

Working for the Clampdown

What might the president do with his new power to declare martial law?

By James Bovard

HOW MANY PIPE BOMBS might it take to end American democracy? Far fewer than it would have taken a year ago.

The Defense Authorization Act of 2006, passed on Sept. 30, empowers President George W. Bush to impose martial law in the event of a terrorist “incident,” if he or other federal officials perceive a shortfall of “public order,” or even in response to antiwar protests that get unruly as a result of government provocations.

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

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

Section 1042 of the Defense Authorization Act of 2006 changed the name of the key provision in the statute book from “Insurrection Act” to “Enforce-

ment of the Laws to Restore Public Order Act.” The Insurrection Act of 1807 stated that the president could deploy troops within the United States only “to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy.” The new law expands the list to include “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition”—and such “condition” is not defined or limited.

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

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

The story of how Section 1042 became law vivifies how expanding government power is almost always

the correct answer in Washington. Some people have claimed the provision was slipped into the bill in the middle of the night. In reality, the administration clearly signaled its intent and almost no one in the media or Congress tried to stop it.

The Katrina debacle seems to have drowned Washington’s resistance to military rule. Bush declared, “I want there to be a robust discussion about the best way for the federal government, in certain extreme circumstances, to be able to rally assets for the good of the people.” His initial proposal generated a smattering of criticism and no groundswell of support. There was no “robust discussion.” On Aug. 29, 2006, the administration upped the ante, labeling the breached levees “the equivalent of a weapon of mass effect being used on the city of New Orleans.” Nobody ever defined a “weapon of mass effect,” but the term wasn’t challenged.

Section 1042 was supported by both conservatives and liberals. Sen. Carl Levin (D-Mich.), the ranking Democratic member on the Senate Armed Services Committee, co-wrote the provision along with committee chairman Sen. John Warner (R-Va.). Sen. Ted Kennedy openly endorsed it, and Rep. Duncan Hunter (R-Calif.), then-chairman of the House Armed Services Committee, was an avid proponent.

Every governor in the country opposed the changes, and the National Governors Association repeatedly and loudly objected. Sen. Patrick Leahy (D-Vt.), the ranking Democrat on the

Senate Judiciary Committee, warned on Sept. 19 that “we certainly do not need to make it easier for Presidents to declare martial law,” but his alarm got no response. Ten days later, he commented in the *Congressional Record*: “Using the military for law enforcement goes against one of the founding tenets of our democracy.” Leahy further condemned the process, declaring that it “was just slipped in the defense bill as a rider with little study. Other congressional committees with jurisdiction over these matters had no chance to comment, let alone hold hearings on, these proposals.”

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

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

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

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

Section 1042 is Enabling Act-type legislation—something that purports to preserve law-and-order while formally empowering the president to rule by decree. The Bush team is rarely remiss in stretching power beyond reasonable bounds. Bush talks as if any constraint on his war-making prerogative or budget is “aiding and abetting the enemy.” Can such a man be trusted to reasonably define insurrection or disorder? Can Hillary Clinton?

Bush can commandeer a state’s National Guard any time he declares a “state has refused to enforce applicable laws.” Does this refer to the laws as they are commonly understood—or the laws after Bush fixes them with a signing statement?

Some will consider concern about Bush or future presidents exploiting martial law to be alarmist. This is the same reflex many people have had to each administration proposal or power grab from the Patriot Act in October 2001 to the president’s enemy-combatant decree in November 2001 to the setting up the Guantanamo prison in early 2002 to the doctrine of preemptive war. The administration has perennially denied that its new powers pose any threat even after the evidence of abuses—illegal wiretapping, torture, a global network of secret prisons, Iraq in

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

On Feb. 24, the White House conducted a highly publicized drill to test responses to IEDs going off simultaneously in ten American cities. The White House has not disclosed the details of how the feds will respond, but it would be out of character for this president to let new powers he sought to gather dust. There is nothing more to prevent a president from declaring martial law on a pretext than there is to prevent him from launching a war on the basis of manufactured intelligence. And when the lies become exposed years later, it could be far too late to resurrect lost liberties.

Senators Leahy and Kit Bond (R-Mo.) are sponsoring a bill to repeal the changes, but it is not setting the woods on fire on Capitol Hill. Leahy urged his colleagues to consider the Section 1042 fix, declaring, “It is difficult to see how any Senator could disagree with the advisability of having a more transparent and thoughtful approach to this sensitive issue.”

He deserves credit for fighting hard on this issue, but there is little reason to expect most members of Congress to give it a second look. The Section 1042 debacle exemplifies how the Washington establishment pretends that new power will not be abused, regardless of how much existing power has been mishandled. Why worry about martial law when there is pork to be harvested and photo ops to attend? It is still unfashionable in Washington to worry about the danger of the open barn door until after the horse is two miles down the road. ■

James Bovard is the author of Attention Deficit Democracy and eight other books.

Arts & Letters

FILM

[The Hoax]

The Howard Hughes He Never Knew

By Steve Sailer

IN THE 1970s, billionaire Howard Hughes's name was as omnipresent as Donald Trump's is today, even though the paranoid recluse was never seen. Since then, Hollywood has treated Hughes's legend well, with Martin Scorsese's masterful 2004 film "The Aviator" delivering an admiring look at the early life of the engineer and movie mogul. Jonathan Demme's "Melvin and Howard," which won a couple of Oscars in 1980, offered a gentle, oblique perspective on the national nuttiness that followed Hughes's death in 1976, such as the "discovery" of 40-odd purported wills.

Now "The Hoax" rounds out cinematic Hughes lore with a comic biopic of novelist Clifford Irving, the scamster who brought the world's Howard Hughes obsession to a crescendo in 1971-72 when he extracted huge advances from the greedy and credulous New York publishing and magazine industries for *The Autobiography of Howard Hughes*. Irving claimed it was based on taped interviews with Hughes. In truth, Irving had never had any contact with Hughes, who in "The Hoax" appears only in documentary footage.

"The Hoax" isn't in the same class as "The Aviator" and "Melvin and Howard,"

but it's significantly better than typical April releases. As Irving, Richard Gere, who normally competes with Bruce Willis for the title of Most Morose Star, revives much of the energy and charm that made him a delight in the underrated 1983 American remake of Godard's "Restless." Now 57, Gere is still credible as the 40-year-old Irving. Indeed, in "The Hoax," Gere looks a lot like former leading man Alec Baldwin did at age 35, which might explain why Gere is still a name-above-title star, while Baldwin had merely a character role as a villain in "The Aviator."

Irving purloined a copy of an unpublished manuscript by Hughes's business manager, Noah Dietrich. This provided his project with some minimal verisimilitude, which Irving embroidered with sheer effrontery. It's always fun watching a good actor like Gere play a con man who must improvise ever more barefaced concoctions to parry each challenge to his credibility.

It's even more entertaining to see an excellent actor like Alfred Molina portray an inept liar. In "The Hoax," Molina plays Irving's Sancho Panza, researcher Dick Susskind, a man more at home digging up facts than retailing fabrications. In meetings with McGraw-Hill brass suspicious of the duo's honesty, he stares bug-eyed and sweats as he tries not to forget the simple bit of business Irving assigned him, only to blurt out at the most disturbing moment, "Howard Hughes gave me a prune!"

Director Lasse Hallström and screenwriter William Wheeler have included in their press notes an unusually frank list of what's fictional in "The Hoax." What they don't reveal, however, is more interesting: how they've reworked Irving, the perfect 1970s antihero, to make him more sympathetic to 21st-century audiences.

Today's moviegoers admire marital stability, so "The Hoax" forgets to mention that Irving's wife Edith, who eventually went to jail for trying to cash the publisher's advance check to "H.R. Hughes" under the name "Helga R. Hughes," was his fourth. Contemporary Americans especially dislike adultery by parents, so Irving's two small children with Edith were written out of the picture. In the film, Irving cheats on Edith once with the folk-singing Danish baroness and movie starlet Nina Van Pallandt and bitterly regrets his moral slip. The real Irving, however, was using his supposed meetings with Hughes abroad to cover frequent vacations with his mistress.

Exciting more controversy is the film's claim that Irving's fake autobiography helped inspire the Watergate break-in at the headquarters of Democratic National Committee Chairman Larry O'Brien, who, possibly not coincidentally, had been Hughes's chief lobbyist.

While overstated, this is not wholly implausible. Nixon had several shady links to Hughes, such as the tycoon's unsecured \$205,000 loan to his brother Donald's Nixonburger restaurant chain. Nixon believed the revelation of this dubious deal may have cost him the exceedingly close 1960 election. A decade later, according to his chief of staff, H.R. Haldeman, Nixon was irrationally obsessed with plumbing the relationship between Hughes and O'Brien.

The truth is that we still don't really understand Watergate, mostly because, in sharp contrast to the JFK assassination, the media haven't been all that interested in finding out precisely what happened. The good guys won and bad guys lost, they reason, so why bother with details that might muddy the glorious memory? ■

Rated R for language and nudity.