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## Constitutional and Statutory Bases of Governors' Emergency Powers

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## COMMENTS

### Constitutional and Statutory Bases of Governors'

#### Emergency Powers

In times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential. The legislative police power can of course be exercised to deal with crises affecting the public health, safety, and welfare. In practice, however, the ravages of nature and the exigencies of rioting, labor strife, and civil rights emergencies usually necessitate prompt governmental response. Since the executive is inherently better able than the legislature to provide this immediate response, state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises.<sup>1</sup> Consequently, when public emergencies arise, the center of governmental response is usually the governor's office.

The primary source of executive emergency power is the state constitution, although statutes often codify the constitutional executive emergency authority and occasionally delegate additional legislative police powers to the governor. Most governors are authorized to respond to public emergencies with a variety of extraordinary emergency measures. This study of state constitutional and statutory emergency power provisions has been undertaken in an attempt to evaluate the sources and scope of governors' emergency powers, as well as the limitations upon those powers. Its primary focus will be upon the extreme breadth of executive emergency authority and, in particular, upon the power to use military force during times of public emergency.<sup>2</sup>

#### I. STATE CONSTITUTIONS

##### A. *Grants of Authority*

The provisions of state constitutions from which executive emergency powers are derived display a marked uniformity. Every

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1. See, e.g., ARIZ. REV. STAT. ANN. §§ 26-341 to -346 (1956) (governor's civil defense powers); KY. REV. STAT. §§ 39.408-409 (1962) (governor's civil defense powers); MICH. COMP. LAWS § 10.31 (1948) (governor's emergency powers); ORE. REV. STAT. § 401.530 (1963) (governor's emergency powers).

2. The components of the state military forces are variously defined in the several states; the component most frequently utilized by governors in public emergencies is the state "national guard"—the term used to identify the organized military force. E.g., VT. STAT. ANN. tit. 20, § 361 (1959); WIS. STAT. ANN. § 21.01 (1957). Typically, the "militia" is the unorganized body of individuals subject to state military service. E.g., MICH. COMP. LAWS § 32.1 (1948); TENN. CODE ANN. § 7-103(d) (Supp. 1964). Also, the statutes frequently authorize organization of a "state guard" when the state national guard is called into active federal service. E.g., TENN. CODE ANN. § 7-401 (Supp. 1964); VT. STAT. ANN. tit. 20, § 1151 (Supp. 1963); WIS. STAT. ANN. § 21.025 (1957).

state constitution confers the executive power upon a governor, or designates the governor as the chief executive officer of the state.<sup>3</sup> Every state constitution also designates the governor as commander-in-chief of the state military forces.<sup>4</sup> Furthermore, all constitutions except those of Massachusetts and New Hampshire explicitly charge the governor with the duty of faithful execution and enforcement of state law.<sup>5</sup> In Massachusetts and New Hampshire, this duty can be implied from the required oath of office.<sup>6</sup> In addition, thirty-five

3. ALA. CONST. art. V, § 113; ALASKA CONST. art. III, § 1; ARK. CONST. art. 6, § 2; CAL. CONST. art. V, § 1; COLO. CONST. art. IV, § 2; CONN. CONST. art. 4, § 4; DEL. CONST. art. III, § 1; FLA. CONST. art. IV, § 1; GA. CONST. art. V, § 2-3001; HAWAII CONST. art. IV, § 1; IDAHO CONST. art. IV, § 5; ILL. CONST. art. V, § 6; IND. CONST. art. 5, § 1; IOWA CONST. art. IV, § 1; KAN. CONST. art. 1, § 3; KY. CONST. § 69; LA. CONST. art. V, § 2; ME. CONST. art. V, pt. 1, § 1; MD. CONST. art. II, § 1; MASS. CONST. ch. II, § I, art. I; MICH. CONST. art. V, § 1; MISS. CONST. art. 5, § 116; MO. CONST. art. IV, § 1; MONT. CONST. art. VII, § 5; NEB. CONST. art. IV, § 6; NEV. CONST. art. 5, § 1; N.H. CONST. pt. 2, art. 41; N.J. CONST. art. V, § I, ¶ 1; N.M. CONST. art. V, § 4; N.Y. CONST. art. IV, § 1; N.C. CONST. art. III, § 1; N.D. CONST. art. III, § 71; OHIO CONST. art. III, § 5; OKLA. CONST. art. VI, § 2; ORE. CONST. art. V, § 1; PA. CONST. art. IV, § 2; R.I. CONST. art. VII, § 1; S.C. CONST. art. IV, § 1; S.D. CONST. art. IV, § 1; TENN. CONST. art. III, § 1; TEX. CONST. art. IV, § 1; UTAH CONST. art. VII, § 5; VT. CONST. ch. II, § 3; VA. CONST. art. V, § 69; WASH. CONST. art. III, § 2; W. VA. CONST. art. VII, § 5; WIS. CONST. art. V, § 1; WYO. CONST. art. 4, § 1; cf. ARIZ. CONST. art. V, § 4; MINN. CONST. art. V, § 4.

4. ALA. CONST. art. V, § 131; ALASKA CONST. art. III, § 19; ARIZ. CONST. art. V, § 3; ARK. CONST. art. 6, § 6; CAL. CONST. art. V, § 5; COLO. CONST. art. IV, § 5; CONN. CONST. art. 4, § 7; DEL. CONST. art. III, § 8; FLA. CONST. art. IV, § 4; GA. CONST. art. V, § 2-3010; HAWAII CONST. art. IV, § 5; IDAHO CONST. art. IV, § 4; ILL. CONST. art. V, § 14; IND. CONST. art. 5, § 12; IOWA CONST. art. IV, § 7; KAN. CONST. art. 8, § 4; KY. CONST. § 75; LA. CONST. art. XVII, § 2; ME. CONST. art. V, pt. 1, § 7; MD. CONST. art. II, § 8; MASS. CONST. art. of amend. LIV; MICH. CONST. art. V, § 12; MINN. CONST. art. V, § 4; MISS. CONST. art. 5, § 119; MO. CONST. art. IV, § 6; MONT. CONST. art. VII, § 6; NEB. CONST. art. IV, § 14; NEV. CONST. art. 5, § 5; N.H. CONST. pt. 2, art. 51; N.J. CONST. art. V, § I, ¶ 12; N.M. CONST. art. V, § 4; N.Y. CONST. art. IV, § 3; N.C. CONST. art. III, § 8; N.D. CONST. art. III, § 75; OHIO CONST. art. III, § 10; OKLA. CONST. art. VI, § 6; ORE. CONST. art. V, § 9; PA. CONST. art. IV, § 7; R.I. CONST. art. VII, § 3; S.C. CONST. art. IV, § 10; S.D. CONST. art. IV, § 4; TENN. CONST. art. III, § 5; TEX. CONST. art. IV, § 7; UTAH CONST. art. VII, § 4; VT. CONST. ch. II, § 20; VA. CONST. art. V, § 73; WASH. CONST. art. III, § 8; W. VA. CONST. art. VII, § 12; WIS. CONST. art. V, § 4; WYO. CONST. art. 4, § 4, art. 17, § 5.

5. ALA. CONST. art. V, § 120; ALASKA CONST. art. III, § 16; ARIZ. CONST. art. V, § 4; ARK. CONST. art. 6, § 7; CAL. CONST. art. V, § 7; COLO. CONST. art. IV, § 2; CONN. CONST. art. IV, § 11; DEL. CONST. art. III, § 17; FLA. CONST. art. IV, § 6; GA. CONST. art. V, § 2-3011; HAWAII CONST. art. IV, § 5; IDAHO CONST. art. IV, § 5; ILL. CONST. art. V, § 6; IND. CONST. art. 5, § 16; IOWA CONST. art. IV, § 9; KAN. CONST. art. 1, § 3; KY. CONST. § 81; LA. CONST. art. V, § 14; ME. CONST. art. V, pt. 1, § 12; MD. CONST. art. II, § 9; MICH. CONST. art. V, § 8; MINN. CONST. art. V, § 4; MISS. CONST. art. 5, § 123; MO. CONST. art. IV, § 2; MONT. CONST. art. VII, § 5; NEB. CONST. art. IV, § 6; NEV. CONST. art. 5, § 7; N.J. CONST. art. V, § 1, ¶ 11; N.M. CONST. art. V, § 4; N.Y. CONST. art. IV, § 3; N.C. CONST. art. III, § 7; N.D. CONST. art. III, § 75; OHIO CONST. art. III, § 6; OKLA. CONST. art. VI, § 8; ORE. CONST. art. V, § 10; PA. CONST. art. IV, § 2; R.I. CONST. art. VII, § 2; S.C. CONST. art. IV, § 12; S.D. CONST. art. IV, § 4; TENN. CONST. art. III, § 10; TEX. CONST. art. IV, § 10; UTAH CONST. art. VII, § 5; VT. CONST. ch. II, § 20; VA. CONST. art. V, § 73; WASH. CONST. art. III, § 5; W. VA. CONST. art. VII, § 5; WIS. CONST. art. V, § 4; WYO. CONST. art. 4, § 4.

6. MASS. CONST. ch. VI, art. I; N.H. CONST. pt. 2, art. 84.

constitutions explicitly authorize the governor to call out the state national guard to enforce the laws, suppress insurrection, and repel invasion.<sup>7</sup> Of these thirty-five constitutions, only that of Arkansas, which restricts exercise of the governor's emergency power to those times when the legislature is not in session, contemplates legislative control of the manner in which the guard is to act.<sup>8</sup> The slight variations of language which occur in the various provisions designating the purposes for which the guard may be called out appear to be of little consequence.<sup>9</sup> Authority for calling out the guard "to enforce the laws" would seem to be sufficiently broad to permit the use of the guard in any public disorder or natural disaster attended by a crisis in local law enforcement. Of the fifteen state constitutions which do not confer upon the governor explicit constitutional authority to call out the national guard, only one specifically prohibits such actions by the governor; the Tennessee militia cannot be called into service unless the legislature declares "by law, that the public safety requires it."<sup>10</sup> In each of the other fourteen states, the governor's power to call out the national guard can be implied from his constitutional powers as chief executive officer of the state and commander-in-chief of the military forces, and from his constitutionally imposed obligation to enforce the laws.<sup>11</sup> The provisions conferring these general powers serve, in each of the fourteen states, as the bases for statutes explicitly authorizing the governor to call out the national guard.<sup>12</sup>

7. ALA. CONST. art. V, § 131; ALASKA CONST. art. III, § 19; ARK. CONST. art. 11, § 4; COLO. CONST. art. IV, § 5; FLA. CONST. art. XIV, § 4; HAWAII CONST. art. IV, § 5; IDAHO CONST. art. IV, § 4; ILL. CONST. art. V, § 14; IND. CONST. art. 5, § 12; KAN. CONST. art. 8, § 4; LA. CONST. art. XVII, § 2; MD. CONST. art. II, § 8; MASS. CONST. art. of amend. LIV; MICH. CONST. art. V, § 12; MINN. CONST. art. V, § 4; MISS. CONST. art. 9, § 217; MO. CONST. art. IV, § 6; MONT. CONST. art. VII, § 6; NEB. CONST. art. IV, § 14; NEV. CONST. art. 12, § 2; N.H. CONST. pt. 2, art. 51; N.M. CONST. art. V, § 4; N.C. CONST. art. XII, § 3; N.D. CONST. art. III, § 75; OHIO CONST. art. IX, § 4; OKLA. CONST. art. VI, § 6; ORE. CONST. art. V, § 9; S.C. CONST. art. XIII, § 3; S.D. CONST. art. IV, § 4; TEX. CONST. art. IV, § 7; UTAH CONST. art. VII, § 4; VA. CONST. art. V, § 73; WASH. CONST. art. X, § 2; W. VA. CONST. art. VII, § 12; WYO. CONST. art. 4, § 4; art. 17, § 5.

8. "The Governor shall, when the General Assembly is not in session, have power to call out the volunteers or militia, or both, to execute the laws, repel invasion, repress insurrection and preserve the public peace in such manner as may be authorized by law." ARK. CONST. art. 11, § 4.

9. Several states substitute other phrases for the phrase "to enforce the laws." *E.g.*, LA. CONST. art. XVII, § 2; N.H. CONST. pt. 2, art. 51. Other states add "suppress riots" or "preserve public peace" to the designated purposes. *E.g.*, ARK. CONST. art. 11, § 4; MISS. CONST. art. 9, § 217; N.M. CONST. art. V, § 4; N.C. CONST. art. XII, § 3; S.C. CONST. art. XIII, § 3.

10. TENN. CONST. art. III, § 5.

11. See notes 3-5 *supra* and accompanying text.

12. ARIZ. REV. STAT. ANN. § 26-172 (1956); CAL. MIL. & VET. CODE §§ 143, 146; CONN. GEN. STAT. ANN. § 27-16 (1960); DEL. CODE ANN. tit. 20, § 171 (1953); GA. CODE ANN. § 86-106 (1963); IOWA CODE ANN. § 29.7 (Supp. 1964); KY. REV. STAT. §§ 37.240, 38.030 (1962); ME. REV. STAT. ANN. ch. 25, § 703 (1964); N.J. STAT. ANN. § 38A:2-4 (Supp.

### B. *Limitations on Authority*

Although the constitutional and statutory provisions granting executive emergency authority do not restrict the mode of exercise of the military power after the state national guard has been ordered into emergency service, several state constitutions contain other provisions indicating that the state executive is not intended to have unlimited military powers in times of public emergency. The constitutions of seven states provide that only those persons in the active service of the militia can be punished under martial law.<sup>13</sup> The phrase "martial law" is indeterminate,<sup>14</sup> however, and no cases have been found which construe its meaning in these particular constitutional provisions. The provisions clearly indicate an intention not to allow the displacement of normal civil processes by the summary trial and punishment of civilians by military commissions;<sup>15</sup> as a practical matter, however, the ambiguity of these constitutional provisions may minimize their effectiveness as limitations upon the exercise of executive emergency authority.

A second type of restrictive provision, found in the constitutions of nineteen states, declares that the operation of the laws is to be suspended only by the legislature.<sup>16</sup> On several occasions involving public emergencies, governors have suspended the operation of the civil laws and have substituted military enforcement of executive orders.<sup>17</sup> The nineteen states which prohibit this practice have recognized the danger that a governor may use the existence of a public emergency as an excuse for imposing arbitrary restrictions upon rights established under the civil laws. The universal adoption of this constitutional prohibition would restrict to some degree the

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1964); N.Y. MIL. LAW art. I, § 6; PA. STAT. ANN. tit. 51, § 1-311 (1954); R.I. GEN. LAWS § 30-2-6 (1957); VT. STAT. ANN. tit. 20, § 601 (1959); WIS. STAT. ANN. § 21.11 (1957).

In Tennessee, despite the constitutional prohibition, see note 10 *supra* and accompanying text, a statute authorizes the governor to call out the national guard in times of public emergency. TENN. CODE ANN. § 7-106 (Supp. 1964). Compliance with the constitution is sought by insertion of a proviso that the "militia" cannot be called out except by legislative command, *ibid.*, with "militia" defined in the statute to exclude the state national guard. TENN. CODE ANN. § 7-103(d) (Supp. 1964).

13. ME. CONST. art. I, § 14; MD. CONST., Declaration of Rights art. 32; MASS. CONST., Declaration of Rights art. XXVIII; N.H. CONST. pt. 1, art. 34; S.C. CONST. art. I, § 27; TENN. CONST. art. I, § 25; VT. CONST. ch. I, art. 17. See also R.I. CONST. art. I, § 18; W. VA. CONST. art. III, § 12.

14. See generally FAIRMAN, *THE LAW OF MARTIAL LAW* 19-49 (2d ed. 1943); WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 6-15 (1940).

15. See FAIRMAN, *op. cit. supra* note 14, at 96-97.

16. ALA. CONST. art. I, § 21; ARK. CONST. art. 2, § 12; DEL. CONST. art. I, § 10; HAWAII CONST. art. I, § 13; IND. CONST. art. 1, § 26; KY. CONST., Bill of Rights § 15; ME. CONST. art. I, § 13; MD. CONST., Declaration of Rights art. 9; MASS. CONST., Declaration of Rights art. XX; N.H. CONST. pt. 1, art. 29; N.C. CONST. art. I, § 9; OHIO CONST. art. I, § 18; ORE. CONST. art. I, § 22; PA. CONST. art. I, § 12; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 21; TEX. CONST. art. I, § 28; VT. CONST. ch. I, art. 15; VA. CONST. art. I, § 7.

17. See RANKIN, *WHEN CIVIL LAW FAILS* 85-113 (1939).

exercise of executive emergency authority, but it could not prevent all arbitrary and unreasonable emergency measures. For example, a court construing the prohibition might accept the dubious theory propounded by the West Virginia Supreme Court that even constitutional guarantees are subject to suspension by executive order when the governor deems the danger to the state sufficiently great.<sup>18</sup> Also, since the prohibition applies only to the total suspension of the operation of the civil laws, it would not seem to prohibit arbitrary emergency measures which supplement but do not suspend the operation of the civil laws.

A third type of constitutional provision could theoretically serve as an effective limitation upon emergency use of military power by the executive. Every state constitution except that of New York declares that military power shall be subordinate to civil power.<sup>19</sup> In practice, however, these provisions have proved largely ineffective as limitations upon executive use of military force during public emergencies. A few courts did hold that state national guard forces could only assist civil officers in the enforcement of civil law, that troops so employed were subject to all the commands and prohibitions of civil law, and that the military forces could not cope with public emergencies by means prohibited to civil authorities.<sup>20</sup> However, subsequent statutes in the states whose courts espoused these restrictive views have granted substantially greater discretionary authority to military forces engaged in public emergency service.<sup>21</sup>

18. *State ex rel. Mays v. Brown*, 71 W. Va. 519, 523, 77 S.E. 243, 245 (1912).

19. ALA. CONST. art. I, § 27; ALASKA CONST. art. I, § 20; ARIZ. CONST. art. II, § 20; ARK. CONST. art. 2, § 27; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 22; CONN. CONST. art. 1, § 18; DEL. CONST. art. I, § 17; FLA. CONST., Declaration of Rights § 21; GA. CONST. art. I, § 2-119; HAWAII CONST. art. I, § 14; IDAHO CONST. art. I, § 12; ILL. CONST. art. II, § 15; IND. CONST. art. 1, § 33; IOWA CONST. art. I, § 14; KAN. CONST., Bill of Rights § 4; KY. CONST. § 22; LA. CONST. art. I, § 14; ME. CONST. art. I, § 17; MD. CONST., Declaration of Rights art. 30; MASS. CONST., Declaration of Rights art. XVII; MICH. CONST. art. I, § 7; MINN. CONST. art. I, § 14; MISS. CONST. art. 3, § 9; MO. CONST. art. I, § 24; MONT. CONST. art. III, § 22; NEB. CONST. art. I, § 17; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 26; N.J. CONST. art. I, ¶ 15; N.M. CONST. art. II, § 9; N.C. CONST. art. I, § 24; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 14; ORE. CONST. art. I, § 27; PA. CONST. art. I, § 22; R.I. CONST. art. I, § 18; S.C. CONST. art. I, § 26; S.D. CONST. art. VI, § 16; TENN. CONST. art. I, § 24; TEX. CONST. art. I, § 24; UTAH CONST. art. I, § 20; VT. CONST. ch. I, art. 16; VA. CONST. art. I, § 13; WASH. CONST. art. I, § 18; W. VA. CONST. art. III, § 12; WIS. CONST. art. I, § 20; WYO. CONST. art. 1, § 25.

Provisions of this type appeared in the earliest of state constitutions. Both the Virginia Bill of Rights of 1776 and the Massachusetts Constitution of 1780 declared that the military power should be held in strict subordination to, and be governed by, the civil authority. DOCUMENTS OF AMERICAN HISTORY 104, 109 (Commager 5th ed. 1949). The desire to subordinate military power is also expressed in the Declaration of Independence, which recites, as one reason for severance, that the king "has affected to render the Military independent of and superior to the Civil Power." *Id.* at 101.

20. See *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911); *Ela v. Smith*, 71 Mass. 121 (1855); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924).

21. See Ky. REV. STAT. § 38.030 (1962); Mass. STAT. ANN. ch. 33, §§ 40-43 (1961); MICH. COMP. LAWS §§ 32.40-41 (1948).

Although these statutes do not overrule the prior judicial constructions of the constitutional provisions, the constitutionality of the statutes would probably be upheld today under any one of a number of theories. For instance, in most jurisdictions the governor's broad power to use the national guard is not limited to merely assisting civil authorities by methods permissible under civil law. Instead, most governors have authority to order the guard to use whatever measures of force are reasonably necessary under the circumstances.<sup>22</sup>

Other theories which would support the constitutionality of the statutes are based upon the doctrine that a governor's invocation of emergency military authority creates a state of qualified martial law.<sup>23</sup> The characteristics of qualified martial law were set forth in an opinion of the Pennsylvania Supreme Court concerning the validity of an order directing the state national guard to put an end to violence during a labor dispute:

Order 39 was . . . a declaration of qualified martial law. Qualified in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it was martial law with all its powers. The government has and must have this power or perish.<sup>24</sup>

Courts upholding broad executive military authority under qualified martial law have found several ways to minimize the impact of the constitutional subordination of the military to the civil power. Some courts have found the necessary subordination in the mere fact that the national guard is subject to the direction and control of the

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22. *Moyer v. Peabody*, 212 U.S. 78 (1909); *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn. 1934); *In re Moyer*, 35 Colo. 154, 85 Pac. 190 (1905); *In re Boyle*, 6 Idaho 609, 57 Pac. 706 (1899); *State ex rel. Roberts v. Swope*, 38 N.M. 53, 28 P.2d 4 (1933); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 Atl. 952 (1903); *In re Jones*, 71 W. Va. 567, 77 S.E. 1029 (1913); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912).

23. See generally FAIRMAN, *op. cit. supra* note 14, at 80-94; WIENER, *op. cit. supra* note 14, at 11-15. Commentators have written much on the nature of qualified martial law, the contrast between absolute and qualified martial law, and the validity of acts of national guard forces during a state of qualified martial law. *E.g.*, FAIRMAN, *op. cit. supra* note 14, at 28-49, 80-124; WIENER, *op. cit. supra* note 14, at 6-42, 62-102; Ballentine, *Qualified Martial Law, A Legislative Proposal*, 14 MICH. L. REV. (pts. 1 & 2) 102, 197 (1915); Ballentine, *Unconstitutional Claims of Military Authority*, 24 YALE L.J. 189 (1914); Ballentine, *Martial Law*, 12 COLUM. L. REV. 529 (1912); Isseks, *The Executive and His Use of the Militia*, 16 ORE. L. REV. 301 (1937); Comment, 1938 WIS. L. REV. 314; Note, 31 IND. L.J. 456 (1956).

24. *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 170-71, 55 Atl. 952, 954 (1903).

governor, who is the chief civil officer of the state.<sup>25</sup> Other courts have based their conclusion on the theory that the paramount importance of the defense of the state requires that the constitutional subordination of the military to the civil power yield when the threat to the state is sufficiently great.<sup>26</sup> Only a small minority of courts have held that the broad executive military powers characteristic of qualified martial law are in conflict with the constitutional subordination of the military to the civil power.<sup>27</sup>

### C. Summary

Constitutional limitations upon the role of military power in state government have not led to the imposition of restrictive criteria governing the use of executives' constitutional emergency powers. The absence of effective constitutional limitations has meant that in practice the exercise of the broad emergency powers is tempered primarily by executive self-restraint. Nevertheless, statutory provisions and due process limitations do impose some degree of control upon the exercise of executive emergency authority.

## II. STATE STATUTES

The statutes pertaining to governors' emergency powers are of two basic types: those which codify constitutional executive emergency authority and those which delegate to the executive additional authority based on the legislative police powers. No detailed survey of the statutes of all fifty states will be made here; instead, attention will be focused on several common patterns.

Statutes cannot, of course, directly restrict the scope of constitutionally granted executive emergency authority. In theory, however, the legislature could significantly guide the executive's use of his constitutional emergency power by articulating the conditions which call for the exercise of that power and suggesting the procedures and degrees of force appropriate to particular emergency conditions. Statutes delegating legislative police powers can restrict the scope of the power granted and delimit the conditions under which it is to be employed.

### A. Executive Military Authority

In most states, legislation governing military affairs includes a codification of the governor's constitutional authority to call out the

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25. *In re Moyer*, 35 Colo. 154, 159, 85 Pac. 190, 193 (1905); *Franks v. Smith*, 142 Ky. 232, 242, 134 S.W. 484, 488 (1911); *In re McDonald*, 49 Mont. 454, 462, 143 Pac. 947, 949-50 (1914); see FAIRMAN, *op. cit. supra* note 14, at 97-98.

26. See, e.g., *In re Boyle*, 6 Idaho 609, 57 Pac. 706 (1899); *State ex rel. Roberts v. Swope*, 38 N.M. 53, 28 P.2d 4 (1933); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 Atl. 952 (1903).

27. *Ela v. Smith*, 71 Mass. 121 (1855); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); cf. *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911).

national guard for public emergency service. Whereas the constitutions state general purposes for which military force may be used,<sup>28</sup> the statutes enumerate in somewhat greater detail the emergency conditions which permit the governor to call out the national guard.<sup>29</sup> Such a statutory classification of emergency conditions can be a useful guide to an executive faced with the decision whether to invoke his emergency powers in a given situation. Unfortunately, however, most statutes defining executive military authority do not suggest what procedures and degrees of force are appropriate to particular emergency conditions. The statutes generally reflect the view that the severity of response to public emergencies is a matter to be left solely to the governor's discretion.

In many states, the legislation fails to indicate what relationship exists between the national guard on emergency duty and the local civil authorities.<sup>30</sup> In several states, however, some guidance is provided by statutes which authorize civil authorities to designate the objectives to be attained, while national guard officers select the means to achieve those ends.<sup>31</sup>

Statutes frequently permit the governor to declare a state of insurrection<sup>32</sup> or of martial law.<sup>33</sup> The two declarations appear to have the same significance, differing only in their terminology. Of the statutes which grant such authority, only two include a definition of martial law.<sup>34</sup> In the absence of definitions and judicial interpre-

28. See note 7 *supra* and accompanying text.

29. See, e.g., CAL. MIL. & VET. CODE ANN. § 146; ILL. REV. STAT. ch. 129, § 220.85 (1963); MICH. COMP. LAWS § 32.40 (1948); N.Y. MIL. LAW ANN. art. I, § 6; OHIO REV. CODE ANN. §§ 5923.21-22 (Baldwin 1964); S.C. CODE § 44-114 (1962); WIS. STAT. ANN. § 21.11 (1957). A typical statute provides:

In event of war, insurrection, rebellion, invasion, tumult, riot, mob or body of men acting together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of this state, or the United States, or in case of the imminent danger of the occurrence of any of said events, or whenever responsible civil authorities shall, for any reason, fail to preserve law and order, or protect life or property, or the governor believes that such failure is imminent, or in the event of public disaster, the governor shall have power to order the organized militia . . . [into active service].

WASH. REV. CODE § 38.08.040 (1958).

30. E.g., ARIZ. REV. STAT. ANN. § 26-172 (1958); CONN. GEN. STAT. ANN. § 27-16 (1958); N.Y. MIL. LAW ANN. art. I, § 6; N.D. CODE ANN. § 37-01-04 (1960); VA. CODE ANN. § 44-75 (Supp. 1964); WIS. STAT. ANN. § 21.11 (1957).

31. E.g., ILL. REV. STAT. ch. 129, § 220.85 (1963); MASS. ANN. LAWS tit. V, § 43 (1961); MICH. COMP. LAWS § 32.41 (1948); OHIO REV. CODE ANN. § 5923.23 (1954); *cf.* VT. STAT. ANN. tit. 20, § 606 (1959).

32. E.g., CAL. MIL. & VET. CODE ANN. § 143; N.D. CODE ANN. § 37-01-08 (1960); S.C. CODE § 44-122 (Supp. 1964).

33. E.g., N.Y. MIL. LAW ANN. art. I, § 6; ORE. REV. STAT. § 399.065 (1963); R.I. GEN. LAWS ANN. § 30-2-5 (1957); UTAH CODE ANN. § 39-1-8 (1953); WASH. REV. CODE § 38.08.030 (1958); W. VA. CODE ch. 15, § 1195 (1961).

34. The Alaska and Washington statutes define a state of complete martial law, which permits the governor to supersede the civil authority by the military forces for a limited time, and a state of limited martial law, which entails only a partial subordi-

tations, the extent of the military authority which may be exercised pursuant to a declaration of martial law or insurrection is uncertain. The terms of the provisions and the context in which they are found often suggest that when a declaration is made the governor may employ whatever measures of force are necessary to restore order.<sup>35</sup> The declarations under this type of statute would therefore appear to carry with them the attributes of qualified martial law.<sup>36</sup>

### B. Executive Civil Defense Authority

Civil defense statutes enacted in many states confer broad emergency authority upon the governor.<sup>37</sup> The legislation supplements, but does not restrict, other constitutional and statutory executive military powers.<sup>38</sup> Civil defense legislation does, however, frequently impose limitations upon the exercise of the emergency powers which it grants. These statutes often provide that the emergency powers do not arise until a civil defense emergency is proclaimed.<sup>39</sup> Many statutes limit the definition of a "civil defense emergency" to emergencies created by war, enemy attack or threats thereof, or natural disaster;<sup>40</sup> others define "civil defense emergency" in terms sufficiently broad to include riots and other instances of civil disorder.<sup>41</sup> The exercise of the governor's powers is sometimes limited by the authority of a civil defense advisory council,<sup>42</sup> but most civil defense legislation gives the governor wide discretion in selecting the appropriate response to a civil defense emergency.<sup>43</sup>

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nation of the civil to the military. ALASKA STAT. ANN. § 26.05.090 (1962); WASH. REV. CODE § 38.08.030 (1958).

35. The California statute, for example, authorizes the governor to declare a state of insurrection and then order the national guard into active service under the command of officers he selects. This power is granted in addition to his power to call out the national guard for public emergency service, and resistance to military authority during a state of insurrection is a crime. CAL. MIL. & VET. CODE ANN. §§ 143, 145, 146.

36. See notes 23-24 *supra* and accompanying text.

37. See, e.g., ARIZ. REV. STAT. ANN. § 26-342 (1956); CONN. GEN. STAT. ANN. §§ 28-9, -11 (1960); N.D. CODE ANN. § 37-17-06 (Supp. 1965); VT. STAT. ANN. tit. 20, § 9 (Supp. 1963); WIS. STAT. ANN. §§ 22.01(4), .02(1) (Supp. 1965).

38. See 25 Ore. Att'y Gen. Rep. 114 (1952).

39. See statutes cited note 37 *supra*.

40. E.g., ARIZ. REV. STAT. ANN. § 26-342 (1956); CONN. GEN. STAT. ANN. § 28-9 (1960); N.D. CODE ANN. §§ 37-17-06, -16 (Supp. 1965); R.I. GEN. LAWS ANN. §§ 30-15-14, -15 (1957); VA. CODE ANN. § 44-142.2 (1953).

41. CAL. MIL. & VET. CODE ANN. § 1505; WIS. STAT. ANN. § 22.02 (Supp. 1965). The California code excludes labor strife from the definition of emergency. CAL. MIL. & VET. CODE ANN. § 1505.

42. E.g., VT. STAT. ANN. tit. 20, § 11 (1959). Civil defense advisory councils, created in many states, constitute forums which may render useful guidance to governors during emergencies. See, e.g., MONT. REV. CODE § 77-1305 (1956); N.C. GEN. STAT. § 166-4 (1964); VT. STAT. ANN. tit. 20, § 4 (1959).

43. See statutes cited note 37 *supra*.

### C. *Special Executive Emergency Authority*

The governors of Michigan, Florida, Georgia, and South Carolina are granted special statutory emergency powers supplementary to their military and civil defense powers.<sup>44</sup> The statutes in those states permit the governors to proclaim a state of emergency and promulgate regulations which have the force of law during the public emergency.<sup>45</sup> The Michigan statute specifically permits these regulations to apply to the use of both public and private property, and to the conduct of private citizens.<sup>46</sup> In contrast, the only regulations specifically authorized by the statutes of Florida and Georgia are those affecting only public property;<sup>47</sup> however, the governors of those states, as well as of South Carolina, have the power to employ whatever measures of force they deem necessary in public emergencies.<sup>48</sup> Such measures could, no doubt, affect private as well as public property, and the conduct of private citizens. The statutes, which impose no restrictions on the measures of force which the governors may apply and leave the determination of the restrictive measures solely in the governor's discretion,<sup>49</sup> clearly reflect a legislative intent to vest extremely broad public emergency powers in the governors.<sup>50</sup> Although the Florida, Georgia, and South Carolina statutes designate numerous means for enforcing the restrictive measures, there is no requirement that the governors use less drastic civil enforcement means before resorting to military force.<sup>51</sup>

Two conclusions can be drawn concerning state constitutional and statutory executive emergency powers. First, most governors have extremely broad authority to cope with problems of natural disaster and civil disorder. Second, in some states emergency powers may be exercised only during certain kinds of crises, but the constitutions and statutes which grant the powers do not restrict the mode of their exercise.

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44. FLA. STAT. ANN. tit. IV, §§ 14.021-.022 (1961); GA. CODE ANN. §§ 40-211 to -217 (1957); MICH. COMP. LAWS §§ 10.31-.33 (1948); S.C. CODE §§ 1-128 to -130.3 (1962).

45. FLA. STAT. ANN. tit. IV, § 14.021(1) (1961); GA. CODE ANN. § 40-213 (1957); MICH. COMP. LAWS §§ 10.31, .33 (1948); see S.C. CODE §§ 1-129 to -130 (1962).

46. MICH. COMP. LAWS § 10.31 (1948).

47. FLA. STAT. ANN. tit. IV, § 14.021(1) (1961); GA. CODE ANN. § 40-213 (1957).

48. "(1) The governor is hereby authorized and empowered to take such measures and to do all and every act and thing which he may deem necessary . . . to order and direct any individual person, corporation, association or group of persons to do any act . . . or . . . to refrain from doing any act . . . ." FLA. STAT. ANN. tit. IV, § 14.022 (1961). See GA. CODE ANN. §§ 40-211, -212 (1957); S.C. CODE § 1-130 (1962).

49. All of the statutes permit the governor to employ whatever measures he deems necessary. FLA. STAT. ANN. tit. IV, § 14.022 (1961); GA. CODE ANN. § 40.211 (1957); MICH. COMP. LAWS § 10.31 (1948); S.C. CODE § 1-128 (1962).

50. See FLA. STAT. ANN. tit. IV, § 14.021(4) (1961); MICH. COMP. LAWS § 10.32 (1948); S.C. CODE § 1-130.3 (1962); cf. GA. CODE ANN. § 40-216 (1957).

51. See FLA. STAT. ANN. tit. IV, § 14.022 (1961); GA. CODE ANN. § 40.216 (1957); S.C. CODE § 1-130.1 (1962).

### III. THE JUDICIARY AND THE EXERCISE OF EXECUTIVE EMERGENCY POWERS

#### A. Judicial Review

Broad emergency powers of unrestricted application are easily abused; on numerous occasions the existence of a public emergency has resulted in the denial of private rights and individual liberties.<sup>52</sup> At the beginning of this century, attempts were made to subject the use of executive emergency powers to judicial control.<sup>53</sup> Effective judicial controls were not imposed, however, because of the widespread judicial acceptance of doctrines of qualified martial law and because of the discretionary nature of the powers. Because governors' declarations of emergencies under civil defense and emergency power statutes are discretionary acts not subject to judicial injunction or invalidation,<sup>54</sup> and because of the refusal of courts to review governors' declarations of martial law, proclamations of insurrection, and calls for national guard troops,<sup>55</sup> attention has been shifted to the judicial review of particular acts ordered by executives during public emergencies. In *Moyer v. Peabody*,<sup>56</sup> the plaintiff, a labor leader, had been arrested and detained without trial by state military forces throughout the course of a violent labor dispute in a Colorado mining region. After his release he brought a suit for damages against the governor, alleging that he had been deprived of liberty without due process of law in violation of the fourteenth amendment. The United States Supreme Court affirmed the dismissal of the action, suggesting in sweeping terms that the governor was the sole judge not only of the necessity for proclaiming a state of insurrection, but also of the appropriateness of the specific measures to be taken to restore order.<sup>57</sup>

*Moyer v. Peabody* undoubtedly inspired the rash of subsequent

52. See RANKIN, *op. cit. supra* note 17, at 65-113.

53. *E.g.*, *In re Moyer*, 35 Colo. 154, 85 Pac. 190 (1905); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 Atl. 952 (1903); *Hatfield v. Graham*, 73 W. Va. 759, 81 S.E. 533 (1914).

54. See statutes cited notes 37, 45 *supra*.

55. *E.g.*, *Sterling v. Constantine*, 287 U.S. 378 (1932); *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865, 867-68 (D. Minn. 1934); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933). To a great extent, these refusals to review governors' orders were occasioned by interpretations of the United States Supreme Court's decision in *Moyer v. Peabody*, 212 U.S. 78 (1909), discussed in text accompanying notes 60-62 *infra*.

56. 212 U.S. 78 (1909).

57. "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 . . . . 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." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909). *Cf.* *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1848).

state-court refusals to review the propriety of measures used in good faith by governors to cope with public emergencies.<sup>58</sup> Neither state nor federal due process requirements were thought to impose any significant limits upon the exercise of executive emergency authority<sup>59</sup> until the decision of the United States Supreme Court in *Sterling v. Constantin*<sup>60</sup> in 1932. In that case, the Supreme Court stated that although the governor's proclamation of martial law is conclusive and permits him a wide range of discretion to deal with public emergencies,

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. . . . What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.<sup>61</sup>

The propriety of judicial review of executive emergency measures, once established in federal courts by the *Sterling* decision, soon became recognized in state courts as well.<sup>62</sup> Nevertheless, some courts today might still refuse to review emergency acts explicitly authorized by statute.<sup>63</sup>

#### B. *The Standard of Due Process*

When executive emergency authority is invoked, the citizens affected may complain in court that the emergency measures ordered by the governor deprive them of their personal or property rights without due process of law. Ordinarily, courts find compliance with due process if the restriction complained of is reasonably necessitated by the public emergency and sufficiently related to the object of securing peace and order.<sup>64</sup> Whether there has been compliance with

58. *E.g.*, *State ex rel. Roberts v. Swope*, 38 N.M. 53, 28 P.2d 4 (1933); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912).

59. See *In re Moyer*, 35 Colo. 154, 85 Pac. 190 (1905); *In re Boyle*, 6 Idaho 609, 57 Pac. 706 (1899); *Hatfield v. Graham*, 73 W. Va. 759, 81 S.E. 533 (1914). *But see* *Herlihy v. Donohue*, 52 Mont. 601, 161 Pac. 164 (1916); *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914).

60. 287 U.S. 378 (1932).

61. *Sterling v. Constantin*, 287 U.S. 378, 400-01 (1932).

62. *E.g.*, *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933); *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935).

63. "It seems to be well established in this State that the courts have no jurisdiction to review any action performed by a governor under the power conferred upon him either by the Constitution or legislative enactment. Mandamus will not lie to compel action on his part, nor will an injunction be issued to restrain such action." *Born v. Dillman*, 264 Mich. 440, 444, 250 N.W. 282, 283-84 (1933).

64. See *Sterling v. Constantin*, 287 U.S. 378 (1932); *Wilson & Co. v. Freeman*, 179 F. Supp. 520 (D. Minn. 1959); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn. 1936); *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865 (D. Minn. 1934).

due process requirements is most easily ascertained when only a single emergency measure has been taken. For example, the Oklahoma Supreme Court found that seizure of the plaintiff's oil wells was not a reasonably necessary measure, because there was no showing that the plaintiff had violated production quotas set by law.<sup>65</sup> However, the standard of due process becomes more difficult to apply when multiple restrictions are imposed and attacked. Even if all of the restrictions relate directly to securing peace and order, the court faces a formidable task in determining the reasonable necessity for a particular measure. It must assess not only the need for the particular restriction but also the efficacy of the restrictions which would remain if the challenged one were invalidated.

When a court finds an emergency measure unduly restrictive, and further determines that the other measures in force are sufficient to deal with the emergency, it faces the additional problem of determining the scope of its decree. The court might enjoin application of the restriction to a single complainant, or it might order relief from the measure in somewhat broader form. Limiting the decree so as to benefit only the single complainant preserves the viability of the emergency restriction for appropriate later applications, but requires that all other affected individuals seek the desired relief in time-consuming and expensive litigation. A broader judicial decree could protect all adversely affected individuals, but might also prevent a necessary application of the measure in a subsequent situation arising out of the same emergency.

### C. Judicial Determinations of Due Process

The due process clause has occasionally been used to challenge the deprivation of personal liberty and property during times of public emergency. The two leading United States Supreme Court decisions involving personal liberty and property rights are, respectively, *Moyer v. Peabody* and *Sterling v. Constantin*. As has already been mentioned,<sup>66</sup> in *Moyer v. Peabody* the Supreme Court held that the detention of a labor leader during the course of a labor dispute did not deprive him of liberty without due process of law, even though he was not charged with any crime during or after the period of detention. Subsequently, numerous state courts upheld the use of similar detentions by the military, and even sanctioned trial of civilians by military commissions.<sup>67</sup> However, military trials of civilians may be a thing of the past, except under actual conditions

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65. *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933).

66. See text accompanying notes 60-61 *supra*.

67. *E.g.*, *United States ex rel. Seymour v. Fischer*, 280 Fed. 208 (D. Neb. 1922); *United States ex rel. McMaster v. Wolters*, 268 Fed. 69 (S.D. Tex. 1920); *In re Jones*, 71 W. Va. 567, 77 S.E. 1029 (1913).

of war. The cases upholding such trials have been severely criticized,<sup>68</sup> and the United States Constitution has been construed to prohibit both Congress and the President from authorizing military trial of civilians.<sup>69</sup> Furthermore, seven state constitutions preclude punishment of civilians by martial law.<sup>70</sup> Military detention of civilians is also of dubious validity today, except, perhaps, when the detention is for a short period of time and is justified by the impracticality of immediately transferring the individual to the civil authorities. Another use of military detention has been to quarantine an individual guilty of no crime but whose mere presence in the vicinity was deemed likely to incite further disorder.<sup>71</sup> The expanding scope of fourteenth amendment due process, as demonstrated in *Sterling v. Constantin*, strongly suggests that state executives no longer have the unrestricted discretion to order military detention of civilians.<sup>72</sup>

Restrictions upon the exercise of property rights frequently accompany the abridgment of personal liberty during public emergencies.<sup>73</sup> After *Sterling v. Constantin* established the principle that the denial of property rights by executive emergency measures may be deemed a violation of due process, several cases have found certain emergency restrictions on property rights violative of due process.<sup>74</sup> Three Minnesota cases involving the forced closing of business operations during labor disputes illustrate the application of the standard of due process to emergency restrictions on property rights.

In *Powers Mercantile Co. v. Olson*,<sup>75</sup> disputes between employers and truck drivers had led to a strike and to violent prevention of truck movements. Since the civil authorities were unable to control the violence, the governor declared martial law and ordered the militia to enforce regulations promulgated to restore order. One of the emergency measures decreed by the governor and upheld by the federal district court was an order prohibiting the complainant

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68. FAIRMAN, *op. cit. supra* note 14, at 167-71. See also ANTHONY, HAWAII UNDER ARMY RULE (1955).

69. See United States *ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). See generally Bishop, *Court Martial Jurisdiction Over Military-Civilian Hybrids—Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).

70. See constitutions cited note 13 *supra*.

71. See, e.g., *Moyer v. Peabody*, 212 U.S. 78 (1909); *Cox v. McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935).

72. *Cf. Cox v. Louisiana*, 379 U.S. 536 (1965).

73. For example, during the steel strike of 1937 the governors of Ohio and Pennsylvania ordered certain steel mills closed, see RANKIN, *op. cit. supra* note 17, at 165-72; during a violent labor dispute in 1955 in New Castle, Indiana, the use of property and the exercise of personal rights were both restricted. See 31 IND. L.J. 456 (1956).

74. *Wilson & Co. v. Freeman*, 179 F. Supp. 520 (D. Minn. 1959); *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384 (D. Minn. 1936); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 (1933); *cf. Herlihy v. Donohue*, 52 Mont. 601, 161 Pac. 164 (1916).

75. 7 F. Supp. 865 (D. Minn. 1934).

employer from operating his trucks. A crucial factor in the determination that the measure was reasonable was that the acts of violence and destruction involved were not focused at one particular location but were directed at mobile personal property; because strikers could interfere with the trucks anywhere along their routes, law enforcement officers could not effectively prevent the unlawful acts except by stopping the traffic altogether.

In two subsequent Minnesota federal district court cases, *Strutwear Knitting Co. v. Olson*<sup>76</sup> and *Wilson & Co. v. Freeman*,<sup>77</sup> *Powers Mercantile* was distinguished on its facts. In both *Strutwear* and *Wilson*, mob violence flared when employers attempted to continue business operations during strikes at their factories. Local authorities, unable to quell the disturbances, requested aid from the governor, and on each occasion the governor ordered out the national guard, whose commanding officer ordered the factories closed. In both instances, the employers successfully sought injunctions prohibiting further interference with their constitutional right to use their property. In *Strutwear* the court stated that interference with the employer's right to use his plant was unnecessary and unjustified because other means of preventing the violence had not been exhausted.<sup>78</sup> In *Wilson* the court stated:

[W]e cannot subscribe to the principle or doctrine that a Governor of a state may bow to the demands of a law-violating mob that a plant under strike shall be closed when neither the local nor State authorities have used all the means available to them to suppress the mob by invoking enforcement of the laws of the State enacted to be enforced under such circumstances. . . . [I]t would be a shocking reflection on the stability of our State Government if the State could not quell the mob action in Freeborn County without declaring martial law and decreeing the deprivation of constitutional rights of those who are the victims of the lawlessness.<sup>79</sup>

#### D. *The Essex Wire Corporation Dispute*

The difficulty of determining the necessity for emergency restrictions is well illustrated by recent events at Hillsdale, Michigan. The International Union of Electrical Radio and Machine Workers began a strike at the Hillsdale plant of the Essex Wire Corporation in February 1964. From its inception, the strike was attended by destruction of company property and harassment of supervisory and other non-union personnel who were attempting to maintain production. A temporary restraining order prohibiting the IUE from

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76. 13 F. Supp. 384 (D. Minn. 1936).

77. 179 F. Supp. 520 (D. Minn. 1959).

78. *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 384, 390-91 (D. Minn. 1936).

79. *Wilson & Co. v. Freeman*, 179 F. Supp. 520, 527-28 (D. Minn. 1959).

engaging in acts of violence and interfering with entrance to and exit from the plant was issued by the county judge, who later revoked the order and disqualified himself.<sup>80</sup> In response to demands from its insurers, Essex hired armed guards to protect its property and workers.<sup>81</sup> Local courts and other civil authorities continued to function normally, but Essex complained that neither local nor state authorities took positive action to halt the strikers' acts of violence.<sup>82</sup>

On two successive days state and local police were forced to spend several hours dispersing mobs which surrounded the county jail after police detained several participants in picket line fracas.<sup>83</sup> Hillsdale authorities then requested assistance from the governor, who quickly proclaimed a state of public emergency.<sup>84</sup> Pursuant to the Michigan emergency powers statute,<sup>85</sup> the governor promulgated regulations, violation of which was a misdemeanor.<sup>86</sup> The emergency proclamation directed the Commissioner of the State Police to prohibit (1) the possession or carrying of dangerous weapons within the city except by law enforcement officials and the national guard; (2) unlawful traffic within the city; (3) movement within the areas surrounding the Essex plant and the city power plant except by those with lawful business to conduct; (4) occupation or use of the Essex plant; and (5) picketing, demonstrations, and assemblies at public places in Hillsdale.<sup>87</sup>

The governor also ordered national guard troops into Hillsdale to assist the Commissioner of the State Police in enforcing the regulations.<sup>88</sup> With the arrival of the first of approximately one thousand armed and uniformed Michigan National Guardsmen, the violence ended, the picketers dispersed, and the plant was closed. Shortly thereafter, the governor amended the prior regulations, allowing the plant to reopen and permitting peaceful picketing by no more than five persons.<sup>89</sup> The amendment also imposed a curfew on all public streets within the county and extended the bans on dangerous weapons and unlawful traffic to the entire county.<sup>90</sup> Four days later

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80. Detroit News, March 2, 1964, p. 11-B, col. 6; *id.*, March 4, 1964, p. 6-A, col. 3.

81. *Id.*, March 11, 1964, p. 12-A, col. 1.

82. Essex Wire Corp., 102 Crucial Days 10-18 (1964). Copy on file, Michigan Law Review office.

83. N.Y. Times, May 28, 1964, p. 28, col. 2; *id.*, May 29, 1964, p. 15, cols. 3, 4.

84. Proclamation by George Romney, Governor of the State of Michigan, May 28, 1964. Copy on file, Michigan Law Review office. Other unpublished proclamations and orders cited *infra* are also on file at the Michigan Law Review office.

85. MICH. COMP. LAWS § 10.31 (1948).

86. Exec. Order No. 1964-2, May 28, 1964.

87. *Ibid.*

88. Exec. Order No. 1964-2A, May 28, 1964.

89. Exec. Order No. 1964-3, June 2, 1964.

90. *Ibid.*

these restrictions were withdrawn.<sup>91</sup> Following settlement of the strike, the state of emergency was declared ended, all emergency regulations were rescinded, and the troops were withdrawn from Hillsdale.<sup>92</sup>

It is arguable that none of the restrictions imposed by the governor's emergency regulations were reasonably necessitated by the circumstances in Hillsdale. The only support for this view, however, is the retrospective observation that the stationing of a thousand national guardsmen in Hillsdale might have been sufficient in itself to control the disorder. Moreover, a court reviewing the necessity for emergency measures would have to recognize two important factors. First, at the time the measures were promulgated the governor had no assurance that national guard aid to the civil authorities would end the crisis without further violence. Second, all of the restrictive measures imposed were specifically authorized by statute.<sup>93</sup>

It would not have been difficult for a reviewing court to find sufficient disorder in Hillsdale to justify resort to *some* emergency measures. Nevertheless, it would have been difficult to hold that *all* the restrictions imposed were necessary during the entire period they were in effect.

Particularly questionable was the governor's order closing the Essex factory.<sup>94</sup> Essex was engaged in lawful business activity on its property. The violence and harassment on the part of the strikers appears to have been directed at forcing Essex to end its lawful but unpopular manufacturing practices. In determining whether closing the plant was reasonably necessary, a reviewing court could properly have given weight to the fact that the emergency measures did not first attempt to restrict the destructive activities of the strikers before depriving Essex of the right to make a lawful use of its property. According to the *Strutwear* and *Wilson* decisions, the closing of the plant deprived Essex of its property without due process, since the governor did not exhaust all available means for controlling unlawful conduct before ordering the factory closed.

#### IV. CONCLUSIONS

Constitutions and statutes confer upon governors extremely broad executive emergency authority. The mode of exercising that emergency authority is rarely subjected to effective limitation by constitutional, statutory, or judicial power. The fourteenth amendment and state constitutional guarantees of due process may limit the

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91. Exec. Order No. 1964-3, as amended, June 6, 1964.

92. Proclamation by George Romney, Governor of the State of Michigan, June 11, 1964.

93. MICH. COMP. LAWS § 10.31 (1948).

94. Exec. Order No. 1964-2, as amended, May 28, 1964.

exercise of emergency powers, but the case-by-case determination of the propriety of emergency measures is likely to cause irrevocable denial of individual rights in many cases. The need for broad executive emergency authority to cope with crises does not preclude statutory specification of the procedures to be followed in exercising emergency powers. Carefully drafted emergency power legislation, permitting the exercise of only that degree of authority which the circumstances require and directing that the lesser measures of force be employed initially, would help to protect against needless encroachment upon individual constitutional rights.

*F. David Trickey*