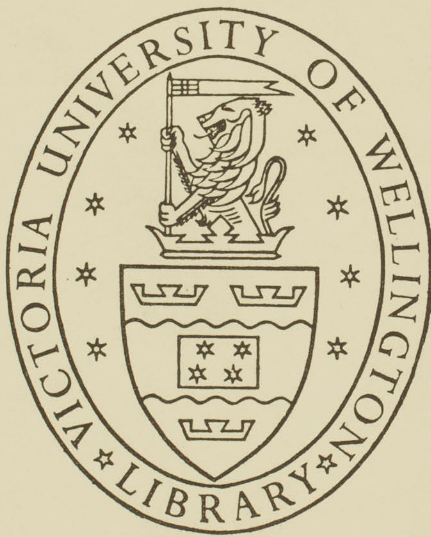
LXCr. CROOKS K.N. THE MILITARY IN AID OF THE CIVIL POWER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THE MILITARY IN AID OF THE CIVIL POWER

1 September 1981

Submitted for the
LLB (Honours) Degree at the
Victoria University of Wellington

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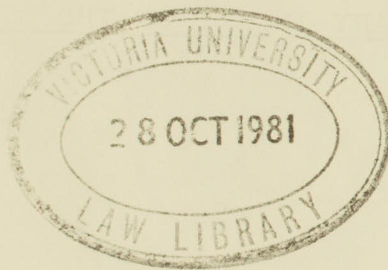

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> Troops may be relied on to assist the civil power to preserve the public peace ... All the reports deprecate the employment of troops in strikebreaking, and it would not be fair to ask troops to do what they consider to be blackleg work ... To use soldiers or sailors kept up at the expense of the taxpayer, in an ordinary trade dispute ... would be a monstrous invasion of the liberty of the subject.
>
> Winston Churchill, May 1919. [1]

Newspaper reports of the Army aiding flood stricken regions, the Combined Services engaged in a search and rescue mission, or the Air Force airlifting cars and passengers across Cook Strait during times of industrial trouble, no longer raise comment as they have become a common occurrence in New Zealand. Although these actions gain the approval of the press and the general public, a closer look at the latter situation of Cook Strait airlifts reveals the wider political implications of the government ordering the Armed Forces to undertake duties designed at breaking a strike. Churchill clearly thought such an action was an invasion of the liberty of the individual, but successive New Zealand governments have had no such qualms. This is plainly illustrated by the 1951 waterfront dispute when troops were used as labour on the wharves and to aid the police. In fact since 1951 the use of the Armed Forces has become more frequent, particularly since the passing of the Defence Act 1971. It would appear

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that in the event of conflict between the government and the trade union movement, the government will often use all necessary forces of the state to put it down. To determine whether or not this is justifiable, or if the power conferred on the government by the Defence Act 1971 should be reduced in scope, it is necessary to look at such government actions in the total context of military aid to the civil power.

HISTORICAL BACKGROUND

"Aid to the civil power" is the formal term for involvement of the military at government direction, in difficult domestic situations beyond the capacity of civil authority to deal with by normal means.[2] Although, as a British colony, New Zealand inherited the military and legal systems as they developed in England, the powers subsequently granted to the military in New Zealand were more far reaching than in England. In England the only assistance which the military gave to the civil authorities was in the restoration of peace in time of riot or rebellion, and this was no more than the duty of the ordinary citizen at Common Law.[3]

In New Zealand legislative authority giving the military potentially great control over the civil community was granted in 1909 by section 17 of the Defence Act of that year. It empowered the Governor General in the case of any sudden or extraordinary disturbance of the peace to order the whole or any part of the Regular Army to aid the police. Each soldier thereby gained the same rights, powers and authorities as if he were a member of the Police Force.

The sweeping powers in section 17 were not re-enacted in later Defence Acts, as other statutes made the necessary provision for military assistance to be available in specified circumstances. In recent years the range of assistance that can be given has greatly

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increased, a result not merely of changed legislation but of changing conditions within the Armed Forces; the wider range of professions, trades and skills which are represented in the three Services, and the greater variety of equipment and specialist training available.

A closer look at the current statutory authority for aid to the civil community may however disclose powers even more sweeping than those of the Defence Act 1909, and these in turn may reflect the desire of successive governments for the military strength of the Armed Forces to be available to them whenever they need it, whether to aid the civil community or strengthen their own political position.

STATUTORY AUTHORITY

"Aid to the civil power" may be conveniently considered under three broad headings:

(a) Community effort

(b) Para-military operations

(c) Industrial activities [4]

While there is specific legislation authorising the use of the military in each of these three categories, it may be the case that statutory authorisation is not always necessary. First the Governor General may have a power arising out of his position as Commander in Chief of New Zealand [5] which allows him to direct the Armed Forces to aid the civil community. Secondly Air Board Orders [6] suggest that the Executive can order the defence forces to take part in any of the above classes of activity without special legislative authority. Similarly, a local commander, providing his action is reasonable in the circumstances, may lawfully launch his men into these activities without waiting for direction from higher authority. [7]

A. Community Effort

This category is epitomised by search and rescue operations, work in connection with natural disasters eg, earthquakes, floods, fires, and such disparate activities as charting New Zealand coastlines, salvage operations, transporting supplies to outlying islands indeed any other need in the community which cannot be met by existing

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civil resources. The involvement of the military in such circumstances is usually welcomed by the civil community since it generally involves the protection of persons and property, and is no way threatening.

The Civil Defence Act 1962 authorises the declaration of two types of emergency under which military aid can be obtained, one of which covers many of the operations encompassed by 'community effort'. Section 22 authorises the Minister of Civil Defence to declare a state of national or regional civil defence emergency, where an emergency has arisen from any fire, explosion, earthquake, flood or other happening that causes or may cause loss of life or injury or distress to people, or in any way endangers the New Zealand public. In such a situation every Department of State or other Government agency has an ogligation to undertake all measures required by any operative national plan.[8] This obligation extends to the Armed Forces. A recent example of the employment of the military in a civil emergency was the Hutt Valley floods of 1976 when considerable assistance was given by the Army based at Trentham.

However it is under the Defence Act 1971 that most assistance is given to the civil community. Nor is this limited to New Zealand itself - there are many examples of aid being given to the civil authorities of neighbouring Pacific islands. Authority for this is to be found in section 4(1) of that Act which empowers the Governor

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General in his role as Commander in Chief to raise and maintain armed forces for a number of purposes including:

(e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency or disaster.

(f) The provision of such public services as may from time to time be required by or for the Government of New Zealand.

Read in conjunction with section 79 of the Act these provisions authorise the Armed Forces to perform any public service the Minister may specify. Section 79(1) reads:

> If the Minister considers that it is in the public interest to do so, he may authorise any part of the Armed Forces to perform any public service, either in New Zealand or elsewhere, subject to such terms and conditions (including payment) as he may specify.

Section 79(2) does limit this slightly by stating that there can be no such authorisation pursuant to subsection (1) in circumstances such that a Proclamation of Emergency could lawfully be issued under the Public Safety Conservation Act 1932, unless such a Proclamation is in force.

The power given to the Minister of Defence under these provisions when used within the context of community effort

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does not normally raise any problems or controversy. Not surprisingly the community is ready to accept aid from the Armed Forces in time of emergency or need. This is apparent from the numerous occasions and widely diverse situations in which they have provided assistance. Recent examples include the use of the Armed Services during the earth subsidence at Abbotsford 1979; the foot and mouth scare at Temuka Canterbury February 1981; and in January 1981 assistance given by soldiers from Linton Military Camp to the police with the investigation into the murder of an elderly Foxton woman.

On occasions where no emergency is declared under the Civil Defence Act the actual authorisation by the Minister to the Services is often quite informal. He would likely initiate an operation by a telephone call and formally confirm this request in writing at a later date. Air Board Orders [9] state that not even ministerial action is essential. A local commander in appropriate circumstances, can launch his men into action without waiting for direction from higher authority. In emergency situations when speedy communication may be difficult such local initiative would seem to be justifiable.

B. Para-Military Operations

Para-military operations are characterised by such activities as riot suppression, armed manhunts, and generally assisting the police to restore law and order. In New Zealand the situations in which the military may assist are governed by the Public Safety Conservation Act 1932,

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the Civil Defence Act 1962, the Crimes Act 1961, and the Defence Act 1971. These statutes embody the two obligations imposed by the Common Law:

(1) that every citizen is bound to come to the aid of the civil powers when the civil power requires his assistance to enforce law and order; and

(2) that to enforce law and order no-one is allowed to use more force than is necessary in the circumstances.[10]

The Public Safety Conservation Act 1932, section 2(1) empowers the Governor General to issue a Proclamation of a State of Emergency if circumstances exist whereby public safety is or is likely to be imperilled. The Governor General by Order in Council may then make such regulations as are, in his opinion, required for the conservation of public safety and order. These could include requiring the Armed Forces to perform duties not otherwise regarded as Service duties to maintain law and order.

Section 21 of the Civil Defence Act 1962 authorises the Governor General to declare a national emergency by proclamation when there is an emergency due to an actual or imminent attack on New Zealand whereby loss of life or injury or distress to people, or danger to the safety of

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the public is caused or threatened to be caused. The occasion for a declaration of a national emergency under the Civil Defence Act has so far not arisen in New Zealand.

The wide provision of the Defence Act 1971 authorise the use of the military in riot suppression and similar activities.[11] But it is under the Crimes Act 1961 that the police can call on the military for help in the suppression of a riot. In these situations everyone, including members of the Armed Forces are justified under section 43 in using such force as is necessary to suppress a riot provided the force used is not disproportionate to the danger to be apprehended from continuance of the riot. In the same way section 42 states that everyone who witnesses a breach of the peace is justified in interfering and using such force as is necessary. In these sections the word "justified" confers both civil and criminal immunity from the law.[12]

However before a military commander in such circumstances orders his troops into action (particularly without a request from the civil authorities) he should exercise utmost caution. For although the legal position of a soldier when called to the aid of the civil power in no way differs from that of other citizens, the mere organisation and equipment of the Armed Forces may if applied in a given situation constitute more force than is necessary. Such a situation would be covered by section 62 of the Crimes Act 1961 which provides:

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> Everyone authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess.

The most recent examples of the military being called on to assist the police in suppressing a riot occurred in 1968 when the Mt Eden and Paparua Prison riots erupted. The 1981 Springbok Rugby Tour illustrates the disapproval that would accompany the use of the Armed Forces against members of the general public. The Prime Minister, Mr Muldoon has stated that there is no possibility of using troops to deal with anti-tour protesters because "The idea of troops with or without bayonets drawn is not our kind of thing at all".[13] But the use of the Army has been authorised by way of logistic backup for the police. In this way they have surrounded rugby parks with barbed wire, and provided transport and other assistance to a sorely pressed police force.

C. Industrial Disputes

Prior to 1971 there was no statutory authority for the use of troops in the handling of commodities and provision of services during a period of strike or some similar breakdown of normal industrial activities, unless a State of Emergency under the Public Safety Conservation Act 1932 had been declared. Section 2(1) states that the Governor General can make such a declaration if he thinks:

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> ... that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light or with the means of locomotion, to deprive the community or a substantial proportion of it of the essentials of life.

Section 3(1) expressly authorises him to make any regulations during the time the Proclamation is in force as he thinks necessary for securing the essentials of life for the community and impose any duties on people in the Service of the Crown as he thinks necessary. This power was invoked to combat the waterfront stoppages of 1951.

Since the passing of the Defence Act in 1971, the Minister of Defence can authorise the use of troops when he considers it is in the public interest to do so. Such a sweeping power appears to encompass situations of industrial trouble where supplies or services to the civil community might be disrupted. There are many examples of this power being used to handle problems arising from industrial disputes in New Zealand. Instances are the use of Army personnel in Oakley Mental Hospital, June 1971; the regular Pluto operations involving airlifts across Cook Strait during ferry stoppages; and the airlift across the Tasman during the Qantas strike earlier this year.

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Military intervention to help protect life and property in times of national disaster or civil disorder can be expected to carry the approbation of the community generally, but the use of Service personnel during industrial disputes particularly in the role of strike-breaker is obviously a more contentious area.

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THE 1951 WATERFRONT DISPUTE

The 1951 watersiders strike provides a graphic illustration of the use of the military in aid of the civil power in industrial disputes, and highlights the problems and issues involved.

Government Attitudes

Industrial unrest is a post-war characteristic of capitalist economies, and in the late 1940s New Zealand was no exception. Throughout that period Prime Minister Fraser's Labour Government was having increasing problems with union militancy, in particular the watersiders who took objection to the government's insistence on the principle of compulsory arbitration. Fraser realised that in order to retain support and ensure a continuation of the Labour government, he must stand firmly against militancy. It is thought that he threatened the militants with the ultimate weapons of union deregistration and emergency powers but was reluctant to apply them, as the counter reaction from the labour movement would have been incalculable. This inability on the part of the Labour Government to deal firmly with the unions provided its opponents with a steady target for attack, and in 1949 the National Party, led by Sidney Holland, won a majority of 12 seats.

During their election campaign National Party leaders had made promises of toughness in their dealings with the militant unions, and their close association with the interests of farmers and employers only served to emphasise

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the firm stance they intended to adopt. By early 1950 public opinion was beginning to turn against the watersiders as problems on the waterfront increased, and even fellow trade unionists suspected the watersiders were exaggerating their grievances. Prime Minister Holland, realising the political potential of this issue, began talking about militants and communists in the same breath, and the press heightened these feelings with its campaign to isolate the unionists.

The recurrent disputes led to calls for the Government to apply some drastic remedy. The New Zealand Observer wrote that "immediate, direct and uncompromising action is required." [14] The Herald gave even more explicit advice: [15]

> The people will look to Mr Holland for firm and decisive action. But they should clearly understand all that may be involved if the Government invokes its wide powers, especially those conferred in the Public Safety Conservation Act. There is in fact no limit to the powers the Government may exercise or in their impact on the community, the guilty, and the innocent, alike. If however there is no alternative save the power of the State to restore industrial law on the waterfront, the Government must go ahead, confident that it has the support of the vast majority of the people.

On the 19 September 1950, Holland threatened a declaration of a State of Emergency under the Public Safety

Conservation Act, unless the watersiders resumed normal work. He justified such a step by saying that their actions bordered on treason and they must therefore accept a "no-holds-barred" policy from the government.[16] An Emergency Declaration was first made on 20 September, and it is interesting that even at this early stage the possibility of the Armed Forces being involved was contemplated. This is evident from the fact that on the same day, senior officers of the Armed Services met at Devonport to discuss any possible repercussions which might follow the Declaration.[17] But the powers conferred on the government by the Public Safety Conservation Act were not put into effect as the employers had been pressured into a meeting with the union, and an understanding acceptable to both parties was reached. The State of Emergency, initially declared for a 14-day period was revoked on 4 October 1950.

Clearly however, the National Government had made a decision to stand firmly against the militants, and its action in finally declaring a State of Emergency on 21 February 1951 and introducing the controversial emergency regulations is understandable. The crises of 1950 had put the government under pressure from the press and its own supporters, and any reluctance to fight the militants would have resulted in accusations of spinelessness. Along with this the general political outlook was poor. The Korean War had resulted in inflationary pressures on the New Zealand economy, and there had been

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substantial Labour gains throughout the country in the November local body elections.

By early 1951 little work was being done on waterfronts throughout the country, and a battle with the watersiders promised direct political gain for the National Party. Along with this there was a total lack of opposition to the taking of emergency powers in Cabinet meetings of 21-22 February 1951, and on 22 February Holland stated that New Zealand was "actually at war".[18] With the prospect of political gain in mind and the lack of opposition it is hardly surprising that the government made a decision to use all its available resources, including the manpower of the Armed Forces, to ensure that it won the forthcoming battle and thereby bolster its own political position.

The Regulations

Late in the day of 21 February 1951, a Proclamation was issued under the Public Safety Conservation Act declaring that a State of Emergency existed. On the following day the Waterfront Strike Emergency Regulations[19] were gazetted and a notice issued, giving the New Zealand Waterside Workers' Union until 8 am Monday, 26 February to end the dispute, or the Regulations would be put into force. On 26 February the union refused to accept the government's demands and moved motions condemning the government for not allowing them to work a 40 hour week.

The Proclamation was based on section 2(1) aimed at preventing "action taken or ... immediately threatened ...

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calculated ... to deprive the community ... of the essentials of life". The purpose of the Regulations was it appears, to keep goods and services providing the essentials of life to the community moving, rather than to put down major disturbances. Prime Minister Holland on 4 July explained the need for the Regulations as being:[20]

> ... to enable men and women who wanted to go to work to be able to do so without being molested and intimidated by other men ... The Regulations were designed to enable essential goods and services to go to the people. They were to prevent demonstrations that might have led to riots.

Regulation 10 authorised the employment of Service personnel:

> The appropriate Service Board may from time to time authorise the temporary employment of members of the New Zealand Naval Forces, or the New Zealand Army, or the Royal New Zealand Air Force, as the case may be, in any kind of work specified in the order.

This regulation contributed to the weakening of the union's power to halt production or the passage of goods across the wharves, and also reduced the need to consider using members of the public as strikebreakers. It had already been made clear to the government by the President of the Federated Farmers, W.N. Perry, that farmers were "not keen"

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to be called upon to act as strikebreakers as they had in the earlier maritime disputes of 1890 and 1913.[21]

It is impossible to know the real reasons behind regulation 10 being included in the Waterfront Emergency Regulations. On the face of it and from the justifications given by Holland it would appear that the purpose of the regulation was merely to allow employment of the Armed Services to ensure that essential services were kept running and supplies continued uninterrupted to the community. However because Service personnel were used on the waterfront and elsewhere as labour in place of the striking unionists, union bargaining power was weakened. They could no longer hold the government to ransom by halting the passage of essential goods across the wharves. In fact the only way in which a union coming within the scope of these regulations could win would be by toppling the government. It is also clear that Holland realised that unless his government dealt effectively with the militant watersiders it might well meet the same fate as Fraser's Labour Government.

It is therefore probable that under the guise of providing essential services to the community, the National Government in fact used the Armed Forces for their own political purposes, that is defeating the militant unionists. If public sympathy had been on the side of the watersiders there might well have been some criticism made on the use of the Armed Forces as strikebreakers, however neither the general public, the press nor the

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Federation of Labour led by F.P. Walsh came out in support of the watersiders.

The Reaction of the Armed Forces

The main concern of the Armed Forces in this situation was that all the activities in which they were involved should have a sound legal basis. This concern was voiced at a meeting of the Chiefs of Staff after the withdrawal of Service personnel from the wharves [22] when they expressed the opinion that it was the responsibility of the Government to ensure that this legal base existed. In the context of the 1951 dispute this would mean first that the Regulations were intra vires the Public Safety Conservation Act, and secondly that all the activities undertaken by Servicemen were either to conserve public safety and order or to secure the essentials of life to the community.

The Supreme Court in Hewett v Fielder [23] in an appeal against conviction for a breach of the Regulations held that they were intra vires the empowering statute. It held that the Regulations were within the power conferred on the Governor General in Council by section 3 of the statute, to make all such regulations "as he thinks necessary" for the purposes stated.

But that was not the only objection to the Regulations. When they were first introduced six university lecturers wrote to the Evening Post pointing out that the

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Regulations violated the United Nations Charter and the Declaration of Human Rights, particularly in respect of freedom of opinion, speech, assembly and association without interference.[24] However it appears that no objections were made by them on the grounds that Service personnel could be used to work on the wharves.

The Chiefs of Staff did raise one specific objection to the way in which Service personnel were used under regulation 10. This concerned the nature of some of the cargo handled on the wharves. It was thought that some of the cargo was outside the range of what could reasonably be characterised as being "essentials of life" for example, motorcars. However the government response was that it was essential to maintain the speediest possible turn-round of shipping to ensure the flow of meat, cheese etc to Great Britain, and raw materials and manufactured goods to New Zealand. Moreover since most ships had mixed cargoes, it was both practical and economical to unload all the ship's cargo rather than attempt to make distinctions between what was and what was not essential.[25]

This rationalisation for allowing the handling of non-essential cargo under regulation 10 was apparently not accepted by many of the individual Servicemen who had to work on the wharves. They felt strongly that they should only participate in activities strictly authorised by the Regulations. For example, during the stoppage there was a protest by a group of airmen who had been asked to unload

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racehorses from an inter-island ferry steamer. They were unconvinced that racing was essential during a period of industrial unrest and refused to do so. The airmen were not disciplined for this protest, and the horses were unloaded by civilian labour.[26]

Subsequently the Chiefs of Staff at a meeting discussing the 1951 strike made a call for explicit statutory authorisation for military aid to the civil power. This has now been implemented in the form of the Defence Act 1971 although it is doubtful whether the Chiefs of Staff ever contemplated the Minister of Defence being granted such a wide ranging power to call on the Armed Forces, as he now enjoys.

The Military as Strikebreakers

There were two main uses to which the Armed Forces were put during the period of the strike, both of which can be regarded as forms of strikebreaking. The first was as labour on the waterfront and elsewhere to keep essential services running, and supplies moving. This type of work was clearly contemplated and authorised by regulation 10. The second was as a backup to the police to protect new union labour and suppress possible violence from demonstrating strikers. This could also come under regulation 10 as being "any kind of work".

Long before February 1951, the likelihood of the Services being called to assist on the Auckland waterfront

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was foreseen, and in August 1950, after consulting with the Police Department, the Auckland Harbour Board, Shipping Company representatives, the Secretary of the Port Employer's Association, and other interested parties, excluding the unions, the combined Services prepared a draft plan for this eventuality.[27] It saw the broad areas of responsibility as the operation of ships gear, unloading of cargo, provision of transport and possibly aid to the police. By February a sub-committee of the above parties had been formed and the plan was discussed and amplified.

On 20 February 1951 there was a conference between the Minister of Labour and Service representatives discussing the number of personnel likely to be available.[28] Simultaneous discussions were being held between the Chiefs of Staff and members of the Government.[29] The result of these meetings was the decision that the work performed by the Services would be confined primarily to labour and transport, and only in exceptional circumstances to aid the civil police.

A. As "Scab" Labour

On 26 February 1951 the Services were instructed that they were to work on the waterfront. On the following day Servicemen began work on Auckland and Wellington wharves in the discharge of perishable cargo from coastal ships and by the end of March, approximately 3,200 members of the Army, Navy and Air Force were employed on waterfront duties

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and ancillary work. [30] During this period the wharves were being closely guarded by a strong force of policemen. Meanwhile Army and Navy personnel were also used on the West Coast to enable coal in stock to be transported to consumers, and to organise further production to keep essential services operating.

On 13 March 1951 compulsory military training was suspended to allow 4,000 18 year olds to be returned to the work force, and to release more regular force personnel for work on the waterfront. [31] It was clear that the Government was determined to win the fight.

Employment of Service personnel brought an immediate reaction from several unions. On 14 March the freezing workers stopped work, objecting to the Regulations and the presence of Servicemen on the wharves. The Wellington Driver's Union decided they would not carry goods handled by Servicemen. All coastal shipping was rendered idle as crews walked off their ships in protest, and by 5 April, 154 naval ratings were manning the decks and engine rooms of 14 coastal ships. [32] The Harbour Board's Employees Union was also on strike refusing to handle goods loaded or unloaded by Servicemen. Likewise seamen, cooks and stewards refused to work with Servicemen.

However this was shortlived and by 21 March 1951 many workers had already decided to return to work, and the National Executive of the Federation of Labour called on all

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others to do the same. Simultaneously, the Government was appealing for men to come forward and join the new unions at each port, and on 3 May the new Auckland Union commenced work under tight security on the Auckland waterfront. The Government's strategy of using the Armed Forces had clearly paid off, and by the first week in June 19 new port unions were working,[33] and the Services gradually pulled out.

The work performed by the Armed Forces was co-ordinated and supervised by a series of committees set up in each of the main centres. The Mayors of Auckland and Wellington were responsible for carrying out the Government's policy on the waterfront, and each chaired an Emergency Essential Supplies Committee. These comprised a Harbour Board representative, Shipping Company representatives, and other interested parties, and gave the final approval for the daily work on the wharves. The details of the work were decided by an Action Committee chaired by the General Manager of the Harbour Board which liaised closely with the Services Committee, whose specific task was to co-ordinate the work of the Services.[34] A friendly relationship existed between these committees and no problems arose in the direction and administration of the work.

The Government laid down the principle that shipping companies and other employers of Service personnel would pay for the work of Servicemen at the same unit cost as was

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paid to civilian labour prior to the strike. This money was to be paid to the respective Service Boards who would be responsible for distributing it. There was no question of the employers receiving free or subsidised labour, although it was estimated that the rate of work performed by Servicemen throughout New Zealand varied from approximately 15 per cent to 100 per cent better than old union labour.[35]

It appears that individual Servicemen generally made no objection to working on the wharves so long as the work they performed was within the ambit of the Public Safety Conservation Act. Many in fact saw it as a pleasant change from normal routine and scores of Servicemen engaged in essential duties on stations requested and were granted, an opportunity to serve on the wharves for at least a short period.[36] There was not a single instance of a Serviceman refusing to do essential work, and the number of charges for breaches of discipline were insignificant. The General Manager for the Waterfront Industry Commission reported that "Servicemen worked with a will ... The men did not cease work for showers of rain and their efforts to get the job done were an inspiration to all."[37]

In return they received constant praise from the Government and the press for example, Mrs Ross MP, Minister for the Welfare of Women and Children stated on 29 March 1951 that:[38]

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> "The public owe a debt of gratitude to the Servicemen working on the waterfront equal to the debt owed to those fighting for their country. These Servicemen have proved that the watersiders have loafed long enough."

The Servicemen also got special treatment on the wharves, including occasional supplies of beer from employers wishing to add to the carnival spirit.[39]

It is interesting that in the early weeks of the strike the Wellington Watersiders Union did not see the Servicemen as working willingly at all and expressed its sympathy at their plight. A leaflet issued by the Union to members of the Armed Forces opens with the words, "Our sympathy goes out to you, members of the Armed Forces. We understand the Iron Discipline that is forcing you to do our work." As the dispute continued the Union frequently reported simmering discontent among Servicemen on the wharves as their initial burst of enthusiasm faded:[40]

> Dissatisfaction among Servicemen working on the wharves continues to grow, and their inexperience in cargo handling appears to be doing the same - the amount of damaged cargo is assuming alarming proportions.

Clearly the Union disapproved of the Armed Forces being used as "scab" labour, and this disapproval manifested itself

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as sympathy towards the Servicemen. However there is little doubt that the Servicemen involved did not object to doing the work, and merely saw themselves as performing a service to the general public. The public and the press were full of praise for the work being done on the wharves, and no criticism was levelled at the National Government for employing the military as "scabs". Regulation 10 therefore was apparently extremely effective in helping to achieve the desired objective - victory over the industrial power of the Union.

B. <u>In Aid of the Police</u>

The attitude of the unions towards the Servicemen as they began to be seen in their more traditional role, underwent a radical change from apparent sympathy with their plight to outright hostility. The Armed Forces began to assist the police first by escorting workers registered under the newly formed unions, to the wharves in Army trucks, and secondly by having armed troops held on standby to aid the police in the suppression of possible violence. The hostility felt by the unions is epitomised in a statement made on 9 July by the Wellington Watersiders Union:[41]

> It has been suggested that ... the police force and members of the Services ... are only men acting under orders and doing their duty ... (they) are instruments of the Government; the repressive organs of the state ... the best we can say is that some of them are not aware of what they will have swung on them as

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being their 'duty' - for those who glory in their scabbery and strikebreaking, the raids and the batoning, it is useless for them to plead that they are 'only carrying out orders', - that was the plea of the Nazi gas-chamber attendants and concentration camp guards.

It was realised from the outset of the strike that the Armed Forces might have to be used to aid the police. But although armed detachments were held on standby, and on one occasion called to the scene of a serious affray, they were not so used.

In fact, the Government, the police and the Armed Forces were all reluctant to see the use of troops in situations of violence, and envisaged their being so used only as a last resort. This however was not the picture presented to the general public by the unions or the press, both of whom appeared keen to over-dramatise this secondary role of the Armed Forces. An example of this is the New Zealand Herald's description of the security surrounding the commencement of work by new unionists in Auckland on 3 May 1951:[42]

> In addition to hundreds of Servicemen arriving by boat and truck for normal port work, large parties of soldiers, sailors, airmen and Royal Marines poured in to assist in defence. Walkie-talkie radio communication between control points was established.
>
> ...

One of the key points was at Military District Headquarters which had all the atmosphere of a wartime command post.

The unions used similarly emotive language in their Bulletins, one of which described the situation as, "The Police, the Army, the Navy and the Marines with fixed bayonets, were mustered under arms to escort a miserable bunch of scabs."[43]

Police leaders were not keen for the Servicemen to become involved in actually dealing with the deregistered men. Although the Servicemen were disciplined and under the control of their officers, unlike policemen they were trained to deal with warlike situations, rather than to act as peace officers.[44] This concern was shared by the Chiefs of Staff who felt that their relationship with the Police Department needed to be clarified, and the respective duties of the police and the Armed Forces clearly differentiated. They did not want to see Servicemen employed as policement.[45] In 1951 they were not so used, nor have they been since in the context of an industrial dispute.

The use of the Armed Forces in the 1951 waterfront dispute was expressly authorised by regulation 10 of the Waterfront Strike Emergency Regulations. The Armed Forces saw their duty as being to obey legal orders without regard to the consequences, or the political implications

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involved, and this they did conscientiously. However the dispute illustrates how government, if it feels so inclined, can utilise the manpower and strength of the military to further its own political ends, in this case the destruction of the militant waterfront unions.

It is noteworthy that the military commanders called for more express statutory authorisation for the use of their troops in aid of the civil power, presumably in the hope of preventing a repetition of blatantly political use of the Armed Forces. The call was eventually heeded, with the result that specific powers appeared in the Defence Act 1971. But it is questionable whether, given the scope of the new powers granted to the Minister, they were what the military commanders originally had in mind.

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THE DEFENCE ACT 1971

The Defence Act 1971 confers on the executive arm of government virtually unlimited power to call on the Armed Forces to perform any task it chooses. Thus section 79 provides that if the Minister of Defence considers it in the public interest to do so, he may authorise any part of the Armed Forces to perform any public service capable of being performed by them. This section which is extremely vague, must be read in the light of sub-section (2) of that section and in conjunction with section 4.

Section 79(2) provides that the Minister cannot authorise the Armed Forces to perform a public service pursuant to sub-section (1) in circumstances such that a Proclamation of Emergency could lawfully be issued under the Public Safety Conservation Act 1932, unless such a Proclamation is in force. This means that if circumstances exist whereby the public safety is imperilled the Minister is limited in the use of his power under the Defence Act 1971, and can exercise it only when a Proclamation has been declared. However it does not place any limitation on the exercise of his power in time of industrial unrest where the consequences of a strike are not serious enough to warrant a Proclamation of Emergency. In such circumstances, the Minister's power is unfettered by section 79(2), and can be exercised to authorise the employment of the Armed Forces.

Section 4 defines the purposes for which the Governor General can raise and maintain armed forces. Unfortunately

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it does not appear to put any restraints on the Minister's power, as sub-section (1)(e) and (f) allow the Governor General to raise and maintain armed forces for "the provision of assistance to the civil power ... in time of emergency and disaster", and "the provision of such public services as may from time to time be required by or for the Government of New Zealand." In fact there is no indication given as to what the legislature contemplated when it passed the Act, as being the type of situation when the use of the Armed Forces in aid of the civil power would be required in the public interest.

Prior to the enactment of the Defence Act 1971, the only possible legal base for the employment of Servicemen in industrial disputes was the Public Safety Conservation Act 1932. It was therefore necessary that there exist such circumstances as to warrant a Proclamation of Emergency under the Act, and regulations, intra vires the Act, expressly authorising the use of the military. The Public Safety Conservation Act 1932 does not grant the government unlimited power. The power when exercised is reviewable by the court. First, circumstances must be such that a Proclamation could lawfully be issued, and although section 2 of the Act does not narrowly define what constitutes such circumstances, it is appreciably less vague than section 79 Defence Act 1971 which requires only that it be "in the public interest". The test is rather, do circumstances exist whereby the public safety is or is likely to be imperilled? Secondly,

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any regulations made pursuant to a Proclamation by the Governor General by Order in Council must be intra vires the empowering Act. Consequently the courts have a degree of control over the substance of the regulations and can ensure they are necessary to secure the public safety.

However under section 79 Defence Act 1971, the Armed Forces can be employed as "scab" labour in any industrial dispute without a Proclamation of Emergency. The Minister's authority may cover the operation of any ships, aircraft, vehicles or equipment of the Armed Forces in connection with the performance of any service. This has now become a common occurrence, and appears to cause little or no dissent among the general public. For example, the Air Force has on a number of occasions, put into effect "Pluto" operations across Cook Strait. Prior to 1971 there would have been no statutory authority for such an operation as the mere stoppage of an inter-island ferry service could not reasonably be construed as either an emergency or likely to imperil the public safety.

In such situations, the Armed Forces are not concerned with the political implications of the assistance they give. They are required to act impartially, and if they receive an order from the Minister, it is their duty to obey it. Their only concern is that such an order has a sound legal base. While a power to act under section 79 is vested in the Minister of Defence, in practice he does not issue an order without first obtaining Cabinet approval.

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The Minister of Labour is often closely involved in the decision.

Although the Armed Forces as such do not question the reasons behind legal orders or the implications of discharging them, it is not unlikely that individual Servicemen will object to being used as "scab" labour, for a number of reasons. For example, a soldier may be called upon to work on the wharves where he has a relative or close friend who is actually one of those on strike; or a soldier may refuse to work simply out of sympathy for the union's position. In practice, attempts would be made to avoid the former situation, but in either case it is simply seen as refusal to obey a legal order and as such could be disciplined under the Armed Forces Discipline Act 1971.[46]

Clearly there is potential for dissent among individual soldiers over the issue of strikebreaking, and this raises the question of whether it is preferable for a government to call for volunteer troops when it requires the Armed Forces as a substitute for union labour, particularly in situations where there is widespread public sympathy for the strikers. For example, in 1972 Prime Minister Kirk, leader of the Labour Government, sent a frigate into the French nuclear testing area of Mururoa Atoll. In that instance Servicemen were given the right to volunteer or to opt out of duty. However this incident was on any view an extraordinary occurrence and is in no sense a precedent for voluntary participation by Service personnel.

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To call for volunteers when a situation is politically controversial is both untenable and incompatible with the established system of discipline in the Armed Forces, and would inevitably lead to a breakdown of authority. It is untenable because there is always a possibility that all troops might in a particular case refuse to work, and the government would be left without the use of the Armed Forces. No government would wish to find itself in such a position. It is incompatible because as servants of the Crown, all members of the Services are bound to undertake any duties, if so ordered. To call for volunteers during industrial disputes is to leave the way open for individuals on future occasions to opt out of duties for any number of reasons, eg, the work is unpleasant or too dangerous, and thereby undermine discipline, the legal base of authority. It is therefore unlikely that the government would decide to use volunteers in any situation, and if they did, such an action would be viewed with disfavour by military commanders.

What then are the limits on the government's power to call on the Armed Forces under the Defence Act 1971? The first is the language of the section itself, but as indicated previously the words used are vague and capable of encompassing a wide variety of situations. The scope of judicial review is extremely limited however the courts can ensure that any order he issues relating to the Armed Forces is reasonably capable of being considered as being in the public interest, and that no such order is issued

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in circumstances such that a Proclamation of Emergency under the Public Safety Conservation Act 1932 could be issued, but has not been.

A second possible limitation can be found in section 4(3) of the Act which states:

> The Governor General by virtue of being Commander in Chief of New Zealand, shall have such powers and may exercise and discharge such duties and obligations relating to the Armed Forces as pertain to the office of Commander in Chief.

This section specifically confers on the Governor General the powers of the Commander in Chief in relation to the Armed Forces which he exercises on behalf of the Sovereign. The Armed Forces owe allegiance directly to the Crown [47] not to the government of the day. Does the Crown represented by the Governor General therefore have the power to overrule a decision of the Minister of Defence to employ the Armed Forces in a particular situation? In practical terms the answer is no.

The Letters Patent 1917 [48] state that a Governor General must always be guided by the advice of his Ministers. In practice therefore, the power is only exercisable in the event of a breakdown of social order and government, when the Governor General would assume full command of the Armed Forces. Today it is merely an honorary position,

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with no actual control over them or any discretion which the Minister has as to their use. [49] Consequently the government has extensive powers to use the Armed Forces in industrial disputes, as the scope of judicial review of the Ministerial decision is very limited.

Not surprisingly, the trade union movement does not view the Defence Act 1971 or the use of troops in industrial disputes with favour. Mr K. Douglas, Secretary of the Federation of Labour, expressing his personal opinion, sees the broad powers of the Defence Act as "an indication of the desire of government to pass unspecific law allowing for any interpretation of it." [50] In particular he regards the Act as a law favourable to employers by assisting them to resist union action. More specifically Mr Douglas believes that if the government keeps services running when the union's only option has been to take industrial action, this is both partisan and hostile. If to achieve this troops are used, it fosters the belief that the military act in collusion with the interests of capital, and in defence of the powerful and privileged social groups.

Mr Douglas would not even support the use of the Armed Forces in keeping essential services running, as was done in 1951, for two reasons. First the difficulty involved in deciding what an essential service is, and secondly having taken industrial action, the unions themselves are not allowed to cater for emergency or

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essential operations. However it appears that the use of the Armed Forces in certain situations is tolerated by the unions for example, the "Pluto" operations. Mr Douglas expressed the opinion that if the trade union movement wished to stop such an airlift, it could do so by, for example, placing a fuel embargo on the Air Force. Apparently, it has not been in their interests to do so, thus far.

Clearly the trade union movement stands opposed to the government exercising its power under the Defence Act to call out the Armed Forces and use them as strikebreakers. The Armed Forces regard themselves merely as following legal orders, with no concern for the political implications of any action they may be ordered to undertake. The general public, although it may look upon such activities with passive approval, when it comes to the broader implications of the action, maintain their usual attitude of apathy or indifference.

The question necessarily arises as to whether it is in the public interest to vest in the Minister of Defence, and hence Cabinet, such broad and unspecific powers in relation to the use of the Armed Forces? There is evidence that the unions consider that such action is taken by government, not for the purpose of keeping services or goods moving to the public, but to employ the military as a political tool. The effectiveness of employing Servicemen in such a manner to break a strike cannot be

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doubted, and as public sympathy does not generally lie on the side of striking unionists, this type of action is not likely to attract widespread adverse comment.

It is questioned however whether the power contained in the Defence Act 1971 for government to employ the Armed Forces, supposedly an impartial body, needs to be as wide and vague as it is, or if it should be reduced in scope or more particularly defined? There are at least two possible ways of achieving this. First section 79 could be amended by making the power exercisable only in times of emergency or natural disaster. If this was done it would then be necessary to make further provision for the Armed Forces to take part in activities that come within the 'community effort' category but cannot reasonably be construed as emergencies, for example, charting New Zealand coastlines.

Alternatively a proviso could be added to section 79 stating that the Armed Forces should not be used in industrial disputes unless it is necessary to secure the public safety, or ensure the continuation of essential services and supplies of essential goods. Conferring the power in this manner would make judicial review of a Ministerial decision under the section more effective, as such action could be subsequently challenged if it could be demonstrated that what he ordered was not essential for the public good. Either of the suggested amendments to the Defence Act 1971 would dispose of the apprehension

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that at the present time the government can legally abuse its position, and employ the Armed Forces for its own political ends under the guise of acting in the public interest.

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CONCLUSION

Statutory authorisation for aid to the civil power in New Zealand is now even wider than it was in 1909, when the Defence Act of that year authorised aid to the police in the event of any sudden disturbance. Today, looking at the many situations in which the Armed Forces aid the civil community it is not difficult to see why they are greatly appreciated. However an amendment to the current Defence Act placing a restraint on the government's ability to employ troops in industrial disputes, need not limit these valuable services, and would in fact be for the good of the community. It would prevent a government from blatantly abusing its power by employing the might of the Armed Forces to strengthen its own position. If such an amendment was passed it would make less relevant what a senior military officer was once reported as saying: [51]

> My advice to all young commanders in all services is, whenever you see any prospect of being called out 'in aid of the civil power' in any part of the world, to get the hell out of there as quickly and as far as you can ... the best thing to do is to take long leave or to get transferred or to retire and buy yourself a farm; to do anything in fact, sooner than get involved 'in aid of the civil power'. There are two things you can get for aiding the civil power, and two things only - brick-bats and blame.

FOOTNOTES

1 The Times 30 May 1919 quoted in KGJC Knowles Strikes - A Study in Industrial Conflict (Alden Press, 1952) 135.

2 C. Coulthard-Clark The Military as Strikebreakers Pacific Defence Reporter May 1981, 72.

3 Manual of Military Law (U.K.) Pt II, s5, 501.

4 Air Board Orders 13/3/1.

5 Defence Act 1971, s4(3).

6 Air Board Orders were issued by the Air Board under the authority of the Royal New Zealand Air Force Act 1950, to ensure the efficient administration and organisation of the Air Force in all spheres of its activities.

7 Air Board Orders 13/3/2.

8 Civil Defence Act 1962, s14.

9 13/3/2

10 supra n 3. Both the British Manual of Military Law and the New Zealand Armed Forces state that such Common Law obligations exist, but the author could not find any other authority for them.

11 Defence Act 1971, ss4(1)(e) and 79(1).

12 Crimes Act 1961, s2(1).

13 The Evening Post, Wellington, New Zealand, 27 July 1981, 1.

14 NZ Observer, 20 September 1950, quoted in M. Bassett Confrontation '51. The 1951 Waterfront Dispute (A.H. & A.W. Reed, 1972), 54.

15 Herald, 16 September 1950, quoted in M. Bassett, idem.

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16 Bassett, op cit n 14, 57.

17 ibid 58

18 ibid 92

19 SR 1951/24

20 NZ Parliamentary Debates Vol 294, 1951 : 110.

21 S. Young The Activities and Problems of the Police in the 1951 Waterfront Dispute M.A. Thesis, Canterbury University 1975, 6.

22 A report of the meeting can be found in Air Department file 1/7/1. Civil Emergencies : Aid by the Armed Forces in Industrial Disputes - Policy 11/41 - 11/53.

23 [1951] NZLR 755

24 supra n 21

25 supra n 22

26 idem

27 Army Report Operation Unload : 27 Feb '51 - 6 Jun '51. Army Department file 270/5/17.

28 Air Department file 1/7/6. Waterfront Strike 1951.

29 supra n 27

30 Report of Department of Labour and Employment for the Year Ended 31 March 1952, New Zealand Parliament House of Representatives Appendix to the Journals, Vol 3, 1952, H 11 : 22.

31 supra n 21, 16

32 supra n 30

33 supra n 16, 165

34 supra n 27

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35 Factual Survey of the Waterfront Strike 1951, submitted to the Royal Commission of Inquiry into the Waterfront Dispute by the General Manager, Waterfront Industry Commission, October 1951, contained in Air Department file 1/7/6.

36 idem

37 ibid 47

38 Wellington Watersiders Information Bulletin, No 7, 30 March.

39 supra n 16, 137

40 supra n 38

41 Wellington Watersiders Information Bulletin, No 44, 9 July.

42 NZ Herald, 4 May 1951, quoted in S. Young, supra 21, 70.

43 Wellington Watersiders Information Bulletin, No 26, 2 May.

44 supra n 21, 68.

45 supra n 22.

46 Section 38, Armed Forces Discipline Act 1971 states that every person subject to the Act who disobeys a lawful command is liable to a term of imprisonment not exceeding five years.

47 Section 37, Defence Act 1971, provides that each Servicemen must take and subscribe an oath of allegiance to Her Majesty the Queen.

48 NZ Gazette, 1919, Vol 1, 1213.

49 This opinion was expressed by the Offical Secretary to the Governor General, Mr J. Brown, 9 Jul 81.

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50 Interview conducted with Mr Douglas 6 Jul 81.

51 Sir Arthur Harris, Marshall of the Royal Air Force in the 1950s, quoted in R. Ewert _In Aid of the Civil Power_, summary notes, Ministry of Defence 1978.

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