Constitutional Law--The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations

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legislation, the law's most important effect will be to increase the number of convictions and thus deter the public from driving after drinking by increasing the fear in a potential drinking driver that he may be convicted for the offense if apprehended. Another benefit of these statutes is that, with the imprecision of subjective observation replaced by objective evidence, the innocent individual is fully protected and the impaired driver is justly adjudicated guilty.

On the other side is the opinion expressed by Judge Osborne that coercion to obtain physical evidence violates the right against self-incrimination. The rationale behind this privilege is that the words of the accused could well be unreliable when obtained by compulsory process. But the accuracy of physical evidence, in this case blood alcohol content, is in no way affected by the compulsion involved. Therefore, the need to remove the drinking driver from the state's highways requires that the Kentucky Court of Appeals uphold the constitutionality of Kentucky's implied consent statute against fifth amendment challenges, as have the courts of other jurisdictions.53

Taft A. McKinstry

CONSTITUTIONAL LAW—THE POWER OF A GOVERNOR TO PROCLAIM MARTIAL LAW AND USE STATE MILITARY FORCES TO SUPPRESS CAMPUS DEMONSTRATIONS.—On April 30, 1970 the war in Indochina came home. It exploded on a thousand1 college and university campuses as the shock waves of outrage swept the country following the President's announcement of the invasion of Cambodia by the Armed Forces of the United States.2 While the President attempted to head off the constitutional crisis he had created by his unilateral action,3 Americans,

53 See note 9 supra, and accompanying text.
1 The magnitude of the reaction is not exaggerated. Newsweek, May 18, 1970, at 28.
2 On April 30, 1970, the President, in a nationally televised speech, announced that 20,000 American troops had joined South Vietnamese forces in an invasion of Cambodia. The stated purpose of the invasion was the destruction of enemy sanctuaries in that country. Newsweek, May 11, 1970, at 22-28; Newsweek, May 25, 1970, at 29. The invasion was such an unexpected shock to the American people because just ten days before, in another televised speech, the President had announced that he would withdraw an additional 150,000 troops from South Vietnam over the following twelve months. Newsweek, May 4, 1970, at 21-22. Only two days before the announced invasion, Secretary of State William Rogers reassured the Senate Foreign Relations Committee that the United States would not engage in ground military operations in Cambodia. Newsweek, May 11, 1970, at 23.
3 The President had not consulted Congress before he ordered the invasion of Cambodia by American military forces. He had not even informed members

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especially students, their confidence in the nation's leaders decimated, their trust seemingly betrayed by the escalation of a war that they had been told repeatedly was shrinking, rose up in despair and anger against the Chief Executive.\(^4\) Four days later, National Guard troops, called out by the Governor of Ohio to suppress student demonstrations at Kent State University, shot four students to death\(^5\) in a totally unjustified and unnecessary over-reaction.\(^6\) The response nationwide was swift and violent as an already divided country plunged into near civil war. Open warfare raged on over twenty campuses.

\(^4\) For an overview of the reaction of the country in general and the college and university campuses in particular, see Newsweek, May 11, 1970, at 22-26, 32-33; Newsweek, May 18, 1970, at 26-30.

\(^5\) On May 2, 1970, during a demonstration against the Cambodian invasion, the R.O.T.C. building on the campus was destroyed by fire. Following the destruction of the building, the mayor of Kent, Ohio requested that the Governor call in the National Guard. The Governor did so without hesitation. He ordered an armored regiment and an infantry battalion to the campus and declared martial law. The Governor then went to Kent, Ohio himself, made an inflammatory speech, all but took personal command of the troops, and, without consulting with National Guard or university officials, ordered all assemblies—even peaceful ones—broken up. It is perhaps significant that the Governor was in the final stages of a difficult senate primary race in which he had made campus disorders a major issue. The election was only a few days away at the time. On May 4, 1970, a rally formed. A battle ensued with the Guardsmen using tear gas and the students allegedly throwing rocks and chanting epithets. After approximately twenty-five minutes of the demonstration, and with no warning, some troops fired directly into the crowd of students, killing four and wounding nine. Ignoring cries for help, the troops marched away. Newsweek, May 18, 1970, at 31-32.

\(^6\) The Ohio National Guard claimed that a mob of students had encircled them and were showering the troops with rocks and chunks of concrete. The Guard also claimed that they had run out of tear gas, that there was a sniper, and that the troops had fired only to save their lives. A Justice Department summary of the F.B.I. investigation involving one hundred agents and culminating in a 7,500 page report found that: 1) the shootings were "not necessary and not in order; 2) no guardsman was in danger of losing his life at the time of the shootings; 3) the guardsmen had not run out of tear gas; 4) the demonstrators could have been turned back by arrests and tear gas; 5) there was no sniper; 6) the guardsmen were not surrounded; 7) only one guardsman was hurt by rocks seriously enough to require any type of medical aid; 8) some guardsmen had to be physically restrained from continuing to fire their weapons into the crowd of students; 9) there is some reason to believe that the National Guard's claim that Guardsmen's lives were in danger was fabricated after the event; 10) a minimum of 54 shots were fired by a minimum of 29 of the 78 guardsmen at the scene in the space of 11 seconds; and 11) thirteen students were hit—all but four in the back and side. See Newsweek, Aug. 3, 1970, at 14; N.Y. Times, July 24, 1970, at 1, col. 4; Louisville Courier-Journal, Oct. 31, 1970, at 1, col. 4.
More than two hundred colleges and universities were shut down in protest over the invasion and the Kent killings. Seventy-five thousand persons converged on Washington, D.C., to convey to the nation the rage of the martyred American anti-war movement.\(^7\)

During the turbulent days following the Cambodian invasion, six state governors proclaimed martial law and used National Guard troops to suppress campus demonstrations.\(^8\) Among the campuses placed under martial law was the University of Kentucky. What made the Kentucky situation virtually unique, however, was that while students and faculty confronted National Guardsmen armed with live ammunition and mounted bayonets, the Governor's power to proclaim martial law and use those troops was being challenged in federal district court.

On the evening of May 5, 1970, students at the University of Kentucky conducted a march\(^9\) to protest the invasion of Cambodia\(^10\) and the killing of the four students at Kent State the day before.\(^11\) Prevented from marching into the downtown area by police, the students gathered in front of the Army R.O.T.C. building on the campus. Approximately one hundred riot-equipped police moved into the area to protect the building. While the student demonstrators confronted the police, the Air Force R.O.T.C. building in another part of the University was destroyed by fire.\(^12\)

On May 6, 1970, the President of the University declared that a limited emergency existed on the campus and imposed a 5:00 p.m. curfew on all gatherings of any kind—peaceful or otherwise. The order was challenged by a group of students who conducted a peace-

\(^7\) Newsweek, May 18, 1970, at 28.
\(^8\) Illinois, Maryland, New Mexico, Wisconsin, Ohio, and Kentucky. Id.
\(^9\) Actually, the first manifestation of the rising level of student tension occurred earlier in the day when approximately 250 students attempted to attend an open meeting of the Board of Trustees in order to urge the Board to condemn the invasion and the killings in Ohio. Only 35 students were admitted, and the rest were barred from the meeting due to inadequate accommodations in the room in which the Board had chosen to meet. The students, packed into a small area outside the meeting room, began to chant and yell that the meeting should be moved to a larger area. Tensions rose and finally erupted in a brief club-swinging skirmish involving campus police, students, and a member of the Board. Following the end of the meeting, the demonstration broke up peacefully. See Lexington Herald, May 6, 1970, at 1, col. 5; Lexington Leader, May 6, 1970, at 1, col. 1.
\(^10\) See note 2 supra.
\(^11\) See note 5 supra.
\(^12\) See Lexington Herald, May 6, 1970, at 1, col. 5; Lexington Leader, May 6, 1970, at 1, col. 1; Lexington Herald, May 7, 1970, at 1, col. 1.

The President of the University later testified that there was no evidence that the Air Force R.O.T.C. building fire was connected with the student demonstrations. Louisville Courier-Journal, May 12, 1970, at 1, col. 2.
ful demonstration that lasted past the curfew deadline. The Governor then issued an executive order proclaiming martial law, imposing a 7:00 p.m. to 6:30 a.m. curfew on the campus, and sending State Police and two hundred fifty armed National Guardsmen to join the existing contingent of campus, city, and state police. The Governor justified his action by declaring that a clear and present danger to life and property existed on the campus. The decision was solely the Governor's. The President of the University had not requested the troops. At 7:00 p.m. the students were forcefully driven from

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13 The text of the order was:

This is an emergency message and executive order of the Governor of the Commonwealth of Kentucky.

I have determined that a state of emergency exists on the campus of the University of Kentucky.

There exists a clear and present danger to the life of students and to University property.

Therefore, as Governor of the Commonwealth of Kentucky and as chairman of the Board of Trustees, I am directing that a curfew be imposed upon the U.K. campus from 7 p.m. tonight, Wednesday, May 6, until 6:30 a.m., Thursday, May 7, and requesting all students to remain in their rooms and all people to stay off and away from the campus during these hours.

The Kentucky State Police and an adequate number of National Guardsmen with mounted bayonets and live ammunition are being moved onto the campus to protect the students and University property.

These officers are under order to use such force as is necessary to perform their mission of protection.

Anyone attempting to defy them does so at his own peril.

Please comply for your own safety and the safety of all others.


14 Ky. Rev. Stat. [hereinafter cited as KRS] § 16.120 (1950) provides with regard to the State Police:

Neither the commissioner nor any officer of the department shall exercise the powers conferred by KRS 16.010 to 16.180 within the limits of any incorporated city of the first to the fifth class, inclusive, except ... when requested to act by the chief executive officer of the city or its chief police officer, or ... when ordered by the Governor, in case of emergency, to act within any specified city or cities.

15 See note 27 infra.

16 The initial contingent of city and state police had been sent to the University of Kentucky campus pursuant to the request of the University's Director of Safety and Security when, in his opinion, the campus police could no longer handle the situation in front of the Army R.O.T.C. building on the evening of May 5, 1970, the night of the fire. See Lexington Leader, May 6, 1970, at 16, col. 7. See note 14 supra.


In his opening statement at the hearing for a preliminary injunction to remove the troops from the University of Kentucky campus, the Attorney General, counsel for the Governor, asserted that "proof will show that the Governor . . . reacted to a clear and present danger." Lexington Herald, May 12, 1970, at 12, col. 4. See note 13 supra.

18 At the hearing for the preliminary injunction to remove the National Guard from the University of Kentucky campus, the President of the University testified

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the campus as martial law and military control of the University grounds began. On May 7, 1970, the ban on assembly was extended to cover daytime gatherings as well, thus completely suspending the rights of free speech and assembly. A peaceful noon rally was broken up by State Police and National Guardsmen, and several arrests were made. A subsequent orderly and unobstructive gathering was dispersed without warning by National Guardsmen using tear gas. The curfew was ordered extended to include the night of May 7, 1970. That afternoon, suit was filed in United States District Court for the Eastern District of Kentucky seeking, among other relief, a declaration that the Governor's order proclaiming martial law and calling in the state military forces was unconstitutional, and an injunction ordering the removal of all non-university forces from the campus as well as an end to martial law. A motion for a temporary restraining order was denied, but a hearing on the motion for a preliminary injunction was granted. At the close of the plaintiffs' case, the defendants moved to dismiss the complaint. Held: Sustained. There was a clear and present danger to life and property, and in such situations the Governor has authority in law to proclaim martial law and use state military forces to restore order.

The oral opinion of the Court justified the Governor's actions solely on the basis of the clear and present danger test, thus ignoring plaintiffs' contention that the proper test of the legality of a proclamation of martial law and use of the National Guard to control demon-

(Footnote continued from preceding page)

that he had not requested that National Guardsmen be sent to the campus to suppress the demonstrations. The President testified that the decision was made solely by the Governor after he was told "a number of students and some faculty members" would not obey the President's 5:00 p.m. curfew on assemblies. Louisville Courier-Journal, May 12, 1970, at 1, col. 1.

Following their expulsion from the campus, the students marched across the city to the campus of Transylvania University and held an orderly rally consisting of speeches and songs. Twenty state police officers and twenty-four armed National Guardsmen converged on the scene. Transylvania University officials told the police and guardsmen to leave the campus grounds since the group of students was orderly. After some argument, the police and guardsmen left the area. The Transylvania University officials had not requested either the troops or the police to come to the campus. Lexington Herald, May 7, 1970, at 1, col. 5.

For descriptions of these events, see Louisville Times, May 7, 1970, at 1, col. 1; Lexington Herald, May 8, 1970, at 1, col. 4.

The Court denied the motion for a temporary restraining order because "the only facts before this Court consist of the subject Complaint with its attachments, and several clippings from the news media, as well as oral allegations of plaintiffs counsel" and because "neither the defendants nor any counsel for them has had an opportunity to come before the Court and be heard on this matter." Order, Civil No. 2139 (E.D. Ky., May 8, 1970).
strations) is the inability of local authorities to control the situation and the virtual disintegration of local government.

This comment offers two points of analysis. First, an examination of the relevant case law shows the clear and present danger test applied by the Court in AAUP v. Nunn to be an erroneous one inapplicable to a martial law situation. When taken in the overview, the cases suggest a more complex doctrine, adherence to which is essential if a Governor's actions are to be consistent with due process of law. Second, this comment urges that the courts adopt a new doctrine holding that National Guard troops are so inherently incapable of dealing with demonstrations on college and university campuses in accordance with due process that the Constitution prohibits their use in any capacity in such situations.

I.

The constitution of the Commonwealth of Kentucky does not explicitly authorize the Governor to proclaim martial law and call up the National Guard to suppress disorders and enforce the laws of the Commonwealth on university campuses or anywhere else. However, the constitution does confer upon the Governor the supreme executive power. It also designates him as the commander-in-chief of the Commonwealth's army and navy. Furthermore, the Governor is charged by the Kentucky constitution with the faithful execution of the laws. From these delegations of power, the Governor's power to proclaim martial law and use the military forces of the Commonwealth to suppress disorders is implied, and these specifically granted powers serve as the constitutional base for statutes authorizing the Governor to call out and direct the National Guard. Thus, the Governor's power in this area is statutory in origin and construction.

These statutes authorize Kentucky's chief executive to activate the state's military forces and use them to suppress any actual or threat-

22 Thirty-five state constitutions do explicitly grant such power to their respective governors. The constitutions of fifteen states, including Kentucky, do not. Of those fifteen states, one, Tennessee, specifically denies such power to the governor. Note, Constitutional and Statutory Bases of Governor's Emergency Powers, 64 Mich. L. Rev. 290, 292-93 & nn.7 & 10 (1965).

23 The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the 'Governor of the Commonwealth of Kentucky.' Ky. Const. § 69.

24 He shall be Commander-in-Chief of the army and navy of this Commonwealth, and of the militia thereof, except when they shall be called into the service of the United States; but he shall not command personally in the field, unless advised to do so by a resolution of the General Assembly. Ky. Const. § 75.

25 "He shall take care that the laws be faithfully executed." Ky. Const. § 81.

ened invasion, rebellion, insurrection, riot, or violence. The Governor is also empowered by statute to prescribe the duty to be performed by the troops as well as to delegate this authority to certain civil authorities in the Commonwealth. However, the tactical decisions and direction of the military forces are solely the province of the military commanders.\textsuperscript{27}

In addition to impliedly granting to the Governor the power to proclaim martial law and direct the state military forces pursuant to such proclamation, the Kentucky constitution also restricts the Governor's exercise of these powers. Section 15 provides that only the General Assembly can suspend the laws of the Commonwealth.\textsuperscript{28}

Governors of several states in this century have shown a remarkable propensity for suspending the civil law, through the tool of a proclamation of martial law, in order to enforce or carry out illegal executive whims.\textsuperscript{29} The Kentucky constitution would seem to prohibit such practices on the part of the Governor as well as the use by him of an emergency situation to justify a wholesale and arbitrary suspension of constitutional and statutory rights. The restriction, however, would not appear to prohibit gubernatorial actions under martial law that supplemented the laws without suspending them.

Section 22 of the Kentucky constitution provides that the military power of the Commonwealth is at all times to be absolutely subordi-

\textsuperscript{27} KRS § 37.240 (1942) provides:
The Governor is hereby authorized to call and assign any part of the Kentucky Active Militia to active service for the purpose of resisting invasion, suppressing rebellions, insurrections, riots or threats thereof; to suppress any active, unlawful or threatened violence to persons or property in this State; to authorize the arrest of all persons engaged in aiding or abetting therein; to investigate any acts of treason, sabotage or attempted sabotage and to cause the arrest of such persons engaged therein for aiding and abetting; to protect life and property in the event of any emergency or disaster. The Governor may by his order prescribe the duty to be performed by the troops thus called into active field service. The Governor may direct the commanding officer of such military forces thus ordered into service to report to any of the following named civil officers of the district, county, city or town: Circuit judge, sheriff, county judge or mayor; and such civil officers may direct the specific object to be accomplished by such military force, but the tactical direction and disposition of the troops and the particular means to be employed to accomplish the object shall be left solely to the officers of the Kentucky Active Militia. Troops shall not be relieved from active field service except by order of the Governor.

KRS § 38.030 (1962) provides essentially the same thing as KRS § 37.240 (1942) with insignificant alterations in wording.

\textsuperscript{28} "No power to suspend laws shall be exercised, unless by the general assembly or its authority." Ky. Const. § 15.


\textsuperscript{29} See notes 63-72 infra.
nate to the civil power. The Kentucky Court of Appeals has held that this provision demands that members of the state militia be subject at all times to the civil law and can thus utilize no means to control disorders that are not also legally available to the civil authorities. However, the subsequent statutory grants of authority seem to bestow discretionary powers beyond these limits of the constitution. Statutes are incapable of nullifying a judicial construction of the constitution; and, unless the Court of Appeals is inclined toward the total obliteration of sixty years of settled law, these particular statutes are constitutionally vulnerable at best. After an examination of the constitutional and statutory authority defining the Kentucky Governor’s emergency military powers, the questions remain. When is the Governor authorized to proclaim martial law and use military forces to suppress campus demonstrations? Must more than the statutory “active, unlawful or threatened violence” exist, or is this sufficient per se to unleash martial law and the stifling rule of “National Guardsmen with mounted bayonets and live ammunition?”

30 No standing army shall, in time of peace, be maintained without the consent of the general assembly; and the military shall, in all cases and at all times, be in strict subordination to the civil power; nor shall any soldier, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in a manner prescribed by law. Ky. Const. § 22.

All state constitutions except that of New York have similar provisions. 64 Mich. L. Rev., supra note 22, at 294 & n.19.

31 The military shall be at all times and in all cases in strict subordination to the civil power. . . . We have not, and cannot have, in this state a military force that is not and will not be subordinate to the civil authorities. . . . Franks v. Smith, 142 Ky. 232, 242, 134 S.W. 484, 488 (1911).

To say that the state militia . . . may commit any act . . . necessary to restore peace and quiet, although such act might be a greater violation of law than was committed by the person it was visited upon, would place the militia above the civil authorities, and give to the soldier power not conferred upon the civil officer charged with the duty of enforcing the law. . . . We can find no warrant, either in the Constitution or statute of the state or the history of constitutional government, for investing the military forces of the state with arbitrary power like this. . . . Id. at 245, 134 S.W. at 490.

In respect to these orders, the powers of the military and local civil officers of the state are identical. What one cannot do, neither can the other; what one may do, so may the other. The soldier has the same measure of protection and is subject to the same liability, whether he is acting under the orders of a military officer, independent of the local civil authorities, or is acting under immediate direction of these authorities. Neither has the right to give any orders or directions except those that a peace officer of the state might rightfully execute. . . . Id. at 251, 134 S.W. at 492.

32 See note 27 supra.
33 See note 31 supra.
35 See note 27 supra.
36 See note 13 supra.
What criteria are to be applied in order to avert the danger of executive government becoming "dictatorial and tyrannical" through "the threatened use of troops and the threat of military dictatorship"? Can the use of National Guard troops, in any capacity, to suppress campus demonstrations be consistent with due process? The solution to these problems requires an initial analysis of history beginning with the most elementary of basics—definitions.

Exactly what martial law is has not been clearly established by the courts or the commentators. However, one definition exists which appears to combine the major qualities most often attributed to martial law:

Martial law, also termed martial rule, is the exercise of the military power which resides in the Executive Branch of the Government to preserve order, and insure the public safety in domestic territory in time of emergency, when civil governmental agencies are unable to function or their functioning would itself threaten the public safety. Martial law depends for its jurisdiction upon public necessity. Necessity gives rise to its creation, necessity justifies its exercise, and necessity limits its duration. The extent of the military force used and the actual measures taken, consequently, will depend upon the actual threat to order and public safety which exists at the time.

The requirement of a real necessity incapable of being controlled by local authorities is critical, as this analysis will show.

When the United States is engaged in a declared war, fighting for its survival as a viable nation-state, domestic security, peace, and order can be constitutionally obtained through the exercise of very

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38 See generally C. Fairman, THE LAW OF MARTIAL RULE 19-49 (2d ed. 1943); F. Weiner, A PRACTICAL MANUAL OF MARTIAL LAW 6-15 (1940) [hereinafter cited as PRACTICAL MANUAL].
39 Army Reg. No. 500-50, para. 10. Weiner defines martial law as "the carrying on of government in domestic territory by military agencies, in whole or in part, with the consequent supercession of some or all civil agencies." PRACTICAL MANUAL 10 (emphasis added).

Weiner also wrote:

Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder or public calamity. . . . PRACTICAL MANUAL 16.

Weiner modified his definition of martial law somewhat when he wrote:

By definition . . . martial law includes every form of military aid to the civil power.

Martial law becomes relevant only when a particular situation can no longer be controlled by the agencies of civil government without military aid. . . . Weiner, Martial Law Today, 55 A.B.A.J. 723, 724 (1969) (emphasis added).
extreme measures which would otherwise be unconstitutional. And in the area of actual combat, the courts have held that the will of the commander governs, not the law. Even during the existence of actual war, however, the military is constitutionally restrained from exercising absolute discretionary power. For example, during war and in the area of actual combat, the military can seize a citizen's property if military necessity so dictates. However, the property owner is entitled to full compensation for the property seized as provided by the fifth amendment of the Constitution; and before the property can be seized by the military, there must be an urgent necessity for the seizure that cannot be met by civil authorities.

Protection of the citizen from the excesses of the military power of the executive during war is no less than that afforded property by the courts and the Constitution. In Ex parte Milligan, the Supreme Court held that although the Civil War was still being fought, a civilian living in a non-hostile, non-combat area of the country could not be tried, sentenced, or imprisoned by military authorities. This holding was reaffirmed eighty years later when the Court invalidated the reign of martial law invoked in Hawaii during World War II. Quoting Milligan, the Supreme Court re-established the doctrine that an absolute necessity must exist before martial law can be invoked, even during war, by stating:

Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

... If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the

41 Dow v. Johnson, 100 U.S. 158, 164-70 (1879); United States v. Diekelman, 92 U.S. 520, 526 (1875).
43 [T]he danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. ... It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851).
44 71 U.S. (4 Wall.) 2 (1866).
army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. . . . (Emphasis added.)

The Court was stating no new principles, for the concepts had already permeated our common law heritage. Only dire necessity, incapable of being adequately handled by the civil authorities, justifies the use of martial law and military force against American citizens—even in time of actual war.

Thus, the prime area of concern is the proclamation of martial law and the use of state military forces by state Governors in situations not amounting to, or even remotely approaching, war or anything so critical, namely rebellion, insurrection, riot, unlawful violence, and lesser disorders such as campus demonstrations that may slightly exceed the limits of constitutional protection. Generally, a state Governor has the power to restore peace and order by the use of military force if necessary. The question is, what are the limits on that power when the situation is of this lesser degree of severity?

Recognizing a disutility in allowing subordinate officials and military personnel to challenge the executive's determination of the existence of a situation requiring the use of military force and his order activating the militia, the courts initially held that the President's determination that such a situation did exist must be conclusive of that fact and unreviewable. This rule of conclusiveness was also

46 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866).
47 For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. 1 W. BLACKSTONE, COMMENTARIES 413.
48 See notes 22-27 supra, and accompanying text.
49 Prize Cases, 67 U.S. (2 Black) 635 (1862); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827). In the Prize Cases, supra, the Court held:
Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed 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. Prize Cases, supra at 670.

In Martin v. Mott, supra, the Court held:
If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? . . . We are all of opinion, that the authority

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applied to the actions of state Governors calling out the state militia to suppress what they determined to be disorders requiring military action and a proclamation of martial law.\textsuperscript{50}

When the due process clause of the fourteenth amendment became applicable to the states, a constitutional basis was created upon which the federal courts could review these previously unreviewable determinations of state executives. Incredibly, in 1909 the Supreme Court in \textit{Moyer v. Peabody}\textsuperscript{51} revitalized the pre-fourteenth amendment doctrine of conclusiveness of executive determinations of what situations require military force and whether the militia should be activated. In \textit{Moyer}, the Court affirmed the dismissal of a union leader's complaint charging that he had been arrested and detained by state military forces for the duration of a labor dispute. The Court held that the Governor was the final judge of the necessity for declaring that a state of insurrection existed and of the propriety of the actions taken to restore peace and order.\textsuperscript{52} In essence, the Court implied that due process did not apply to a state governor exercising his powers in the area of martial law. A governor's assertion that a situation necessitating the use of military force existed, his proclamation of martial law, and the actions ordered by him pursuant to such proclamation were held to be completely within the discretion of the Governor and unreviewable by any court--federal or state.\textsuperscript{53}

\textsuperscript{50} Luther v. Borden, 48 U.S. (7 How.) 1 (1849). This case dealt with a challenge to the imposition of martial law in Rhode Island. The Court held: \[U\]nquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. . . . The State itself must determine what degree of force the crisis demands. 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. . . . \textit{Id.} at 45.

\textsuperscript{51} 212 U.S. 78 (1909).

\textsuperscript{52} It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact. \textit{Moyer v. Peabody}, 212 U.S. 78, 83 (1909).

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. . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. \textit{Id.} at 85.

The Moyer doctrine was not repudiated until the Court's decision in Sterling v. Constantin\(^{54}\) in 1932. In that case, the Governor of Texas declared that an insurrection beyond the control of local authorities existed in certain counties due to wasteful oil production in violation of state conservation laws, and proclaimed martial law. All oil wells were shut down by military force and were later allowed to resume operation in compliance with administrative regulations limiting production. The federal district court enjoined the administrative orders, and the Governor retaliated by taking military control of the wells. The Court held that whether a situation existed that justified the Governor's invasion of the rights of the well owners was not settled exclusively by the Governor's actions and declarations, but was subject to judicial review and determination. The action of the district court in issuing the injunction was affirmed.\(^{55}\)

The Court in Sterling limited the Moyer doctrine of executive conclusiveness\(^{56}\) to situations where actual violence existed and where the Governor's actions were directly related to quelling the violence.\(^{57}\) Where no violence existed, or where the Governor's acts were not related to the alleviation of the disorder in question, the Governor's proclamation of martial law was not only inconclusive, but was all but void, for it could not justify any military action taken pursuant to it. A real necessity that cannot be met by civil authorities and can only be handled by the use of military force is absolutely essential before a Governor's declaration of necessity and proclamation of martial law can justify subsequent actions in light of the fourteenth amendment.\(^{58}\)

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\(^{54}\) 287 U.S. 378 (1932).

\(^{55}\) Id. at 398-403.

\(^{56}\) The opinion in Sterling v. Constantin is internally inconsistent. An overview suggests that the Court repudiated the Moyer doctrine altogether. See notes 59-62 infra, and accompanying text.

\(^{57}\) 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. . . . 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. . . . Sterling v. Constantin, 287 U.S. 378, 399-401 (1932).

\(^{58}\) . . . [A]ppellants assert . . . 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

(Continued on next page)
Although *Sterling* clearly obliterates the *Moyer* doctrine that a governor's determination of the necessity of declaring martial law and his implementation of it are conclusive, the opinion is internally inconsistent. On the one hand, the Court asserts that the executive's determination that military force is necessary is conclusive while on the other it emphasizes the inconclusiveness of such determinations. The conflict can be resolved only by looking at what the Court did in the case. That examination will reveal that the Court refused to accept the Governor's declaration of insurrection and proclamation of martial law as conclusive and held the actions done pursuant to them to be illegal. Thus, the limited deference paid to gubernatorial conclusiveness must be regarded as dicta and lip service to a dead doctrine.

Unfortunately, the poison of *Moyer* seemed to outlive the application of the antidote in *Sterling*. State governors, thwarted by law from achieving desired goals, continued to use proclamations of martial law and military force to attain illegal ends where it was clearly not permissible to do so consistent with due process. However, *Sterling* had given the courts a weapon with which to combat executive lawlessness and despotism, and the courts used it.

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(Footnote continued from preceding page)

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. *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932).

... Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed. ... But ... in all of these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. ... Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. ... There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity. *Id.* at 401.

It does not follow ... that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. *Id.* at 400-01.

See note 57 *supra*.

See notes 58-59 *supra*.

Perhaps inspired by the facts in *Sterling*, the Governor of Oklahoma declared martial law and used state military forces to seize oil wells in order to enforce state laws prohibiting waste. The owner of the wells had not been found guilty of breaking the law in question by any administrative or judicial tribunal. The Governor was enjoined.\(^6\)

Two years later, the same Governor attempted to force Oklahoma City into adopting a segregation ordinance by proclaiming martial law in certain parts of the city and declaring a “segregation zone” for whites and another for blacks with a “nontrespass zone” between the two. The Governor ordered that martial law and his segregation decree continue until the city adopted an ordinance to the effect of the edict. The court held the decree void and the resulting ordinance unconstitutional.\(^6\)

Another Oklahoma Governor, undaunted by the failures of his predecessors, proclaimed martial law and sent armed state troops to stop construction of a dam being built largely by the federal government. The Governor’s purpose was to exact money damages for flooded roads in excess of that allowed by statute. At no time was there any insurrection, riot, tumult or violence against civil authority, nor was there any failure of the civil authority to function. The court enjoined the Governor,\(^6\) and the Oklahoma executive went down for the third time.

Unable to legally fulfill a campaign promise to remove the State’s highway commissioner, the Governor of South Carolina declared the highway department to be in a state of insurrection and rebellion! Under his declaration of martial law, armed troops seized the offices, operations, and assets of the department and forcibly removed the lawful commissioner. The area was peaceful and the courts were open at the time.\(^6\) The Governor of Georgia used the same tactic to remove the chairman of the State’s highway board whose right to the position had been repeatedly adjudicated by the courts.\(^6\) Both Governors were enjoined.

In Tennessee, the Governor, in order to enhance his renomination prospects, threatened the use of military force and the imposition of a military dictatorship for the sole purpose of preventing thousands of legally registered voters from voting. The court, unimpressed with the Governor’s arguments asserting the conclusiveness of his determination of necessity, enjoined him.\(^6\) The Governor of Iowa declared an

\(^{63}\) *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933).

\(^{64}\) *Allen v. Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (1935).


emergency and proclaimed martial law to prevent a hearing by the N.L.R.B.\(^6^9\) In Arkansas, the Governor used state troops to thwart a federal court order to integrate a high school. It was shown that no violence had occurred or would occur if the court order were carried out. The Governor was enjoined.\(^7^0\)

The Governor of Minnesota, upon the request of local authorities, proclaimed martial law and sent state military forces to control a violent labor dispute involving plaintiff's factory. Instead of restraining those committing the violence against the factory and its workers, the Governor thought it expedient to use the troops to close the plant, thus pacifying the strikers and returning order to the situation. He was enjoined.\(^7^1\) Twenty-three years later, another Minnesota Governor reacted the same way to a violent strike, except that this time the local authorities had not requested martial law. The local government was functioning, and the civil authorities could have handled the situation without martial law. He, too, was enjoined.\(^7^2\)

This brief survey of illegal use of martial law by governors is not to suggest that the courts struck down all actions of the state executives in this area. For example, in Minnesota, when a strike became violent and civil authorities attempted to restore order but were unable to do so and requested military assistance, the Governor's proclamation of martial law and his sending of the state military forces were upheld by the courts.\(^7^3\) Likewise, in Indiana, when local authorities lost control of a violent general strike and petitioned the Governor for military forces, the Governor's proclamation of martial law and actions pursuant to it were sustained.\(^7^4\)

An analysis of the cases dealing with the emergency military powers of state governors and a synthesis of their holdings suggest a doctrine, conformity to which is necessary if due process requirements are to be even nominally satisfied. The doctrine is: Before a state governor can, within the requirements of due process, declare that a situation requiring military force exists, proclaim or continue a state of martial law, call upon or direct state military forces, or take or continue other actions pursuant to a proclamation of martial law 1) there must in fact exist a dire necessity consisting of actual unlawful violence or disorder

\(^7^0\) Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).
\(^7^1\) Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn. 1936).
\(^7^3\) Powers Mercantile Co. v. Olson, 7 F. Supp. 865 (D. Minn. 1934).


\footnote{For the Court's opinion in Sterling v. Constantin, supra, see note 58 supra. For a discussion of Wion & Co. v. Freeman, supra, see text accompanying notes 82-83, infra. In United States v. Phillips, supra, the court held that: A Governor's proclamation of martial law does not legalize his use of military force where, in fact... there is no violence or disorder or resistance to civil authority. Id. at 269. Following an examination of the relevant cases in the area of martial law, the court in Constantin v. Smith, supra, stated that: [O]ne general principle runs through them ... that dire necessity and dire necessity alone, the necessity of self-defense, suspends ordinary constitutional guaranties, and that, where that necessity does not in fact exist, no such suspension occurs. Id. at 240. In Ex parte Lavinder, supra, the court held, with regard to when martial law was justified, that: Its sole justification is the failure of the civil law fully to operate and function, for the time being, by reason of the paralysis or overthrow of its agencies, in consequence of an insurrection, invasion, or other enterprise hostile to the state, and resulting in actual warfare. Id. at --, 108 S.E. at 499.}

\footnote{In Franks v. Smith, supra, the Governor of Kentucky called out the State Militia to stop vigilante activity in a county. While the court held that the Governor was the sole judge of the necessity that required the aid of state military forces, the holding was qualified: The presumption of course is that he will not exercise this high power unless it becomes necessary to maintain peace and quiet and protect the life or property of the citizen, after the local civil authorities have shown themselves unable to cope with or control the situation. Id. at --, 134 S.W. at 487. (Continued on next page)}
taken by military forces pursuant to a proclamation of martial law must be directly related to the quelling of the unlawful violence or disorder, prevention of its continuance, or prevention of its imminent occurrence;\(^7\) 4) the military forces must exercise the minimum force or deprivation of rights necessary to restore peace and order and cannot utilize means not legally available to civil authorities under the circumstances;\(^8\) and 5) no action, declaration, proclamation, or any other exercise of executive emergency military authority is to be conclusive or unreviewable by the courts.\(^8\)

(Footnote continued from preceding page)

This doctrine was reaffirmed in \(\text{Op. Ky. Att'y Gen.} 38949\) (1956). In State \textit{ex rel. Roberts v. Swope}, \textit{supra}, the court held that:

The employment of the military is not resorted to while the local peace officers are able to cope with the situation. \textit{Id.} at \(28\) P.2d at \(7\).

For the Court's holding in \textit{Sterling v. Constantin}, \textit{supra}, see note \(58\) \textit{supra}. For a discussion of \textit{Wilson & Co. v. Freeman}, \textit{supra}, see notes \(82-83\) \textit{infra}, and accompanying text. For holding in \textit{Ex parte Lavinder}, \textit{supra}, see note \(75\) \textit{supra}.


In \textit{Sterling v. Constantin}, \textit{supra}, the court held that

 Arbitary and capricious acts of the Governor, and those having no relation to the necessities of the situation may be enjoined by the courts. . . .

\textit{Id.} at \(868\).


For the Court's holding in \textit{Sterling v. Constantin}, \textit{supra}, see notes \(58-59\) \textit{supra}. For a discussion of \textit{Wilson & Co. v. Freeman}, \textit{supra}, see notes \(82-83\) \textit{infra}, and accompanying text.

In \textit{Powers Mercantile Co. v. Olson}, \textit{supra}, the court said:

We may inquire whether there was any justification for the governor's act in requiring the military authorities to take charge . . . and whether the means which he has employed have any relation to the duties imposed upon him. . . . \textit{Id.} at \(868\).

The court in \textit{United States v. Phillips}, \textit{supra}, concurred by holding that "[t]he Governor's action in using military force . . . is subject to judicial review." \textit{Id.} at \(269\).
It appears from this analysis that the clear and present danger test is at most only a part of the more complex doctrine required by due process of law and imposed upon the states by the fourteenth amendment of the Constitution. No viable support exists for the assertion that martial law with its inherent deprivations of liberty can be proclaimed and enforced solely because of the existence of a clear and present danger. The application of such a simplistic test beckons us back to the dubious doctrine of Moyer v. Peabody and opens wide the door to gubernatorial abuse of discretion and judicially sanctioned annihilation of due process through the vehicle of unreviewable executive fiat. A clear and present danger per se cannot justify executive proclamations of martial law and exercise of military force.

The case of Wilson & Company v. Freeman provides a synthesis of those elements comprising the suggested doctrine as evolved by the courts since Sterling v. Constantin. In Wilson, union employees of plaintiff's factory went on strike and violently tried to prevent strike-breakers from working in the plant. Local government was functioning and no showing was made that local law enforcement agencies could not handle the situation with perhaps the aid of military forces. However, the Governor declared martial law and ordered troops to shut down plaintiff's plant in order to halt the violence. In granting the injunction restraining the Governor from interfering with the factory operations, the court was unequivocal in its holding:

[W]hen there is actual war in a community, or where insurrection or revolt occurs so that the duly constituted government is usurped and overcome by the insurrectionists or mobs, the Governor is impliedly authorized to declare martial law. But where any disturbance . . . presents a situation with which the local police or other law enforcement agencies are not able to cope, it does not follow that, without more, the drastic and oppressive rule of martial law can be imposed upon any community. . . . In fact, the basis for martial law assumes that local government has completely broken down and is, or is about to be taken over by the forces of a mob. . . . [A] serious situation existed. . . . Obviously, however, plaintiff was within its rights . . . in attempting to keep its plant in production. . . . Plaintiff cannot be held responsible for mob violence . . . precipitated by its attempt to keep its plant open. . . .

At the time the Governor declared martial law, the local government . . . was functioning. The courts were open, the citizens were moving freely . . . without danger, except those who desired to . . . work for plaintiff. The District Court . . . had issued restraining orders against mass picketing and violence, and contempt

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81 See notes 51-53 supra, and accompanying text.
citations... had been set for hearing... but... the Governor summarily declared martial law.... The rights of the courts to proceed... were enjoined. The workers... were forbidden to return, and plaintiff’s right... to operate its plant was abrogated by the decree of the military.

We are not unmindful of the discretion which must necessarily rest in the Governor of a State in determining whether martial law... shall be imposed.... But a free people do not surrender to mob rule by the expediency of martial law until all means available... to enforce the laws have proved futile. The imposition of the drastic action and the curtailment of constitutional rights of citizens of a state resulting from a declaration of martial law, cannot be sustained except in situations of dire necessity....

The Governor possesses no absolute authority to declare martial law. Military rule cannot be imposed upon a community simply because it may seem to be more expedient than to enforce the law by using the National Guard to aid the local civil authorities....

... A declaration of martial law connotes the disintegration of the local and State Government which has been created to maintain peace and order under civil rule. ... 83

The Court in AAUP v. Nunn found that a clear and present danger existed and held that this fact per se was sufficient justification for the Governor’s actions placing the University of Kentucky under martial law, suspending constitutional liberties, and sending armed military forces to the campus to enforce his edicts. An application of the doctrine suggested by both forty years of precedent and the better reasoning requires a contrary conclusion.

There existed no dire necessity, no violence, no disorder. The building had been burned almost twenty-four hours prior to the Governor’s proclamation of martial law. The interim period between the fire and the proclamation had been peaceful and normal. Despite the university President’s declaration of limited emergency, no emergency seems to have existed—limited or otherwise. The University was open. All university buildings and offices were open. Students attended classes. Final examinations were given. The President of the University himself addressed a large gathering of students without incident. No violence occurred. No demonstrations were held, except the single one late in the afternoon challenging the President’s curfew, and that demonstration was peaceful. The situation was drastically less acute than that presented to the court in Wilson. In that case there was actual violence in progress when the Governor proclaimed martial law. In AAUP v. Nunn there was no violence and no dire

83 Id. at 525-28.
necessity requiring the use of state military forces and the curtailment of constitutional rights.

Local government was functioning normally and local law enforcement agencies had the situation under complete control up until the time they were superseded by the military. At no time had the demonstrations escalated to a point beyond the control of the local security forces. Nothing seems to have happened on the day that the Governor proclaimed martial law or the previous day when the building was burned that was not within the capacity of campus police with perhaps support from the city police forces. When limited violence did break out on the afternoon of May 5, 1970, campus police controlled the situation. When students gathered in front of the Army R.O.T.C. building on the night of the fire, campus and city police controlled the situation. Even after the proclamation of martial law on May 6, 1970, it was the police forces that cleared the students from the campus before the National Guard troops arrived, clearly showing their capability to handle the situation. Also, the local courts were open and functioning, thus they were available to provide any orders that were necessary and justifiable. The Governor had an entire day to seek such relief in the courts, but chose to rely instead on the arbitrary power of martial law even when the civil authority was intact and in control.

In Wilson the court was faced with a similar situation. The courts were open and functioning. Injunctions had been issued, and those violating the orders of the court were set to be punished not by the harsh, overbroad rule of martial law which abridges the rights of all citizens, but by the surgical precision of the civil law of contempt working through due process. Both Governors ignored the processes of justice established by the civil law and relied instead on the expedience of martial law which did not seem to require rational motives, equity, or respect for basic constitutional freedoms. It was immensely less difficult to resort to the dictatorial rule of military force rather than to justify before a court of equity why constitutional rights had to be suspended on the university campus and why two hundred fifty soldiers armed with deadly weapons and bayonets had to be sent into the midst of peaceful demonstrators exercising the rights of a system they had been admonished to accept and follow. The court in Wilson severely criticized the Governor of Minnesota for bypassing the court system. The Court in AAUP v. Nunn constructively condoned such behavior on the part of the Governor of Kentucky.

The Governor's proclamation of martial law, suspension of constitutional rights of speech and assembly, and imposition of military
rule by armed troops on campus were not directly related to the alleviation of the alleged harms justifying their existence. As in the Wilson case, the Kentucky Governor indirectly applied military force against what he perceived to be (in good faith or not) a clear and present danger. This resulted in an abridgement of the constitutional rights of those guilty of no wrong, while sanctions directly related to the "harms" would have led to the same result without curtailing rights. For example, in Wilson the Governor of Minnesota was faced with a mob of strikers who were illegally using violence to force plaintiff to stop operating his plant. The Governor had two options. He could restrain the mob from continuing their illegal conduct, a direct action. He could also force plaintiff to close his plant which would pacify the mob, since this was the goal of their violence. This would be an indirect action. Both would result in the same thing—cessation of the violence. However, the indirect method would abridge plaintiff's rights while the direct would not. The Governor chose the indirect method of closing plaintiff's plant and was promptly enjoined. This is similar to the situation that faced the Court in AAUP v. Nunn. The Governor was allegedly concerned with possible arson, outside agitators, bomb threats, and disruption of the academic process. These harms were attacked by prohibiting free speech and assembly and enforcing curfews. The simplistic logic involved was sound: an arsonist cannot set fire to a building if nobody is allowed on campus; outside agitators cannot agitate if speech and assembly are prohibited to all persons; bombs cannot be set if all people are barred from the campus; the academic process is not disrupted if people cannot gather and talk even peacefully.

Arson could have been prevented by securing campus buildings and patrolling them, instead of banning the exercise of free speech and assembly. There can be no significant causal relation between free speech and assembly on the one hand and arson and bombings on the other that would necessitate the former's annihilation in order to prevent the latter. Persons prone to violence or incitement could have been kept under surveillance, instead of excluding all persons from campus. If identification of non-university persons was a legal concern of the authorities, it could have been accomplished by I.D. checks without abridging the rights of the students across the board as the Governor's order did. Purchasing academic tranquility by forbidding students and faculty from assembling and discussing public issues in an orderly manner, by ending examinations, stopping use of the libraries, keeping faculty members from their offices, and turning the campus into an armed camp stretches even the politician's ability
to rationalize. Here, as in Wilson, the Governor chose the more expedient and politically popular tactic of suppressing free speech and assembly in order to avert alleged clear and present dangers when more direct methods would have achieved the same ends and preserved constitutional liberties at the University of Kentucky. The latter course, perhaps, would have been more inconvenient, but inconvenience is the smallest price that government must pay if it is to enjoy the support of free men and women.

By proclaiming martial law and suspending constitutional liberties without the existence of a dire necessity and when all contingencies had been and could have been controlled by local police authorities acting in direct relation to the necessity, the Governor utilized greater force than was necessary to control the situation.

In sustaining defendants’ motion to dismiss and by justifying the Governor’s actions solely on the basis of the clear and present danger test, the Court in AAUP v. Nunn essentially refused to review the Governor’s proclamation of martial law and his use of state military forces. Even if the existence of a dire necessity were granted, the court should have inquired into the ability of the local authorities to control the situation; into the reason why injunctive relief was not sought prior to the proclamation, since there was sufficient time to seek such relief; and into the relationship between the Governor’s orders and the necessity he was allegedly attempting to meet.

The clear trend of the courts would necessitate a finding that the Governor’s actions were unconstitutional. The injunction should have issued.

II.

It has been established that clear and present danger per se is not a proper test of the constitutionality of a governor’s proclamation of martial law and use of state military forces pursuant to that proclamation. A new doctrine is suggested that synthesizes the holdings and trends of the courts. It is argued that compliance with this doctrine is essential if the Governor’s actions in exercising his emergency military powers are to be consistent with due process of law. This appears to be the state of the law today. However, it may be that the due process clause of the fourteenth amendment will tolerate no test at all when a governor dispatches military forces to control campus demonstrations. It is suggested that the fourteenth amendment may forbid the use of National Guard troops in any capacity on college and university campuses to control demonstrations.

It must be remembered that the typical campus disorder is of
much less severity than an armed rebellion or insurrection. Yet military forces armed and supposedly trained for rebellion, insurrection, and even all-out war are used by state governors almost routinely in such campus demonstration situations. Of such practices, the President's Commission on Campus Unrest concluded in its report that:

[S]ending civil authorities [referring to National Guard troops] onto a college campus armed as if for war—armed only to kill—has brought tragedy in the past. If this practice is not changed, tragedy will come again.

The shocking performance of the National Guard at Kent State University raises the question of whether there are constitutional restraints on which agency a state may use to execute and enforce its laws as long as the methods and procedures used comply with due process requirements. There may very well be such restraints. Evidence and data now emerging strongly suggest that the state militias are so inherently incapable of performing consistently with due process in a campus demonstration situation that the Constitution prohibits their use. Three areas of concern have thus far emerged: 1) the National Guard's political and emotional bias against student demonstrators; 2) their inadequate training and lack of standards as to when weapons may be used; and 3) the incitement resulting from their very presence. No attempt will be made here to discuss these issues in any depth. That task is perhaps better suited for the social scientists. The purpose here is simply to raise these issues for future study and consideration.

There are 850,000 National Guardsmen in the United States. The vast majority of these men are blue-collar workers who tend to be political conservatives hostile toward student dissent. An example of this hatred, and what it can mean when held by those entrusted to restore order, is evidenced by the fact that some of the Guardsmen at Kent State University refused to obey the orders of their commanders to cease firing and had to be physically restrained from continuing to fire their weapons at the students. The troops at Kent State University had non-automatic M-1 rifles. National Guardsmen are now being issued M-16 rifles—a machine gun type weapon.

Concerning the training received by National Guard troops, the President's Commission on Campus Unrest said that "[t]he events at

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84 See notes 5, 8, & 18 supra, and accompanying text.
86 See notes 5-6 supra.
87 See Newsweek, May 18, 1970, at 33F.
88 See note 6 supra.
Kent State betrayed... the poor morale—indeed, the anxiety—that inevitable [sic] accompanies poor preparation." Ever since poorly trained National Guardsmen unnecessarily killed scores of people—many of them innocent bystanders—in the urban riots of 1967, all guardsmen have had to undergo a basic thirty-three hour riot control course which is supplemented each year by a sixteen hour refresher course. Training standards are developed by the Pentagon and center around the "rules of engagement" which stress discipline and restraint in disorder situations. However, when the National Guard is in the service of the state, they are not bound by the federal standards. The state rules of engagement then apply, and they tend to be much less stringent as to when a soldier may fire his weapon and for what purpose. The need to examine the adequacy of National Guard training and the state rules of engagement in light of due process was vividly demonstrated at Kent State when one guardsman took it upon himself to fire at a student who had made an obscene gesture.

Lastly, the very presence of National Guard troops on a campus during a demonstration is an inflammatory element in the disorder. One commentator wrote that

Civil disorders by their very nature are highly charged emotional situations, and the presence of a formidable armed and uniformed military force does not, ipso facto, calm an already aroused civilian population. At best, it may simply fan the fires of resentment; at worst, it may trigger the troops, under the stress of necessity, to take action which could ultimately result in their use of "combat" tactics against fellow citizens.

Thus, the sending of National Guard troops to a college campus because there might be violence may inherently be a self-fulfilling prophecy.

These areas of concern should be investigated and considered by the courts whenever faced with a case such as AAUP v. Nunn, for they suggest very strongly that the use of National Guard troops to control campus disorders may be a denial of due process per se.

CONCLUSION

The Governor of Kentucky violated the due process clause of the fourteenth amendment when he proclaimed martial law and ordered

90 See Newsweek, May 18, 1970, at 33F.
armed National Guard troops to the campus of the University of Kentucky to suppress demonstrations and the exercise of the first amendment rights of free speech and assembly. But this was not the real tragedy of such abuse of executive military power. The real tragedy, which will endure long after the incident of May, 1970 has faded from the memory of all who experienced it, was and is that a court of law validated this unconstitutional conduct by ignoring its duty to society and bowing impotently to an executive assertion of necessity. As Mr Justice Jackson wrote:

A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order . . . the principle [t]hen lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. . . .

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.93

Surely this is the age of Leviathan come alive, an age in which the behemoth of institutionalized repression of dissent lurks about our door. The Court in AAUP v. Nunn has beckoned it enter.

Scott T. Wendelsdorf

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