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Charles Fairman

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MARTIAL RULE, IN THE LIGHT OF STERLING V. CONSTANTIN

CHARLES FAIRMANT†

I

By its decision in *R. S. Sterling, Governor of the State of Texas, et al. v. E. Constantin, et al.*,¹ the Supreme Court has placed a limit upon a significant though little-noticed trend in American public law. Among the numerous occasions where governors have declared "martial law", only once before since the adoption of the Fourteenth Amendment had the measures taken thereunder been brought before the Supreme Court; and in that case, *Moyer v. Peabody*,² the governor emerged victorious. Wishful thinking about the Moyer decision, as well as a number of cases in federal district and state supreme courts,³ made it appear that on his own finding of necessity, declared in a proclamation of "martial law", the governor might use the military arm of the State subject to no effective judicial control. Hence the significance of the instant case, which held that the measures of martial rule taken by the governor of Texas amounted to a taking of property without due process of law.

For a variety of reasons, natural and legal, the world's oil industry was already overdeveloped and disorganized when further confusion was added by the discovery of tremendous oil deposits in East Texas.⁴ By 1931 this field alone was producing approximately a million barrels of oil per day, while the price of crude oil tumbled accordingly. The Texas legislature, on August 12, 1931, passed an amended oil conservation act, authorizing the State Railroad Commission to make proration orders limiting production. On August 16, before any such order had been made, Governor Sterling issued a proclama-

†Assistant Professor of Political Science, Williams College.

¹ 287 U. S. 378, 53 Sup. Ct. 190 (1932).

² 112 U. S. 78, 29 Sup. Ct. 227 (1909).

³ *Moyer v. Peabody*, 148 Fed. 870 (C. C. D. Colo. 1906); U. S. *ex rel. McMaster v. Wolters*, 268 Fed. 69 (S. D. Texas 1920); U. S. *ex rel. Seymour v. Fischer*, 280 Fed. 208 (D. Neb. 1922); U. S. *ex rel. Palmer v. Adams*, 26 F. (2d) 141 (D. Colo. 1928), 29 F. (2d) 541 (C. C. A. 8th 1928) (dictum); *In re Moyer*, 35 Colo. 154, 85 Pac. 190 (1904); *In re Boyle*, 6 Idaho 609, 57 Pac. 706 (1899); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. St. 165, 55 Atl. 952 (1903); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S. E. 243 (1912); *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029 (1913); *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533 (1914); *Ex parte Lavinder*, 88 W. Va. 713, 108 S. E. 428 (1921).

⁴ Logan, *The Use of Martial Law to Regulate the Economic Welfare of the State and its Citizens* (1931) 17 IOWA L. REV. 40; Marshall and Meyers, *Legal Planning of Petroleum Production* (1931) 41 YALE L. J. 33; (1933) 42 *ibid.* 702.

tion reciting that in certain counties in East Texas a group of oil producers were in insurrection against the conservation laws; that by reason of their reckless production enormous physical waste was resulting; and that this condition had brought about such a state of public feeling that acts of violence were to be anticipated. Wherefore he declared "martial law" and directed General Wolters to assume command. The troops were ordered in and the wells were closed.

On September 2, 1931, the Commission made an order fixing 225 barrels per day as the amount that might be produced at any East Texas well, and the governor permitted the wells to be reopened and to produce at this rate. On September 18 the Commission reduced the rate to 185, and on October 10 to 165, and these maxima were enforced by the governor through the military officers.

On October 13 Constantin and others, as owners of interests in oil and gas leaseholds, brought suit in the Federal District Court against the Commission, the general in command, and others. Their bill alleged that the members of the Commission had conspired, under color of applying the conservation laws, to impose an arbitrary limitation upon production in the interest of higher prices, thereby depriving the plaintiffs of their property without due process of law, and denying them the equal protection of the laws. An injunction was prayed for. The district judge issued a temporary restraining order forbidding defendants to limit plaintiffs' production below 5000 barrels per well, and proceeded to organize a three-judge court.

Thereupon Governor Sterling, who had not thus far been a party to the controversy, ordered the general to maintain the limit of 165 barrels, and as new wells came in this figure was lowered until on December 10 it was fixed at 100. It was hoped that while the Commission obeyed the restraining order the governor could take over "the proration end" as an exercise of "martial law", and so escape the control of the courts. Complainants filed an amended bill making the governor and adjutant general parties to the suit, and challenging the executive and military orders as contrary to state and Federal Constitutions. So when the case came on for hearing it was the measures of "martial law" rather than the orders of the Commission which were before the three-judge court. The position of the State officers was that the proclamation of "martial law" was conclusive; that war powers might therefore be exercised; and that during the continuance of this regime the court was without jurisdiction. As the court found:

"It was conceded that at no time has there been any actual uprising in the territory. At no time has any military force been

'exerted to put riots or mobs down. At no time, except in the refusal of defendant Wolters to observe the injunction in this case, have the civil authorities or courts been interfered with or their processes made impotent.'"⁵

The court, speaking through Hutcheson, Circuit Judge, held that no proclamation could avail to insulate a State officer from judicial process. Coming to the merits, it was declared that under the constitution and laws of Texas, properly construed, when the State troops were called out by the governor

"they were called out to act as civil officers, with no more power than civil officers would have, that in their actions they were amenable to inquiry, as civil officers are, in their actions, and that neither the proclamation of martial law, nor the purported military character of the actions, constitutes any defence to plaintiffs' suit."⁶

The three-judge court issued a permanent injunction. An appeal was taken to the Supreme Court, which on December 12, 1932, affirmed the judgment. The Court, through Mr. Chief Justice Hughes, said that the fiat of the governor could not supersede the Constitution of the United States as the supreme law of the land. Its more detailed statement is set forth below.

II

To tell the place of "martial law" in the history of English law is a long story.⁷ The view long received grew out of the struggle between Parliament and the Crown, and, as Professor Corwin has remarked, it was strongly Whiggish.⁸ Lord Chief Justice Holt, for example, who sat in the King's Bench after the Revolution of 1688, and who was deeply attached to Whig principles, viewed with the greatest jealousy the employment of soldiers to restore peace among the civil population.⁹ Yet the Government in Ireland and colonial governors often acted on the contrary view that there was a prerogative to exercise "martial law", and this was inferentially supported by two Acts of Parliament.¹⁰ Sir Frederick Pollock has compressed the matter in these few sentences:

⁵Constantin, *et al.* v. Smith, *et al.*, 57 F. (2d) 227, 231 (E. D. Texas 1932).

⁶*Supra* note 5, at 241.

⁷It has been done by I STEPHEN, *HISTORY OF THE CRIMINAL LAW* (1883) 207; FAIRMAN, *LAW OF MARTIAL RULE* (1930); Holdsworth, *Martial Law Historically Considered* (1902) 18 *LAW Q. REV.* 117.

⁸Corwin, *Martial Law, Yesterday and Today* (1932) 47 *POL. SCI. Q.* 95, 103.

⁹III LORD CAMPBELL, *LIVES OF THE CHIEF JUSTICES* (1874) 60.

¹⁰43 GEO. III c. 117 (1803) and 3 and 4 WM. IV, c. 4 (1833) refer to "His Majesty's undoubted prerogative" to exercise martial law.

"Some writers deny that outside the actual seat of hostilities there is any common law justification at all. Some think that there is, and that it wholly excludes the authority of the Courts; one or two have propounded extravagant theories of a supposed prerogative of the Crown in the matter. I venture to think it the better opinion that whatever, in time of war within the jurisdiction, is or reasonably appears necessary for the common defence against the King's enemies is justified by the common law, but that, in the absence of an Act of indemnity, the existence of the necessity and the reasonableness of the action are to be determined by the ordinary Courts when peace is restored."¹¹

The only theory on which the common law justified the exercise of martial rule is expressed by the maxim *quod enim necessitas cogit defendit*.¹²

How far this justification could be stretched to cover the extraordinary powers needed by a government in the event of some major national emergency no one can say. For instead of putting the question to the test in actions brought against public officers, it has been the practice to secure an act of indemnity. The outbreak of the World War, and then the attempt to restore order in Ireland, made it necessary to secure in advance statutory authority for martial rule.¹³ And now by the Emergency Powers Act of 1920¹⁴ it has been made a permanent feature of English law that the Crown may declare that a state of emergency exists if it appears to His Majesty that any action has been taken or is immediately threatened, which is calculated, by interfering with the supply and distribution of food, water, fuel, light, or with the means of locomotion, to deprive the community, or any substantial portion thereof, of the essentials of life. The effect of such a declaration is that thereupon His Majesty in Council may make regulations for securing the essentials of life to the community.

Dicey's classic exposition of the rule of law has come to be both a

¹¹POLLOCK, *LAW OF TORTS*, (13th ed. 1929) 127. If the emergency falls short of a state of war the powers of the Crown would be correspondingly less.

¹²As L. C. B. Palles observed in *Rainsford v. Browne*, 2 New Irish Jur. Rep. 179, 186 (1902); to the same effect was I STEPHEN, *op. cit.* note 7, at 215.

¹³DEFENCE OF THE REALM ACT, 4 & 5 GEO. V, c. 29 (1914), often amended thereafter; RESTORATION OF ORDER IN IRELAND ACT, 10 & 11 GEO. V, c. 31 (1920).

¹⁴10 & 11 GEO. V, c. 55. Sir Gordon Hewart, A. G. (as he then was) was one of the sponsors for the Bill, while Labourites and others, including Mr. Asquith and Lord Robert Cecil, fought it with remarkable tenacity, and secured some amendments looking toward more effective parliamentary control. 133 H. C. DEB. 5s., and 42 H. L. DEB. 5s., *passim*. The Act is, of course, to be applied only in emergencies (such as was the General Strike in 1926); yet it undoubtedly constitutes a feature of that extension of the powers of the Crown of which Lord Chief Justice Hewart writes in *THE NEW DESPOTISM* (1929). Reviewed in (1930) 39 YALE L. J. 763.

marker from which to measure the growth of administrative control and a target at which to shoot. After a characteristically unfriendly sketch of the French *état de siège* he assures us that "this kind of martial law is in England unknown to the constitution".¹⁵ He could scarcely say so since the Emergency Powers Act was added to the common law powers of the Crown.

The state of siege may lawfully be proclaimed only "*en cas de péril imminent, résultant d'une guerre étrangère ou d'une insurrection à main armée*". Emergency powers may, in England, be taken in less dire exigencies. The state of siege may be declared only by Parliament, or by the President if necessary during an adjournment. In the latter case Parliament convenes in two days. In Great Britain it is the King in Council that declares the state of emergency, and Parliament if not in session must be convened in five days. In neither country could the courts set aside the declaration as unjustified by the facts.

The legal consequences of the state of siege in France are briefly these:¹⁶

(1) The powers of police devolve upon the military authority. But a citizen may sue in an administrative tribunal to have an *arrêté* promulgated under this head annulled for *excès de pouvoir*. Or he may wait until he is proceeded against in the ordinary courts, and then challenge the *arrêté* as *ultra vires*.¹⁷

(2) The military authority becomes vested with four exceptional powers:

- (a) To search, by day or night, in any habitation.
- (b) To send from the area individuals not having their domicile therein.
- (c) To search for and seize arms.
- (d) To forbid publications and meetings which the military authority considers of a nature to excite or result in disorder.

(3) The *état de siège* transfers from the judicial courts to *conseils de guerre* jurisdiction over crimes against the Constitution or the safety of the Republic, or against order and the public peace. And when the emergency is mere insurrection this jurisdiction is further limited by the Law of April 27, 1916.¹⁸

In Great Britain, on the other hand, the result of a proclamation is that the executive may issue regulations for the preservation of the peace, for securing the necessities of life, and for any other purposes

¹⁵THE LAW OF THE CONSTITUTION (8th Ed. 1915) 283-289.

¹⁶LAW OF AUGUST 9, 1849, c. 3.

¹⁷A number of decisions of the *Cour de Cassation*, in some of which the defendant's contention was upheld, are reported in Sirey (1917). I. 25.

¹⁸DUGUIT, II TRAITE DE DROIT CONSTITUTIONNEL (2d. ed. 1921) 257 *et seq.*; III, 698 *et seq.*; IV, 413 *et seq.*; V, 74 *et seq.*

essential to the public safety and the life of the community. Such regulations are to be laid before Parliament as soon as may be, and shall not continue in force for more than seven days thereafter unless by a resolution passed by both Houses. Enforcement of the regulations may be by courts of summary jurisdiction, with a maximum penalty of three months imprisonment or a fine of £100, or both. The regulations may not impose compulsory military or industrial conscription.

In short, it has been found expedient to supplement by statute the common law powers of the Crown in case of national emergency, and the contrasts between the English state of emergency and the French state of siege are less marked than the resemblances.

III

The common law justification for the use of force necessary for the preservation of the peace is equally applicable in the United States. But constitutional and statutory provisions have introduced features peculiar to this country. Federal and state laws authorize the chief executive to recognize by proclamation the existence of an insurrection, and to employ military forces for its suppression. Such a proclamation is conclusive of the existence of insurrection.¹⁹ During Dorr's Rebellion in Rhode Island in 1842 the legislature declared "martial law", and Chief Justice Taney, speaking for the majority of the Court, said that:

"if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which *this court* can question its authority."²⁰

I write *this court* in italics, for it indicates what the Court really held. It was a question of local law, on which the Federal courts would follow those of Rhode Island,²¹ there being at that date no Fourteenth Amendment under which the Supreme Court could exercise a supervisory power. But by giving this sentence an unwarranted significance, and by laying hold of careless words such as those wherein the Chief Justice said "It was a state of war",²² the case has sometimes been made to seem an affirmative authority for the legality of "martial law". The Court held that which of two factions was the

¹⁹Martin v. Mott, 12 Wheat. 19 (U. S. 1827), invariably followed in a long line of state and federal cases.

²⁰Luther v. Borden 7 How. 1, 45 (U. S. 1848).

²¹*Supra* note 20, at 40.

²²*Supra* note 20, at 45.

rightful government constituted a political question, and the President by recognizing one of them concluded the Court. It did *not* hold that the necessity for an exercise of "martial law" by that State government was a political question.

If one infers from the Chief Justice's opinion a rather tolerant attitude toward martial rule in times of emergency, precisely the opposite tendency was shown in 1861 in his opinion as Circuit Justice, in *Ex parte Merryman*,²³ where the Lincoln Administration had temporarily detained a person suspected of destroying railroad bridges at Baltimore to prevent the passage of troops to the defence of Washington.

Two years later the Supreme Court, renewed by three Lincoln appointees, who had a different attitude toward executive power in time of war, decided the *Prize Cases*,²⁴ holding that:

"Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.'"²⁵

Specifically, it decided that the President might establish a blockade of the rebel states without waiting for a Congressional declaration of war.

Then in *Ex parte Milligan*,²⁶ decided after the war was over, the Court declared that:

"Martial rule can never exist where the courts are open and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."²⁷

Now the *Prize Cases* and the *Milligan* case grew out of quite different factual circumstances, and strictly construed the holdings are not irreconcilable. Yet in a broad sense it is true that in the former an executive proclamation was held conclusive of the legality of war measures not otherwise lawful, while in the latter an executive proclamation was not conclusive, and "actual and present" necessity, of which the courts were to judge, was held to be the criterion. The

²³Fed. Cas. No. 9487 (D. Md. 1861).

²⁴2 Black 635 (U. S. 1863).

²⁵*Supra* note 24, at 670.

²⁶4 Wall. 2 (U. S. 1866).

²⁷*Supra* note 26, at 127. It has been rather widely felt that this language was too restrictive. FAIRMAN, *THE LAW OF MARTIAL RULE* 145. Courts in the British Empire have been forced to allow a wider scope to executive power once a state of war is made out. *Id.*, ch. 7.

Milligan decision was the last word, and has generally been regarded as having settled the law.

Such, in brief, was the background when toward the close of the century the lines between workers and employers came to be sharply drawn. There followed presently a series of labor disputes, usually in mining areas, where State executives resorted to measures of "martial law". Perhaps Mr. Cleveland's use of troops in the Pullman strike, and the subsequent opinion in *Re Debs*²⁸ had something to do with popularizing this *modus operandi*. At any rate there soon appeared a number of decisions in which the doctrine of the *Prize Cases* was carried over into state constitutional law. This, it is submitted, was a capital mistake, for it would seem that under the United States Constitution a state has no power to wage war, and that if domestic violence came to such a pass it would be the task of the Federal government to make good the guaranty of Article IV sec. 4.

In re Boyle,²⁹ *In re Moyer*,³⁰ and *Ex parte McDonald*³¹ were applications for writs of habeas corpus. The respective Supreme Courts held that the governor's declaration was conclusive of the existence of an insurrection, and that preventive detention during the emergency was a lawful means of accomplishing the duty to suppress the insurrection. Very emphatically these cases do not hold that the governor may suspend the writ of habeas corpus; they do not hold that by numbing the incantation "martial law" the governor can increase the scope of his lawful powers, or deprive the courts of their jurisdiction to review executive acts.

*Moyer v. Peabody*³² was an action for damages by a union leader against the former governor and militia officers by whom he had been detained for 76 days during the suppression of an insurrection. The State court had upheld the detention.³³ As to the federal question the Court, speaking through Mr. Justice Holmes, quoted the statute to the effect that "when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same", and continued:

"That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.

²⁸158 U. S. 564, 15 Sup. Ct. 900 (1895).

²⁹6 Idaho 609, 57 Pac. 706 (1899).

³⁰35 Colo. 154, 85 Pac. 190 (1904).

³¹49 Mont. 454, 143 Pac. 947 (1914).

³²212 U. S. 78, 29 Sup. Ct. 235 (1909).

³³*Supra* note 30.

So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."³⁴

During martial rule in Montana in 1914 the commanding officer destroyed a quantity of liquor as a punishment for a saloon keeper's failure to obey a closing order. In an action to recover the State Supreme Court said:

"That within the narrow limits of *actual and pressing necessity*, private property may be taken and destroyed for the public good, scarcely admits of doubt. The most common illustration of this is the demolition of a building to prevent the spread of a conflagration. But in every instance where such a right has been exercised and questioned, the decision upholding the right makes it clear beyond controversy that only the most overriding necessity will justify or excuse the officer ordering such destruction."³⁵

In making "imminent and overwhelming necessity" the justification for trespass to property the Montana Court was following most authoritative decisions of the United States Supreme Court.³⁶ This test, it will be noted, is more severe than that laid down in the detention cases above. This does not mean that liberty of person is an interest less worthy of judicial protection than is private property. Rather, it may be said that on habeas corpus proceedings it is usually possible to show that preventive detention is a means plainly adapted to accomplishing the governor's constitutional duty to suppress insurrection: reasonable appropriateness is therefore the test. The destruction of property is not ordinarily regarded as an apt measure for suppressing insurrection, and so trespasses to property are to be justified, if at all, only on common law grounds.³⁷

The truly distressing development came with the West Virginia cases of 1912-14.³⁸ As a means of restoring order in the coal mines along Paint and Cabin Creeks, where an acute labor dispute was in progress, the governor declared the existence of a state of war. The Court of Appeals held this declaration to be conclusive, and thereupon conceded to the governor powers appropriate to a commander on the field of battle. In particular it refused to interpose when a military

³⁴Moyer v. Peabody, 212 U. S. 78, 84-85, 29 Sup. Ct. 235, 236.

³⁵Herlihy v. Donohue, 52 Mont. 601, 610, 161 Pac. 164, 166-167.

³⁶Mitchell v. Harmony 13 How. 115 (U. S. 1851); U. S. v. Russell 13 Wall. 623 (U. S. 1871).

³⁷See remarks of Judge Learned Hand in Commercial Cable Co. v. Burleson, 255 Fed. 99 (S. D. N. Y. 1919).

³⁸State v. Brown, 71 W. Va. 519, 77 S. E. 243 (1912); *Ex parte* Jones, 71 W. Va. 567, 77 S. E. 1029 (1913); Hatfield v. Graham 73 W. Va. 759, 81 S. E. 533 (1914).

commission sentenced civilians to the penitentiary for terms of years,³⁹ and when a newspaper was suppressed for opposing the measures the government was taking. Seven years later the decision of the West Virginia court in *Ex parte Lavinder*,⁴⁰ freeing on habeas corpus a prisoner held during a subsequent "war", distinguishes the earlier cases, but leaves their authority considerably impaired.

This exercise of "punitive martial law" in West Virginia was followed by the setting up of a military tribunal for the trial of civilians during the longshoremen's strike at Galveston in 1920, and again in the packers' strike at Nebraska City in 1922. In each case the military custody was challenged in a Federal district court, and in each habeas corpus was denied and the exercise of war powers expressly upheld.⁴¹ Finally in 1928 another Federal district court released on habeas corpus proceedings a prisoner held without charges during the miners' strike in Colorado; but the court added this dictum:

"If the governor had declared martial law, we would have an entirely different situation. All the rules applicable thereto, which the courts and others are bound to recognize, would come into play."⁴²

It is evident that, whatever the courts of any particular State might allow in the way of extraordinary executive process during public emergencies, there was need of a decision from the United States Supreme Court to settle the federal questions involved.

IV

If we turn for a moment from "martial law" in the books to "martial law" in practice, we find that it has become almost a household remedy. In Texas, for example, it has been invoked seven times in the last fourteen years.⁴³ It is, of course, desirable

³⁹State v. Brown, *supra* note 38.

⁴⁰*Supra* note 3.

⁴¹U. S. *ex rel.* McMaster v. Wolters, *supra* note 3; U. S. *ex rel.* Seymour v. Fischer, *supra* note 3.

⁴²U. S. *ex rel.* Palmer *et al.* v. Adams, Governor of Colorado, *supra* note 3.

⁴³By Gov. Hobby: June 1919, in Gregg county, during inter-racial riots, duration 10 days; September 1919, in Aransas and San Patricio counties and at Port Aransas, following a hurricane, duration 30 days; June 1920, at Galveston, during a longshoremen's strike, duration June 7 to Sept. 30.

By Gov. Neff: Jan. 1922, at Mexia, as a result of disorder consequent upon the opening of an oil pool, duration Jan. 11 to end of February; July 1922, at Denison, during a strike of the Federated Shop Craft Union, duration July 26 to Oct. 21.

By Gov. Moody: Sept. 1929, at Borger and in Hutchinson county. The danger was an "organized and entrenched criminal ring" in a newly-opened oil field. It lasted from Sept. 29 to Oct. 18.

By Gov. Stirling: in the West Texas oil field, as narrated above. See BRIG. GEN. JACOB F. WOLTERS, *MARTIAL LAW AND ITS ADMINISTRATION* (1930).

that some rational process be devised for the solution of economic conflicts, and in the meantime the peace must be preserved. But it is neither an expedient nor a lawful course to call the conflict an insurrection and then force one party into line by the use of troops. In the Galveston strike the troops kept pickets away from the docks and maintained a condition of *laissez faire*. In the West Texas oil field the system of *laissez faire* was declared to amount to insurrection, and a crude form of state control was imposed. The interests involved are too important for their evaluation to be left to the rough empiricism of a single executive officer.

In Oklahoma Governor Murray imposed "martial law" at the same time as Governor Sterling in Texas, as a means of shutting down oil wells in an effort to bring the price up to a dollar a barrel.⁴⁴ In July 1931 he called forth the national guard to open an interstate bridge which had been closed at the Texas end by a court order.⁴⁵ In Idaho "martial law" was recently proclaimed on the occasion of forest fires suspected of being of incendiary origin.⁴⁶ Troops were used in Iowa to enforce the State tuberculin test of cattle,⁴⁷ and in Louisiana by Governor Huey Long when, on his election to the Senate, the lieutenant governor attempted to assume the gubernatorial office.⁴⁸ The case of Harlan county is notorious. The popular impression that a declaration of "martial law" has some magic potency is suggested by the remark attributed to Governor Olson of Minnesota:

"Not even the President of the United States, *except through establishment of martial law*, could suspend the collection of debts."⁴⁹

V

Such was the background, in recent law and practice, when *Sterling v. Constantin* came before the Supreme Court. The Chief Justice, speaking for a unanimous bench, affirmed the judgment below. In the light of our present discontent and the consequent likelihood of more frequent resort to extraordinary executive action, the decision is of particular interest, both in what it says and in what it omits.

The Court reviews the facts and the decision of the three-judge court holding that under the Texas Constitution the action of the governor was *ultra vires*.

⁴⁴Logan, *loc. cit. supra* note 4.

⁴⁵NEW INTERNATIONAL YEAR BOOK (1931), p. 612.

⁴⁶*Supra* note 45, at 398.

⁴⁷*Supra* note 45, at 418.

⁴⁸*Supra* note 45, at 418.

⁴⁹N. Y. Times, Feb. 3, 1933, at p. 3. Other instances have occurred in the troublous months since this article was written.

The Chief Justice goes on to say:

"While we recognize the force of these observations, and the question of the interpretation of the provisions of the state constitution is before us, it is still a matter of local law, as to which the courts of the State would in any event have the final word. We do not find it necessary to determine that question and we shall not attempt to explore the history of Texas or to review the decisions of the state courts cited by the appellees. We pass to the consideration of the federal question presented, and for that purpose we shall assume, without deciding, that the law of the State authorizes what the Governor has done."⁵⁰

While the complainants were seeking equitable relief for what the district court found to have been a deprivation of property unjustified by any existing emergency,

"appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution."⁵¹

The Court did not overlook the range of discretion which must be reserved to State governments:

"As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander-in-Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full recognition of its importance."⁵²

⁵⁰Sterling v. Constantin, 287 U. S. 378, 396, 53 Sup. Ct. 190, 194 (1932).

⁵¹Sterling v. Constantin, *supra* note 50, at 397, 53 Sup. Ct. 190, 195 (1932).

⁵²Sterling v. Constantin, *supra* note 50, at 399, 53 Sup. Ct. 190, 195 (1932).

Not only was the decision of the executive as to the existence of an insurrection conclusive:

"By virtue of his duty to 'cause the laws to be faithfully executed', the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive....

"The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace."⁵³

It was on this ground that *Moyer v. Peabody*⁵⁴ had been decided:

"In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided."⁵⁵

The Court did not find it necessary to consider the significance of the expression "martial law" nor to determine the permissible scope of determinations of military necessity in all conceivable emergencies:

"The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible."⁵⁶

It is notable that the Supreme Court did not follow the court below in laying down the rule that in suppressing insurrection a military commander is limited to the powers of a police officer.⁵⁷ However

⁵³*Sterling v. Constantin*, *supra* note 52.

⁵⁴*Supra* note 3.

⁵⁵*Sterling v. Constantin*, *supra* note 50, at 400, 53 Sup. Ct. 190, 196 (1932).

⁵⁶*Sterling v. Constantin*, *supra* note 50, at 401, 53 Sup. Ct. 190, 197 (1932).

⁵⁷This view is stated with emphasis in *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484 (1911), approved in *Fluke v. Canton*, 31 Okla. 718, 123 Pac. 1049 (1912). A similar view was taken in *Bishop v. Vandercook*, 228 Mich. 299, 200 N. W. 278 (1924).

The same thesis was developed by H. W. Ballantine in his articles on *Martial Law* (1912) 12 COL. L. REV. 529; *Military Dictatorship in California and West Virginia* (1913) 1 CALIF. L. REV. 413; and *Unconstitutional Claims of Military*

this may be as a question of state law, the Supreme Court does not say that the Fourteenth Amendment implies so rigorous a test. Between the powers of a police officer and those of a general in the field in time of war there is a wide margin, and because the latter criterion is rejected it does not follow that the other is the necessary alternative. Instead the Chief Justice speaks of a range of honest judgment, measured by the test of direct relation to subduing the insurrection.

In saying that it is only the proclamation of a state of insurrection, and not the orders issued in the premises, to which the courts must give conclusive value, the Supreme Court cuts away the ground on which the West Virginia cases of 1912-1914 rested, and also the judgments of the federal district courts upholding the governor's war powers. In emphasizing the *preventive* nature of the executive action upheld in the *Moyer* case the Court conveys a clear admonition that punishment by military tribunal and other excesses such as the suppression of a newspaper would not be upheld on appeal.

In the case at hand the Court concludes that:

"There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this in-

Authority (1915) 24 YALE L. J. 189; (1915) 5 JOURNAL AMER. INST. CRIM. LAW AND CRIMIN. 718. In *Qualified Martial Law, a Legislative Proposal* (1915) 14 MICH. L. REV. 102, 197, Professor Ballantine suggests that rather than have one law in theory and another in practice it may be wise to concede somewhat larger powers to the national guard than are allowed to peace officers. He adds a draft code designed to formulate clearly the powers and liability of soldiers called out to suppress riot or insurrection.

In contrast with these views was *Commonwealth v. Shortall* 206 Pa. St. 165, 55 Atl. 952 (1903), where it was held that a homicide committed by a member of the militia called out to suppress disorder, committed without malice in the performance of his supposed duty as a soldier, and under the order of an officer, is excusable, unless it is manifestly beyond the scope of the militiaman's authority or is such as a man of ordinary understanding would know was illegal. So where a sentinel, posted at night where dynamiting was apprehended, shot and killed a civilian who did not halt when repeatedly challenged, it was held that there was not a prima facie case, and the prisoner was released on *habeas corpus*. The court said "There is no real difference in the commander's powers in a public war and in domestic insurrection"; but it adds that in the former he is answerable only to his military superiors, while in the latter "he is accountable, after the exigency has passed, to the laws of the land."

The decision of the Supreme Court in *Sterling v. Constantin* is not directly in point, but makes it clear that judicial control is not deferred until the exigency has passed.

stance was to maintain the Federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared. It is also plain that there was no adequate remedy at law for the redress of the injury and, as the evidence showed that the Governor's orders were an invasion under color of state law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction."⁵⁸

The due process clause of the Fourteenth Amendment, as judicially applied, has certainly produced asymmetrical results. Considering how much has fallen under its stroke it was anomalous that there should be no Supreme Court decision squarely limiting the extraordinary "martial law" powers claimed and exercised of late. Whether one chooses to think of due process as identified with the historical phrase *per legem terrae*—or as connoting a "higher law"—or "only as cautionary, prescriptive of a procedural pattern"—⁵⁹ from any point of view, it is submitted, such arbitrary executive measures are without constitutional justification.

⁵⁸*Sterling v. Constantin*, *supra* note 50, at 404, 53 Sup. Ct. 190, 197 (1932).

⁵⁹Judge Hough in *Due Process of Law—To-day* (1918) 32 HARV. L. REV. 218, 221.