other major competitors/enemy states such as Weimar and then Nazi Germany.[51]

The New Deal came to an end by 1938; the emergency and its surrounding logic did not. In 1973 a Special Committee on the Termination of the National Emergency reported to Senate. The committee had been established following an increasing concern about the use of emergency powers, not least in the Vietnam War. The report which emerged begins as follows: "Since March 9, 1933, the United States has been in a state of declared national emergency." It went on: "In addition to the national emergency declared by President Roosevelt in 1933, there are also the national emergency proclaimed by President Truman on December 16, 1950 during the Korean conflict, and the states of emergency declared by President Nixon on March 23, 1970, and August 15, 1971."[52] In other words, the report found that not only was the Vietnam War being conducted under forty-year-old emergency legislation, but the whole of America seemed to be governed under the same powers. As the committee notes, a forty-year state of emergency can in no way be defined as "temporary." The U.S. had, in effect, been in a *permanent* state of emergency. And since then over forty more national emergencies have been

50. 80 Cong. Rec. 2069 (1936).

51. Jane Perry Clark, Emergencies and the Law, 49 Pol. Sci. Q., 268 (1934); Harold C. Relyea, A Brief History of Emergency Powers in the United States: A Working Paper Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, United States Senate, 1974; Michal R. Belknap, The New Deal and the Emergency Powers Doctrine, 62 Tex. L. Rev. 67 (1983).

52. Special Committee on the Termination of the National Emergency, S. Rep. No. 93–549 (1973).

declared,[53] all the way up to Bush's declaration of emergency on September 14, 2001 and the range of other emergency orders which followed. In other words the U.S. spent most of the twentieth century and, so far, all of the twenty-first century, being governed by emergency powers.

The U.S. is far from alone here. United Nations research in the 1990s found many of the dozens of states declaring themselves in a state of emergency had presented their emergency as permanent—either de jure or de facto: Israel since its inception in 1948; South Africa through more or less the whole of apartheid; Zambia from 1964 to 1991; Zimbabwe from 1965 to 1990; Peru from 1981 onwards; Pakistan from 1977 to 1985; Malaysia from 1969 onwards; Ireland from 1976 to 1995; Brunei from 1962 onwards; Turkey's public emergency for more than 77 percent of the period between June 1970 and July 1987, including a continuous stretch of almost seven years from Sept 1980 to May 1987; Greece's formal state of war mobilization from 1974 to May 2002; India's twenty-one uses of the constitutional emergency clause between 1950 and 1983; Egypt's almost continuous state of emergency since 1967; Paraguay's emergency from something like 1929 to 1987; and Columbia's forty-year state of emergency, just two instances of the wide use of emergency powers across the South American Continent.[54] As one of the UN Reports points out, "if the list of countries which have proclaimed, extended or terminated a state of emergency were to be projected onto a map of the world . . . the resulting area would cover nearly three-quarters of the Earth's surface."[55]

Now, what is notable about this global reach of emergency powers is that while a few of the openly authoritarian regimes remain happy to use the language of martial law, most of them prefer instead to talk of emergency powers (that is, powers used in a "state of emergency"—there is a sense in which the term "state of emergency" is now meaningless). The latter notion better connotes neutrality and necessity. It manages to do so

53. Terrorist Attacks and National Emergencies Act Declarations, Congressional Research Service Report RS21017 (Jan. 7, 2005); National Emergency Powers, Congressional Research Service Report 98–505 (Nov. 13, 2006).

54. U.N. Econ. & Soc. Council, The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency, U.N. Doc. E/CN. 4/Sub. 2/1996/19 (June 18, 1996).

55. Report by the U.N. Special Rapporteur, Mr. Leandro Despouy, on the question of Human Rights and States of Emergency, ¶ 181, U.N. Doc. E/CN. 4/Sub. 2/1997/19 (June 23, 1997) [hereinafter Despouy Report].

not only by eliding the differences between war in the conventional sense and class war, but also between these and more general rebellions (such as the declaration of a state of emergency by Paul Schell, mayor of Seattle, in response to the protest against the annual meeting of the World Trade Organization being held in the city).[56]

It also manages to elide the differences between these and other, often more mundane social issues, such as drugs (think of Reagan's use of troops to counteract the drug trade on the grounds that the emergency constituted a threat to national security); or football hooliganism (the communications officer of UEFA described a series of crowd troubles in European football in the 2006–2007 season as an "emergency situation");[57] or child abuse (described as a national emergency by a panel of government-appointed childcare experts in 1990).[58] We also see the rhetoric of emergency introduced to discuss "natural" emergencies such as floods (during Hurricane Katrina a state of emergency was declared, and at one point the authorities in question were at pains to point out that martial law had definitely not been declared); famines (too numerous to mention); the possible extinction of species;[59] or even just unusual weather (in Italy during spring 2007 officials claimed they were "moving towards declaring a state of emergency" due to the heat).[60] Rather conveniently for the ruling powers, a "state of emergency" is a very elastic term, merely pointing to a state of affairs which supposedly demands drastic action.[61] Hence the UK's Civil Contingencies Act 2004 counts as an "emergency" an event or situation which threatens serious damage to human welfare, an event or situation which threatens serious damage to the environment, and events of

56. Indeed, World summits invariably require the declaration of a state of emergency *before* they have even begun, such as the declaration of a state of emergency by six Georgia coastal counties in late May 2004 in readiness for the G8 summit on Sea Island two weeks later.

57. Inquiry Launched after Violent Clashes See English Fans Stabbed and Beaten, Guardian, Apr. 5, 2007, available at http://football.guardian.co.uk/championsleague200607/story/0,,2050526,00.html (quoting William Gaillard).

58. U.S. Department of Health and Human Services, Child Abuse and Neglect: Critical First Steps in Response to a National Emergency (1990).

59. United Nations Environment Programme, Last Stand of the Orang-Utan: State of Emergency (2007).

60. Reuters, Rome, Italy prepares for Droughts and Blackouts, Guardian, Apr. 25, 2007, at 14.

61. H.P. Lee, Emergency Powers 4 (1984).

war or terrorism which threaten the security of the United Kingdom. That just about covers all bases—similar to the range of bases overseen by the Federal Emergency Management Agency (FEMA). International documents have a similar openness, vagueness, and coverage: article 4, paragraph 1 of the UN "International Covenant on Civil and Political Rights" defines "public emergency" as something which "threatens the life of the nation."[62] It does not take much to see how this again could be used by politicians to run the whole gamut from war in Iraq to foot and mouth disease, taking in rebellions, strike action and more or less everything else in between. And it also does not take much to see how the rhetoric of "emergency" might be accepted where the imposition of martial law would not.

Despite this elasticity and ambiguity—or rather *because* of this elasticity and ambiguity—no constitution exists that does not contain provisions for the emergency powers.[63] In other words, the liberalization of martial law has been part and parcel of a broader constitutionalization of emergency powers. And yet as we have noted, martial law has not been directed or approved for any area of the United States. Neither has it been declared in the UK, or in many of those other states which have been administered under emergency conditions. In other words, the explicit declaration of martial law in situations which were understood implicitly to be emergencies of some sort has been transformed into the explicit use of emergency powers involving the implicit use of martial law powers. To fully grasp this, however, and to extend the scope of our argument, we need to link the emergency concept to its younger partner: national security.

III. SECURITY, EMERGENCY, CIRCUITRY

In June 1934, Roosevelt announced that the New Deal was to "place the security of the men, women and children of the Nation first."

> We are compelled to employ the active interest of the Nation as a whole through government in order to encourage a greater security. . . . If, as our

62. United Nations, International Covenant on Civil and Political Rights art. 4, para. 1 (March 23, 1976), available at http://www2.ohchr.org/english/law/pdf/ccpr.pdf.

63. Despouy Report, supra note 55; Oren Gross, Providing for the Unexpected: Constitutional Emergency Provisions, 33 Israeli Y.B. Hum. Rts. 1 (2003); Ergun Ozbudun & Mehmet Turhan, Emergency Powers 7–9 (1995).

> Constitution tells us, our Federal Government was established among other things, "to promote the general welfare," it is our plain duty to provide for that security upon which welfare depends. . . . Hence I am looking for a sound means which I can recommend to provide at once security against several of the disturbing factors in life.[64]

Later that month he created the Committee on Economic Security (CES) to prepare for "A Program of National Social and Economic Security." As well as describing the situation as one of war and emergency, then, Roosevelt also constantly gave "security reasons" for his program.

His choice of language here sounds to us rather banal, accustomed as we are to politicians blathering on about security. But as I have shown elsewhere, it would turn out to be of major historical importance.[65] To understand why we need to note that the years 1933 to 1934 were a period of intense class conflict,[66] with almost 2,000 work stoppages involving around 1.5 million workers and, as we have seen, a significant number of labor disputes in which the military were employed; many, including Roosevelt, believed that a revolution was possible.[67] At the same time, however, various reformist activists, socialists, and radical social insurance experts had come to highlight the "insecurity" of contemporary capitalism. The economist Abraham Epstein, for example, had published *Insecurity: A Challenge to America* (1933), while Max Rubinow wrote of *The Quest for Security* (1934). Harold Laski published a series of lectures given in the U.S. as *Liberty in the Modern State* (1930, reissued in 1937) with economic insecurity as a main theme. Harold Lasswell reiterated the theme in *World Politics and Personal Insecurity* (1934), as did ex-President Hoover in *The Challenge to Liberty* (1934). Roosevelt's adoption of the rhetoric of security in mid-1934 represented an attempt to simultaneously manage this moment of class struggle, outflank critics, and build on the

64. 3 Franklin D. Roosevelt, Public Papers and Addresses of Franklin D. Roosevelt 287–92 (1938).

65. Mark Neocleous, From Social to National Security: On the Fabrication of Economic Order, 37 Security Dialogue 363 (2006).

66. Irving Bernstein, Turbulent Years: A History of the American Worker, 1933–1941 (1971).

67. See Franklin D. Roosevelt, Address Delivered at Democratic State Convention, September 29, 1936, in 5 Franklin D. Roosevelt, Public Papers and Addresses of Franklin D. Roosevelt 385 (1938).

suggestions of writers close to him such as Laski. Throughout 1934 and 1935 Roosevelt could thus barely stop speaking about security, now identified as "the main objective of our American program."[68] On topics as diverse as banking legislation, industrial relations, and the gold standard, security had become *the* major theme. Security had become *the* concept of the New Deal.

But it became *the* concept of the New Deal very much in the form of *social* security—the *Economic* Security Bill eventually became *Social* Security Act of 1935.[69] And behind this ideology of social security was nothing less than a reordering of contemporary capital. On the one hand was an attempt to reshape the behavior of the working class around a new political technology of social insurance, transforming notions of risk and responsibility, independence and thrift among the working class, fostering new conceptions of citizenship and circumventing trade union radicalism. On the other hand was an attempt to reshape the behavior of capital, which leapt on the opportunities offered by the new regime of insurance generated by the social security measures: corporations came to offer a degree of what they could now happily call "security," but very much on their own terms, without making old-age or illness support an employee right, by maintaining managerial control, and by shifting emphasis away from the political arena to private individual economic relationships.

If the New Deal was emergency rule writ large, then security was perhaps its key concept. The New Deal represents a prime example of the *ideological circuit* between emergency powers and security, an ideological circuit that helped legitimize the forms of political administration and policing which would come to the fore in the twentieth century. "Security," in its "social" dimension, became a key tool for fabricating a new order, one which reshaped working class expectations and patterns of behavior, reestablished capital accumulation as the main goal, and thus sought to "secure" the system as a whole. Social security had become a key part of the political administration of capitalist modernity. This meant that from here on in "security reasons" could be cited for any and every attempt at a political reordering of society. The supposed concern for the security of the nation and its citizens could be used to justify emergency

68. Franklin D. Roosevelt, Message to Congress, January 1935, in 4 Franklin D. Roosevelt, Public Papers and Addresses of Franklin D. Roosevelt 43 (1938).

69. Social Security Act, ch. 531, 49 Stat. 620 (1935).

measures, and emergency measures would be exercised in the name of security in an ideological circuit which would come to permeate the exercise of state power for the rest of the twentieth century. And this created the opening for the ideological power and political force of the idea of *national* security following World War II.

When in the postwar period the ruling elites in America looked for a new category to grasp the logic of national and international order they had a range of options. "National security" was ultimately thought to be a more expansive term than "defense," which was seen as too narrowly military, and far more suggestive than "national interest." But "national" security also picked up on the logic of "social" security that had been developed a decade previously: namely, that a fundamental reordering could take place under its rubric. Carried through by the "national security state," this reordering had ramifications both internationally and domestically. Internationally, the U.S. could now aim to reshape the global order in the name of security. NSC-68, the most significant national security document to emerge in this period, glosses this as "positive participation in the world community," which, it explains, means a policy "designed to foster a world environment in which the American system can survive and flourish."[70] It was this sort of assumption that originally lay at the heart of the Marshall Plan and the Truman doctrine: projects for both national security and for the reordering of global capital, understood as part and parcel of the same project and in the same terms. In conjoining the security project with the "emergency situation" faced by global capital, the U.S. was able to gain ideological support for both the politico-strategic and economic dimensions of liberal order building: to think simultaneously about the security of capital and the American state. It has been through such thinking and under the banner of security that the U.S. has seen fit to order and reorder international society and the affairs of myriad number of nation-states, including those with democratically elected governments, coming to administer global order according to a "security doctrine" which pays little or no respect to the human rights in which it purports to believe.

70. National Security Council, United States Objectives and Programs for National Security, NSC-68 (April 14, 1950), in Containment: Documents on American Policy and Strategy, 1945–1950, at 401 (Thomas H. Etzold & John Lewis Gaddis eds., 1978).

Domestically, the search for national security led to the development of huge surveillance techniques, purges of suspicious persons from positions of responsibility, and loyalty tests for millions of people, most of who posed little or no security threat. The Internal Security Act, 1950, required "Communist organizations" to register with the attorney general, strengthened the espionage laws, and tightened the immigration and naturalization laws for anyone who had been connected with advocating any form of "totalitarianism." Title II of the act, usually cited as the "Emergency Detention Act," allowed for the declaration of an "internal security emergency" under which individuals thought likely to be spies or saboteurs could be interned. The names of those to be interned were held on FBI files, which at its peak in 1954 contained the names of over 26,000 individuals for whom Congress had authorized and funded six detention centers. The Internal Security Act, like the national security state in general, is thus interesting for the way in which it continued the ideological circuit between emergency and security, at the heart of which is a set of powers which just half a century previously would have been known as martial law.

The ideological circuit between emergency and security and their oscillation between the external and internal, the foreign and domestic, are very far from being Cold War phenomena. Not only does it remind us of martial law and all its powers, but it also tells us something about the present "war on terror" and the various laws and regulations which have come to perpetuate the ideological circuit in question. Thus we need to situate the USA-PATRIOT Act of 2001 as a mechanism for policing internal dissent and shaping political behavior alongside both the *National Security Strategy* (September 2002) as a mechanism for securing global capital and the overwhelming powers of FEMA. As its name suggests, FEMA's task is to prepare for "emergencies" and yet its prime concern is also very much "security": from its inception as a result of an Executive Order (12148) in July 1979, FEMA incorporated powers included in the National Security Act of 1947 as well as the Defense Production Act of 1950, which combined to give the president more or less complete control over the economy as well as the power to arrest and detain citizens in special detention centers. Symptomatically, it is now part of the Department of Homeland Security. Equally symptomatically, the Post-Katrina Emergency Management Reform Act of 2006 reinforces the circuit by strengthening the link between "emergency" and "security" planning. Developments in the UK

show precisely the same trend. The Anti-Terrorism, Crime and Security Act (2001), for example, allows for internment for "security reasons" and thus consolidates the logic of detention of earlier emergency powers legislation, but it also needs to be read alongside the Civil Contingencies Act of 2004, a document through which emergency and security circulate dressed up in the garb of "contingency."

I am suggesting, then, that the arguments, propositions, and assumptions running through these documents and institutions, especially when taken together, always legitimate emergency measures conducted in the name of security; or, if you prefer, security measures conducted in a state of emergency. And the roots of this circuit can be traced back to the history of martial law. This is of course one way of saying that martial law has never gone away—its possibilities have seeped into other forms of legal and political practice. But it is also a way of saying that the reason martial law has not been approved by the executives of most liberal democracies is because there is absolutely no need for it: whatever might be desired through martial law can be achieved through the rhetoric of security and emergency. At the heart of this rhetoric lie all the traditional powers of martial law, subsumed under the label of national security and the logic of emergency.