

B. MILITARY RULE, A VARYING CONCEPT; SOME EXAMPLES OF A GOVERNOR'S USE OF THE MILITIA; CONSIDERATIONS OF STATE AND FEDERAL DUE PROCESS

It has been said that "the battles of words which have been waged over (the meaning of martial law) seem to have been almost as sanguinary as the struggles leading to the actual declaration of martial law."³¹ (To avoid the linguistic problem, the popular "martial law" has been termed "military rule" in this paper.)

One may find his way through a maze of misused vocabulary if he will understand that all military rule is "qualified, in the sense that its scope and extent are limited by the scope and extent of the necessity calling it forth."³² A situation may require the governor only to call up the militia for *in terrorem* effect and thus cause insurgents to back down; it may so escalate that military patrol is necessary; or circumstances could be so dangerously volatile that the military must take over the local police duties and, in the extreme instance, all functions of local government.

Use of the militia is also limited to the infected geographical area. For this reason a proclamation by the governor, although not legally required, is useful in establishing what local duties the militia has been ordered to carry out and also over what factory, street, town, city, county, or larger area the military authorities are to prevail.

Military rule, of course, is also limited in time. It arises of necessity and must be dissolved as the civil order again becomes capable of operating.

Instances of absolute military rule (when the will of the military com-

mander "is law") create almost a special case limited to for example, the occupation of hostile foreign countries or the Civil War aftermath. However, "qualified military rule," which is only preventive of violence and not a government in itself, has in various situations been utilized by a state's chief executive.

A lengthy quotation from one authority provides helpful background.³³

"The best known episodes of martial rule have been chiefly the result of chronic lawlessness in the mining industry. The depression brought forth the problem of dealing with demonstrations of hungry men, and then the increased militancy of organized labor. In some states 'martial law' was invoked to cover the imposition of executive moratoria. Thus the crude remedy of calling out the militia was increasingly adopted . . . [I]n the fiscal year 1934, twenty-seven states mobilized the guard for emergency duty, and in the next year the number reached thirty-two. The occasions have often been small, even trivial in compass. Troops have been mobilized to prevent whites from lynching Negroes, but also to prevent Negroes from exercising their legal rights to reside among whites; to protect the community from bandits, and to protect the bandits, dead or alive from the community; to guard the life of the governor of Kentucky and to keep peace at the derby. In some states the proclamation of 'martial law' has become a familiar, even whimsical act. Texas had seven such episodes in the twelve years following the first World War. Governor Murray of Oklahoma restricted the production of oil . . . ; he declared martial rule within fifty feet around each well, reciting that some

³¹ *Id.* at 6.

³² *Id.* at 12-13.

³³ Fairman, *supra* note 14, at 1275-1277.