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NOTES

RULE BY MARTIAL LAW IN INDIANA: THE SCOPE OF EXECUTIVE POWER

Use of the military to handle domestic crisis is a common technique of state government. The military forces of the State of Indiana have been called out for state duty on over thirty occasions in the last forty years,¹ and in at least seven instances during this period the governor has declared areas of the state to be under military control.² Although martial law is not mentioned in the Indiana Constitution, nor dealt with by any Indiana statute,³ it is obviously no stranger to the state. Because of the inherent nature of the military as an instrument of war, its employment in civil disorders has led to considerable confusion between the powers of a military commander on the battlefield and his powers at the scene of a domestic disturbance. The confusion has been compounded by the notion that plenary powers may be vested in the military by a governor's proclamation. Despite the frequent reliance of the state executive on martial law in dealing with civil disorder the limitations on the power of the executive to subordinate civil authority to the military and the legal boundaries of military operations under a proclamation of

1. Survey of instances reported in YEAR BOOK OF THE STATE OF INDIANA, vols. 1920-1950. Twelve occasions involved fires, floods, tornadoes and other natural disasters. Thirteen instances involved labor troubles. The troops were used for a miscellany of purposes in the remaining instances, *e.g.*, policing the burial of a notorious criminal, 1935 YEAR BOOK OF THE STATE OF INDIANA 36; convoying discharged service men home for Christmas, 1945 YEAR BOOK OF THE STATE OF INDIANA 1215.

2. In 1919, at East Chicago and Indiana Harbor (labor dispute), 1920 YEAR BOOK OF THE STATE OF INDIANA 226-231; in 1922 in Clay County (labor dispute), 1922 *id.* at 818; in 1932 in Vigo County (labor dispute), 1932 *id.* at 969; in 1933 in Sullivan County (labor dispute), 1934 *id.* at 33; in 1935 in Vigo County (labor dispute), *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935), compare 1936 YEAR-BOOK OF THE STATE OF INDIANA 34; in 1937 in the Ohio River Valley flood areas, 1937 *id.* at 90; in 1955 in Henry and Wayne Counties, see note 16 *infra*.

3. The phrase "martial law" appears in one statute dealing with jurisdiction of courts martial over state troops. IND. ANN. STAT. § 45-2201 (Burns Supp. 1955). The term has been justifiably criticized as obscure. FAIRMAN, LAW OF MARTIAL RULE 19-21 (2d ed. 1943). However, its dominance in lay and legal parlance makes acceptance of any other terminology seem hopeless. The trouble lies in the fact that "martial law" has been employed to cover the entire spectrum of use of military for civil purposes, from total subversion of civil government to selling tickets at football games. FAIRMAN, *op. cit. supra* at 80-94. "Martial law" is herein used to denote the substitution of military rule for civil law and government.

martial law are not generally understood.⁴ The most recent instance of such a proclamation in Indiana illustrates the legal problems arising out of use of the military to deal with civil disturbance, and points up the confusion surrounding them.

On October 5, 1955, a dispute between management of the Perfect Circle Foundry in New Castle, Indiana, and the United Automobile Workers Union culminated in armed violence.⁵ A riot between massed pickets and non-striking workers resulted in the wounding of several persons. Cars were stoned and overturned; a building was set afire.⁶ Violence subsided only after pleas for peace were made by labor leaders and the lieutenant governor of the state. State police were allowed to disarm workers within the plant and escort them through picket lines.⁷

The mayor of New Castle immediately declared an emergency to exist within the city and petitioned the governor for assistance from the National Guard.⁸ The governor authorized assistance and ordered the

4. *E.g.*, "Efforts should be taken to bring about a recognized legal status for action that must be taken by the military under Martial Law conditions. Great study should be given for the reasons for the inaction of the Circuit Court in Henry County [see p. 460 *infra*] and the legal profession in Indiana and the General Assembly of Indiana should be asked to study the problem with the hope that a solution for future operations will be forthcoming." After Action Report from Col. H.S. Wilcox, Ind. N.G. (Commanding Officer at New Castle) to the Adjutant General of Indiana, Oct. 28, 1955, on file in the office of the Adjutant General of Indiana. The author is indebted to Col. John W. McConnell, NGUS, Assistant Adjutant General, State of Indiana, for access to the collection of very detailed records and documents concerning the New Castle incident on file in the Adjutant General's office. Citations to the collection will hereafter be labeled "AG files."

5. The strike commenced on July 24, 1955 at the expiration of the Perfect Circle-UAW contract. Negotiations had broken down on the question of union shop. Despite an order by the Circuit Court for Randolph County enjoining mass picketing, the foundry was the scene of intermittent bursts of violence throughout August and September. Cars were stoned and overturned; workers seeking entry to the plant were threatened and manhandled. Although the foundry management tried to maintain limited operations, it was forced to shut down completely in mid-September. The plant remained inoperative until September 27, when a force of New Castle police removed pickets from the gates. Detailed chronological account of the development and progress of the strike is contained in an undated brochure, Labor Relations History—Perfect Circle Corporation, AG files.

6. N.Y. Times, Oct. 6, 1955, p. 1, col. 7.

7. *Ibid.*

8. "I, Paul F. McCormack, Mayor of the City of New Castle, Indiana do hereby declare a state of emergency existant within the city. And that to assure safety of life and property and to obtain law and order, it is necessary to have National Guardsman called in to meet the situation and restore complete order.

"I hereby request the governor of the State of Indiana, Honorable George N. Craig, to send National Guardsmen to New Castle, Indiana." Proclamation by the Mayor of the City of New Castle, Indiana, Oct. 5, 1955, AG files. Whatever its political value, such a proclamation is not a prerequisite to a call out of the guard. The evaluation and decision lie wholly with the governor, and he may order up the troops without a request from local authorities. IND. ANN. STAT. § 45-2104 (Burns Supp. 1955). If an emergency demands, commanding officers of the National Guard units in the vicinity may order

Guard mobilized.⁹ Instructions to the National Guard made it clear that the military was to operate in aid of and in strict subordination to the civil authorities in New Castle.¹⁰ The troops arrived in the city in force the next morning. For the next four days, the National Guard worked in close conjunction with the New Castle authorities, subject to the direction of the mayor.¹¹

The Guard set up road blocks around the city, searched automobiles, and confiscated firearms and liquor.¹² They established an armed guard around the foundry, which had been closed on October 6 by the mayor.¹³ They maintained continuous roving patrols throughout the city, enforcing the 9:00 P.M. curfew and the ban on liquor sales ordered by the mayor.¹⁴ Although instances of violence and vandalism had become common in New Castle during the development of the labor dispute,

out their troops on written request of the sheriff of the county without waiting for the governor's order. IND. ANN. STAT. § 45-2106 (Burns Supp. 1955).

9. The governor was out of the state at the time and communicated his orders by telephone. This complication led to anxiety in the Adjutant General's office, because the lieutenant-governor vigorously opposed sending out the troops and maintained that the decision was with him. Memorandum from Capt. W. A. Scott, Executive for the Adjutant General, to Governor George N. Craig, Oct. 8, 1955, AG files; N.Y. Times, Oct. 7, 1955, p. 1, col. 7. There was strong feeling that the governor shed his executive power when he left the territory of the state, and thus could not act in his official capacity outside the state's perimeter. Editorial, Indianapolis Star, Oct. 7, 1955, p. 24, col. 1; statement of the Attorney General of Indiana, Indianapolis Star, Oct. 7, 1955, p. 1, col. 1; Indianapolis Star, Oct. 8, 1955, p. 1, col. 7.

10. Letter of instructions from Headquarters, 38th Infantry Division, to Commanding Officer, Indiana Command Central, 38th Infantry Division, Oct. 5, 1955, AG files.

11. *Ibid.*; Indianapolis Star, Oct. 7, 1955, p. 1, col. 1.

12. Memorandum report by Col. W. C. Phillippi, Ind. N.G., Oct. 10, 1955, A.G. files.

13. N.Y. Times, Oct. 7, 1955, p. 52, col. 5; Indianapolis Star, Oct. 7, 1955, p. 1, col. 1. The mayor himself voiced considerable doubt as to the legality of this action. Indianapolis Star, Oct. 8, 1955, p. 1, col. 2. The Attorney General of Indiana also questioned the legality of the order, Indianapolis Star, Oct. 8, 1955, p. 1, col. 8, and since he felt that the troops were illegally in New Castle, Indianapolis Star, Oct. 9, 1955, p. 1, col. 1; see note 9 *supra*, feared the state might be liable to suit by anyone damaged by the presence of troops. Indianapolis Star, Oct. 7, 1955, p. 3, col. 3. It would appear, however, that without its consent the state is immune from such suit. *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945); *State ex rel. Indiana Department of Conservation v. Pulaski Circuit Court*, 231 Ind. 245, 108 N.E.2d 185 (1952).

14. Indianapolis Star, Oct. 6, 1955, p. 12, col. 3. The legality of the mayor's action is subject to question on two grounds. Although there is statutory provision for emergency publication of city ordinances by the mayor, such ordinances must still be enacted by the city council. IND. ANN. STAT. §§ 48-1406, 48-1407 (Burns 1950). Moreover, while there appears to be no constitutional right to sell liquor in Indiana, IND. ANN. STAT. § 12-443 (Burns Supp. 1953); *State ex rel. Zeller v. Montgomery Circuit Court*, 223 Ind. 476, 62 N.E.2d 149 (1945), the curfew raises serious problems of state infringement on personal liberties. Although curfews may be valid, a strong showing of necessity is required to make them so. *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

there were none reported during this period.¹⁵ Order was effectively restored.

On October 10, however, when a meeting of officials of the foundry and the UAW with the governor failed to establish a basis for the resumption of negotiations, the governor proclaimed a state of emergency to exist in New Castle and Henry County, designated the county as a military district, and declared it to be under military control. The proclamation forbade assembly within the district, limited ingress and egress to the county, and purported to make the civil authority an agency of the military.¹⁶

Despite the broad powers conferred on the National Guard by the governor's proclamation, the military did not find it necessary to greatly expand its scope of operations. The area guarded by road blockades was

15. The some fifty instances of violence and vandalism which terrorized both factions in New Castle during the two months prior to the Guard's arrival are itemized in an undated pamphlet, Chronology of Incidents Related to P.C. Strike, New Castle Foundry, AG files.

16. "WHEREAS, an emergency has arisen in and around the City of New Castle, Henry County, Indiana, by reason of violence and other breaches of the peace occurring in connection with a strike at the Perfect Circle Factory in said city

"NOW, THEREFORE, acting by virtue of the power and authority conferred upon me as Governor of the State of Indiana, and as Commander-in-Chief of the military and naval forces of the State of Indiana, it is ordered that the National Guard of Indiana assume control of the following described territory: All of the territory lying within the boundaries of Henry County, Indiana.

"Said territory is hereby designated as a military district and, until further order and notice, is under military control.

"It is the purpose of the military control that the military authorities conduct the affairs of this district in cooperation with the civil authorities, which shall become, until further order, an agency of the military authorities.

"The following notice is given to all persons in the district herein designated as being under military control.

1. No assembly will be permitted in the district.

2. No persons, other than the police, of the City of New Castle, Henry County, Indiana, the county sheriff and his duly appointed deputies, members of the State police, military authorities and troops will be permitted to carry arms or weapons of any kind or description.

3. No persons, other than those authorized by the military authorities will be permitted ingress or egress to or from the district.

4. All crowds, picketers and other assemblage will disperse immediately, except as authorized by existing court order.

"The military authorities, troops and all civil peace officers are charged with the carrying out of these orders, which will be rigidly enforced.

"All persons within the limits of the district are admonished to observe and strictly comply with these instructions.

"Any person having a petition to present or complaint to make will present it to the commanding officer of said district for his consideration." Proclamation by George N. Craig, Governor of the State of Indiana, Oct. 10, 1955, copy on file in Indiana Law Journal office. This follows the form of prior documents purporting to establish martial law in Indiana. See *e.g.*, *Cox v. McNutt*, 12 F. Supp. 355, 357 (S.D. Ind. 1935). The sites of other Perfect Circle plants were placed under military control by separate proclamations designating Hagerstown and a section of Richmond, Indiana as military districts. Copies on file in Indiana Law Journal office.

slightly increased, and roving patrols continued to enforce the existing curfew and alcoholic beverage restrictions.¹⁷ Liquor,¹⁸ arms, and ammunition¹⁹ were forbidden sale and were confiscated. Several bootleggers and curfew violators were arrested.²⁰ The number of troops in the area was gradually reduced during this period,²¹ and only a skeleton force was left to aid the civil authorities after the governor terminated military control.²²

Although the governor's proclamation led to very little change in the military's policing activities in the area, it had a profound effect on the local civil government. The circuit judge for Henry County immediately abdicated his bench and refused to hold court, on the ground that neither he nor his court had any legal status during military control of the county.²³ This action met with considerable opposition from the local bar association, whose members believed that any question of jurisdiction might be overcome by waivers from all parties to the litigation.²⁴

17. The 9:00 P.M. curfew was relaxed by the military on October 15. Curfew for persons over eighteen was extended to midnight; all others were to be off the streets at 10:30 P.M. Proclamation from Commanding Officer, Indiana Command Central, to all residents, Oct. 15, 1955, AG files.

18. Proclamation from Commanding Officer, Indiana Command Central, Oct. 14, 1955, AG files.

19. Indianapolis Star, Oct. 17, 1955, p. 1, col. 2.

20. Periodic Operations Report No. 8, Oct. 17, 1955 from Indiana Command Central; Periodic Operations Report No. 9, Oct. 18, 1955 from Indiana Command Central, AG files (bootleggers). Periodic Operations Report No. 10, Oct. 19, 1955 from Indiana Command Central; Periodic Operations Report No. 11, Oct. 20, 1955, AG files (curfew violators).

21. Indianapolis Star, Oct. 17, 1955, p. 1, col. 1; Indianapolis Star, Oct. 19, 1955, p. 1, col. 2.

22. Indianapolis Star, Oct. 26, 1955, p. 24, col. 4.

23. The Henry Circuit judge, assuming the legality of military control over the county, reasoned that the governor's proclamation abolished the legal status of judge and court within the area. Therefore, by virtue of the proclamation, the court no longer existed, and it could not in light of the constitutional provision that the military shall be kept in strict subordination to the civil power, IND. CONST. art. 1, § 33, be reincarnated by order or sufferance of the military. Indianapolis Star, Oct. 13, 1955, p. 3, col. 1. This action created a serious problem for one seeking judicial review of actions taken by the military after a proclamation of martial law. The venue for suits against public officers for acts done by virtue of office is the county where the cause arose. IND. ANN. STAT. § 2-702 (Burns 1946); see 2 GAVIT, INDIANA PLEADING AND PRACTICE §§ 207-208 (1942). If actions against the military fall into this category, it would seem that no action could commence until martial law had terminated. Even the writ of habeas corpus might be unavailable, for jurisdiction to grant the writ is limited to the county in which the petitioner is restrained. IND. ANN. STAT. § 3-1905 (Burns 1946); *State ex rel. Moore v. Carlin*, 226 Ind. 437, 81 N.E.2d 670 (1948). There is no original jurisdiction in the Indiana Supreme Court to grant the writ. *Jones v. Dowd*, 219 Ind. 114, 37 N.E.2d 68 (1941).

24. Indianapolis Star, Oct. 18, 1955, p. 13, col. 3. The President of the Indiana Bar Association suggested an action for mandate to compel the court to hear docketed cases. Indianapolis Star, Oct. 15, 1955, p. 1, col. 5. Ordinarily a judge has a legal duty to hold court, and may be compelled to execute that duty by mandate. *State ex rel. Devening v. Bartholemew*, 176 Ind. 182, 95 N.E. 417 (1911); IND. ANN. STAT. §§ 3-2201,

The court was reopened on October 20 on that basis,²⁵ and military control of the county was terminated by the governor the same date.²⁶

Under normal conditions the action taken by the military in Henry County would not have been tolerated. Individual rights secured by both state and federal constitutions were invaded. The right to bear arms,²⁷ to peacefully assemble,²⁸ to be secure against unreasonable search and seizures²⁹ were restricted by the military. Merchants properly

3-2202 (Burns Supp. 1955). Thus it would at least seem possible through an action for mandate to compel the circuit court to rule on its own jurisdiction, allowing the issue to be taken up on appeal. Moreover, the status of the civil courts under an executive declaration of martial law might be adjudicated in the mandate action itself. Unfortunately this avenue of judicial review was not followed.

25. The circuit judge was still doubtful as to whether the court could legally function but agreed to handle all probate matters, dispose of all default situations in the usual manner, and hear contested litigation on the condition that all parties agree to the court's jurisdiction and waive any future attack on that point. Indianapolis Star, Oct. 20, 1955, p. 1, col. 4.

It is urged below that jurisdiction of the civil courts cannot be suspended by a state governor's proclamation. See p. 466 *infra*. But assuming the proclamation to have that effect, the question of waiver of the jurisdictional defect still remains. It has been maintained that a judgment rendered after an adversary proceeding is not subject to a collateral attack based on lack of jurisdiction over the subject matter in the original action. 2 GAVIT, INDIANA PLEADING AND PRACTICE § 184(e) (1942). The same authority further urges that the question may not be raised for the first time on appeal. *Id.* at § 184(c). But the effect of a waiver of jurisdiction over the subject matter would seem to vary with the nature of the jurisdiction sought to be waived. Each case depends on a balancing of the policy underlying the doctrine of res judicata with the policy against permitting a court to act beyond its jurisdiction. RESTATEMENT, JUDGMENTS § 10 (1942). In a recent case, the parties in the trial court agreed to permit the trial judge, whose term of office had expired, to continue the case. On appeal, the Appellate Court on its own motion held that the parties could not confer jurisdiction to hear the case on a person with no legal status. *Macy v. Logansport Machine Co.*, — Ind. App. —, 101 N.E.2d 715 (1951). This holding was superceded by the Indiana Supreme Court, which affirmed the judgment of the trial court without comment on the jurisdictional point. *Macy v. Logansport Machine Co.*, 232 Ind. 270, 111 N.E.2d 717 (1953). It would appear, therefore, that Indiana will give effect to waiver of certain types of jurisdiction over subject matter. Surely the policy behind preventing a court from acting beyond its jurisdiction under a state of martial law could not concern litigation totally unconcerned with martial law. If the court and judge would normally have jurisdiction over the cause, and all litigants agree to that jurisdiction, no policy is furthered by denying them jurisdiction by dint of executive declaration. Allowing the question of jurisdiction over civil cases to be waived presents no compelling problem of competency, convenience, or sovereignty.

26. Proclamation by George N. Craig, Governor of the State of Indiana, Oct. 20, 1955, copy of file in Indiana Law Journal office.

27. IND. CONST. art. 1, § 32; U.S. CONST. amend. XIV, § 1. See note 16 *supra*.

28. IND. CONST. art. 1, § 31; U.S. CONST. amend. XIV, § 1. See note 16 *supra*.

29. IND. CONST. art. 1, § 11; U.S. CONST. amend. XIV, § 1. See note 16 *supra*.

authorized by statute and license to sell liquor³⁰ or firearms³¹ were forbidden to do business. The statutory right of properly licensed persons to carry concealed weapons was denied.³² Orderly civil process was supplanted by military government. Although in fact the military was conscious of an obligation to act temperately,³³ and the measures taken to police the area appear mild, the moderation employed in the New Castle operation resulted from practical rather than legal considerations. The uncertainty of the military as to its status and powers under the governor's proclamation doubtless had some effect in tempering its actions.³⁴ Yet far harsher measures were designed and held in abeyance pending the development of an apparent necessity for them. The military planned, and apparently considered itself empowered, to try civilians by military tribunal, suspend the right to the writ of habeas corpus, trial by jury, change of venue and release on bond.³⁵ The implication is that under a martial law declaration, action taken by the military is limited only by its own determination of the practical necessities of the situation. If so, this raises the phenomenon of an executive empowered to suspend the laws and constitution of a state by fiat.

The basic legal problem is this. If an emergency permits the state executive to substitute military force for civil law, then there can be legal responsibility for actions taken by the military only if the circumstances which provoked the executive's decision do not meet the judicial definition of emergency. Judicial review is directed to the question of whether an emergency initially existed, which can be answered only by

30. Although in Indiana there is no property right in a liquor license, the authority to issue, suspend, or revoke permits is clearly given the Alcoholic Beverage Commission, and no other. IND. ANN. STAT. § 12-443 (Burns Supp. 1953). Absolute discretion is vested only in the Commission. Apparently the Alcoholic Beverage Commission was also unaware of the extent of its authority in the New Castle area, for it acquiesced in the ban on liquor sales. Statement by Headquarters, Indiana Command Central, Oct. 14, 1955, AG files.

31. IND. ANN. STAT. § 10-4742 (Burns 1933).

32. IND. ANN. STAT. § 10-4738 (Burns Supp. 1953). There is no constitutional right to carry concealed weapons in Indiana. *McIntyre v. State*, 170 Ind. 163, 83 N.E. 1005 (1908); *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833).

33. "The troop commander has been instructed that he will accomplish this mission as expeditiously as possible; however, there will be no effort to supersede civil authority unless it breaks down. The occupation and policing of the areas designated will be accomplished at the least possible inconvenience to the civil populace. No undue encroachment of inherent civil rights will be imposed." Public statement of H.A. Dougherty, Major General, Ind. N.G., Adjutant General, (no date, but made sometime after the governor's proclamation), AG files.

34. See notes 4 and 33 *supra*.

35. Special Orders, No. X, Headquarters, Indiana Command Central, New Castle, Indiana (no date), AG files. This order was filed with the Adjutant General on Oct. 19, 1955, but was never dated, numbered or signed. It was prepared for a contingency that never developed.

defining limits of the concept of emergency. Emphasis is thus placed on the question of the legality of the governor's decision, rather than the legality of actions taken by the military on the premises. Although this theory has its advocates,³⁶ it is hardly an effective legal approach. Its rigidity creates too broad a power in the military, for once the courts decide that an emergency permitting the suspension of the laws exists, actions patently arbitrary and unrelated to the crisis are conferred immunity from litigation. On the other hand, insistence that normal routines must prevail until an emergency is reached too narrowly constricts executive action under circumstances serious but not yet constituting an emergency. It denies the existence of any middle ground between normality and crisis.

Proponents of the proposition that the governor of a state may by his *ipse dixit* suspend the protection of the laws over the citizens of a state by a proclamation of martial law argue by analogy from the traditionally broad powers of the executive to conduct war.³⁷ The institutional history of martial law in England lends some support to the position that in time of war the king can dispense with the common law and rule by royal discretion. The term "martial law" itself apparently stems from a medieval court composed of the king's highest military officers and empowered to administer drum-head justice on the battlefield.³⁸ Attempts to increase the scope of this court's power were blocked by the

36. *Moyer v. Peabody*, 212 U.S. 78 (1909). This opinion indicates that the governor's declaration of an insurrection is sufficient to confer legality on actions taken under it. Moreover, it implies that so long as the declaration was made in good faith, it is not subject to attack in the courts. See WIENER, *PRACTICAL MANUAL OF MARTIAL LAW* 109-110 (1940); FAIRMEN, *LAW OF MARTIAL RULE* 101 (2d ed. 1943).

37. U.S. *ex rel. Seymour v. Fischer* 280 Fed. (D. Neb. 1922); U.S. *ex rel. McMaster v. Wolters*, 268 Fed. 69 (S.D. Texas 1920); *Ex parte Jones*, 71 W.Va. 567, 77 N.E. 1029 (1913); *State v. Brown*, 71 W.Va. 519, 77 N.E. 243 (1912).

38. This was the Court of Constable and Marshall. Holdsworth, *Martial Law Historically Considered*, 18 L.Q. REV. 117 (1902); FAIRMEN, *op. cit. supra* note 36, at 1-6. See also MORRIS, *CONSTITUTIONAL HISTORY OF ENGLAND TO 1216*, at 329 (1930). The origins of this court are obscure, but are probably to be found in the older court of Steward and Marshall. 3 SAYLES, *SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I, LXXXIII-LXXXVIII* (58 Selden Society 1939). This court appears to have developed from the *curia regis* of the Angevin kings but did not develop along common law lines. *Id.* at LXXXVIII. It was a special target of the reaction against the decay of legal order in medieval England. *E.g.*, Articles on the Charters, 1300, 28 EDW. 1, stat. 3, c. 3; The New Ordinances, 1311, 5 EDW. 2, c. 26; see also JOLLIFE, *CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 409-430 (2d ed. 1948). Perhaps the limitations on the court of Steward and Marshall led to the exercise of similar jurisdiction through the court of Constable and Marshall, or perhaps growing legal sophistication demanded a sharper jurisdictional differentiation between the two. At any rate, the latter court became a greater source of discontent during the reign of Richard II. 8 RICH. 2, c. 5 (1384); 13 RICH. 2, stat. 1, c. 2 (1389).

incipient English tenderness for legality,³⁹ and by the Seventeenth Century, jurisdictional strictures had led to the court's atrophy.⁴⁰ It had early been made clear that rule by martial law, although occasioned by war, was not justified merely because a state of war existed.⁴¹ It could be invoked only when it became impossible for the organs of the common law to function.⁴² The struggle between Charles I and Parliament made it apparent that martial law was not an adjunct of the royal prerogative of discretion in the manner of making war, for the attempt of Charles to rule the southeast coast of England by royal commissioners during the Thirty Years War met with stern rebuff.⁴³ Parliament made it clear that the king had no power to suspend the operation of the laws within the realm, even during wartime.⁴⁴ The king had broad powers to conduct war, but these powers were vested in him by the common law. It was one thing to say that the common law permitted the king extreme emergency powers; it was quite another to say that the king could suspend the common law.⁴⁵ The former position implied ultimate responsibility of the king to Parliament as the arbiter of governmental power; the latter urged that the reigns of power were ultimately with the king. Rule by martial law was not, therefore, an incident of the king's war powers. Only where raging warfare made it physically impossible for the machinery of the common law to function did the demand for some sort of order and government allow rule by law martial to be tolerated.⁴⁶

39. 8 RICH. 2, c. 5 (1384); 13 RICH. 2, stat. 1, c. 2 (1389). Compare 2 RICH. 2, stat. 2, c. 2 (1378), repealing 2 RICH. 2, stat. 1, c. 6 (1378) which allowed the arrest and incarceration of rioters by king's commissioners without process of law. See also 3 SAYLES, *op. cit. supra* note 38, at lxxxviii.

40. HALE, HISTORY OF THE COMMON LAW 36 (4th ed. 1779); 3 BLACKSTONE, COMMENTARIES *103-4; Holdsworth, *supra* note 38, at 118.

41. Its jurisdiction was over "things that touch war within the realm, which cannot be disclaimed by the common law." 13 RICH. 2, stat. 1, c. 2 (1389). See also 8 RICH. 2, c. 5 (1384).

42. HALE, HISTORY OF THE COMMON LAW 34-36 (4th ed. 1779).

43. Petition of Right, 1623, 3 CHAS. 1, c. 1.

44. Interpretations of the precise legal effect of the Petition of Right differ widely. FAIRMAN, *op. cit. supra* note 36, at 9-18; Holdsworth, *supra* note 38, at 120-121; Dodd, *The Case of Marais*, 18 L.Q. REV. 143, 147-51 (1902); RELF, THE PETITION OF RIGHT, iii (1917). It is clear, however, that considered in its historical context, the Petition was a declaration of the sentiment in Parliament that the king had no power to suspend the operation of the common law over his subjects. This was the attitude of the leading contemporary lawyers. HALE, HISTORY OF THE COMMON LAW 35 (4th ed. 1779); see FAIRMAN, *op. cit. supra* note 36, at 16.

45. "[T]he pretended power of suspending of laws or the execution of laws by regal authority without consent of parliament is illegal; . . . the pretended power of dispensing with laws or the execution of laws by regal authority, as it has been assumed and exercised of late, is illegal. . . ." Bill of Rights, 1689, 1 WM. & MARY, stat. 2, c. 2.

46. HALE, HISTORY OF THE COMMON LAW 35-36 (4th ed. 1779).

The limits of the power of the President of the United States to conduct war have never been precisely defined.⁴⁷ That they are broad in scope can not be denied. But the Supreme Court has never admitted that the chief executive might suspend the operation of the laws in such a manner as to deny the courts jurisdiction to decide the legality of action taken under the suspension.⁴⁸ This explains the tenacious judicial emphasis on the distinction between suspension of the writ of habeas corpus and suspension of the privilege of the writ.⁴⁹ Although the courts may deny a prisoner release because the privilege of the writ has been suspended, they will not refuse him a judicial hearing on the legitimacy of his detention. Ultimately the courts must have the final word on the legality of the chief executive's actions. However broad the war powers of the President may be, they do not encompass the power to close the courts of the United States. Over-emphasis on the courts' natural reluctance to interfere with executive action in time of war may lead to the position that war powers are unlimited.⁵⁰ But allowing broad scope to the executive's power to conduct war, while retaining the ultimate right to review the occasion for the use of that power, is not to say that the war power is without limits. The existence of an institution which has the power to declare certain exercise of war power *ultra vires* must exert at least a cautionary function. The Supreme Court has never considered itself subject to suspension, by either the President or Congress.

Martial law, defined as a suspension of the law of a nation by executive proclamation, was not a power of the king under common law, nor is it a power of the President of the United States. Although it is arguable that the English Parliament holds that power,⁵¹ it is obvious that the power of Congress is more limited. The law of the United

47. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646-47 (1951) (concurring opinion). See also CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 275-318 (3d ed. 1948); ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1951).

48. E.g., President Roosevelt attempted by proclamation to close the courts to German saboteurs apprehended in the United States. The Supreme Court took no heed. *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942), discussed in Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806, 828 (1956).

49. E.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866). See WIENER, *PRACTICAL MANUAL OF MARTIAL LAW* 68-72 (1940).

50. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 131 (1951); ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 286-87 (1948); cf. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 317-18 (3d ed. 1948). This view would seem to demand radical revision in the light of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951), which declared unconstitutional a presidential seizure of a steel plant during the Korean War.

51. See Corwin, *Martial Law, Yesterday and Today*, 47 POL. SCI. Q. 103 (1932); FAIRMAN, *op. cit.* *supra* note 36, at 20-21.

States is not only statutory, but constitutional. The law of the separate states in addition rests on the norms of the state constitutions. Although the power relationship between state governor, judiciary, and legislature rests primarily on the state constitution, and thus would seem a question for the state rather than the federal judiciary, it would appear that action by a state executive claiming justification under war powers presents a federal question. Even if the war powers of the President encompass the power to rule by martial law, the state governments were divested of similar powers by virtue of the Federal Constitution.⁵² The states are therein denied the power to wage war. This aspect of sovereignty with its concomitant powers is no longer a state power. It is therefore impossible for a governor's rule by martial law to be explained as deriving from his war powers. Furthermore, the incidents provoking state executives to attempt to govern by martial law have little resemblance to war.⁵³ Martial law has most frequently been called down to quell labor disputes.⁵⁴ But strikes, even when accompanied by armed violence, are not war.⁵⁵ They display no aspect of struggle between sovereigns. They have no resemblance to situations demanding the application of war powers. Unreviewable executive legislation exercised by martial law can be tolerated, if at all, only in the face of an actual threat to the sovereignty or constitutional structure of a nation.⁵⁶ Although labor disorders often reflect resistance to the execution of the laws, they rarely pose a direct threat to the political structure of the state. Considerable force may be required to overcome the lawlessness engendered by the labor dispute, but force should halt when that point is reached. Resolution of labor difficulties should be left to those organs of civil government specially created for this function.⁵⁷

A state governor's attempt to rule by martial law presents questions for both state and federal judiciary. As it affects the governmental relationship between state executive, legislature, and judiciary, martial law is primarily a question of the interpretation of the state constitution.

52. U.S. CONST. art. I, sec. 10. Cf. *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883); *Luther v. Borden*, 48 U.S. (7 How.) 1, 48, 71-79 (1849) (dissenting opinion). See FAIRMAN, *op. cit. supra* note 36, at 121-24.

53. Generally, see WIENER, *op. cit. supra* note 49, at 81-102; FAIRMAN, *op. cit. supra* note 36, at 80-94; *Federal Aid in Domestic Disturbances*, S. Doc. No. 263, 67th Cong., 2d Sess. (1921).

54. Labor disputes prompted six out of the seven declarations of martial law in Indiana since 1920. See note 2 *supra*. See also Isseks, *The Executive and His Use of the Militia*, 16 ORE. L. REV. 301 (1937); Comment, 1938 WIS. L. REV. 314.

55. See WIENER, *op. cit. supra* note 49, at 28-35.

56. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 298 (1948).

57. The Perfect Circle—UAW dispute was before the National Labor Relations Board at the time martial law was declared. N.Y. Times, Oct. 6, 1955, p. 20, col. 7.

The Constitution of the State of Indiana provides for a tri-partite government.⁵⁸ The governor, as commander-in-chief of the military forces of the state, may call out the troops to execute the laws, suppress insurrection, or repel invasion. But the constitution warns that the military must be kept in strict subordination to the civil power,⁶⁰ that all courts shall be open,⁶¹ and that the operation of the laws shall never be suspended except by the authority of the General Assembly.⁶² Whatever doubts might exist as to the prerogative of the executive to rule by martial law would seem to be dispelled by this last stipulation. It follows the traditional language of Anglo-American constitutional documents excoriating rule by executive fiat.⁶³ The Revolution of 1688 determined that the legislative power in England should rest with the Parliament.⁶⁴ The power to suspend law, as well as to create it, is a legislative power. It has been held, not without strong dissent, that even a legislature, created by a written constitution, has no power to suspend the operation of that constitution by enactments enabling the executive to rule by martial law.⁶⁵ This is not in question here. The General Assembly of Indiana has enacted no such legislation. The question involves the power of the governor in the absence of statutory authorization. The weight of authority which argues for the constitutionality of martial law admits that the power to initiate it does not lie with the executive.⁶⁶ Surely the dictates of good government demand that the representative assembly, rather than the

58. IND. CONST. art. 3, § 1.

59. IND. CONST. art. 5, § 12.

60. IND. CONST. art. 1, § 33.

61. IND. CONST. art. 1, § 12.

62. IND. CONST. art. 1, § 26.

63. Petition of Right, 1628, 3 CHAS. 1, c. 1; Bill of Rights, 1689, 1 WM. & MARY, stat. 2, c. 2; Preamble to the Virginia Constitution (1776), 9 VA. STAT. AT LARGE, 112-13 (Hening 1821); Virginia Bill of Rights (1776), 9 VA. STAT. AT LARGE, 109 (Hening 1821); Declaration of Independence (1776).

64. See note 45 *supra*.

65. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). There is also Indiana authority for this proposition. *Skeen v. Monkeimer*, 21 Ind. 1 (1863); *Griffin v. Wilcox*, 21 Ind. 370 (1863). These opinions have been criticized as unreliable because they assume that a state court may determine the legality of detention by federal authorities, and because of the Copperhead sympathies of the court. WIENER, *op. cit. supra* note 49, at 64 n. 8. But the former point was not clarified until *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872). The political turmoil in Indiana during the Civil War inevitably led to severe criticism of the opinions rendered by the Democratic state Supreme Court. Note, *Samuel E. Perkins: A Judge in Politics*, 28 IND. L. J. 106 (1952). The opinion in *Griffin v. Wilcox*, *supra*, was rendered by Judge Perkins, a vociferous Democrat. Although Perkins obviously felt that his position on the bench should not forbid him access to the political stump, he was a sound legal craftsman. His firm belief in the natural rights of man, as reflected in decisions rendered during his judicial tenure, has profoundly influenced Indiana constitutional law. Paulsen, *Natural Rights—A Constitutional Doctrine in Indiana*, 25 IND. L. J. 123, 147 (1950).

66. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 132, 137 (1866) (concurring opinion); *Luther v. Borden*, 48 U.S. (7 How.) 1, 46 (1849).

recipient of emergency powers, decide whether the emergency exists.⁶⁷ If the crisis is not great enough to convince a legislature that martial rule is necessary, it is not so acute as to demand a radical departure from normal government for its control.

The actions taken by both state and federal governments to deal with domestic crisis prior to the Civil War indicate the traditional limitations on rule by martial law. Although military force was utilized on several occasions to quell disorders of serious proportions, it was carefully kept within the bounds of assistance to civil authorities.⁶⁸ Civil process was enforced, not supplanted. Civil magistrates and judges directed the actions of the troops and often accompanied them in the field.⁶⁹ The initiative remained with the civil authorities, and whatever action was taken was accomplished through civil process.⁷⁰ Moreover, use of the troops to assist civil government was generally considered the last recourse of a government *in extremis*, a step to be taken only after all else had failed;⁷¹ use of the troops to supplant civil authority was unthinkable.⁷² It is significant that in the one instance a state government resorted to martial law prior to the Civil War, that government was faced with a direct threat to its sovereignty and constitutional structure.⁷³ Furthermore, martial law was there initiated by the legislature, not the governor.⁷⁴ It is only after the doubtful precedent of rule by martial law during the course of the Civil War that the phenomenon

67. ROSSITER, CONSTITUTIONAL DICTATORSHIP 299, 304 (1948).

68. *E.g.*, in Shay's Rebellion (1786) the militia was placed under the direction of the courts. The military had no initiative or discretion, but acted solely at the instance of the civil authorities. MINOR, HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS IN THE YEAR 1786, at 77, 95-96, 99-101 (1788). See also ADAMS, NEW ENGLAND IN THE REPUBLIC 1776-1850 c. 6. Accounts of other early instances of the use of military power in domestic crisis may be found in RICH, THE PRESIDENTS AND CIVIL DISORDER (1941); RANKIN, WHEN CIVIL LAW FAILS (1939); *Federal Aid in Domestic Disturbances*, S. Doc. No. 263, 67th Cong., 2d Sess. (1921).

69. *E.g.*, in the Whiskey Insurrection (1794) the federal judge accompanied the army, issuing warrants for the arrest of rebels along the way. BALDWIN, WHISKEY REBELS 241 (1939); RICH, THE PRESIDENTS AND CIVIL DISORDER 15 (1941).

70. "The disposition of justice belongs to the civil magistrate, and let it ever be our pride and our glory to leave the sacred deposit there unviolated." Letter from President Washington to General Lee, Oct. 20, 1794, instructing him as to the conduct of the army in the Whiskey Insurrection. 4 PENNSYLVANIA ARCHIVES (2d ser.) 418-19.

71. See *e.g.*, FINDLEY, HISTORY OF THE INSURRECTION IN THE FOUR WESTERN COUNTIES OF PENNSYLVANIA 317 & App. I (1796). See also RICH, THE PRESIDENTS AND CIVIL DISORDER 1-70 *passim* (1941).

72. See note 70 *supra*.

73. In Rhode Island, in 1842, where discontent with the franchise still in force under the original Charter (1663) led to the formation of a rival state government. MOWRY, THE DORR WAR 75-76 (1901); RICH, THE PRESIDENTS AND CIVIL DISORDER 54-66 (1941); RANKIN, WHEN CIVIL LAW FAILS 26-34 (1939).

74. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

of martial law by executive proclamation became widespread.⁷⁵ But President Lincoln's use of the military to supplant civil government in the Northern states dealt with a governmental crisis the severity of which has not been approached in the subsequent history of state governments. The action instituting martial law was held unconstitutional despite the gravity of that crisis.⁷⁶ It can have no value as precedent for state martial law in disorders less severe.

The Indiana General Assembly has indicated, by enacting legislation regulating the use of troops in civil disorder, that these emergency powers are vested in the governor only by dint of a legislative grant, the source of power ultimately residing in the Assembly. The governor is by statute authorized to order up the National Guard for state duty whenever he may deem it necessary.⁷⁷ He is to decide when a situation calls for the presence of troops. But the manner in which the troops may be utilized once on duty is limited. Although the exact extent of the discretionary powers granted by this legislation to control the activities of the troops while on state duty is not clear, the statutes stop far short of enabling the governor to rule by martial law. The military is granted no power to supersede the civil authorities but is contemplated as acting in close cooperation with them.⁷⁸ The military is not to create law; it is to operate within strict legal limits. The statutes outline the procedures to be followed by the troops in dealing with civil disorder. The military may arrest or use force to quell an unlawful assembly which has failed to obey a command to disperse, or is engaged in actual violence to persons or property.⁷⁹ The means to deal with unlawful assembly are left to the discretion of the military, but the occasion for their use is clearly defined. On the other hand, the military is given discretionary power to clear the streets and regulate their use, but the means to be employed are strictly limited.⁸⁰ The troops may arrest only those persons informed of the regulations who refuse to depart the streets after they have been ordered to do so. Moreover, such persons may not be confined by the military, but must be turned over to a civil magistrate. Finally, the commanding officer of the National Guard is authorized to take all neces-

75. For detailed coverage up to 1903, see *Federal Aid in Domestic Disturbances*, S. Doc. No. 263, 67th Cong., 2d Sess. (1921). A general history of rule by martial law in the United States may be found in FAIRMAN, *LAW OF MARTIAL RULE* 81-94 (2d ed. 1943). See also RANKIN, *WHEN CIVIL LAW FAILS* 65-136 (1939).

76. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* c. 7, 8 (2d ed. 1951).

77. IND. ANN. STAT. § 45-2104 (Burns Supp. 1955).

78. IND. ANN. STAT. §§ 45-2107, 45-2108, 45-2110, 45-2115 (Burns Supp. 1955).

79. IND. ANN. STAT. §§ 45-2108, 45-2110 (Burns Supp. 1955).

80. IND. ANN. STAT. § 45-2115 (Burns Supp. 1955).

sary steps for the safety of his command should the Guard be in imminent danger of attack.⁸¹ These are the statutory powers of the Guard to deal with civil disorder.

If the governor of Indiana has no residuary power to rule by martial law, except where war or disorder may destroy the institutions of civil government, it is clear that he has not been delegated this power by the General Assembly. His discretionary power is restricted to calling up the troops; their activities after mobilization are limited strictly by the laws and constitution of Indiana. The National Guard is not a tool through which the laws may be suspended; it is a force capable of enabling of the governor to insure that the laws are executed. As such, the troops have the status of police officers.⁸² The National Guard is well adapted to handle serious civil disorder, not because its presence suspends the laws, but because its mobility, strength, and ready availability render it an effective auxiliary police force.

Categorizing the military with police officers does not necessarily diminish its ability to deal with civil disturbance. Mere show of military force is often sufficient to discourage lawlessness. Those serious disorders which called for the use of troops in our earlier history were handled without granting the military powers greater than those held by the civil authorities.⁸³ Moreover, the legal limitations on the powers of peace officers tend to be flexible. Probable cause for warrant and arrest is an elastic concept which may vary with circumstance.⁸⁴ In reality, orderly procedure is all that is required. Furthermore, the common law has long recognized that even orderly procedure may be circumvented in case of an emergency.⁸⁵ The threat of grave and impending danger may

81. IND. ANN. STAT. § 45-2112 (Burns Supp. 1955).

82. *Middleton v. Denhardt*, 261 Ky. 134, 87 S.W.2d 139 (1935); *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); *Fluke v. Canton*, 31 Okla. 718, 123 Pac. 1049 (1912). See Ballantine's articles on the subject: *Martial Law*, 12 COLUM. L. REV. 529 (1912); *Military Dictatorship in California and West Virginia*, 1 CALIF. L. REV. 413 (1913); *Unconstitutional Claims of Military Authority*, 24 YALE. L. REV. 189 (1914). But see Fairman, *Martial Rule in the Light of Sterling v. Constantine*, 19 CORNELL L. Q. 20 (1933); WIENER, PRACTICAL MANUAL OF MARTIAL LAW 74-77 (1941).

83. See note 68 *supra*.

84. EWBANK, INDIANA CRIMINAL LAW §§ 247-49 2d ed. (1929).

85. *E.g.*, ship's cargo may be jettisoned to save the lives of passengers, *Mouse's Case*, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1608); buildings may be torn down to stop the spread of fire, *Conwell v. Emrie*, 2 Ind. 35 (1850); see Hall and Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501 (1907); levees may be cut to stop floods, *Newcomb v. Tisdale*, 62 al. 575 (1881); private property may be impressed into public service under conditions of immediate peril to the public interest, *cf. Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851). While action taken by the military may be justifiable, that is for the courts to decide. *Sterling v. Constantine*, 287 U.S. 378, 400-01 (1932); *Mitchell v. Harmony*, *supra*, at 134.

justify actions normally illegal. To deny the power to rule by martial law is not to deny the power to take effective action against emergencies, but it does deny the military discretion to decide when and how effective action should be taken. Civil government, even in an emergency, should rest with civil authorities. The National Guard is trained in warfare, not police work. Its effectiveness stems from its manpower and armament, not from its superior ability to handle routine police duties. And if routine police work demands capable, highly trained personnel, surely police work in domestic crisis requires direction by equally capable men.⁸⁶ Effective government calls for expertise as well as force. Although military force may be required to quell civil disorder, it should be directed by those whose particular knowledge and training in routine government has made them peculiarly suited for the job. Domestic disturbance should be met with no greater disruption of normal government and no greater use of power than is necessarily required to deal effectively with the situation.

The above considerations are primarily pertinent in determining the ultimate source and extent of state power to deal with internal crisis, as defined by the laws and constitution of Indiana. But insofar as the exercise of that power affects individual rights through an abridgement of due process of law and infringement of civil liberties, federal constitutional problems are raised. The path to review in the federal courts may be tortuous, but there is little doubt that it exists via the Fourteenth Amendment.⁸⁷ Although earlier federal cases reflected the confusion surrounding martial law engendered by utilizing analogies of executive prerogative and war powers,⁸⁸ the most recent consideration by the Su-

86. "The maintenance of order requires the use of experts and professionals who, if democracy is to survive, must themselves be subordinated to popular control. Without the experts, we cannot solve the difficult problems of aggression in modern society. But unless the experts are subjected to the rule of law and other forms of popular control, they become an insensitive élite." Hall, *Police and Law in a Democratic Society*, 28 *IND. L. J.* 133, 176 (1953). It has been urged that police work, intelligently applied, can nip an incipient riot in the bud. *Id.* 146-51.

87. "When there is a substantial showing that the exertion of state power has overridden private rights secured by that [U.S.] Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends. . . ." *Sterling v. Constantine*, 287 U.S. 378, 398 (1932). Injunction, when appropriate, will be granted. *Sterling v. Constantine*, *supra*. If the issue is the constitutionality of a statute or regulation under which the state executive purports to act, then the action is properly brought before a three judge district court, with direct appeal to the Supreme Court. 28 U.S.C. §§ 1253, 2281-2284 (1952). But if the allegation is that the governor has acted *ultra vires* in declaring martial law, then the normal system of proceeding through the lower federal courts must be utilized. *Phillips v. United States*, 312 U.S. 246 (1940).

88. *Moyer v. Peabody*, 212 U.S. 78 (1909); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *U.S. ex rel. Seymour v. Fischer*, 280 Fed. 208 (D. Neb. 1922); *U.S. ex rel. McMaster v. Wolters*, 268 Fed. 69 (S.D. Texas 1920). Justice Holmes' language

preme Court of the United States of an attempt by a state executive to rule by martial law clarified the problem. Brushing aside arguments of absolute discretion and executive prerogative, in *Sterling v. Constantine*⁸⁹ the Supreme Court declared that the legality of a governor's proclamation of martial law which proposed to invade rights protected by the federal Constitution was subjective to review. The test for legality would seem to be the same as that for any state action touching constitutional rights. The courts will consider the purpose of the action and weigh the reasonableness of the means taken to effectuate that purpose against the gravity of the invasion of individual rights.⁹⁰ Necessity and emergency may condition the reasonableness of the means, but they must be proved. Rule by martial law is so drastic a means, and poses so grave a threat to civil rights, that an extremely high measure of necessity must be shown to justify its use.⁹¹ The court, therefore, will closely scrutinize the circumstances which provoked the governor's proclamation.

The opinion in *Sterling v. Constantine* left some doubt as to the proper center of judicial focus in reviewing actions taken by the military under martial law.⁹² A review centered solely around justification for the governor's proclamation implies that complete suspension of law by executive fiat might be proper under some circumstances. Logically, therefore, it is conceivable under this theory that rule by martial law might legally be invoked. According to this approach no action by the military, however arbitrary or malicious, is subject to review if the initial proclamation is held valid. However, if the specific activities of the military are subject to the same test for legality as the governor's declaration, protection against irresponsible invasions of civil rights is insured.

The Supreme Court has more recently declared that the civil courts may not be suspended by resort to martial law by the federal government.⁹³ By so limiting the definition of martial law, the court has per-

in *Moyer v. Peabody*, *supra*, has justifiably been criticized. WIENER, PRACTICAL MANUAL OF MARTIAL LAW 110 (1940).

89. 287 U.S. 378 (1932).

90. *Id.* at 399.

91. *Id.* at 401.

92. The case has been interpreted as giving conclusive value to the governor's proclamation but not to orders issued under it. Fairman, *Martial Rule in the Light of Sterling v. Constantine*, 19 CORNELL L. Q. 20, 33 (1933). Compare WIENER, PRACTICAL MANUAL OF MARTIAL LAW 85-87 (1940).

93. *Duncan v. Kahanamoku*, 327 U.S. 304 (1945). The separate opinions in this case run the gamut of judicial opinion on martial law. The majority opinion (Justice Black) denies that martial law can mean anything more than military aid to civil authorities. The concurring opinion by Justice Murphy would allow martial law in its classic sense only when the courts are unable to function. Chief Justice Stone's concurring opinion would require a showing of necessity for both the executive proclamation and actions taken under it. The dissent (Justice Burton, Justice Frankfurter concurring)

mitted itself greater latitude in reviewing the justification for specific action of the military at the scene of civil crisis. The attention of the court is thus directed not only to the exigencies of the general situation, but also to the reasonableness of the particular means taken to handle it. To the federal courts, therefore, rule by martial law should present a problem no different than that of any other state action subversive of individual rights. The nature of permissible action by the National Guard in dealing with civil disorder should be defined by its position as an arm of state power and not by the status of the troops as a military force. When the military contemplates overriding individual rights it must, therefore, be guided by those judicial decisions outlining the permissible scope of their invasion, and must be prepared to justify its action in court. Unreasonable use of state power cannot be conjured into legality simply by invoking the talisman of martial law.

Conclusion: The governor of a state has no power to rule by martial law. The governor's power to use the troops in civil disturbances arises from his duty to see that the laws are executed. This duty does not encompass the power to suspend civil government, but requires only the use of that force necessary to quell lawlessness. In carrying out their mission the troops are bound to follow legal procedures. The extent of their power is that of any peace officer acting under similar circumstances.

ARBITRATION OF NO-STRIKE CLAUSE BREACHES: AN ANSWER TO SECTION 301 OF THE TAFT-HARTLEY ACT

Under Section 301 of the Taft-Hartley Act labor unions are subject to suit in federal courts for non-compliance with no-strike provisions in collective bargaining agreements.¹ Litigation of union liability is maintained despite provisions in the agreements for grievance and arbitration procedures designed for the settlement of disputes arising between the parties. The result may well mean invasion and frustration of the voluntarily established processes by which the parties have agreed to govern their relations.

Some form of no-strike provision is included in more than 89 per

argues that martial law in a theater of war could be proclaimed at the discretion of the President, and therefore is not subject to judicial review.

1. 61 STAT. 157 (1947); 29 U.S.C. § 185 (1952).