

NECESSARY NECESSITY: COURTS' HISTORICAL ASSESSMENT OF THE CONDITION PRECEDENT FOR MARTIAL LAW

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Abstract

In 2020, three distinct crises—a global pandemic, civil unrest following the murder of George Floyd, and a presidential election challenge—each led to national discussions of “martial law” as a possible response. In fact, sitting members of Congress and key presidential advisers recommended martial law to the sitting President of the United States, with some discussions apparently occurring in the Oval Office. When these crises arose, no President, governor, or military commander had declared martial law in over half a century. The cause, nature, and effects of each of these crises were different, as were the existing legal authorities available for utilizing military forces to address them.

The diversity of situations that prompted national contemplation of martial law in 2020 warrants a contemporary review of courts' treatment of the nearly universally accepted required condition precedent for the imposition of martial law and military actions taken thereunder: necessity. This Article identifies and analyzes federal and state courts' historical assessments of the existence of necessity sufficient to justify martial law, categorizing the discussion in the four situations most commonly claimed as necessitating martial law: 1) war; 2) insurrection or disorder; 3) closure of civil courts; and, most dangerously, 4) executives' dissatisfaction with another government entity's actions.

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I. Introduction

In 2020, three distinct national crises—a global pandemic,¹ civil unrest following the murder of George Floyd,² and a presidential election

1. See, e.g., Joseph Nunn, *Can the President Declare Martial Law in Response to Coronavirus?*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/can-president-declare-martial-law-response-coronavirus> (concluding that martial law could “probably no[t]” be imposed due to COVID-19 under the circumstances as they stood at the time of publication, but calling for greater clarity by Congress); Sarah Sicard, *Will Coronavirus Lead to Martial Law?*, MIL. TIMES (Mar. 17, 2020), <https://www.militarytimes.com/news/your-military/2020/03/17/will-coronavirus-lead-to-martial-law/>.

2. See, e.g., David Smith & Daniel Strauss, *America ‘Staring Down the Barrel of Martial Law’*, *Oregon Senator Warns*, GUARDIAN (July 25, 2020, 2:00 PM), <https://www.theguardian.com/us-news/2020/jul/25/portland-martial-law-ron-wyden-jeff-merkley>; Matt Rothschild, *Trump’s Troops in Portland and the March to Martial Law*, WIS. EXAM’R (July 24, 2020, 12:24 PM), <https://wisconsinexaminer.com/2020/07/24/trumps-troops-in-portland-and-the-march-to-martial-law/>; Matthew Mosk & Katherine Faulders, *Trump’s Quest to ‘Dominate’ Amid George Floyd Protests Sparks New Concerns About Presidential Powers*, ABC NEWS (June 8, 2020, 3:14 AM), <https://abcnews.go.com/US/trumps-quest-dominate-amid-george-floyd-protests-sparks/story?id=71126346>; Alan Dershowitz, Opinion, *Does President Trump Have Power to*

challenge³—each led to national discussions of “martial law” as a possible response. While the suggestion of martial law to address these circumstances may have been ignorance, fearmongering, or fancy for some, its significance should not be ignored.⁴ After all, key presidential advisers recommended martial law to the sitting President of the United States, with some discussions apparently occurring in the Oval Office.⁵

Declare Martial Law?, THE HILL (June 3, 2020, 10:00 AM), <https://thehill.com/opinion/judiciary/500855-dershowitz-does-president-trump-have-power-to-declare-martial-law> (concluding that the authority to declare martial law, in response to civil rights protests and generally, was unclear).

3. See, e.g., Kimberly Wehle, Opinion, *No, Flynn’s Martial Law Plot Isn’t Sedition. But It’s Not Necessarily Legal Either*, POLITICO (Dec. 24, 2020, 2:47 PM), <https://www.politico.com/news/magazine/2020/12/24/flynn-martial-plot-legality-450344> (referring to retired Lieutenant General Flynn’s advocacy for imposing martial law to rerun the presidential election, and the Oval Office meeting at which the idea was discussed); see Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html> (noting that during a meeting in the Oval Office, President Trump asked about retired Lieutenant General Flynn’s proposal to institute martial law to address election); Laura Vozzella, *Republican Contender for Va. Governor Says Trump Should Declare Martial Law*, WASH. POST (Dec. 15, 2020, 4:15 PM), https://www.washingtonpost.com/local/virginia-politics/chase-trump-martial-law/2020/12/15/95ca99a4-3ee5-11eb-9453-fc36ba051781_story.html.

4. Of these three situations, probably only one would have required an actual declaration of martial law in order to accomplish the proponent’s purposes. Resort to true martial law would be legally unnecessary when existing law authorizes use of the military. Legal authorities existed for both the military response to the COVID-19 pandemic, and no matter how misguided, the contemplated use of federal military action to address the civil unrest associated with racial justice protests and counter-protests would likely have been authorized under the Insurrection Act. 10 U.S.C. §§ 253–254; see Christine Hauser, *What Is the Insurrection Act of 1807, the Law Behind Trump’s Threat to States?*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/article/insurrection-act.html>. On the other hand, election law prohibiting use of the military in election matters would seem to forestall any arguments in favor of using the military to re-accomplish the election within existing legal authorities. See, e.g., 18 U.S.C. § 592 (criminalizing having troops at a place where a general or special election is held); 18 U.S.C. § 593 (criminalizing a variety of types of interference with elections by military members, including attempting to “impose any regulations for conducting any general or special election in a State, different from those prescribed by law”). Thus, only the election “crisis,” where military intervention would have been otherwise illegal, would have required true martial law to accomplish the Commander in Chief’s goals.

5. Wehle, *supra* note 3; Jonathan Swan, *Officials Increasingly Alarmed About Trump’s Power Grab*, AXIOS (Dec. 19, 2020), <https://www.axios.com/2020/12/19/trump-officials-alarmed-overturn-election-results>.

National and state military forces have been used in various ways in domestic civil society, including in some high-profile situations, such as in the wake of the Rodney King verdict or in response to the storming of the United States Capitol on January 6, 2021. However, as of 2020, no President, governor, or military commander had declared martial law in over half a century; then, suddenly three very different crises prompted national discussion of martial law. The cause, nature, and effects of each of these crises were different, as were the existing legal authorities available for utilizing military forces to address them. The diversity of situations prompting discussion of martial law in 2020 warrants a contemporary review of courts' treatment of the prerequisites to its declaration. Courts nearly universally require the same condition precedent for the imposition of martial law and military actions thereunder: necessity. This Article identifies and analyzes federal and state courts' historical assessments of the existence of necessity.

A. Defining “Martial Law”

Discussions of martial law suffer from a common malady: the lack of a generally accepted understanding of what martial law means. Courts,⁶

6. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 14 (1866) (“Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler.”); *id.* at 141–42 (Chase, C.J., dissenting) (referring to military control during time of invasion or insurrection where “ordinary law no longer adequately secures public safety and private rights”); *Ex parte Jones*, 77 S.E. 1029, 1034 (W. Va. 1913) (“Martial law is the temporary government and control by military authority of territory in which, by reason of war or public disturbance, the civil government is inadequate to the preservation of order and the enforcement of law.”); *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952, 954 (Pa. 1903) (suggesting a difference between “qualified martial law,” where military force replacing civil authorities is used only for the preservation of peace and order, and not for ascertainment or vindication of private rights or other functions of government, and broader martial law); *Bishop v. Vandercook*, 200 N.W. 278, 281 (Mich. 1924) (“There is no such thing as ‘qualified martial law.’ There is no middle ground or twilight zone, between government by law and martial rule. Martial law or rule cannot arise unless and until there is a suspension of civil power. . . . Martial law, or rather martial rule (for it is no law at all), is a rule of paramount necessity, never existing in company with civil law or authority . . .”).

scholars,⁷ and practitioners⁸ have attempted descriptions and definitions of martial law, often bemoaning the lack of a generally accepted definition.⁹ One Attorney General of the United States famously lamented:

What is martial law? What is meant by the proclamation of martial law? Who has power to declare martial law? How does such a state exist lawfully, and what are the effects of its existence? All these are questions of great interest, to which, however, it is not easy to find satisfactory answer.

. . . .

. . . [T]he common law authorities and commentators afford no clue to what martial law, as understood in England, really is

. . . .

7. See, e.g., CHARLES FAIRMAN, *THE LAW OF MARTIAL LAW* 6, 20, 43–44 (2d ed. 1943) (noting the debate among two professors at Harvard Law School in 1861 over whether martial law means only the suspension of the writ of habeas corpus or much more than that, tracing development of the term martial law from Sir Matthew Hale’s understanding of the term as something akin to what today we call military law, and labeling the obscurity of the term martial law as “the problem” in his seminal work on the subject); George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST., 52, 52–60 (1974) (observing the term’s varying meaning in English and American common law).

8. See, e.g., FREDERICK BERNAYS WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 10 (1940) (“Martial law is the carrying on of government in domestic territory by military agencies, *in whole or in part*, with the consequent supersession of *some or all* civil agencies.”); *id.* (noting lawyer David Dudley Field’s argument in *Ex parte Milligan* that “martial rule” should be thought of as abolishing all law, and substituting the will of the military commander); H.C. Carbaugh, *Martial Law*, 7 ILL. L. REV. 479, 481 (1913) (“It would be much less confusing if the term, ‘martial law,’ should become obsolete and be superseded by the term, ‘martial rule.’ Martial law conveys to the mind the impression that there is a written or unwritten code when in fact it only means martial rule, limited by the ‘laws and customs of war.’ The use of the term, ‘martial law,’ with the conflicting and contradictory meanings that have arisen in the United States since the beginning of the Civil War in 1861, creates confusion and false ideas in the minds of those who may be called upon in a military way to assume command in trying times”); GUIDO NORMAN LIEBER, *THE JUSTIFICATION OF MARTIAL LAW* 3 (Washington, D.C., U.S. Gov’t Prtg. Off. 1898) (“Martial law at home, or as a domestic fact; by which is meant military power exercised in time of war, insurrection, or rebellion, in parts of the country retaining allegiance, and over persons and things not ordinarily subject to it.”).

9. *Duncan v. Kahanamoku*, 327 U.S. 304, 315–16 (1946) (noting that it was unclear in 1857 what martial law meant and that was still true when *Duncan* was decided).

In this country it is still worse.¹⁰

Here, a description of martial law is offered not in attempt to resolve the definitional dispute, but rather to specify the scope of this Article. As used in this Article, “martial law” means the use of the military to carry out some or all the functions of civil government, by *displacing, replacing, or subordinating* civil government and those functions, rather than merely *assisting* civil government.¹¹ That is, under martial law, the military performs some or all of the various executive, legislative, and judicial functions of civil government.¹² This understanding of the term somewhat echoes the definition offered by the Supreme Court nearly a century earlier in *Luther v. Borden* and reiterated by Chief Justice Stone in *Duncan v. Kahanamoku*: “[M]artial law is the exercise of the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety.”¹³

B. Necessity as Condition Precedent for Martial Law

Some jurists and scholars believe martial law is never constitutional or legal.¹⁴ But of those who believe some form of martial law can be lawful

10. Martial Law, 8 Op. Att’y Gen. 365, 365, 367, 368 (1857).

11. Thus, mere military participation in law enforcement, or military participation in what is usually a civil government activity, such as is authorized under the Insurrection Act, is not considered martial law in this Article.

12. See *Duncan*, 327 U.S. at 319.

13. *Id.* at 335 (Stone, C.J., concurring) (citing *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849)).

14. See, e.g., *Franks v. Smith*, 134 S.W. 484, 489 (Ky. 1911) (“We are not willing to concede that in any exigency that may arise the military is superior to the civil authorities. We do not apprehend that any conditions could come up that would justify us in so holding. Nor do we believe that the time will ever come when the military forces of the state, acting under and in obedience to the civil laws of the state, will not be able to control under the authority conferred by these laws any situation that may present itself.”); *State ex rel. Mays v. Brown*, 77 S.E. 243, 249 (W. Va. 1912) (Robinson, J., dissenting) (“[T]he principle of martial law can not be inherently connected with any constitutional government in which the constitution itself directly declares against the principle as our Constitution does.”); THE FEDERALIST NO. 25, at 3 (Alexander Hamilton) (Bantam Books 2003) (1787) (“[E]very breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.”); *Ex parte Jones*, 77 S.E. 1029, 1052 (W. Va. 1913) (“The leading American authority of the present day says: ‘There is, then, strictly speaking, no such thing in American law as a

under some circumstances, the predominant view is that martial law can only be justified by “necessity.”¹⁵ Indeed, while many facets of martial law, including what it is, remain subject to vigorous debate, it has long been the predominant view of justices and judges,¹⁶ practitioners,¹⁷ scholars,¹⁸ and even Presidents,¹⁹ that the required condition precedent for martial law in the United States is *necessity*. In fact, the first declaration of martial law in the United States—by then-General Andrew Jackson in New Orleans during the

declaration of martial law whereby military is substituted for civil law.” (quoting 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 727 (1910)).

15. *Jones*, 77 S.E. at 1033 (“Martial law is the law of military necessity in the actual presence of war.”); *Duncan*, 327 U.S. at 311 (“[T]he establishment of martial law . . . could not be taken except when required by military necessity due to actual or threatened invasion . . .”).

16. *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (“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. Public danger warrants the substitution of executive process for judicial process.”); *United States v. Diekelman*, 92 U.S. 520, 526 (1875) (“Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will.”); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) (“[W]e are clearly of opinion, that 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.”); *In re Ezeta*, 62 F. 972, 1002 (N.D. Cal. 1894) (“Martial law is founded on paramount necessity. It is the will of the commander of the forces. In the proper sense, it is not law at all.”) (citation omitted); *Mays*, 77 S.E. at 250 (Robinson, J., dissenting) (“Martial law rests not on constitutional, congressional, or legislative warrant; it rests wholly on actual necessity. Nothing else can ever authorize it.”); *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952, 955 (Pa. 1903) (“What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.”).

17. See, e.g., WIENER, *supra* note 8, at 16 (“Martial law is the public law of necessity.”); LIEBER, *supra* note 8, at 24 (“The Constitution of the United States affords protection, therefore, against the danger of a declaration of martial law by the legislature of a State as well as against the danger of its declaration by Congress. The principle holds true both as to the United States and the States that the only justification of martial law is necessity.”).

18. FAIRMAN, *supra* note 7, at 47 (“Martial rule depends for its justification upon this public necessity.”).

19. Letter from Alexander James Dallas to Andrew Jackson, (July 1, 1815), in 2 CORRESPONDENCE OF ANDREW JACKSON 203–04 (John Spencer Bassett ed., 1969) (reporting that President George Washington was satisfied with General Jackson’s declaration of martial law in New Orleans because it rested “exclusively upon the ground of ‘a necessity, not doubtful, but apparent from the circumstances of the case’”).

War of 1812—came after his legal aide’s advice that martial law depended on “necessity” for its justification.²⁰ During his subsequent proceeding for contempt of court, General Jackson’s written defense of his declaration of martial law relied heavily on martial law’s necessity under the circumstances.²¹ But what does “necessity” mean in United States jurisprudence? That is, what facts must be present to justify the existence of martial law and acts taken thereunder?

C. Courts’ Assessment of Claims of Necessity

The purpose of this Article is to catalog courts’ reported assessments of the various claims of necessity the actors have offered for martial law throughout United States history. The justifications have tended to lie in one or more of four recurring categories of factual circumstances: 1) actual war and threats of war or invasion; 2) insurrection, riot or disorder, and threats of the same; 3) closed or ineffective courts; and 4) the executive’s dissatisfaction with another government entity.

Part II identifies reported opinions that have addressed these justifications, outlining how courts have applied the requirement of necessity to each of these proffered bases for martial law, both as to the general acceptability of the justification and as to its application in the case before the court. Though in the context of martial law necessity serves as a legal justification, the existence of necessity in a particular case is inherently a factual question.²² Accordingly, this Article focuses on the facts that courts considered relevant to the question of necessity.

Before turning to Part II, two important notes about courts’ assessments of necessity must be made. First, the focus here on courts’ evaluations of necessity should not suggest that courts always engage in this activity when evaluating the legality of, or justification for, martial law. To the contrary, in a significant line of cases, courts have eschewed assessments of necessity altogether, seemingly relying on extreme deference to martial law declarations by the political branches, sometimes even suggesting that the declaration of martial law served as its own justification for any acts

20. Dennison, *supra* note 7, at 61.

21. *Id.* at 62–63 (observing that General Jackson attempted to defend himself on the grounds that an alien enemy had appeared and threatened immediate conquest of the territory, thus justifying the initial declaration of martial law as well as its continuation due to the remaining threat).

22. WIENER, *supra* note 8, at 16.

thereunder.²³ Indeed, the earliest United States Supreme Court pronouncement on martial law strongly suggested that such deference was required.

In *Luther v. Borden*, the Supreme Court assessed warrantless searches and seizures under martial law declared by the Rhode Island Legislature in response to the Dorr Rebellion, in which a large, armed group of citizens asserted the Rhode Island government was not the lawful government of the state.²⁴ There, the Court articulated a standard of deference that would be repeated by other courts for decades: “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.*”²⁵ Federal and state courts would adopt this deferential position in later cases, perhaps emboldening state governments—especially state governors—to declare martial law.²⁶

Nearly 100 years after *Luther*, the Supreme Court would demonstrate a less deferential approach in evaluating a governor’s declaration of martial law. In *Sterling v. Constantin*, the Court characterized the Governor’s declaration as having “the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the

23. See, e.g., *United States ex. rel. McMaster v. Wolters*, 268 F. 69, 71 (S.D. Tex. 1920) (“The question as to whether there is riot, or insurrection, or breach of the peace, or danger thereof, is one solely for the decision of the Governor. The courts will not interfere with his discretion in that, and will not inquire as to whether or not the facts justify the Governor.”); *Ex parte Jones*, 77 S.E. 1029, 1045 (W. Va. 1913) (“[T]he declaration of a state of insurgency or war by competent authority is conclusive upon the court.”); cf. *Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932) (“[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 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 Under our system of government, such a conclusion is obviously untenable.”); *United States v. Phillips*, 33 F. Supp. 261, 269 (N.D. Okla. 1940), *vacated on other grounds*, 312 U.S. 246 (1941) (“A Governor’s proclamation of martial law does not legalize his use of military force where, in fact, as in this case, there is no violence or disorder or resistance to civil authority.”).

24. 48 U.S. (7 How.) 1, 7–9 (1849).

25. *Id.* at 45 (emphasis added).

26. See, e.g., *Jones*, 77 S.E. at 1045; *Wolters* 268 F. at 71.

judicial power of the federal government.”²⁷ This position may have had some support from the standard of apparent absolute deference suggested by the Court’s language in *Luther*, but the Court rejected this understanding of the deference owed, opining:

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases Under our system of government, such a conclusion is obviously untenable.²⁸

Second, in martial law cases, courts analyze necessity as a justification for martial law at one or both of two levels: for the declaration or existence of martial law generally; and for specific activities undertaken pursuant to martial law, such as warrantless searches, military tribunals, or the military creation of new crimes. Though in the national security arena courts often pay attention to broad authorities,²⁹ in the martial law context, courts more often spend more time evaluating the lawfulness of *specific activities* undertaken under martial law. In fact, sometimes the deference to declarations of martial law noted above regards the existence of martial law generally, but that deference evaporates when examining the specific alleged legal injuries giving rise to the cases. For example, in *Sterling*, the Court generally left alone the question of the governor’s ability to *declare* martial law, and instead focused on whether the governor’s and military’s actions were justified by necessity.³⁰ This approach is in striking contrast to the Court’s approach in *Luther*, which was deferential both as to the ability of the Rhode Island government to establish martial law, and to the actions taken thereunder.³¹

A court’s focus on whether specific acts are justified by necessity has several consequences. Necessity is widely accepted among scholars and

27. 287 U.S. at 397.

28. *Id.* at 397–98. Even in this case, however, the Court cited its earlier decision in *Luther* in recognizing some level of discretion on the part of the executive. *Id.* at 399 (“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.” (quoting U.S. CONST., art. II, § 3)).

29. *See generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

30. 287 U.S. at 393–98.

31. 48 U.S. (7 How.) 1, 45 (1849).

judges as the condition precedent both for *declarations* of martial law and all *actions* taken by the military thereunder, but we have rather limited judicial jurisprudence regarding the former question. This limitation is perhaps in part due to the variability of state law authorizations for martial law. For instance, “riot” may be a basis for the governor to declare martial law in one state, but not another.³² Given that martial law declarations are a juridical act, purporting to imbue the executive with arguably extra-constitutional powers, one might expect the Court to opine clearly on the extent of that authority. And this decision to bypass the question cannot easily be explained by the Court’s general doctrine of constitutional avoidance; in some of the same cases in which the Court bypasses questions of the constitutionality of martial law, it addresses other constitutional questions.³³ State supreme courts have been more willing to opine on the existence of general authority for martial law found—or not found—in state law. In any event, scholars and jurists are left with less guidance from the United States Supreme Court regarding what constitutes “necessity” in determining whether martial law can be declared or exists in the first instance.

II. Claims of Necessity

Courts’ analyses of the justifications for martial law and acts taken thereunder rarely rest solely on legal conclusions of whether a particular justification could ever—or never—constitute necessity, but rather on the application of the claimed justification to the facts of the particular case. Here, we will explore the justifications of: 1) war or threatened war or invasion; 2) insurrection, riot, or disorder; 3) closed or ineffective courts; and 4) the executive’s dissatisfaction with another government entity’s actions. Given the fact-specific nature of the inquiry, it is unsurprising that for several of the justifications, courts conclusions regarding whether necessity existed under the circumstances have been mixed. All courts evaluating necessity under the guises of actual war or the collapse of government functions have found the justification sufficient. On the other hand, no court has found

32. See, e.g., *State ex rel. Mays v. Brown*, 77 S.E. 243, 244–45 (W. Va. 1912) (citing a riot as a sufficient basis for martial law).

33. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 318–25 (1946) (avoiding the question of whether martial law is itself constitutional, but determining the governor’s specific actions violated individual rights under the United States Constitution); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (deferring to state legislature on question of authority to declare martial law, but determining which branches of the federal government could recognize the legitimacy of state governments under the United States Constitution).

sufficient the justification of threatened invasion, or an executive's dissatisfaction with another government branch's actions.

A. War

1. Necessity

Numerous courts have opined that during war, martial law and the actions thereunder may be justified by necessity when in the actual theater of war.³⁴ War can justify seizing, destruction, or impressment of property, trespass, denial of due process, killing, and other actions engaged in by military forces during times of peril.³⁵

In *Luther v. Borden*, though it deferred to the Rhode Island government's authority to determine for itself the existence of justification for martial law, the United States Supreme Court clearly stated that war can constitute necessity sufficient to justify martial law:

The State itself must determine what degree of force the crisis demands. And 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. *It was a state of war*; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.³⁶

Later, *United States v. Diekelman* presented a prime example of the circumstances most likely to justify martial law.³⁷ During the Civil War, the Union Army captured the city of New Orleans, Louisiana.³⁸ Nearly all the city's inhabitants were presumed to be secessionist Southerners.³⁹ A primary purpose of the Union Army's capture of New Orleans was the city's strategic

34. See, e.g., *United States v. Diekelman*, 92 U.S. 520, 526 (1875); *Sterling v. Constantin*, 287 U.S. 378, 401 (1932); *Duncan*, 327 U.S. at 343–44 (1946) (Burton, J., dissenting) (“The vital distinction is between conditions in ‘the theater of actual military operations’ and outside of that theater.” (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866))).

35. See *Milligan*, 71 U.S. at 17, 20 (explaining the commander in chief could arrest and punish individuals and seize property without the protections of the Fourth, Fifth, and Sixth Amendments).

36. *Luther*, 48 U.S. at 45 (emphasis added).

37. See 92 U.S. 520.

38. *Id.* at 525.

39. *Id.*

importance as a port.⁴⁰ By controlling New Orleans, the Union Army was able to help impose a blockade to starve the Confederate Army's supply and economic support.⁴¹ But the existence of a hostile civilian population threatened to undermine the Union's control.⁴² Major General Benjamin Franklin "the Beast" Butler imposed martial law for the purpose of controlling the city's citizens.⁴³ General Butler's martial law included measures designed to prevent rebellion, including requiring "[a]ll persons in arms against the United States" to surrender themselves and their weapons, and to shutter newspapers that might be used to promote sedition or report troop movements.⁴⁴ The regime of martial law also imposed severe penalties for acts seen to be crimes against the United States. In one notorious example, a secessionist who had desecrated a United States flag was tried before military tribunal, convicted, sentenced, and hanged.⁴⁵

In assessing the legitimacy of the justification for martial law, the Supreme Court said:

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so.⁴⁶

In short, actual war existed in the area, civil authority did not exist, and martial law was thus justified by necessity.

Though arguably jurisprudential outliers, a line of cases from the Supreme Court of Appeals of West Virginia highlights an important concept in the area of "war as necessity." During the notorious years-long labor unrest known as the "West Virginia Coal Wars," the governor repeatedly declared

40. *Id.* at 525–26.

41. *Id.*

42. *Id.*

43. Alan G. Gauthreaux, *The Beast Turned Loose in New Orleans*, HISTORYNET (Mar. 7, 2012), <https://www.historynet.com/the-beast-turned-loose-in-new-orleans/>.

44. *Id.*

45. *See id.*

46. *Diekelman*, 92 U.S. at 526.

portions of the state to be in a “state of war.”⁴⁷ And in a series of opinions, the highest court of the state held that the governor’s *declaration alone* constituted a state of war sufficient to justify martial law, without regard for actual conditions supposedly necessitating martial law.⁴⁸

Early in the Coal Wars, violence arose after the mining companies’ armed guards evicted the miners from their company-provided housing and engaged in various strikebreaking activities. The striking miners acquired numerous weapons, including machine guns, at least 1,000 high-powered rifles, and 50,000 rounds of ammunition.⁴⁹ After several thousand miners declared their intent to destroy the mines, Governor William Glasscock declared a state of war existed, and declared martial law in the Cabin Creek district of Kanawha County.⁵⁰ In addition to sending state troops to confiscate the miners’ weapons and attempt to keep peace, Governor Glasscock appointed a military commission to hear criminal cases in Kanawha County.⁵¹

State ex rel. Mays v. Brown was the first of multiple West Virginia Supreme Court of Appeals cases to address the legality of the military commissions. Two people who were convicted by military commission and jailed in the state penitentiary sought writs of habeas corpus, alleging that the governor lacked authority to impose martial rule and lacked authority to suspend the writ of habeas corpus.⁵² The defendants had been arrested in the area of martial rule.⁵³ As will be discussed in greater detail below, the defendants were tried by military commission despite the fact that civil courts with jurisdiction over the offenses were operating unobstructed in Charleston, the Kanawha County seat, which was outside the military zone.⁵⁴

In upholding the conviction and sentence of the military commission, the West Virginia Supreme Court of Appeals relied in large part on the existence of the state of war, as declared by the governor.⁵⁵ Notably, the court somewhat conflated war and insurrection, analyzing that “[a]n insurrection

47. *State ex rel. Mays v. Brown*, 77 S.E. 243, 244 & 247 (W. Va. 1912); *Ex parte Jones*, 77 S.E. 1029, 1030–32 (W. Va. 1913); Hoyt N. Wheeler, *Mountaineer Mine Wars: An Analysis of the West Virginia Mine Wars of 1912–1913 and 1920–1921*, 50 BUS. HIST. REV. 69, 71–72 & 78 (1976).

48. *Mays*, 77 S.E. at 244–45; *Jones*, 77 S.E. at 1031–32.

49. Wheeler, *supra* note 47, at 71.

50. *Id.*

51. *Id.* at 72.

52. 77 S.E. at 244.

53. *Id.* at 246.

54. *See id.*

55. *See id.* at 244.

in a given portion of a state, or an invasion thereof by a foreign force, does not produce a state of war outside of the disturbed area.”⁵⁶ In any event, the court rejected the idea that the proclamation of martial law suspends civil jurisdiction. Instead, the court held that:

The *invasion or insurrection* sets aside, suspends, and nullifies the actual operation of the Constitution and laws. The guaranties of the Constitution, as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things . . . and declares it.⁵⁷

As the United States Supreme Court had done in *Milligan*, and would again in *Duncan*, West Virginia’s highest court in *Mays* focused on the existence of war in the location of martial law:

Martial law is operative only in such portions of the country as are *actually in a state of war*, and continues only until pacification. Ordinarily the entire country is in a state of peace, and, on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas, the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, nor try citizens for offenses, nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But, in all the undisturbed, peaceable, and orderly sections, the constitutional guaranties are in actual operation and cannot be set aside.⁵⁸

Unlike in *Milligan* and *Duncan*, however, the court determined that both the locality of the defendants’ offenses and the military commission were in a state of war, thus justifying martial law.

56. *Id.* at 246.

57. *Id.* at 244 (emphasis added). This notion calls to mind Professor John Yoo’s argument that Congress’ power to declare war is merely juridical—the ability to recognize what it is. See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1671 (2002).

58. *Mays*, 77 S.E. at 245, 258 (emphasis added). The court went on to distinguish a provision of the West Virginia Constitution that stated its provisions were operative “alike in a period of war as in time of peace,” by noting this provision referred to a period (time), not a place. See *id.* at 259.

Despite explicitly acknowledging the importance of “actual war” to the analysis of the validity of military commissions under proclamations of martial law, and despite recognizing that in “undisturbed, peaceable, and orderly sections [of the country], the constitutional guaranties are in actual operation and cannot be set aside,” in upholding martial law, the West Virginia Supreme Court of Appeals engaged in no analysis of the facts of war in the Cabin Creek area of Kanawha County.⁵⁹ The dissent opined that a declaration of war is not a declaration of martial law and that “[t]he mere presence of war does not set aside constitutional rights and the ordinary course of the laws.”⁶⁰ The dissent further argued that the mere proclamation of war does not constitute itself necessity, but rather, “[t]he physical status must make it.”⁶¹ Nevertheless, the majority included no discussion of troop presence or operations, incidents of hostilities in the area, the relative strength and armaments of the opponents, or even whether government agents or forces were being attacked or obstructed.⁶² Instead, in apparent contradiction to the notion that martial law may only be effective in areas where actual war exists, the court deferred completely to the governor’s declaration of the existence of a state of war in the Cabin Creek district.⁶³ In essence, the majority found that “actual war” existed in the area because the governor had declared war existed. And the court held the governor’s determination to be not reviewable.⁶⁴ Thus, in this case, the only fact supporting the “necessity” of martial law was the governor’s declaration.⁶⁵

The Supreme Court of Appeals of West Virginia reiterated this concept in cases that followed during the continuing mine-related labor unrest in the state. A year after its decision in *Mays*, the court again upheld a conviction by military commission under martial law in *Ex parte Jones*.⁶⁶ In *Jones*, several defendants were arrested in Charleston, West Virginia, far outside the

59. *See id.* at 245.

60. *Id.* at 250 (Robinson, J., dissenting).

61. *Id.* at 254.

62. *See id.* at 243–47 (majority opinion).

63. *Id.* at 246 (“[I]f the Governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt.”).

64. *Id.*

65. *See id.* Also curious is the court’s acknowledgement, without discussion, that the offenses for which the defendants had been arrested, convicted by military commission, and sentenced were committed “in an interim between two successive periods of martial government.” *Id.* In other words, a state of war existed, then did *not* exist when the offenses were committed, but then did exist again when trial occurred.

66. 77 S.E. 1029, 1047 (W. Va. 1913).

area of declared war and martial law, for crimes allegedly committed in the military district that had been declared by the Governor.⁶⁷ A justice of the peace in Charleston ordered that the defendants be delivered to military authorities, and the defendants were then taken from Charleston into the purported war zone and tried and convicted by military commission.⁶⁸ Again in *Jones*, the majority was primarily concerned with the existence of a state of war. The court observed: “Whether there was justification for the declaration of a state of war in this instance is not an open question. By all authority the declaration of a state of insurgency or war by competent authority is conclusive upon the court.”⁶⁹ In further establishing the legality of martial law in the military district, the court held that “[t]he declaration of a state of war was in law and fact a recognition or establishment of belligerency and made the inhabitants of the military district technically enemies of the state”⁷⁰

In *Jones*, the West Virginia Supreme Court of Appeals addressed whether a “state of war” could exist in a state versus at the national level. In concluding that a state of war could be declared by the governor, the court pointed to other cases in which states of war existed at the state level when martial law was declared.⁷¹ In attempting to address the dissent’s contention that there was no “state of war” sufficient to justify martial law in West Virginia at the time, the majority again conflated insurrection and a “state of war,” noting that an insurrection need not take the form of an attempt to set up a new government.⁷² The majority explored various definitions of war but, as it had in *Mays*, again ultimately founded its opinion that martial law was justified on the basis of the governor’s declaration of a state of war alone.⁷³

However, unlike in *Mays*, the court in *Jones* opined that *if it were* an open question whether war existed, it would conclude that war existed.⁷⁴ In reaching this conclusion, the court provided some clues regarding facts it considered relevant for determining whether war justifies martial law as necessary:

67. *Id.* at 1050.

68. *Id.*

69. *Id.* at 1045.

70. *Id.*

71. *Id.* at 1043 (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *In re Moyer*, 85 P. 190 (Colo. 1905); *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952 (Pa. 1903)).

72. *Id.* at 1044.

73. *Id.* at 1045.

74. *Id.*; see *State ex rel. Mays v. Brown*, 77 S.E. 243, 245 (W. Va. 1912).

In the territory covered by the proclamation, armed forces have been contending with one another for nearly a year. Many persons have lost their lives and property has been destroyed, railroad trains have been interfered with, execution of the law by the civil officers has been resisted and prevented by force of arms, and much worse results have been threatened. Though the courts of Kanawha county have been sitting outside of the district, nobody has been brought to trial, arrested, or indicted for any of these offenses.⁷⁵

Beyond this accounting, the court engages in no analysis of what constitutes “war.” And indeed, the court immediately returned to its conclusion that the governor’s “declaration of a state of war was in law and fact a recognition or establishment of belligerency . . . even though another executive might not have regarded the facts sufficient to warrant the action.”⁷⁶

Notably, the court engaged in no discussion of whether the “war” sought to overthrow the civil government. The dissent’s response focused on what constitutes a public war, concluding that “[a] clash between mine owners and miners can not be considered public war” because “[n]othing in the record justifies the conclusion that either the mine owners and their guards on the one hand, or the miners on the other, have lost their allegiance to the State by the unfortunate clash between them or by any other act.”⁷⁷ The dissent noted that each time the Governor sent the militia to the state, all “remained quiet” and that the “*Cabin Creek District has not seceded!*”⁷⁸ Quoting a prominent commentator of the day, the dissent urged “War is thus sharply distinguished from a mere insurrection or resistance to civil authority.”⁷⁹ Ultimately, the dissent concluded the governor could not “by proclamation or otherwise make that public war which in fact is not such” and that “[t]he existence of martial law does not in any way depend upon the proclamation of martial law.”⁸⁰

75. *Jones*, 77 S.E. at 1045.

76. *Id.*

77. *Id.* at 1050 (Robinson, J., dissenting).

78. *Id.* at 1051.

79. *Id.* (quoting WILLOUGHBY, *supra* note 14, § 730 (emphasis omitted)).

80. *Id.* (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 545 (1885)).

The following year, in *Hatfield v. Graham*, the West Virginia Supreme Court of Appeals continued its internal debate regarding whether the mere proclamation of war constitutes “war” sufficient to justify martial law as “necessary,” but this time, the court addressed the issue in the context of a civil suit against the governor and subordinate military officers.⁸¹ Claiming authority under martial law, Governor Hatfield—who had replaced Governor Glasscock while continuing the declaration of war and martial law—suppressed the publication of a socialist, pro-labor weekly newspaper he viewed as contributing to “disorder and rioting” during an ongoing labor dispute between mine companies and miners.⁸² “Suppression” involved arresting the newspaper’s staff, seizing the advance copies of the week’s edition of the newspaper, and “pie[ing]” the type used in the printing press.⁸³ Notably, the newspaper staff was arrested at the location of the newspaper’s operations in Huntington, West Virginia, over sixty miles outside the “martial zone” where martial law had been declared.⁸⁴ The newspaper had twenty subscribers from within the military district.⁸⁵

Reiterating its previous decisions, a majority of the Supreme Court of Appeals of West Virginia said the governor “has the power to declare that a state of war exists in any part of the state” and to “proclaim martial law for the government of such disturbed district, and to make use of the military forces to restore peace, law, and order; and his official acts in that respect are not reviewable by the courts.”⁸⁶ Thus, the court again found that the declaration of war constituted the necessity, justifying martial law and the specific actions thereunder that would otherwise be wholly unconstitutional were legalized.⁸⁷ And in this instance, the governor’s determination that suppression of the newspaper issue was necessary proved sufficient justification for the act.⁸⁸

81. 81 S.E. 533, 533 (W. Va. 1914).

82. *Id.* at 533–36.

83. *Id.* at 534.

84. *See id.* at 533, 536.

85. *Id.* at 535.

86. *Id.* (citing *State ex rel. Mays v. Brown*, 77 S.E. 243 (W. Va. 1912)).

87. *See id.*

88. *Id.* at 536 (“The necessity for [the governor’s] act makes it both lawful and “due process” within the meaning of the Constitution of the United States.”). Though reiterating the governor’s decision was conclusive and unreviewable, the court did articulate a new requirement of reasonableness from his standpoint. *Compare id.* (“The necessity for the act is its justification, and the Governor had the discretion to determine whether the necessity therefor existed, and, having had cause to believe that the necessity did exist, the courts have

The court relied on the fact that “[a] person outside of the military cordon might be able to do more mischief than one within”⁸⁹ Therefore, the court held that the newspaper plant’s location outside the martial zone did not limit the governor’s power “to stop the issue of the paper which he had good reason to believe was antagonizing him and encouraging further disorder.”⁹⁰ The court was satisfied that because the newspaper had “severely criticized” the governor’s proposed strike settlement, the governor “had reason to believe that the newspaper was lending aid and encouragement to the rioters.”⁹¹ This outcome meant the governor had the power to arrest anyone lending aid and prevent the circulation of newspapers in the martial zone “designed to prolong the disturbance and prevent the restoration of law and order.”⁹²

In a somewhat surprising coda to the West Virginia Coal Wars martial law saga, in 1921, the Supreme Court of Appeals of West Virginia again decided a case regarding the justification for martial law. This time, in *Ex parte Lavinder*, the court found martial law was *not* justified solely by the governor’s declaration of a state of war.⁹³ In this case, a third West Virginia governor had declared martial law due to labor unrest, this time in Mingo County, West Virginia.⁹⁴ A.D. Lavinder carried a pistol in Mingo County, and though he was licensed to do so in West Virginia generally, this violated one of the martial law regulations applicable only to Mingo County.⁹⁵ Lavinder was arrested and detained by civil authorities upon the order of a military officer.⁹⁶

Despite the majority opinion being authored by the same West Virginia Supreme Court of Appeals judge who had held in *Mays* and *Jones* that the governor’s mere declaration of a state of war was conclusive regarding the

no power to review his discretion and pronounce his warrant or command unlawful, as being in excess of his constitutional power”), *with id.* (“Of course, the governor must act in good faith . . . and when his act is justifiable, as in the present case, only on the ground of public necessity, he must have reasonable ground to believe that the necessity therefor exists.”). The court further articulated that reasonableness must be determined from the governor’s perspective. *See id.*

89. *Id.*

90. *Id.*

91. *Id.* at 538.

92. *Id.*

93. 108 S.E. 428, 429 (W. Va. 1921).

94. *Id.*

95. *Id.*

96. *Id.*

justification for martial law, this time the court held that only “actual warfare” could justify martial law.⁹⁷ Unlike in its prior decisions, where the court’s analysis rested almost entirely on the governor’s proclamation of an existence of a state of war, in *Lavinder*, the court, referencing the United States’ recent experience in World War I, explicitly stated that martial law within a territory of a country “is not a necessary incident or consequence of the existing state of war.”⁹⁸ Further, the court declared, “It is perfectly manifest that the proclamation of war did not, ipso facto, nor ex proprio vigore, inaugurate martial law in Mingo county.”⁹⁹

In determining that “actual war” did not exist sufficient to justify martial law in this case, the court noted several facts that may be instructive for future cases. The court observed, *inter alia*, that though the governor had a potential military force in the state, it was “unenrolled, uncalled, and unorganized” and could not have been deemed “an actual military force[.]” and that Mingo County was not occupied by any state military forces.¹⁰⁰ Rather, the court found, “The enterprise was an attempt to put into effect and enforce military or martial law by merely civil agencies.”¹⁰¹ The court further explained:

[M]artial law is an incident of military operations within the area of actual, not merely theoretical, warfare. Being only an incident of actual warfare, such warfare is essential to its existence; and, being also a mere incident of actual military occupation of territory, an army in the field is equally essential and indispensable.¹⁰²

The court held the governor’s authority to impose martial law “in time of war” meant actual war, not theoretical or technical war, which requires “actual military or naval operations.”¹⁰³ The court explained that the requirement of “actual war” would serve as a sufficient test by which the governor could determine the propriety of martial law, what it described as “a drastic and oppressive system.”¹⁰⁴

97. *Id.* at 431.

98. *Id.* at 429.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 431.

104. *Id.* at 430.

The striking turnaround of the Supreme Court of Appeals of West Virginia on the sufficiency of a declaration of war notwithstanding,¹⁰⁵ the West Virginia Coal Wars saga demonstrates the importance of a clear understanding regarding what constitutes “necessity” sufficient to justify martial law. In *Lavinder*, the court ultimately arrived at what might be considered the modern “majority view,” especially in light of *Milligan*, that necessity for martial law is a *factual* necessity.¹⁰⁶ That is, the merely *legal* existence of a state of war is insufficient justification. Rather, martial law must be necessitated by actual war,¹⁰⁷ which at minimum requires some actual military operations. This view squares more clearly with what the United States Supreme Court had decided in *Ex parte Milligan*, to which we now turn.

2. Not *Necessity*

Perhaps unsurprisingly, there are no reported court opinions in the United States holding that actual war does *not* constitute necessity for the purpose of justifying martial law in the theater of war. However, courts have on multiple occasions strictly applied the requirement that the specific locality where the acts pursuant to martial law are occurring must be in a state of war at the time of those acts for “war” to justify martial law.¹⁰⁸

The seminal case of this type was *Ex parte Milligan*, in which the United States Supreme Court held that the acts of martial law to which Milligan

105. It is not the purpose of this Article to explain or ridicule the seemingly inconsistent opinions on this subject. The explicit language of its analysis in *Mays* and *Jones* seems hard to square with the language and facts of *Milligan*. *Jones* might be viewed as a step between *Mays* and *Lavinder*, in that the court at least noted some of the facts that suggested actual war existed, even as it decried the necessity of such analysis. The court’s perhaps unwise founding of its opinions in *Mays* and *Jones* on only the legal pronouncement of war aside, the factual situations certainly were different in the earlier cases, where actual troops were at least deployed to the district declared to be under martial law.

106. *See id.* at 429.

107. This conclusion is consistent with the assertion of dissenting Judge Robinson in *Mays*, who had argued that declarations of war were insufficient, but rather “[t]he physical status must make it.” *State ex rel. Mays v. Brown*, 77 S.E. 243, 254 (W. Va. 1912) (Robinson, J., dissenting).

108. Though only Supreme Court cases are provided as exemplars in this section, lower courts have echoed the Supreme Court cases discussed here. *See, e.g.*, *Wilson & Co. v. Freeman*, 179 F. Supp. 520, 525 (D. Minn. 1959) (“[W]here there is actual war *in a community* . . . the Governor is impliedly authorized to declare martial law.”) (emphasis added); *Mays*, 71 S.E. at 245 (“Martial law is operative only in such portions of the country as are actually in a state of war.”).

objected were not justified by necessity because they occurred outside a theater of war, where the courts were functioning.¹⁰⁹ Importantly, the military commission to which Milligan was unconstitutionally subjected occurred in Indiana during the Civil War.¹¹⁰ Thus, actual war—one that was devastating the entire nation—clearly existed. Nevertheless, the Supreme Court held that the facts, as they existed in Indiana, did not constitute war sufficient to justify the military commissions.¹¹¹ The Court held martial law was not justified, despite the fact that Indiana was part of a “military district” with a commander appointed over it, because “on [Indiana’s] soil there was not hostile foot.”¹¹² Addressing the argument that at some point Indiana had been invaded, the Court opined that because any such invasion had ended, “all pretext for martial law” had also ended.¹¹³ Thus, timing was established as a critical element of necessity. Famously, the Court asserted that “[m]artial 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.”¹¹⁴ The Court continued, “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.”¹¹⁵ The Court detailed the lack of necessity for a military tribunal, noting:

It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.¹¹⁶

The fact that the civilian justice system was functional meant a military commission was, quite literally, *unnecessary*.

109. See 71 U.S. (4 Wall.) 2, 121, 127 (1866).

110. *Id.*

111. See *id.* at 127.

112. *Id.* at 126.

113. *Id.* at 126–27.

114. *Id.* at 127 (second emphasis added).

115. *Id.*

116. *Id.*

In *Milligan*, the Court offered a broad description of when war might justify martial law:

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 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.¹¹⁷

However, the Court provided few additional factual details for determining whether war “really prevails.”¹¹⁸

In a case involving a state governor’s declaration of martial law in circumstances that did not constitute war, the Supreme Court reiterated that “[i]n the theater of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service.”¹¹⁹ But, the Court specified, “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.”¹²⁰

In *Duncan v. Kahanamoku*, the Supreme Court again evaluated the conditions in a locality alleged by the government to be in a theater of war and found the military’s justification for supplanting civilian courts with military tribunals wanting.¹²¹ On December 7, 1941, the day the Empire of Japan attacked the United States at Pearl Harbor, the governor of the Hawaii Territory suspended the writ of habeas corpus and placed the territory under martial law.¹²² The governor declared martial law pursuant to a provision in the Hawaiian Organic Act that authorized, but did not define, the term.¹²³ The governor’s proclamation also authorized and requested the Commanding General of the United States military in Hawaii, ““during . . . the emergency

117. *Id.*

118. *See id.*

119. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

120. *Id.*

121. 327 U.S. 304 (1946).

122. *Id.* at 307.

123. *Id.* at 307–08.

and until danger of invasion is removed, to exercise all the powers normally exercised' by the Governor and by 'the judicial officers and employees of the Territory.'"¹²⁴ According to the Court, "The military authorities took over the government of Hawaii" and, by promulgating orders, governed the "day-to-day activities of civilians who lived, worked, or were merely passing through there."¹²⁵ The Commanding General then established military tribunals to take the place of the civil courts.¹²⁶ As noted by the Court, "These were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders."¹²⁷ The military tribunals interpreted the orders promulgated by the military authorities and punished violators.¹²⁸

Duncan was a combination of cases appealing military tribunal convictions, including one of a stockbroker for embezzling stock from another civilian, and another (*Duncan*) for "engag[ing] in a brawl with two armed Marine sentries at the [naval] yard" at which he worked.¹²⁹ By the time of *Duncan*'s alleged offenses and trial, over two years had passed since the Pearl Harbor attack and "the military had eased somewhat the stringency of military rule."¹³⁰ In fact, the Court noted that during this time bars, schools, and movie theaters on the island had all reopened.¹³¹ Though initially the military "took over all government and superseded all civil laws and courts" with military tribunals, by the time of *Duncan*'s military tribunal, civilian courts had been authorized to resume exercising their normal functions and were once more summoning jurors and witnesses and holding criminal trials.¹³² An important exception to this—the exception under which *Duncan* was tried—was that "Criminal Prosecutions for violations of military orders" remained within the exclusive jurisdiction of military tribunals.¹³³

Though the Supreme Court's analysis explicitly focused on the meaning of "martial law" in the Hawaiian Organic Act passed by Congress, much of its discussion centered on the factual circumstances and non-existence of war

124. *Id.* at 308 (citation omitted).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 309.

129. *Id.* at 309–10.

130. *Id.* at 310.

131. *Id.*

132. *Id.* at 310–14.

133. *Id.* at 310.

at the time of Duncan's offenses and trial by military tribunal.¹³⁴ As it had in *Milligan*, the Court disregarded the fact that the locale had been under attack at some point during the war in question, and that when Duncan was tried, the United States was still years away from ending the war raging in the Pacific with Japan, and future attacks were expected.¹³⁵

In a concurrence critical of the military's and government's arguments in favor of military tribunals, Justice Murphy detailed that Duncan's tribunal occurred long after the military had permitted the reopening of the civilian courts in the months that followed the attack on Pearl Harbor.¹³⁶ In response to testimony by Admiral Chester Nimitz and General Richardson that Hawaii was in the "actual theatre of war from December 7, 1941 through the period in question," Justice Murphy accepted that the threat to Hawaii was real, and that the general declaration of martial law may have been justified.¹³⁷ He rejected, however, the idea that the military was free to close civil courts, "especially after the initial shock of the sudden Japanese attack had been dissipated."¹³⁸ In Justice Murphy's view, the fear of military assault was insufficient to sacrifice the right to trial by jury and other constitutional rights.¹³⁹ He believed that "[t]here must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension."¹⁴⁰ Paraphrasing the Court in *Milligan*, Justice Murphy asserted his test for the necessity of allowing martial law with military tribunals replacing civilian courts: "the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended."¹⁴¹

In the second concurrence in *Duncan*, Chief Justice Stone detailed facts that informed his conclusion that the challenged military tribunals under martial law were not a "necessity."¹⁴² Chief Justice Stone accepted that Japan's attack on Pearl Harbor was an invasion and he acknowledged there

134. *See id.* at 313.

135. In contrast to the majority, the dissent emphasized the imminent danger of future attack. *See id.* at 340 (Burton, J., dissenting) ("[T]his isolated outpost . . . faced . . . imminent danger of further invasions . . . Military attack by air, sea and land was to be expected.").

136. *Id.* at 328 (Murphy, J., concurring).

137. *Id.* at 329.

138. *Id.* at 330.

139. *See id.*

140. *Id.*

141. *Id.*; *see Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

142. *Duncan*, 327 U.S. at 335 (Stone, C.J., concurring).

was a danger of further invasion during the original tribunal.¹⁴³ Nevertheless, Chief Justice Stone asserted that the record demonstrated no factual conditions requiring military tribunals, noting that in addition to civil courts operating, “places of amusement” had been opened and the sale of liquor at bars had been re-authorized less than two months after the Pearl Harbor attack.¹⁴⁴ Chief Justice Stone believed these facts suggested that Hawaii was not sufficiently in the theater of war to justify the military tribunals’ necessity, despite the reality that another attack on Hawaii by Japan was possible.¹⁴⁵

Summarizing the jurisprudence of claimed justifications for martial law could be folly. Still, some ideas may be distilled from the cases in which courts have addressed war as a necessity for martial law. The majority view is that actual war can constitute a necessity sufficient to justify martial law. Much of the crux of this view is drawn from the traditional understanding of martial law as the interim law imposed on occupied territory on the battlefield.¹⁴⁶ An outlying practice, demonstrated in the early West Virginia Coal Wars cases, suggested that a state of war alone could constitute necessity, without assessment of the factual circumstances necessitating martial law.¹⁴⁷ But the majority view is clear: as in other areas, “actual war” must still in fact necessitate the actions taken under martial law. In assessing whether war has made martial law and the actions taken thereunder necessary, courts have considered spatial and temporal facts. The courts generally require that the conditions necessitating martial law are occurring in the same time and locale where the actions were taken under martial law.¹⁴⁸

143. *See id.* at 336.

144. *Id.*

145. *Id.* at 337.

146. *See, e.g.,* United States v. Diekelman, 92 U.S. 520, 522, 526–27 (1875) (justifying the use of martial law during the Union occupation of New Orleans in the Civil War).

147. *See Ex parte Jones*, 77 S.E. 1029, 1045 (W. Va. 1913) (“[T]he declaration of a state of insurgency or war by competent authority is conclusive upon the court.”); *Hatfield v. Graham*, 81 S.E. 533, 535 (W. Va. 1914) (“[The Governor] has the power to declare that a state of war exists in any part of the state, and to proclaim martial law . . . and his official acts in that respect are not reviewable by the courts.”) (citation omitted); *State ex rel. Mays v. Brown*, 77 S.E. 234, 246 (W. Va. 1913) (“[I]f the Governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt.”).

148. *See, e.g. Mays*, 77 S.E. at 246 (“An insurrection in a given portion of a state, or an invasion thereof by a foreign force, does not produce a state of war outside of the disturbed area.”); *Duncan*, 327 U.S. at 326 (Murphy, J., concurring) (“Only when a foreign invasion or

B. Threatened *Invasion*

Related to the idea that martial law may be necessary in a theater of war is the contention that a *threatened* invasion is sufficient to justify martial law.¹⁴⁹ This notion has some practical resonance, as it is not hard to imagine that a military commander preparing to defend against an imminent invasion might wish to impose martial law on a community to ensure behavior consistent with a successful defense against attack. This practical concept was the government's argument in *Duncan*.¹⁵⁰ However, courts that explicitly address arguments citing merely *threatened* invasions as justifications for martial law have uniformly held it insufficient.

As noted above, in *Milligan*, the Court asserted that martial law cannot arise from a threatened invasion.¹⁵¹ The Court provided little factual detail regarding the extent of the threat of invasion by the Confederate Army in Indiana, though it acknowledged an invasion of Indiana was possible and that there were several Union troops in Indiana.¹⁵² In discussing the latter point, the Court opened the door to the idea that a threatened invasion might justify martial law. The Court responded to the argument that the presence of significant Union troops in Indiana proved the seriousness of the threatened invasion. Rather than simply asserting the legal conclusion that threatened invasions do not justify martial law, the Court made the factual observation that “[i]f armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed.”¹⁵³ This observation suggests that if armies had been collected in Indiana to defend against an imminent invasion, the conclusion may have

civil war actually closes the courts . . . can martial law validly be invoked to suspend their functions. Even the suspension of power under those conditions is of a most temporary character.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126–27 (1866) (“On [Indiana’s] soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law.”); *Sterling v. Constantin*, 287 U.S. 378, 392 (1932) (“The evidence shows no insurrection nor riot; in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war.”).

149. See *Duncan*, 327 U.S. at 339–41 (Burton, J., dissenting).

150. See *id.* at 339–40 n.1 (Murphy, J., concurring).

151. *Milligan*, 71 U.S. at 127.

152. *Id.* at 140.

153. *Id.* at 126.

been different. However, the Court's conclusion was clear: threatened invasions do not justify martial law.¹⁵⁴

Likewise, in *Duncan*, the Court was unmoved by arguments that the surprise attack on Pearl Harbor demonstrated that the Hawaii Territory could be attacked at any time, and therefore martial law was not justified.¹⁵⁵ This is noteworthy because the same Court that determined threatened invasion justified curfews and exclusion of persons of Japanese ancestry who lived on the West Coast of the United States,¹⁵⁶ an area that had not been invaded or attacked, also held that threatened invasion did not justify martial law in the same place that *had been* attacked.¹⁵⁷ As Chief Justice Stone's concurrence in *Duncan* suggested, the Court's conclusion was based in part on the factual realities in Hawaii, including that the threat of invasion was not so great that places of amusement and bars could not be open, which meant the invasion was not as significant a threat as the government claimed.¹⁵⁸

While some may argue that threatened invasion might justify martial law in the modern era, where there are no "fronts" in war, and invasion can occur anywhere without warning, as of now, no United States court has held that a merely threatened invasion constitutes "necessity." And indeed, all reported opinions addressing the question have held the opposite: merely threatened invasions do not justify martial law.

C. *Insurrection, Riot, or Disorder*

Closely related to war as a justification for martial law is "insurrection, riot, or disorder." This close relationship is partly due to the potential factual similarities between the type and magnitude of violence involved in war and insurrection. The nebulous nature of the terms war, insurrection, riot, and disorder have allowed commanders in chief and courts to, intentionally or otherwise, blur distinctions between them.

Recall this Article examines justifications for *martial law* (as roughly defined above), not merely military aid to civil authorities. Under the Insurrection Act and equivalent state laws, commanders in chief are given authority to use the military to quell insurrections and other violent disorders

154. See *id.* at 127.

155. See 327 U.S. at 313. *Contra id.* at 338–39 (Burton, J., dissenting) (emphasizing surprise attack at Pearl Harbor as evidence of imminent danger).

156. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 103–04 (1943).

157. See *Duncan*, 327 U.S. at 336 (Stone, J., concurring).

158. *Id.*

in ways short of martial law.¹⁵⁹ Those authorities and circumstances that have triggered their use are not discussed here. Rather, the focus here is situations that, though perhaps factually similar, have resulted in the far greater assertion of authority: martial law.

The most frequent opinions citing insurrection, riot, or disorder in the context of the validity of martial law revolve around labor unrest and the resulting conflict. In *Commonwealth ex rel. Wadsworth v. Shortall*,¹⁶⁰ the Pennsylvania Supreme Court examined actions taken under martial law that were imposed due to a labor-related insurrection. The case's assessment of the facts underlying that declaration are instructive, as is its explication of the sometimes-unclear distinction between war and insurrection as it relates to justifications for martial law.

Unlike many reported opinions, the court in *Wadsworth* relays a fair number of facts that led to the declaration of martial law.¹⁶¹ In 1902, a miner strike affected much of the anthracite coal-producing region of central Pennsylvania.¹⁶² As mining companies accepted labor from non-union strikebreakers, the strikers engaged in increasing disorder and violence.¹⁶³ According to the court, alongside threats and intimidation of management personnel, strike-breaking workers, and their families, "rioting, bridge-burning, stoning and interference with railroad trains, destruction of property, and even killing of non-union workmen, became of frequent occurrence."¹⁶⁴ As the court noted, "the communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them."¹⁶⁵ In fact, on multiple occasions mobs overtook local law enforcement officers attempting to preserve peace.¹⁶⁶ Ultimately, at local law enforcement's request, the governor ordered out an entire division of the Pennsylvania National Guard, giving it authority to preserve public peace and ordered that no one may

159. See 10 U.S.C. §§ 251–255.

160. 55 A. 952 (Pa. 1903).

161. See *id.* at 953.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

interfere with military personnel.¹⁶⁷ The court interpreted the governor's order to impose "qualified martial law."¹⁶⁸

After the house of a strikebreaker had been dynamited by striking miners, a sentry was posted to guard the house, in which a woman and several children were still living.¹⁶⁹ One night as a stranger approached the house, Wadsworth, the posted sentry that night, ordered the person to halt.¹⁷⁰ When the person ignored Wadsworth's order, opened the house gate, and entered the yard, Wadsworth shot and killed him.¹⁷¹ A civil coroner's inquest found the shooting to be unjustifiable and Wadsworth was jailed.¹⁷²

In assessing the lawfulness of Wadsworth's detention, the court evaluated the justification for martial law.¹⁷³ The court recognized the challenge in differentiating between war and insurrection, noting:

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war.¹⁷⁴

Thus, according to the court, insurrection or disorder can render martial law necessary, when the effect of the insurrection or disorder is comparable to

167. *Id.*

168. *Id.* at 954. One might quibble with whether this situation meets the definition of martial law employed in this Article. The governor did not order the subversion of civil courts or abolition of other governmental functions. As the court noted, the declaration was "not for the ascertainment or vindication of private rights, or the other ordinary functions of government." *Id.* But the court accepted it was martial law within the field of preserving peace, with essentially unlimited power to preserve peace. *Id.* And the court further explained the extent of the military's authority in the case as "mean[ing] that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander." *Id.* at 955.

169. *Id.* at 953.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 954.

174. *Id.*

the effects of war.¹⁷⁵ Moreover, the court explained, the individual “troops in a riotous and insurrectionary district approximates that of troops in an enemy’s country.”¹⁷⁶ Thus, the specific actions undertaken by the military in the insurrection context are justified in proportion to the extent and violence of the insurrection.¹⁷⁷ The court’s examination of the necessity for Wadsworth’s actions relied on the danger at the time.¹⁷⁸ Given that the agent of violence (dynamite) was destructive and in “lawless” hands, the duty of precaution was correspondingly great.¹⁷⁹

Another example where the court determined that labor strife justified martial law occurred in *Powers Mercantile Co. v. Olson*.¹⁸⁰ Here, the federal district court assessed a governor’s imposition of martial law during a dispute primarily involving trucking and transport union.¹⁸¹ In attempting to resolve a labor dispute, the governor favored a particular proposal to end the labor disagreement. He imposed martial law in Minneapolis, under which the military was authorized to permit trucks to operate only if their companies had agreed to the labor dispute resolution proposal.¹⁸²

The court provided some evidence regarding the extent of the violence that justified martial law:

Special deputies were struck down, and beaten after they were unconscious, in the presence of uniformed policemen, who could not, on account of the mob, assist them or arrest the offenders. Truck traffic was at a standstill. Automobiles of persons who were engaged in procuring food for themselves and their families were in some instances stopped by strikers. These cars were searched and the food was taken. The protection of life and property was entirely inadequate. The situation clearly called for the intervention of the military forces of the state, at least to assist the civil authorities, and, in view of the affidavits of various military officers and others as to the conditions of mob violence, actual and threatened, that existed in Minneapolis in the months of May and July, 1934, we do not believe that on this record we would be

175. *Id.*

176. *Id.* at 956.

177. *Id.*

178. *Id.* at 957.

179. *Id.*

180. 7 F. Supp. 865 (D. Minn. 1934).

181. *Id.* at 866–67.

182. *See id.*

justified in invalidating the Governor's proclamation of martial rule.¹⁸³

Importantly, in ultimately declining to issue an injunction against the governor's declaration of martial law, the court acknowledged the possibility that martial rule might have been avoided:

[T]here is substantial foundation for plaintiffs' belief that the Governor is using his powers for the purpose of coercing them into an acceptance of the Haas-Dunnigan proposal, and there is nothing in the situation as it has been presented to us which indicates that a timely order directing the adjutant general to use the military forces of the state in assisting the civil authorities in Minneapolis to restore law and order in that community, and to see that all persons who were lawfully entitled to use the streets and highways of the city should be protected from mob violence and unlawful acts, would not have accomplished all or more than has been accomplished by martial rule.¹⁸⁴

This implicit acknowledgment that martial law may not have been "necessary" is an example of judicial deference to the chief executive's determination.¹⁸⁵ This approach may be surprising, coming the year after the Supreme Court had demonstrated in *Sterling v. Constantin* that absolute deference to governors' decisions to impose martial law was inappropriate.¹⁸⁶ Curiously, the district court in *Powers Mercantile* made no reference to *Sterling*.¹⁸⁷

As noted above, some courts have conflated "war" and "insurrection." A prime example of this line-blurring occurred in the West Virginia Coal Wars cases. In *State ex rel. Mays v. Brown*, the Supreme Court of Appeals of West

183. *Id.* at 868.

184. *Id.* at 868–69.

185. The court articulated a deferential standard, opining that [t]o justify a court in finding, where lawlessness and violence have made the presence of troops necessary, that the commander in chief of the troops is violating his oath and prostituting his office to a purpose which has no relation to the restoration of law and order, there must be clear and convincing proof.

Id. at 869.

186. *See infra* note 406–20 and accompanying text.

187. *See Sterling v. Constantin*, 287 U.S. 317 (1932).

Virginia elided the legal difference between war and insurrection, suggesting that insurrection produced a state of war sufficient to justify martial law.¹⁸⁸

In *Ex parte Jones*, the court found that the effect of martial law is to vest a military commander with authority for the preservation of order and security of life and property.¹⁸⁹ The only limit to this authority is “the necessities and exigency of the situation[,] [a]nd in this respect there is no difference between a public war and domestic insurrection.”¹⁹⁰ The court further claimed that “[a]s to what constitutes an insurrection or state of war or rebellion, the authorities are fairly clear.”¹⁹¹

The court asserted that the common law rule “is that when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.”¹⁹² The court noted, however, that “[w]ar is not necessarily a rising of the people in an armed effort to establish a rival government.”¹⁹³ As noted above, the court ultimately determined that justification for the state of war existed based on facts some might label an “insurrection”:

In the territory covered by the proclamation, armed forces have been contending with one another for nearly a year. Many persons have lost their lives and property has been destroyed, railroad trains have been interfered with, execution of the law by the civil officers has been resisted and prevented by force of arms, and much worse results have been threatened.¹⁹⁴

188. *See, e.g.*, 77 S.E. 243, 246 (W. Va. 1912) (“An insurrection in a given portion of a state . . . does not produce a state of war outside of the disturbed area.”); *id.* at 246 (“[Civil tribunals] are wholly inadequate to the exigencies of a state of war, incident to an invasion or insurrection.”); *id.* at 259 (noting that offenses committed in “areas of actual war” are not within the reach of civil courts “if they are committed in aid or furtherance of the invasion, insurrection, rebellion, or riot”); *id.* at 261 (“We hold the writs of the courts do not run in the war area, or district under martial law We hold the courts cannot arrest the arm of the executive engaged in the suppression of an *insurrection*.”) (emphasis added).

189. 77 S.E. 1029, 1034 (W. Va. 1913).

190. *Id.* at 1043 (citing *Commonwealth ex. rel. Wadsworth v. Shortall*, 55 A. 952 (Pa. 1903)).

191. *Id.*

192. *Id.*

193. *Id.* at 1044.

194. *Id.* at 1045.

In his dissent in *Jones*, Judge Robinson highlighted the difference between war and insurrection in justifying martial law. He argued:

The failure in the majority opinion to observe the sharp distinction between public war and civil disorder, between enmity against the State and individual enmity between citizens of the State, between rebels and mere violators of the law, between belligerent territory and territory retaining allegiance, accounts for the misapplication of decisions, legislative enactments, and quotations relied on therein. . . . They relate to public war and to public enemies. We are not dealing with public war or with public enemies. . . . That which may be allowable by the usages of nations in a public war can not be applied as against citizens of a State engaged in civil disorder. . . . Nor can the Governor by proclamation or otherwise make that public war which in fact is not such.¹⁹⁵

In applying his understanding of the critical difference between insurrection and war, Judge Robinson asserted that “[a] clash between mine owners and miners cannot be considered public war, and the participants dealt with as enemies of the State.”¹⁹⁶ Judge Robinson observed that neither side had assumed the status of a belligerency against the state, noting that neither side’s actions demonstrated that they had lost their allegiance to the state or made war against the State.¹⁹⁷ Quoting United States Supreme Court Chief Justice John Marshall, Robinson observed: “To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose.”¹⁹⁸

Judge Robinson’s dissent expresses the prevailing view on this point. Setting aside the debate regarding whether states can ever declare “war,”¹⁹⁹ insurrection may involve heavily armed groups. In general the uprising is against civil or political authority in a particular context and only arises to the status of “war” when the insurrectionist group attempts to establish a rival civil government and claims of sovereignty.²⁰⁰

195. *Id.* at 1051 (Robinson, J., dissenting).

196. *Id.* at 1050.

197. *Id.*

198. *Id.* at 1050–51 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 75 (1807)).

199. *See, e.g.*, *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883) (“[States] can neither make war nor peace without the consent of the national government.”); WIENER, *supra* note 8, at 30–31 (“War Against Whom? The State? A state cannot declare war.”).

200. *See, e.g.*, WIENER, *supra* note 8, at 29, 33–34.

There are multiple examples of courts evaluating circumstances of claimed “insurrection” or other riotous disorder and determining the circumstances did not constitute “necessity” sufficient to justify martial law or military actions thereunder. For example, the court in *Wilson & Co. v. Freeman*, articulated a standard to justify martial law that requires demonstration of the failure of civil authorities and the inability to use military forces to support civil authorities.²⁰¹

An earlier example, *Ex parte McDonald*,²⁰² will be discussed further below in the context of the ineffectiveness of courts as a justification for martial law, but the court also addressed insurrection as justification for martial law generally. In *McDonald*, the governor had declared martial law to address labor-related violence in Silver Bow County.²⁰³ “Industrial warfare” between striking miners and mine companies in Butte, Montana created conditions of lawlessness, which included the strikers dynamiting mines and equipment.²⁰⁴ The commanding officer of the Montana National Guard ordered all “saloons and places where intoxicating liquors are sold” be closed and the liquor stock of any person who violated the rule destroyed. The officer established that misdemeanors would be punished by a summary court. All violations of state and federal laws, other than misdemeanors, would be “referred to a proper military commission for trial.”²⁰⁵ The commanding officer prohibited publication of any newspaper or pamphlet “tending to influence the public mind against” the United States or the state of Montana, barred assembly in streets and highways or without his prior permission, and imposed a curfew.²⁰⁶ McDonald and others filed a petition for habeas corpus after being arrested and detained for trial by a military tribunal.²⁰⁷

The Montana Supreme Court recognized that martial law was most often justified by a state of “war.”²⁰⁸ Responding to the argument that the executive

201. See 179 F. Supp. 520, 526 (D. Minn. 1959).

202. 143 P. 947 (Mont. 1914).

203. *Id.* at 947–48.

204. See *id.* at 947; Henry Winthrop Ballantine, *Unconstitutional Claims of Military Authority*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 718, 721 (1915).

205. Ballantine, *supra* note 204, at 721.

206. *Id.* at 721–22. The commanding officer also declared, “It is hoped that martial law in Silver Bow county will be mild and gentle, but it will be quickly and vigorously exercised when occasion requires.” *Id.* at 722.

207. *McDonald*, 143 P. at 948.

208. See *id.* at 953.

can establish martial law in a time of war, and that an insurrection is war, the court accepted the governor's determination that an insurrection existed.²⁰⁹ The court acknowledged that “[w]hen in domestic territory the laws of the land have become suspended, not by executive proclamation, but by the existence of war, the Executive may supply the deficiency by such form of martial law as the situation requires, but *we deny that insurrection and war are convertible terms.*”²¹⁰ The court explained:

There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency, which to a mere insurrection are unknown. Doubtless an insurrection may become war, as was the case with the great rebellion, but it does not become so in the legal sense until the rebellious party assumes political form.²¹¹

The court characterized the powers of martial law during war as “inapplicable . . . to a formless insurrection.”²¹²

After describing the difference between war and insurrection, the Montana Supreme Court explained why insurrection in Montana justified “martial law” to the extent that the governor could authorize “the militia to suppress the insurrection and direct their movements without regard to the civil authorities.”²¹³ The militia could, in the performance of their work, take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law for delivery to the civil authorities.²¹⁴ The court rejected the idea that insurrection could serve as justification—instead of war—for military tribunals.²¹⁵ Thus, the insurrection could justify a type of qualified martial law, but not martial rule.

209. *Id.* at 949 (“[T]he recitals in the proclamation that a state of insurrection existed in the county of Silver Bow cannot be controverted.”).

210. *Id.* at 953 (emphasis added).

211. *Id.* at 953–54.

212. *Id.* at 954.

213. *Id.*

214. *Id.*

215. *Id.*; *cf.* *United States v. Fischer*, 280 F. 208, 211 (D. Neb. 1922) (“No doubt the commander may avail himself of the courts as a means of trial, but he may also institute tribunals during the emergency to deal with offenders in the district. . . . This is especially true

1. Failure of Civil Authorities as a Component of Insurrection

Some court opinions suggest that a factor in determining whether an insurrection or other riotous disorder constitutes necessity for martial law is an assessment of whether the violence is “beyond control of civil authorities.”²¹⁶ One such example occurred when the Idaho Supreme Court evaluated martial law in the context of an insurrection.²¹⁷ In 1899, after a particularly destructive and violent six years of mining labor-related violence in Shoshone County, Idaho, the governor declared the county was in a state of “insurrection and rebellion” and employed federal military troops in a “limited martial law” to help quell violence.²¹⁸ After he was arrested by military forces, William Boyle applied for a writ of habeas corpus.²¹⁹ In evaluating the legality of his detention, the court assessed the legality of the governor’s martial law declaration. The court did not conduct a fact inquiry, but rather relied on the facts as asserted by the Executive imposing martial law.²²⁰ Nevertheless, the court provided some factual basis for its conclusion that martial law was justified.

In characterizing the nature of the violence leading to the governor’s declaration of martial law in Shoshone County, the Idaho Supreme Court described “hundreds of men” arming themselves and destroying “vast properties,” and killing and injuring citizens.²²¹ In fact, even the detainee admitted that on one day alone, the parties implicated in the disturbance

of offenses against the military regulations, such as these petitioners committed, acts which are not offenses against the laws of the state.”).

216. *See, e.g., In re Boyle*, 57 P. 706, 706–07 (1899).

217. *Id.* at 706.

218. *Id.* at 707; *Martial Law in Idaho a Thing of the Past*, WRAY WEEKLY TIMES (Wray, Colo.) (Apr. 13, 1901), <https://www.coloradohistoricnewspapers.org/?a=d&d=WWT19010413-01.2.28&e=-----en-20--1--img-txIN%7ctxCO%7ctxTA-----0----->.

219. *Boyle*, 57 P. at 706.

220. *See id.* at 707 (“It would be an absurdity to say that the action of the executive . . . may be negated, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to be that palladium of the rights of the citizen so ably described by counsel. . . . On application for writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed.”).

221. *Id.* at 706. The court variously characterized the violence as “insurrection,” or “rebellion,” or “mob,” declining to determine the legality of the martial law decree on the basis of the status of the violence.

destroyed property worth a quarter million dollars (in 1899 dollars) and committed “several murders.”²²² The governor’s martial law decree relied on not only the years-long violence but also the inability of civil authorities to preserve order.²²³ The court explicitly suggested the peace officers were subservient to, or fearful of, the insurrectionists, such that men in Shoshone County were able to resist execution of process and enjoyed “immunity from arrest and punishment.”²²⁴ The Idaho Supreme Court even noted the potential for further corruption in that the county officials could be “in league with the insurrectionists.”²²⁵ Ultimately, the combination of the violence and inability or unwillingness of local officials to stop it meant the “execution of the laws” was rendered “practically impossible,” justifying martial law.²²⁶

In one of the most “modern” cases in which a court has issued a reported opinion regarding martial law, one court clarified that the incapacity of civil authorities to handle violence does not, by itself, constitute necessity.²²⁷ In *Wilson & Co. v. Freeman*, a three-judge federal district court assessed the governor’s declaration of martial law in the City of Albert Lea within Freeborn County, Minnesota in 1959.²²⁸ The court provided somewhat greater factual detail regarding the violence involved in the case than have many others.

Wilson & Co operated a meatpacking plant in Albert Lea, Minnesota employing roughly 1,300 employees and staff.²²⁹ The union representing the plant employees went on strike, picketing the plant.²³⁰ Wilson & Co. attempted to continue its operations, originally with supervisory and maintenance employees, and later by attempting to employ new workers.²³¹ Within two months of the beginning of the strike, the plant had hired sufficient new workers to run at half capacity.²³²

222. *Id.* at 706. The destroyed property included an expensive piece of mining equipment known as a concentrator. *Martial Law in Idaho a Thing of the Past*, *supra* note 218.

223. *Boyle*, 57 P. at 706.

224. *Id.* (“[T]he perpetrators of said outrages seeming to enjoy immunity from arrest and punishment through subserviency of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men . . .”).

225. *Id.* at 707.

226. *Id.*

227. *See* 179 F. Supp. 520, 526 (D. Minn. 1959).

228. *Id.* at 522–24.

229. *Id.* at 523.

230. *Id.*

231. *Id.*

232. *Id.*

Meanwhile, picketers engaged in acts of violence.²³³ An order issued by the District Court of Freeborn County enjoined the local union from interfering with free access to the plaintiff's plant and enjoined the strikers from acts or threats of violence.²³⁴ This order did not completely stop the actions of the picketers, and authorities cited violators of the court order for contempt.²³⁵ At one point, a large crowd—estimated to include over 1,000 persons—gathered around the plant to block the entrance and prevent the production employees from leaving.²³⁶ In the ensuing violence, the crowd threw rocks at production employees' cars and broke several windows.²³⁷ Police and union officials pleaded with the picketers to disperse and refrain from violence, but their pleas were unsuccessful.²³⁸ Alongside the mob violence, as an intimidation tactic, the strikers engaged in vandalism at the homes of some of the non-union production workers.²³⁹ During this violence, local law enforcement officials did not arrest any of the picketing mob.²⁴⁰

Ultimately, local law enforcement officials requested that the governor assume authority and temporarily close the Wilson & Co. plant in order to restore law and order within the city and county.²⁴¹ Soon after receiving the request, the governor drafted a proclamation explaining that a state of insurrection existed in Albert Lea and Freeborn County and martial law thus prevailed.²⁴² As the federal district court noted, the governor made this proclamation “without any attempt to call out the National Guard in aid of the civil authorities in maintaining peace and order in the suppression of mob violence.”²⁴³ Pursuant to the Governor's proclamation, the Major General of the Minnesota National Guard then suspended the operation of the plant and prevented all entry and exit to plant premises without military authorization.²⁴⁴ Also, the National Guard forbid the District Court of

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 524.

242. *Id.*

243. *Id.* at 526.

244. *Id.* at 524.

Freeborn County from issuing further orders in plaintiff's labor dispute with the striking workers.²⁴⁵

The district court noted that when the governor declared martial law, both Albert Lea and Freeborn County governments were functioning, local courts were open, and citizens enjoyed free movement without danger, outside of the small number of people who continued to try to work for the plaintiff.²⁴⁶ The court viewed the result of the martial law declaration and closure of the plant as succumbing to mob rule.²⁴⁷ The court then articulated a standard for justifying martial law that requires proof that nothing short of martial law would suffice:

[A] free people do not surrender to mob rule by the expediency of martial law until all means available to the City, County and State 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.²⁴⁸

Under the standard articulated in *Wilson & Co.*, necessity for martial law requires proof that any effort short of martial law would not work.²⁴⁹ In so doing, the court suggested a level of violence, and government failure, required for martial law to be "necessary" under the justification of insurrection, riot, or disorder.²⁵⁰ The court acknowledged that "obviously where 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."²⁵¹ The court noted, however, that "where any disturbance caused by a strike or otherwise presents a situation with which the local police or other local 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."²⁵² To the court, the fact that the governor had authority under Minnesota law to use the military in support of

245. *Id.* at 523.

246. *See id.* at 526.

247. *Id.*

248. *Id.*

249. *Id.*

250. *See id.* at 526–27.

251. *Id.* at 525.

252. *Id.*

civil authorities meant that he had a “sworn duty to enforce the laws with the use of such powers as the law affords.”²⁵³

Admitting that “[n]o one will disagree that a serious situation existed at or near plaintiff’s plant at Albert Lea when strikers and their sympathizers sought by mob violence to prevent some 500 persons from carrying on their lawful employment with plaintiff,”²⁵⁴ the court determined there was “an utter absence of any persuasive showing here that law enforcement could not be maintained . . . by the National Guard available to the Governor in aid of the local authorities.”²⁵⁵ The court noted that “[u]nder the factual presentation herein, it 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”²⁵⁶

The court explained the need for this burden by urging that the expediency of martial law is insufficient justification; when martial law, seeking to accomplish peace, “acced[es] to the demands of the mob,” it would encourage “mob rule and law violations in every labor dispute.”²⁵⁷ The court offered an example of how racial hatred against minority citizens moving into a community often “incites mob action.”²⁵⁸ In this example, if the violence could not be suppressed by local authorities, a governor could impose martial law and order innocent, though unwelcome, citizens to leave the community.²⁵⁹ As the court noted, “Lawlessness in this manner could be suppressed, but it would be obtained by compelling the victims of such lawlessness to surrender their constitutional rights so precious to all freedom-loving people.”²⁶⁰ The court’s conclusion that “[m]ilitary 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,” is an important recognition that if significant violence alone could be used to justify martial law, martial law would be tempting to impose, and violence would be tempting to kindle.²⁶¹

253. *Id.*

254. *Id.*

255. *Id.* at 527.

256. *Id.* at 528.

257. *Id.* at 527.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 526–27.

What the *Wilson & Co.* court did not say—but can be observed by modern discussion of martial law—is that the commander in chief may also be tempted to use violence as a pretext to declare martial law intended to accomplish something more sinister than mere suppression of violence. A legal standard requiring executives to support, but never replace, civil authorities with military forces could limit executives' attempts to declare martial law for nefarious, power-seeking purposes.

Indiana in 1935 provides a case study of a potential “breach of the peace” on the precipice, but not yet crossing into, actual violence.²⁶² In response to a general labor strike in Terre Haute in which 20,000 workers refused to go to work on July 22, 1935, the governor declared martial law in Vigo County, the location of Terre Haute.²⁶³ The general strike involved major industrial plants, public transportation, local miners, and unionized employees of restaurants, retail stores, gas stations, barbershops, ice, bread, milk deliveries, and other businesses.²⁶⁴ Bands of strikers patrolling the city visited local establishments that attempted to stay open and convinced many of them to close up.²⁶⁵ Miners from the local United Mine Workers unions participating in the general strike played an integral role in enforcing this shutdown.²⁶⁶ Several services were unaffected by the strike, including utility services (despite an attempt to sabotage a power line), hospitals, pharmacies, and the post office.²⁶⁷ On the first day of the strike, the Sheriff noted that the strikers were a “good-humored” mob and that he had the “situation perfectly in hand.”²⁶⁸ Later that day, however, the mayor requested military assistance from the governor, who promptly declared martial law.²⁶⁹ Importantly, there is little evidence of any violence outside of scattered fistfights prior to the governor's declaration.²⁷⁰

When a worker at the plant at the center of the labor controversy was arrested and imprisoned, he sought a writ of habeas corpus from the federal

262. See Gary L. Bailey, *The Terre Haute, Indiana, General Strike, 1935*, 80 IND. MAG. HIST. 193, 195 (1984).

263. *Id.* at 215–16.

264. *Id.* at 214.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 216.

269. *Id.*

270. See *id.* at 213–16.

district court.²⁷¹ Though the complainant asserted that there had been no “invasion of Vigo county, or any insurrection, rebellion, riot, or tumult therein,” the three-judge district court panel in *Cox v. McNutt* found otherwise.²⁷² The court noted the evidence was “undisputed that at the time of the issuance of the [martial law] proclamation by the Governor there were existing in Terre Haute riots and mobs, and that a state of insurrection did exist.”²⁷³ The court further observed that “civil authorities were unable to cope with the situation and asked the Governor to extend military aid.”²⁷⁴ Accordingly, the court upheld the governor’s martial law declaration as necessary to restore law and order.²⁷⁵

Considering the apparent lack of serious violence—the facts suggest only the foreshadowing of violence—preceding the martial law declaration, this case demonstrates how a large group of people defying corporate and civil authority can be viewed as an “insurrection.” In this case, the city was brought to a halt, and many essential services ceased, but no serious physical violence, property destruction, or attempted overthrow of civil government occurred. Nevertheless, the court considered the power of the general strikers and the effect of their actions to give rise to an insurrection.²⁷⁶ Moreover, despite the Supreme Court’s rebuke of the Texas governor just two years earlier, the federal district court returned to the traditionally deferential position regarding the executive’s unfettered discretion to determine the condition(s) precedent for martial law existed.²⁷⁷ In fact, the district court cited *Sterling v. Constantin* regarding executive discretion but omitted discussion of the Supreme Court’s finding that the Texas governor’s actions were wholly without justification because there was, at most, a threat of violence or breach of the peace.²⁷⁸

In light of the district court’s conclusion that a state of insurrection existed in this case, it is inappropriate to characterize the court’s opinion as finding

271. *Cox v. McNutt*, 12 F. Supp. 355, 360 (S.D. Ind. 1935).

272. *Id.* at 357, 360.

273. *Id.* at 360.

274. *Id.*

275. *Id.*

276. *See id.*

277. *See id.* at 358–59 (“If the Governor determines that an exigency requires the use of the military forces, then, in his discretion, he has authority to call out such forces, and the courts will not interfere therewith.”).

278. *See id.* at 359 (citing *Sterling v. Constantin*, 287 U.S. 378, 390 (1932)). For a full discussion of *Sterling*, see *infra* Section II.E.

that the mere “threat of violence” constitutes necessity. Rather, the state of insurrection, combined with the civil authorities’ inability to address the situation, constituted the necessity.

2. Threats of Violence or Breaches of Peace

Just as courts have not found threatened invasion to constitute necessity, the United States Supreme Court has indicated that mere *threats* of violence or breaches of the peace are insufficient to justify martial law.²⁷⁹ As will be demonstrated below, no insurrection or riot, or anything approaching such a state, existed when Texas Governor R.S. Sterling declared martial law in certain counties, even though he asserted the counties “were in a state of insurrection, tumult, riot, and breach of the peace.”²⁸⁰ In noting this factual discrepancy, the district court in *Sterling* opined:

Not only was there never any actual riot, tumult, or insurrection, which would create a state of war existing in the field, but that, if all of the conditions had come to pass, they would have resulted merely in breaches of the peace, to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling, a state of war.²⁸¹

The district court noted that the governor claimed the declaration of martial law had not been issued for the purpose of affecting prices, “nor even per se to limit production, but as acts of military necessity to suppress actual threatened war,” based on the belief that unless oil production was kept “down to within 400,000 barrels, a warlike riot or insurrection, in effect a state of war, would ensue.”²⁸² The Supreme Court adopted the conclusion of the district court, rejecting the Governor’s argument, noting:

We find no warrant in the evidence for such belief. Looking at it in the light most favorable to defendants’ contention, it presents nothing more than threats of violence or breaches of the peace. . . . The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war, and that, unless the Governor

279. See *Sterling*, 287 U.S. at 391–92.

280. *Id.* at 387.

281. *Constantin v. Smith*, 57 F.2d 227, 231 (E.D. Tex. 1932).

282. *Id.* at 231.

may by proclamation create an irrebuttable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity.²⁸³

The distinction between “mere” violence or breaches of the peace and the type of “riot, tumult, or insurrection” sufficient to justify martial law is important. The Supreme Court did not explore this distinction here because not even ordinary breaches of the peace occurred before Governor Sterling imposed martial law.²⁸⁴ As the Supreme Court intimated, ordinary violence and breaches of the peace can be addressed by ordinary civil law enforcement or even civil law enforcement coordinating with military assistance, but not martial law.²⁸⁵

In the United States, and many state, Constitutions, “insurrection” justifies using military forces to quell the uprising.²⁸⁶ However, such use of military force is typically in the capacity of assisting the civil government. When martial law (as the term is used in this Article, see Section I.A. above) is declared on the basis of the insurrection, courts have somewhat inconsistently examined whether martial law is necessary. This inconsistency comes in part from some courts conflating “war” and “insurrection,” but also because the circumstances of cases differ. In attempting to distill some principles regarding courts’ examination of insurrection, riot, or disorder as necessitating martial law, it seems the insurrection or breach of the peace must approach the magnitude of war, at least to the extent it *requires a* military response.²⁸⁷ That is, the actual violence or breach of the peace overwhelms civil government. Though courts have not consistently held that the failure of civil authorities is a required condition for insurrection or breaches of the peace to necessitate martial law, it is an indicator of magnitude that may support such a finding.

D. Courts Closed or “Ineffective” (Non-functioning)

In contrast to the binary approach that courts have taken to actual war and threatened invasion (no court has ever found that an actual war did not

283. *Sterling*, 287 U.S. at 391–92 (quoting *Constantin*, 57 F.2d at 231–32).

284. *See id.* at 391.

285. *See id.* (“They would have resulted merely in breaches of the peace, to be suppressed by the militia as a civil force . . .”).

286. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 15; TEX. CONST. art. IV, § 7; OKLA. CONST. art. VI, § 6.

287. *See Sterling*, 287 U.S. at 401.

constitute necessity and no court has ever found that a merely threatened invasion did), courts' assessment of whether closure of civil courts constitutes necessity for martial law and the military tribunals operated thereunder, has varied considerably.

Beginning with *Milligan*, the United States Supreme Court has been especially wary of martial law impositions involving a substitution of military commissions or military tribunals for the civilian judicial process.²⁸⁸ Indeed, the status of courts as open or closed seems to be the most common litmus test and area of greatest concern for determining whether martial law and the military tribunals conducted thereunder are necessary.²⁸⁹ In *Milligan*, the Court queried:

Had this tribunal the *legal* power and authority to try and punish this man? *No graver question was ever considered by this court*, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with a crime, to be tried and punished according to law.²⁹⁰

Eighty years later in *Duncan v. Kahanamoku*, the Supreme Court again expressed its concern about military tribunals subverting civilian courts: "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued."²⁹¹

Judicial focus on the status of courts is perhaps unsurprising. Many cases that have given courts the occasion to opine on the necessity of martial law have been appeals from convictions by military tribunals, where the necessity of a military tribunal was the central question. Moreover, courts are not immune from institutional self-interest and self-importance.²⁹² In any event,

288. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122 (1866).

289. *See, e.g., The Brig Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 667–68 (1862) (suggesting that civil war exists when the civil courts cannot be kept open).

290. *Milligan*, 71 U.S. at 118–19 (second emphasis added).

291. 327 U.S. 303, 322 (1946) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).

292. The notion that if courts are open and functioning there is no need for martial law could certainly be viewed as reflecting a fair amount of judicial self-importance. This seems even more a concern in light of the fact that courts assessing necessity for martial law are seemingly less concerned with military usurpation of other functions of government. For example, courts have barely addressed what is a real and practical concern to the people who live under martial law – the military's power to legislate. For instance, in *Duncan*, the military took over the entire government of Hawaii for two years, prescribing what residents of Hawaii could and could not do, but the Supreme Court's focus was solely on whether the courts could

in multiple cases the United States Supreme Court and other courts have articulated a standard for evaluating the necessity of martial law that implicitly renders the status of courts as the touchstone for necessity determinations.

1. Courts Open, Therefore No Necessity

In *Milligan*, the majority was angered that Lambdin Milligan was tried by a military commission when civilian courts in the area were open and functioning.²⁹³ In concluding that trial by military commission violated his constitutional rights, the Supreme Court detailed the status of the courts in Indiana at the time of Milligan's arrest and subsequent conviction by the military tribunal:

Soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice.²⁹⁴

Dissenting Chief Justice Stone also acknowledged the courts had been open and functioning, observing that “[t]he holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted” and that a grand jury had met locally while Milligan was imprisoned and had not indicted him.²⁹⁵ Thus, both the majority and dissent suggested that the military chose to try Milligan by military commission even though the civilian courts were operating completely unhindered.

be functioning and whether military tribunals were thus necessary. 327 U.S. at 311–13. Of course, this focus is also a function of how the cases get to the court: they are appeals from military tribunal convictions. But even then, the courts focus less on whether the military regulation is justified by necessity and more on the way in which the regulation was enforced: military tribunal.

293. See *Milligan*, 71 U.S. at 121.

294. *Id.* at 122.

295. *Id.* at 134 (Stone, C.J., dissenting).

It was in this context that the Supreme Court announced a standard for necessity that has often been repeated since

there are occasions when martial rule can be properly applied. 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 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.*²⁹⁶

Whether or not intended, a technical reading of this articulation of the standard seems to require courts to be closed in order to justify martial rule *at all*, not only to justify military tribunals thereunder. In any event, courts have interpreted this standard to mean the closure of courts is one of several potential circumstances that might justify martial law, rather than the only measure.²⁹⁷

2. Courts Closed by the Military/Executive

Although the Court in *Milligan* found that the civilian courts were not closed, and thus military tribunals under martial law were not necessary, the ruling implied that the closure of civilian courts might serve as justification for martial law under the right facts.²⁹⁸ Perhaps unsurprisingly, several later attempts to justify martial law relied on the closure of civilian courts,

296. *Id.* at 124 (majority opinion) (third emphasis added).

297. *See, e.g., Ex parte Jones*, 77 S.E. 1029, 1044 (W. Va. 1913) (“That the condition of the courts is not the sole criterion seems to be very well settled, when the question is justification of a declaration of war.”); *United States v. Phillips*, 33 F. Supp. 261, 267 (N.D. Okla. 1940) (listing civil court closure as one of several potential bases for martial law that did not exist in the case), *vacated on other grounds*, 312 U.S. 246 (1941).

298. *See Milligan*, 71 U.S. at 54.

sometimes when the closure of the courts was directed by the executive or military entity imposing martial law.²⁹⁹

Though closure of courts has been a touchstone for determining the legitimacy of martial law, multiple courts have found that the closure of civil courts did *not* constitute necessity.³⁰⁰ Not coincidentally, these cases involved situations where the civil courts were closed by the very executive declaring martial law: and in one instance, the closure of the courts was the primary purpose of the martial law declaration.³⁰¹ Instances of courts evaluating martial law when the courts have been closed by actual violence, rather than upon direction of an executive, have been exceedingly rare. Except for the West Virginia Supreme Court of Appeals' approach to this question in the *Mays* and *Jones* cases discussed above, these opinions all suggest court closure by the executive cannot serve as its own justification.

The fascinating saga of a territorial governor's declaration of martial law in 1856 provides yet another judicial insight. The closure of courts by the executive, based on the apprehension that civil courts might be ineffective, does not constitute necessity.³⁰² During an ongoing conflict between settlers and native persons in Washington Territory, Territorial Governor Isaac Stevens became convinced a small group of settlers was aiding the Native Americans.³⁰³ Governor Stevens had the settlers arrested and confined.³⁰⁴ Apparently afraid civil courts might not convict the settlers he suspected, Governor Stevens declared martial law in two counties, suspended all activities of civil government (including operations of the civil courts), and ordered the settlers' trial by military commission.³⁰⁵ The subsequent conflict over the governor's authority to declare martial law led to the arrest and jailing of one judge who attempted to hold civil court to entertain habeas

299. *See, e.g.*, *United States ex rel. McMaster v. Wolters*, 268 F. 69, 71–72 (S.D. Tex. 1920); *Duncan v. Kahanamoku*, 327 U.S. 304, 328 (1946) (Murphy, J., concurring) (critiquing the government's argument on the closure of civilian courts and the duration of martial law).

300. *See, e.g.*, *Ex parte McDonald*, 143 P. 947, 954 (Mont. 1914) ("It was conceded at bar that some of the courts of Silver Bow [C]ounty are in operation, though it was insisted to be only such as are permitted by the military authorities; the others being closed by their order. No such closure can be recognized.").

301. *See infra* notes 302–14 and accompanying text.

302. Roy N. Lokken, *The Martial Law Controversy in Washington Territory, 1856*, 43 PAC. NW. Q. 91 (1952). Mr. Lokken's work is a fascinating tale of an incident of martial law that is less well known.

303. *See id.* at 93.

304. *Id.* at 93, 96.

305. *Id.* at 99, 108–09.

corpus challenges by the settlers in contravention of the martial law declaration.³⁰⁶ This in turn led to a contempt citation and failed arrest attempt of Governor Stevens by a United States Marshal, the issuance of a contempt of court citation against military officers by a second civil judge, and ultimately the reprimand of Governor Stevens by the United States Secretary of State William L. Marcy on behalf of President Franklin Pierce.³⁰⁷

When Governor Stevens issued the martial law proclamation, hostilities existed between the territorial government and some tribes, but there is no evidence those hostilities rose to the level of inhibiting civil government, including courts, from functioning.³⁰⁸ Indeed, a judge *did* open court to hear the habeas petitions of the settlers whom the governor had imprisoned.³⁰⁹ Only the volunteer military forces acting at the behest of the governor prevented the judge from trying the case.³¹⁰ Military forces arrested the judge, who later complained to the United States Secretary of State.³¹¹ Thus, the court was closed, but only because the governor feared it would reach a result that would impede successful prosecution of the conflict.³¹²

When a second judge ignored the governor's threat of arrest, he issued an opinion demonstrating the governor lacked legal authority to institute military commissions or suspend habeas corpus and opined on the lack of justification for martial law.³¹³ In describing the lack of necessity to try the settlers by military commission rather than utilize the existing civil courts, Justice F. A. Chenoweth said:

[The governor] does not even intimate that there was the slightest difficulty in prosecuting to final judgment and execution of these "evil disposed persons." He says "there was an overruling necessity," but shows none; indeed the description of the case shows there was none. Not an intimation that a single citizen of the county was the least inclined to obstruct legal process, or that any justice of the peace had refused a warrant, or sheriff had refused or shown the least reluctance to act faithfully and

306. *Id.* at 105.

307. *Id.* at 109, 113 & 117.

308. *See id.* at 92–93.

309. *Id.* at 105.

310. *Id.* at 105, 109.

311. *Id.* at 109, 116.

312. *See id.* at 106–07.

313. *Id.* at 113.

promptly in his service; nor does he intimate that the district court was or would be inclined to discharge them.³¹⁴

Thus, judicial assessment of whether closure of courts constitutes necessity may include consideration of whether any citizen or official has actually—or attempted to—obstruct justice.

Duncan v. Kahanamoku is the United States Supreme Court's most recent exposition on the effect of court closure on necessity.³¹⁵ As noted previously, in *Duncan*, the Governor of the Territory of Hawaii declared martial law following the Japanese attack on Pearl Harbor.³¹⁶ In his declaration, he authorized the Commanding General “‘during . . . the emergency and until danger of invasion is removed, to exercise all the powers normally exercised’ by the Governor and by ‘the judicial officers and employees of the Territory.’”³¹⁷ The Commanding General assumed the title of Military Governor and, among other things, promptly forbade civil and criminal courts from trying cases and established military tribunals to take the place of civil courts.³¹⁸ The military tribunals “were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders or policies of the Military Government.”³¹⁹

In a companion appeal to *Duncan*'s, eight months after the Pearl Harbor attack, the accused was charged with embezzling stock and brought before a military tribunal.³²⁰ By this time, civil courts had been given authority “as agents of the Military Governor[.]” to hear some non-jury civil cases, but were still prohibited from summoning jurors or exercising criminal

314. Opinion of Hon. F. A. Chenoweth (May 24, 1856), in S. EXEC. DOC. NO. 41, 34th Cong., at 9, 10 (1857), <https://perma.cc/6QGX-V8AE>. Secretary of State Marcy, writing at President Pierce's direction, echoed Justice Chenoweth's view. In reprimanding Governor Stevens, Marcy wrote:

[Martial law] can never be excusable where the object in resorting to martial law was to act against the existing Government of the country, or to supersede its functionaries in the discharge of their proper duties. The latter seems to have been the principal ground you had for proclaiming martial law. Your conduct in that respect does not, therefore, meet with the favorable regard of the President.

Lokken, *supra* note 302, at 117 (quoting Secretary of State William L. Marcy).

315. 327 U.S. 304 (1946).

316. *Id.* at 308–09.

317. *Id.* at 308.

318. *Id.* at 308–09.

319. *Id.* at 308.

320. *Id.* at 309.

jurisdiction.³²¹ Duncan was arrested for engaging in a brawl with two Marine sentries more than two years after the Pearl Harbor attack.³²² By this time, civil courts had been authorized by the Military Governor to “exercise their normal function,” though only military tribunals were permitted to try “criminal prosecutions for violations of military orders.”³²³ Though the general laws of Hawaii made assault a crime, Duncan was charged with violating a military order outlawing assaults against persons performing military defense functions and subjected to trial by military tribunal.³²⁴

Though the civil courts were, by order of the military, not permitted to try criminal cases, the Supreme Court treated the courts as though they were “open” to analyze the necessity of military tribunals.³²⁵ Of critical importance to the Court’s conclusion is the fact that the courts were closed *by the military*, rather than by externally created necessity.³²⁶ Ultimately, the majority determined that the Hawaii Organic Act had not authorized supplanting civilian courts under martial law.³²⁷ Two concurring justices focused more specifically on whether the status of the courts justified military tribunals.³²⁸

In the view of concurring Justice Murphy, “the territorial courts of Hawaii were perfectly capable of exercising their normal criminal jurisdiction had the military allowed them to do so.”³²⁹ Justice Murphy went so far as to say “it is undenied that the territorial courts of Hawaii were open and functioning” when the offenses and subsequent military trials occurred.³³⁰ He noted that both the Chief Justice of the Supreme Court of Hawaii and the

321. *Id.*

322. *Id.* at 310.

323. *Id.*

324. *Id.* at 310–11.

325. *See id.* at 309, 313 (“We note first that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts. In fact, the buildings had long been open and actually in use for certain kinds of trials.”). The district court also noted that the courts “had always been able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regular courts. *Id.* at 311–12.

326. *See id.* at 311–12.

327. *Id.* at 324.

328. *Id.* at 324–25 (Murphy, J., concurring); *id.* at 337 (Stone, C.J., concurring).

329. *Id.* at 327 (Murphy, J., concurring).

330. *Id.* at 326.

Governor of Hawaii testified that the trial of civilians before military courts for offenses against the laws of the territory was unnecessary when Duncan and White were tried.³³¹

As Justice Murphy described, “the Bill of Rights disappeared by military fiat rather than by military necessity.”³³² Citing *Milligan*, Justice Murphy asserted “the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.”³³³ He opined that the lesson of *Milligan* was that “[o]nly when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be invoked to suspend their functions.”³³⁴

Justice Murphy rejected the government’s several arguments that military trials were justified by necessity.³³⁵ This catalog of government arguments for the necessity of military tribunals under martial law is instructive.

First, the government argued that Hawaii was in the actual theater of war, despite Hawaii having not suffered an actual attack in years.³³⁶ Justice Murphy accepted this contention, and further accepted that the threat to Hawaii was real.³³⁷ Justice Murphy observed, however, that though the general declaration of martial law may have been justified due to the existence of war, it did not follow “that that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated.”³³⁸

Second, the government argued that civil courts could be too slow, though the government offered no proof that the Hawaiian courts specifically had been too slow.³³⁹ Justice Murphy accepted the possibility that the civil court process takes time but concluded the Court “would be false to our trust if we

331. *Id.* at 327–28.

332. *Id.* at 328.

333. *Id.* at 330 (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)) (“The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.”).

334. *Id.* at 326.

335. *See id.* at 328–32.

336. *Id.* at 329.

337. *Id.*

338. *Id.* at 330.

339. *Id.*

allowed the time it takes to give effect to constitutional rights to be used as the very reason for taking away those rights.”³⁴⁰

Third, the government argued that because there were military orders relating to civilians, the military needed some sort of tribunal to enforce those regulations.³⁴¹ Justice Murphy was particularly offended by this argument, opining this was “the ultimate and most vicious of the arguments used to justify military trials. It assumes without proof that civil courts are incompetent and are prone to free those who are plainly guilty.”³⁴² He further rejected the supposed expedience of military tribunals, opining that “the mere fact that it may be more expedient and convenient for the military to try violators of its own orders before its own tribunals does not and should not furnish a constitutional basis for the jurisdiction of such tribunals when civil courts are in fact functioning or are capable of functioning.”³⁴³

Fourth, the government argued that “the civil courts in Hawaii had no jurisdiction over violations of military orders by civilians.”³⁴⁴ Justice Murphy noted that Congress vested jurisdiction to enforce military orders in the federal courts, and further noted that the federal court in Hawaii was open at all relevant times and remained capable of exercising criminal jurisdiction.³⁴⁵

Fifth, the government argued that enforcement in civil courts of military orders “would subject the military to ‘all sorts of influences, political and otherwise, as happened in the cases on the east coast in both Philadelphia and Boston’ and that ‘it is inconceivable that the military commander should be subjected for the enforcement of his orders to the control of other agents.’”³⁴⁶ Justice Murphy observed that this argument was “merely a military criticism of the proposition that in this nation the military is subordinate to the civil authority. It does not qualify as a recognizable reason for closing the civil courts to criminal cases.”³⁴⁷

Justice Murphy quickly dispatched the government’s sixth argument: that holding civil trials could interrupt the work of war workers who were

340. *Id.* at 331.

341. *Id.*

342. *Id.*

343. *Id.* at 332.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

required to serve as jurors.³⁴⁸ Justice Murphy simply noted that war workers could have been excused from jury duty.³⁴⁹

The government's seventh and final argument was premised on the concern that the population of Hawaii was "heterogenous" with various "affinities and loyalties," including one-third of the civilian population being of Japanese descent.³⁵⁰ The government argued, and the Ninth Circuit agreed that

[t]o function in criminal matters the civilian courts must assemble juries; and citizens of Japanese extraction could not lawfully be excluded from jury panels on the score of race—even in cases of offenses involving the military security of the Territory. Indeed the mere assembling of juries and the carrying on of protracted criminal trials might well constitute an invitation to disorder as well as interference with the vital business of the moment.³⁵¹

Justice Murphy interpreted the argument to mean that persons of Japanese descent were unfit for jury duty and were of so doubtful loyal as a group as to justify denial of constitutional procedural rights to all accused persons in Hawaii.³⁵² Justice Murphy rejected this "[e]specially deplorable . . . use of the iniquitous doctrine of racism to justify the imposition of military trials."³⁵³

In a separate concurrence, Chief Justice Stone echoed Justice Murphy's sentiments, dispatching the argument that military tribunals were justified by necessity:

[The record in this case] demonstrates that from February, 1942 on, the civil courts were capable of functioning, and that trials of petitioners in the civil courts no more endangered the public safety than the gathering of the populace in saloons and places of amusement, which was authorized by military order. I find nothing in the entire record which would fairly suggest that the civil courts were unable to function with their usual efficiency at

348. *Id.* at 333.

349. *Id.*

350. *Id.*

351. *Id.* (quoting *Ex parte Duncan*, 146 F.2d 576, 580 (9th Cir. 1944), *rev'd sub nom. Duncan*, 327 U.S. 304).

352. *Id.* at 334.

353. *Id.*

the times these petitioners were tried, or that their trial by jury in a civil court would have endangered good order or the public safety. The Governor of Hawaii and the Chief Justice of the Hawaiian Supreme Court testified to the contrary. The military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts.³⁵⁴

In the Washington Territory case, Justice Chenoweth presaged the standard the United States Supreme Court would articulate in *Milligan* a decade later: “Indeed if the courts of law were fully open to [the territorial governor], and the people of the county did not hinder or obstruct the operation of law, it is difficult to conceive the necessity for so extraordinary a proceeding [military tribunal].”³⁵⁵ Ultimately, in *Duncan*, the Court foreclosed the argument that an executive’s closure of courts can serve as its own justification for martial law and military tribunals.³⁵⁶ Rather, the closure of courts must be due to the physical necessity—that is, the courts cannot function due to the war or insurrection occurring in the location of the courts—to constitute necessity sufficient to justify martial law.

3. Courts Open, but “Ineffective”

In *Duncan*, a common theme of the government’s several arguments in favor of military tribunals under martial law was the concern that the civil courts could be open, but somehow ineffective for the task at hand.³⁵⁷ This notion had been previously articulated by Chief Justice Chase in *Milligan*, when he noted that “courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.”³⁵⁸ Indeed, whether martial law and military tribunals are justified by civil courts that are open, but arguably ineffective, has been the source of significant disagreement among courts.³⁵⁹

354. *Id.* at 337 (Stone, C.J., dissenting).

355. Opinion of Hon. F. A. Chenoweth, *supra* note 314, at 10.

356. *See* 327 U.S. at 324.

357. *See id.* at 329–34 (Murphy, J., concurring).

358. 71 U.S. (4 Wall.) 2, 140–41 (1866) (Chase, C.J., concurring).

359. *Compare id. with Duncan*, 327 U.S. at 331 (Murphy, J., concurring) (addressing the argument that civilian courts may be less effective than military courts in certain circumstances).

The closure or effectiveness of courts was the focus of significant disagreement in the line of cases arising from West Virginia's "Coal Wars" discussed above in the context of war justifying martial law. In the first of those cases, *State ex rel. Mays v. Brown*, the *ineffectiveness* of courts within the martial zone was a strong theme of the court upholding martial law and military tribunals thereunder and key to justifying its holding was consistent with *Milligan*.³⁶⁰ The *Mays* court focused on *Milligan*'s holding that "martial rule can never exist where the courts are open *and in the proper and unobstructed exercise of their jurisdiction*," emphasizing that latter portion of the rule.³⁶¹ Of *Milligan*, the *Mays* court asked, "Having spoken of open or unobstructed courts having free course, as precluding martial law, and overthrown, obstructed or interrupted courts, as justifying it, shall we not take the opinion as having stated just what the [Supreme Court] meant?"³⁶²

Without providing much factual detail, the majority suggested that in the "martial zone" within Kanawha County, the ordinary justices (of the peace) were not operating or could not operate.³⁶³ However, the nature of that non-operation is unclear from the opinions. The majority implied that the affected courts were not "closed" per se, but rather operating ineffectively.³⁶⁴ For instance, describing the courts in the martial zone, the majority stated:

[T]he courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district, at the time of the military occupation and immediately before, was such as to preclude the free course *and effectiveness* of the civil law and the process of the court³⁶⁵

Likewise, later in its "Additional Opinion," the majority concluded by observing that "[a] sitting court whose process is obstructed by insurrectionary forces is, in a practical sense, no court, and might as well be 'closed' or 'overthrown.'"³⁶⁶ Of note, the dissent did not concede that execution of process by justices of the peace was impeded within the martial

360. See 77 S.E. 243, 263 (W. Va. 1912).

361. *Id.* (emphasis added) (quoting *Milligan*, 71 U.S. at 127).

362. *Id.*

363. *Id.* at 246.

364. See *id.*

365. *Id.* (emphasis added). Importantly, the court's factual observation is based on a *presumption* rather than actual findings of fact regarding the courts' operation.

366. *Id.* at 257, 264.

zone.³⁶⁷ Unfortunately for our present purposes, the majority and dissent failed to provide further detail regarding the impact of the military conflict on the justices within the martial zone. For the majority, it was apparently sufficient that the justices of the peace in the area had not executed processes in criminal cases to assume their ineffectiveness.³⁶⁸

A critical element of Judge Robinson's dissenting view, that martial law was not necessitated by interrupted or ineffective courts in the martial zone, was the fact that civil criminal courts were operating in parts of Kanawha County outside the martial zone.³⁶⁹ According to the dissent, Mays and other criminal defendants would have been tried at the criminal courts in the Kanawha County seat after the institution of the criminal process by the justices in the local district within the martial zone, even absent any martial rule.³⁷⁰ Those courts, within the same county where the defendants were arrested, were open and operating completely unobstructed.³⁷¹ As the dissent noted:

The criminal court that pertained to [the martial zone in the Cabin Creek area] and to the whole of the county was far from the seat of riot and wholly unaffected in its powers for regular and orderly presentment and trial. Even as to offenses cognizable only by justices [of the peace], there was power and opportunity to bring offenders from [the martial zone] to trial before justices in undisturbed districts of the county. But it does not even appear that the disturbances in the district rendered it impossible, by the aid of the militia there present, for the courts of justices of the peace there to mete out justice according to the civil law. The war must put the ordinary courts out of business, *out of reach*, before military courts can ever take their place. This of course may be different in foreign conquered territory where the courts of the conquered country are not in sympathy with the obligations of the conquering army to society. It can not be gainsaid that the ordinary courts for Cabin Creek District were at all times during

367. *See id.* at 254 (Robinson, J., dissenting) (“[I]t does not even appear that the disturbances in the district rendered it impossible, by the aid of the militia there present, for the courts of justices of the peace there to mete out justice according to the civil law.”).

368. *See id.* at 246 (majority opinion).

369. *Id.* at 253 (Robinson, J., dissenting).

370. *Id.* at 254.

371. *Id.*

the disturbances within reach and in operation. The militia could reach them with prisoners for trial much more easily than it could reach the Penitentiary with prisoners for imprisonment. The State courts were more accessible than the State prison.³⁷²

In response to the dissent's objection, the majority focused on the location and nature of the offenses. Suggesting that the declaration of martial law deprived the courts within the martial zone of jurisdiction, the majority said of courts:

In the areas of actual war, however occasioned, [the courts] do not have free course. Offenses committed there are not cognizable by the civil courts, because not within their reach; and, if they are committed in aid or furtherance of the invasion, insurrection, rebellion or riot, they are punishable by a military commission appointed for the trial thereof.³⁷³

Under the majority's seemingly circular analysis, military tribunals under martial law are necessary when martial law removes offenses related to the furtherance of war or insurrection from the civil courts' reach. Or, as the dissent noted in response to this argument, "The offenses charged against [the defendants] were plainly cognizable by a civil court—*capable of being presented and tried there*. The only excuse for their not being tried there is that the Governor ordered otherwise. Thus, the Governor alone made the necessity."³⁷⁴

Responding to the suggestion that the courts were closed by operation of martial law itself, the dissent reiterated its contention that *physical necessity* must justify military commissions under martial law.³⁷⁵ The dissent argued that precedent and scholars were clear that only "the annihilation and inoperation of courts, could, if martial law was at all allowable, justify [the defendants'] military trial and sentence."³⁷⁶ In attempting to support its argument, the dissent continued:

No physical status existed, like the destruction of the ordinary courts, to make it necessary to try [the defendants] other than they would have been tried if no disturbances had existed in Cabin

372. *Id.* at 254–55.

373. *Id.* at 259 (majority opinion).

374. *Id.* at 254 (Robinson, J., dissenting).

375. *Id.* at 253.

376. *Id.* at 254.

Creek District. Those disturbances had not interrupted the very court that would have tried them if there had been no such disturbances. Those disturbances did not physically prevent the transportation of [the defendants] out of the riotous district to the county seat for trial. If they could be transported out of that district to [the state penitentiary] for imprisonment, as they were, they could readily have been transported to Charleston [the county seat] for trial. It is said that the process of the court was prevented from execution in that district by the disturbances. That made no necessity for trial there. Surely the militia which was in possession of the district could execute all process of the court, or cause the sheriff so to do. That was a very proper sphere of the militia in a riotous district. It can legally assist in the execution of the process of the civil courts. Thus, it may assist in the execution of the laws. But plainly it can not supplant operative civil courts. The militia must aid the courts, not supplant them.³⁷⁷

The debate among the majority and dissent of the West Virginia Supreme Court of Appeals regarding whether military commissions were necessitated by “ineffective courts” continued the following year in opinions issued in *Ex parte Jones*.³⁷⁸ As noted above, in *Jones*, several defendants were arrested in Charleston, West Virginia, far outside the area of declared war and martial law, for crimes allegedly committed in the military district that had been declared by the governor.³⁷⁹ A justice of the peace in Charleston ordered the defendants delivered to military authorities, and the defendants were taken into the military district and tried and convicted by military commission.³⁸⁰

In *Jones*, the majority provided a bit more factual detail regarding the status of the courts than the court had provided in *Mays*. The *Jones* majority acknowledged that the courts of Kanawha County had been sitting (open and operating) outside of the military district.³⁸¹ But the majority again concluded the courts were ineffective because no one had been arrested, indicted, or brought to trial for any of the offenses committed in the violent conflict.³⁸² As the court noted, “If the courts could have acted, they have not done so.

377. *Id.* (citation omitted).

378. 77 S.E. 1029 (W. Va. 1913).

379. *See id.* at 1030–32.

380. *Id.*

381. *Id.* at 1031–32.

382. *Id.* at 1045.

What efforts have been made to enforce the law and punish offenders are not fully disclosed, but the fact is nothing has been done.”³⁸³ Thus, to the extent the ineffectiveness of courts necessitated martial law, the majority was content to conclude the courts in the county were ineffective based only on the “negative proof” that no convictions had occurred.

In addressing the significance of ineffective courts in *Jones*, the majority first articulated the notion that when there is a declaration of war, “the condition of the courts is not the sole criterion” for judging the necessity of martial law.³⁸⁴ The majority accepted the general rule that martial law could be justified by closed courts, as well as the inverse rule that martial law is ordinarily not justified when courts are open. However, the majority reiterated its view that “though the courts be open, if they are so obstructed and overawed that the laws cannot be peaceably enforced, there might, perhaps, be cases in which this converse application of the rule would not be admitted.”³⁸⁵

In a reprise of his dissent in *Mays*, Judge Robinson again argued that the defendants could readily have been tried by civil courts.³⁸⁶ He wrote the suggestion that civil courts are “inefficient . . . is the same excuse invariably given for suspending the Constitution and laws when a lynching takes place.”³⁸⁷ The dissent noted the defendants were arrested in the city of Charleston, not in the military zone, and were taken to a justice of the peace “within sight of the courthouse, where the civil courts of the county were open and in the exercise of their powers,” before the justice of the peace had the defendants sent into the military zone for trial by military commission.³⁸⁸ In refuting arguments of practical difficulties, the dissent noted that “[t]he way to the courthouse was unobstructed. If the militia could arrest offenders and secure witnesses for its own assumed court, it could do so as readily for the legally organized courts.”³⁸⁹ Without providing facts, the majority countered that “[i]f insurgents or rebels must be turned over to the civil authorities as fast as seized, when the courts cannot or will not try them, though sitting and performing other functions, the courts become, by reason

383. *Id.*

384. *Id.* at 1044.

385. *Id.* at 1043 (quoting *The Parkhill*, 18 Fed Cas. No. 10,755a, at 1191 (E.D. Pa. 1861)).

386. *Id.* at 1051 (Robinson, J., dissenting).

387. *Id.* at 1049.

388. *Id.* at 1050.

389. *Id.* at 1051.

of their existence, agencies or instrumentalities of resistance of the exercise of necessary executive power.”³⁹⁰

Few courts have weighed in on open but “ineffective” courts and their measure on necessity, so it is difficult to say if the approaches of *Mays* and *Jones* are mainstream or outliers. Courts have articulated the opposite view. For instance, in *Ex parte McDonald*, decided the same year as *Jones*, the Montana Supreme Court opined that courts partially closed or ineffective due to an insurrection did not justify trials by military tribunal.³⁹¹ In *McDonald*, the governor had declared martial law to address labor-related violence in Silver Bow County.³⁹² *McDonald* and others filed a petition for habeas corpus after being detained for trial by military tribunal.³⁹³

In declaring military commissions void, the Montana Supreme Court took a starkly different approach than had the West Virginia Supreme Court of Appeals in contemporaneous decisions. The Montana Supreme Court accepted that courts, “prevented by insurrection from executing their process are not open in contemplation of the law.”³⁹⁴ Still, it held that this status did not justify military tribunals.³⁹⁵ Rather, this situation imposed upon the military a duty to open the civil courts.³⁹⁶ The court explicitly rejected the idea that military tribunals could be necessitated by civil courts closed by the military.³⁹⁷ Finally, the court rejected the argument that military tribunals could be necessary because the public sentiment in the affected county would render trial by jury in civil courts “ineffective.”³⁹⁸

The Montana Supreme Court’s rejection of ineffectiveness solely because the wrong result might be reached in jury trials echoes the similar sentiment expressed by Judge Chenoweth in the Washington Territory case discussed above.

Closure of the courts is an important measure for determining necessity for martial law generally, and for acts taken thereunder, especially military

390. *Id.* at 1045 (majority opinion).

391. *See* 143 P. 947, 954 (Mont. 1914).

392. *Id.* at 948; Ballantine, *supra* note 204, at 719–20.

393. *McDonald*, 143 P. at 948.

394. *Id.* at 954.

395. *Id.*

396. *Id.*

397. *Id.* (“No such cloture can be recognized.”).

398. *Id.* (“We are loath to believe that the courts and citizenship of that county are so weak as this; but if they are, ample relief is afforded the state by the statutory provisions for change of venue.”). The court also rejected the argument that military trial was preferable to indefinite detention during insurrection while awaiting civil courts’ availability. *Id.*

tribunals. The predominant view is that courts must be closed or ineffective due to the actual violence occurring in the locality of the courts at the time of the arrests and tribunals. Courts will not be considered “closed” for the purpose of constituting necessity when that closure is a result of the actions of the executive imposing martial law. Following the Supreme Court’s example in *Milligan*, most courts assessing necessity have found that courts were not “closed” under circumstances that justified martial law. And most, though not all, courts have been wary of claims of “ineffective” courts when such ineffectiveness may be characterized as a concern that the courts will not reach the “right result” rather than when the courts are simply incapable of functioning due to the violence.

E. Executive’s Dissatisfaction with Another Government Entity’s Actions

While conceptually startling, more than one executive has attempted to implement martial law due to his dissatisfaction with the actions of another government official or agency.³⁹⁹ Indeed, this might have occurred following the 2020 election had President Donald Trump followed the recommendation of sitting members of Congress and his advisors to declare martial law and seize voting machines to implement recounts or revotes in states that had voted for Trump’s opponent.⁴⁰⁰

No court has explicitly found that an executive’s dissatisfaction with the actions or inaction of another government entity constitutes necessity or has permitted martial law when such dissatisfaction is the only justification.

399. See, e.g., *United States ex rel. McMaster v. Wolters*, 268 F. 69, 70 (S.D. Tex. 1920) (discussing jurisdiction of provost court installed by the Texas Governor after declaring martial law).

400. See, e.g., Jacqueline Alemany & Felicia Sonmez, *GOP Texts Cast Renewed Spotlight on Post-2020 Election Efforts*, WASH. POST (Apr. 25, 2022, 10:07 PM EDT), <https://www.washingtonpost.com/politics/2022/04/25/greene-text-meadows-raised-topic-martial-law-keep-trump-power/> (reporting that Congresswoman Marjorie Taylor Greene communicated with White House Chief of Staff Mark Meadows over text and advocated for President Trump to declare martial law, claiming multiple members of Congress also agreed); Charlotte Klein, *Martial Law? Seizing Voting Machines? Trump’s Election Denial Is Only Getting More Deranged*, VANITY FAIR (Dec. 20, 2020), <https://www.vanityfair.com/news/2020/12/martial-law-seizing-voting-machines-trumps-election-denial-is-only-getting-more-deranged> (reporting that an idea was suggested for “an executive order to seize voting machines to examine them for alleged fraud”); Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html> (reporting that retired Lieutenant General Michael Flynn urged President Trump to declare martial law).

However, at least one court has permitted martial law when the facts imply that the governor's underlying motivation for implementing martial law was dissatisfaction with a local government's inaction.⁴⁰¹ Even in that case, other bases for claiming necessity existed.⁴⁰² In response to labor unrest in Galveston, Texas, in 1920, Governor Hobby declared martial law in the city and directed General Wolters of the Texas militia to assume command of the area.⁴⁰³ When Governor Hobby became dissatisfied with how local government officials were handling the labor unrest, he suspended the mayor, four city commissioners, the city attorney, the judge of the city court, chief of police, the chief of detectives, and all members of the police and detective departments, declaring they had "failed, refused, and neglected to maintain order and preserve the peace."⁴⁰⁴ Governor Hobby further directed General Wolters to enforce order and "cause the civil law to be faithfully executed."⁴⁰⁵ General Wolters then directed his provost marshal to "take charge of the police station, city hall, office of the city judge, and all records and ordered that all persons charged with violations of city ordinances be tried by the provost marshal."⁴⁰⁶

William McMaster, a civilian, was convicted of speeding by a military officer in the provost court and subsequently jailed.⁴⁰⁷ When McMaster challenged his conviction and detention, the federal district court upheld the conviction pursuant to martial law and denied his habeas petition.⁴⁰⁸ Relying on *Luther v. Borden*, the judge determined that he could not interfere with the governor's discretion and was required to "conclude that the Governor had complete authority to institute martial law in the city of Galveston."⁴⁰⁹ Recognizing that the governor had the authority to institute martial law, the judge further determined the governor "could do anything necessary to make his proclamation effective."⁴¹⁰ The judge opined, "If the civil officers of Galveston were not performing their duties, and not aiding in the

401. See *Wolters*, 268 F. 69 at 70–71.

402. *Id.* at 70.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 71.

408. *Id.*

409. *Id.* (citing 48 U.S. (7 How.) 1, 12 (1849)).

410. *Id.*

enforcement of the law, the Governor would be authorized to suspend them. He did that, and in my opinion the suspension was legal.”⁴¹¹

Though the suspension of local officials was not a necessary element of martial law, the judge’s broad language suggests that actions taken under martial law—including the elimination of courts and their replacement by military tribunals—can be necessary when the governor determines local officials are not doing their jobs.⁴¹² Note, however, that the initial declaration of martial law occurred amid labor-related civil unrest, a common theme for martial law declarations in the early twentieth century. Considering the cases that follow, *United States ex rel. McMaster v. Wolters* is an outlier and should provide no significant support for the argument that an executive can institute martial law simply because another government entity or official is not conforming to the executive’s wishes.

First among the cases that demonstrate the principle that dissatisfaction with another government entity’s actions does not constitute necessity sufficient to justify martial law is *Sterling v. Constantin*, another case arising from a Texas governor’s declaration of martial law.⁴¹³ In August 1931, Texas Governor Ross Sterling issued a proclamation for the “conservation of oil and gas” in East Texas that limited oil production in the area until the Texas Railroad Commission could have hearings and promulgate orders regarding acceptable oil production levels.⁴¹⁴ The governor declared martial law and called out the troops to shut down the oil wells.⁴¹⁵ He claimed an organized group of oil and gas producers were in a state of insurrection against the conservation laws, that the civil officers did not have a sufficient force to compel them to obey, and that it was necessary “that the reckless and illegal exploitation” of oil and gas be stopped until the resources might be properly conserved and developed under the protection of the civil authorities.⁴¹⁶

The governor called out the troops because he believed that if the plaintiffs’ oil wells were not shut off there would be “general trouble in the field,” including dynamiting of private property.⁴¹⁷ But as the district court

411. *Id.*

412. *See id.* at 70–71.

413. 287 U.S. 378 (1932).

414. *Id.* at 389.

415. *Id.* at 387, 390.

416. *Id.* at 389.

417. *Id.* at 391. The governor and General Wolters further claimed that the orders had not been issued for the purpose of affecting prices, nor even per se to limit production, but “as acts of military necessity to suppress actual threatened war” as they believed from reports

found, there was no evidence of any dynamite having been used or attempted, there was never any “actual riot, tumult, or insurrection which would create a state of war existing in the field,” and that, had dynamiting occurred, it would have “resulted merely in breaches of the peace, to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling, a state of war.”⁴¹⁸

The Texas Railroad Commission subsequently issued an order limiting oil production.⁴¹⁹ After the Commission issued the order, the wells were reopened and continued to produce daily. To aid the Commission, “General Wolters, with the assistance of the ‘Rangers,’ the civil officers of the community, and ‘the few military still remaining in the field,’ . . . patrolled the territory to see that the Commission’s orders were complied with.”⁴²⁰ The Railroad Commission continued to modify its orders further limiting production, and producers generally obeyed these orders.⁴²¹ However, a group of oil well owners sued to challenge the Railroad Commission’s orders, claiming they constituted a “taking” in violation of the Texas and United States Constitutions.⁴²²

The federal district court issued a temporary restraining order barring the Railroad Commission from limiting oil production below 5,000 barrels per well.⁴²³ The Railroad Commission accordingly ceased its attempt to enforce its limitation orders.⁴²⁴ The governor and General Wolters did not, and the military began setting production limits at their behest.⁴²⁵ When the district court made its temporary restraining order, Governor Sterling was “determined not to brook court interference with the program of restricted production which they determined to continue.”⁴²⁶ He then issued orders to General Wolters to limit oil production in the described military district to 165 barrels per well per day.⁴²⁷ Because the production limit was fixed by the

brought to them that “unless they kept the production of oil down to within 400,000 barrels, a warlike riot or insurrection, in effect a state of war, would ensue.” *Id.*

418. *Constantin v. Smith*, 57 F.2d 227, 231 (E.D. Tex. 1932), *appeal dismissed*, *Sterling*, 287 U.S. 378.

419. *Sterling*, 287 U.S. at 390.

420. *Id.*

421. *Id.*

422. *Smith*, 57 F.2d at 229–30.

423. *Id.* at 229.

424. *Id.* at 230.

425. *Id.* at 231.

426. *Id.*

427. *Id.* at 229.

commission's order of October 10, its enforcement was subject to the restraining order.⁴²⁸ On October 28, the Governor made the limit 150 barrels, and on November 6, 125 barrels.⁴²⁹ General Wolters enforced these orders and oversaw the resulting contempt proceedings.⁴³⁰

The district court determined that "martial law had not ousted the commission from making and enforcing rules regulating conservation, except alone as to production from the field."⁴³¹ In essence, martial law had been targeted squarely at setting oil production levels to prevent the Railroad Commission or the federal district court from affecting those levels. The United States Supreme Court ultimately found the governor's use of the military and executive order to be unjustified, holding:

[T]here was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful. Complainants had a constitutional right to resort to the federal court to have the validity of the commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the federal court in the exercise of its jurisdiction, and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared.⁴³²

The Supreme Court thus soundly rejected the notion that an executive could use martial law to elide actions of other government entities.

A few years after *Sterling* was decided, the Oklahoma Supreme Court followed the United States Supreme Court's lead and rejected a governor's declaration of martial law based on his disagreement with the actions—or

428. *Sterling v. Constantin*, 287 U.S. 378, 387–88 (1932).

429. *Id.* at 388.

430. *Id.*

431. *Smith*, 57 F.2d at 231–32.

432. *Sterling*, 287 U.S. at 403–04.

more accurately, the inaction—of a local government.⁴³³ In *Allen v. Oklahoma City*, the governor was frustrated that Oklahoma City had not passed a segregation ordinance requiring segregated housing.⁴³⁴ Governor William H. Murray “issued an executive military order declaring a state of martial law to exist in certain areas of . . . Oklahoma City, declaring a ‘segregation zone’ for white people and another for ‘black or colored people,’ and, between the two, a ‘nontrespass zone.’”⁴³⁵ The governor was alarmed “that a large number of Negroes were moving, or attempting to move into districts entirely used and occupied by white people,” and believed that this indicated imminent riot and bloodshed.⁴³⁶ He claimed he intended to preserve peace with the military order.⁴³⁷ Importantly, by its explicit terms, Governor Murray’s imposition of martial rule was effective only until Oklahoma City passed its own segregation ordinance.⁴³⁸ Thus, the governor attempted to use martial law to force a government entity to comply with his policy preferences.

Oklahoma City adopted a segregation ordinance satisfactory to the governor so that martial law would be lifted.⁴³⁹ A citizen sued, and the Oklahoma Supreme Court found that the governor lacked the authority in the first instance to impose martial law, citing *Milligan* for the proposition that no military order could possess “more efficacy than the Constitution of the United States and the laws adopted or expressly authorized by that instrument[.]”⁴⁴⁰

In what may have been the most brazen attempt by an executive to use martial law to accomplish political preferences, in 1939, Georgia Governor E.D. Rivers imposed martial law surrounding (only) the Highway

433. *Allen v. Oklahoma City*, 1935 OK 1143, 52 P.2d 1054.

434. *See id.* ¶ 34, 52 P.2d at 1058.

435. *Id.* Earlier, during the 1921 Tulsa Race Riot, the governor of Oklahoma also declared martial law and called out state military forces to quell opposition. Alfred R. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67, 102 (2001).

436. *Allen*, ¶ 34, 52 P.2d at 1058.

437. *Id.*

438. *Id.*

439. *See id.* ¶¶ 1–2, 34, 52 P.2d at 1054, 1058.

440. *Id.* While unrelated to the purpose of this Article, it is important to note that the Oklahoma Supreme Court also held that the city ordinance was directly contrary to the United States Supreme Court’s decision two decades earlier in *Buchanan v. Warley*, 245 U.S. 60 (1917). *Id.* ¶¶ 14–15, 52 P.2d at 1055.

Department Building of the State of Georgia.⁴⁴¹ Governor Rivers had attempted to replace the appointed chairman of the State Highway Board, W. L. Miller, even though Chairman Miller's appointed term had not expired.⁴⁴² When Chairman Miller refused to leave office, he was forcibly removed from his office at the Georgia Highway Board headquarters by people acting on behalf of the governor.⁴⁴³ When Chairman Miller then obtained an injunction from a state court preventing the governor and his agents from again removing Miller from office or interfering with his performance of duties, the governor declared martial law.⁴⁴⁴ The governor defined the scope as "in and around the Highway Department Building of the State of Georgia," and ordered "the National Guard to establish military control over all the property and premises of the State Highway Department of Georgia."⁴⁴⁵ The National Guard then prevented Chairman Miller from accessing the highway building where his office, books, and records were located.⁴⁴⁶

When a state court subsequently issued an injunction against the military commanders involved, the National Guard violated the injunction by continuing to prevent Chairman Miller from accessing the highway building and performing his duties.⁴⁴⁷ As a result of their defiance, the military commanders were held in contempt of court; the governor subsequently declared martial law over the military department of Georgia and pardoned the military officers for the offenses identified in the contempt proceedings.⁴⁴⁸ Thus, the governor used martial law to subvert Georgia law regarding appointments to the State Highway Board, to attempt to defeat Chairman Miller's decision not to leave his appointment, to "obstruct and prevent the execution of the judgments" of the state court, and to enact pardons.⁴⁴⁹

Chairman Miller filed suit in federal district court.⁴⁵⁰ As that court noted in rejecting Governor Rivers' efforts, "The courts were open and functioning

441. *Miller v. Rivers*, 31 F. Supp. 540, 542 (M.D. Ga. 1940), *rev'd*, 112 F.2d 439 (5th Cir. 1940).

442. *Id.* at 541-42.

443. *Id.* at 542.

444. *Id.*

445. *Id.* at 542-43.

446. *Id.* at 543.

447. *Id.* at 543-44.

448. *Id.* at 544.

449. *Id.* at 544-45.

450. *Id.* at 543.

and there was no break-down of the courts or the civil authorities, except as they were obstructed and interfered with by the said E. D. Rivers, Governor of Georgia, and those acting in conjunction with him and under orders from him.”⁴⁵¹ The court detailed how Georgia law did not permit the replacement of a Highway Board member under the circumstances, implicitly holding that an executive cannot use martial law to elude what the law requires.⁴⁵²

III. Conclusion

While this Article is largely descriptive and does not argue a central thesis, some important takeaways emerge from this study of courts’ treatment of necessity.

First and foremost, necessity remains the essential justification for martial law.⁴⁵³ Though significant time has elapsed since a court in the United States last assessed necessity, no replacement standard has emerged for justifying martial law. Future courts’ assessments of martial law can be expected to focus on necessity as well.

Second, courts are wary of martial law but frequently defer to executive decisions to declare martial law.⁴⁵⁴ This deference is especially true in the state context, where many state constitutions or statutes have explicitly granted the governor authority to invoke martial law. Despite this deference to executives, courts are generally non-deferential when assessing the necessity for specific actions taken under the banner of martial law that infringe upon individual rights and liberties.⁴⁵⁵ Stated differently, courts have been quite deferential when determining whether necessity has justified the *declaration* of martial law and far less deferential when determining whether necessity has justified specific military acts under martial law.

Third, while courts are generally receptive to the idea that war can necessitate martial law, they have generally imposed strict requirements in determining whether martial law is necessary, even when war exists, taking

451. *Id.* at 545.

452. *Id.* The court did not explicitly rest its opinion on the existence of necessity sufficient to justify martial law, but rather held that the governor’s actions violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and 8 U.S.C. § 43. *Id.* at 546.

453. *See supra* Section I.B.

454. *See supra* note 23 and accompanying text.

455. *See, e.g.,* *Duncan v. Kahanamoku*, 327 U.S. 303, 322 (1946) (“Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued.” (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942))).

their cue from the United States Supreme Court in *Milligan*.⁴⁵⁶ Recall that in *Milligan*, the nation was in the midst of the Civil War, and still, Milligan's military commission was not deemed "necessary."⁴⁵⁷

Fourth, insurrection, violence, or breaches of the peace that disrupt daily life or portend violence can justify martial law when the magnitude of the violence or shattered peace approaches that which might be expected in war. One measure of such violence has been the extent to which civil authorities have failed to control the violence or return the community to a state of peace.⁴⁵⁸ Courts have not consistently agreed on a standard for determining what an insurrection is or when an insurrection or similar breach of the peace constitutes necessity for the purposes of imposing martial law. This lack of certainty provides fertile ground for executives who may be tempted to manufacture or use violence or disorder as a pretext for imposing martial law.

Fifth, the closure or ineffectiveness of courts is essentially a required precondition for justifying civilian submission to military tribunals martial law. And such closures or ineffectiveness must be based on the *fact* that the courts are not—or cannot—operate under the circumstances, not based on an executive's decision to close the courts. That is, the closure must be caused by the war or disorder, not by a decision of government.

Finally, absent another justification, courts have uniformly opposed executive attempts to use martial law to accomplish what ordinary government and legal processes were not accomplishing.⁴⁵⁹ That said, the line of cases arising in the West Virginia Coal Wars should serve as a cautionary tale that state supreme courts may sanction executive assertions of martial law in circumstances where a meaningful assessment of necessity would likely conclude that martial law was not necessary under the circumstances.⁴⁶⁰ Courts remain the final bulwark against the unnecessary imposition of martial law, but only when they are willing to engage in meaningful analysis of necessity.

456. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121, 127 (1866).

457. See *id.* ("The evidence shows no insurrection nor riot; in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities.")

458. Compare *State ex rel. Mays v. Brown*, 77 S.E. 243, 246 (W. Va. 1912), with *Commonwealth ex rel. Wadsworth v. Shortall* 55 A. 952, 954 (Pa. 1903).

459. See, e.g., *Sterling v. Constantin*, 287 U.S. 317 (1932).

460. See, e.g., *Mays*, 77 S.E. 243; *Ex parte Jones*, 77 S.E. 1029 (W. Va. 1913); *Hatfield v. Graham*, 81 S.E. 533 (W. Va. 1914).