North Dakota Law Review

Volume 50 | Number 1 Article 7

1973

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Recommended Citation

Engelman, Jerald L. (1973) "Emergency Powers of the Governor in North Dakota," *North Dakota Law Review*: Vol. 50 : No. 1 , Article 7.
Available at: https://commons.und.edu/ndlr/vol50/iss1/7

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EMERGENCY POWERS OF THE GOVERNOR IN NORTH DAKOTA

I. INTRODUCTION

Gubernatorial powers can be broadly categorized into three main areas: legislative powers, judicial powers, and executive powers. Legislative powers are methods of influencing legislation and legislators. Such powers include the state of the state message, budget messages, special messages, approval of bills, power to call special sessions, and the veto power. Judicial powers authorize the governor to exercise executive clemency; to grant pardons and reprieves, and to reduce sentences. Executive powers are involved with the administration of the executive branch, including the use of the executive order[1] and the constitutional and statutory based emergency powers.[2]

In times of labor strikes, civil disorders, natural disasters, and other crises affecting the public health, safety, and welfare, flexible executive emergency powers must exist to implement immediate governmental response. This note analyzes the present executive emergency powers of the governor in North Dakota. Primary focus will be upon existing powers and judicial review of the imposition of these emergency powers upon the public.

II. STRUCTURE OF THE EXECUTIVE POWER

All States have a public official known as a governor who acts as the chief executive of State government.[3] Historically, the governor's office developed from the Crown Government of Great

1. *See generally* Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 IOWA L. REV. 78, 81-86 (1964) for a discussion of gubernatorial executive orders. It views the executive order as an effective management tool within the executive branch.

2. For a general discussion of the various powers of the governor see R. BABCOCK, STATE & LOCAL GOVERNMENT & POLITICS 204-17 (1957); F. BATES & O. FIELD, STATE GOVERNMENT 266-83 (3d ed. 1949).

3. Comment, *Constitutional & Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290, 291 (1965) gives a complete analysis of the constitutional provisions of the fifty state constitutions designating the governor as the chief executive officer of the state.

Britian's American Colonies.[4] Throughout this developmental stage, powers in the form of royal charters, commissions, and instructions were conferred upon this officer. Initially, the governor was viewed more as an observer of colonial activities than as an executive.[5] At first, the states were inclined to provide a weak governor who was not given extensive authority to exercise control and power. As time progressed, these general powers were transposed into specific grants of power properly belonging to the executive.[6] Today, these specific grants of power are provided for in every state Constitution[7] and are known as executive powers.

In North Dakota, governmental powers are divided into three separate branches. These branches are the legislative branch,[8] the executive branch,[9] and the judicial branch.[10] Deliberating upon and codifying principles and policies for the future is the function of the legislative branch; administering the executive law is the basic function of the executive branch; and protecting the rights of citizens, determining the constitutionality of the law and analyzing the law, is the function of the judicial branch.[11] This tri-partite division is a theory basic to state and federal government.[12] In the case of *City of Carrington v. Foster County*,[13] the Supreme Court of North Dakota recognized this theory, stating that:

> [I]rrespective of the fact that a constitution does not contain a general distributing clause expressly providing for the division of governmental powers among the legislative, executive, and judicial branches of government (and ours does not contain such a clause), the creation of those branches of government operates as an apportionment of the different classes of power. As all of the branches derive their authority from the same constitution, *there is an implied exclusion of each branch from the exercise of the functions of the others.*[14]

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4. Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 IOWA L. REV. 78 (1964), *citing* FINLEY & SANDERSON, THE AMERICAN EXECUTIVE & EXECUTIVE METHODS 8-14 (1908).

5. *See* F. BATES AND O. FIELD, STATE GOVERNMENT 268-69 (3d ed. 1949).

6. *See* Fairlie, *The State Governor*, 10 MICH. L. REV. 370-73 (1912).

7. Comment, *Constitutional & Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290, 291 (1965).

8. N.D. CONST. art. 2, § 25 (Supp. 1973). "The legislative power of this state shall be vested in a legislature consisting of a senate and a house of representatives."

9. N.D. CONST. art. 3, § 71 (Supp. 1973). "The executive power shall be vested in a governor. . . ."

10. N.D. CONST. art. 4, § 85 (1960). "The judicial power of the state of North Dakota shall be vested in a supreme court, district courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns, and villages."

11. Verry v. Trenbeath, 148 N.W.2d 567, 570 (N.D. 1967).

12. *See* G. MITAU, STATE & LOCAL GOVERNMENT: POLITICS & PROCESSES 19-27 (1966), This book gives a detailed analysis of the legislative, executive, and judicial articles contained in various state constitutions.

13. City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969).

14. *Id.* at 382. (Emphasis added). In State v. Boucher, 3 N.D. 389, 56 N.W. 142, 145 (1893) the court stated that:

The executive power of the state is vested in the governor.[15] Generally, the state constitution prescribes these powers,[16] and such powers "are to be measured by the terms and necessary implications of the grant conferring the power on them."[17] Because the executive power is vested solely in the governor, neither the legislative nor judicial branches may interfere with the powers or duties which the constitution has imposed upon that office.[18] However, even with this interpretation of the executive power, "many governors find that their powers are still much more limited by constitutional and legal restrictions than may be desirable for most efficient administrative and executive action."[19] An example of a limitation upon the executive powers of the governor is the case of *State v. McPhail*.[20] In this case, the Supreme Court of Mississippi held that a governor's use of his executive power is subject to judicial review and is within the scope of the state's Constitution and laws.[21] Therefore, when deciding whether or not to exert executive power, the governor must consider all ramifications of this exertion of power and the full boundaries of the state laws and Constitution.

It should be noted that some courts do not allow judicial review of the governor's discretionary judgment in asserting his executive power.[22] In *State v. French*,[23] the court held that the state constitution has vested within the governor certain powers and it is within his judgment when these powers shall operate. The court further stated that such judgment is at the discretion of the governor and, therefore, it is not subject to judicial review.[24] However, a majority

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all governmental sovereign power is vested in the legislature, except such as is granted to other departments of the government, or expressly withheld from the legislature by constitutional restrictions.

Thus, provisions in the constitution expressly decreeing power to the executive and judicial branches are grants of power to them, but upon the legislature, these grants of power are limitations.

15. N.D. CONST. art. 3, § 71 (Supp. 1973).

16. It should be noted that statutes, or both the Constitution and statutes, may prescribe these powers.

17. Kopplin v. Burleigh County, 77 N.D. 942, 47 N.W.2d 137, 140 (1951).

18. State v. Quam, 72 N.D. 344, 7 N.W.2d 738, 739 (1943).

19. R. ROSS & K. MILLSAP, STATE & LOCAL GOVERNMENT & ADMINISTRATION 327 (1966).

20. State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

21. The court stated in *McPhail* that:

> Official action, whether the officer be of the highest or the lowest grade, must be within the Constitution and the laws, and the facts must be such as to uphold or justify the exercise of the official authority which in a given case is exerted. If any officer, be he high or low, attempt to exercise an authority not legally vested in him, or if he attempts to do so upon a state of facts which does not bring the asserted authority into existence, his action thence is as much the subject of judicial review and remedial rectification as is the action of any private person within the jurisdiction of the state.

Id. at 391.

22. Susman v. City of Los Angeles, 269 Cal. 2d 803, 75 Cal. Rptr. 240, 250 (1969).

23. State v. French, 44 N.M. 169, 99 P.2d 715, 720 (1940).

24. The court in *French* stated that:

> He is made the sole judge of the facts. . . . The presumption of course is that he will not exercise this power unless it becomes necessary. To his good judgment

of the courts which have dealt with this issue have held that the executive power is subject to judicial review and the outcome will depend upon the circumstances in each case.[25]

Because of the difficulties involving the exercise of executive powers, some states have provided statutory guidelines to aid in the decision-making process.[26] In the absence of such legislative intent, the uncertainty of the perimeters of the executive power will continue. To maintain strength within the executive power and avoid future patent difficulties with its exercise, legislation should contain sufficient flexibility to allow adaptations to changing conditions.[27]

III. PRESENT STATUTORY EMERGENCY POWERS OF THE GOVERNOR

Within the scope of the executive power lies the governor's emergency powers. These emergency powers can arise from the state Constitution, or from legislation involving the delegation of legislative powers. Statutes applying to emergency powers should be drafted to provide sufficient guidance in the use of these powers. This can be accomplished by articulating guidelines to aid in deciding whether certain conditions require the exercise of that power. These statutes can restrict the range of the powers granted and curtail the conditions under which they can be exercised.

In North Dakota, the existing statutory emergency powers of the governor can be placed into four categories: (1) preservation of the peace,[28] (2) military authority,[29] (3) civil defense,[30] and (4)

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and sound discretion, the law has left the final decision. . . . If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts.

Id. at 720.

25. Sterling v. Constantin, 287 U.S. 378, 401 (1932). *See* notes 86-92, *infra.*

26. Comment, *supra* note 3, at 296-99.

27. *See* notes 50-60, *infra,* wherein the North Dakota Legislature passed the Disaster Act to provide the governor with flexibility within the executive power.

28. N.D. CENT. CODE §§ 12-19-15, -16 (1943).

If it appears to the governor that the power of the county is not sufficient to enable the sheriff to execute process delivered to him or to suppress riots and to preserve the peace, he, on the application of the sheriff or a judge, must order such a force from any other county or counties as is necessary to execute such process and to preserve the peace.

N.D. CENT. CODE § 12-19-15; (1943).

Under the facts and circumstances mentioned in section 12-19-15, and when the civil and the military power of the state is not deemed sufficient, the governor shall apply to the military authorities of the United States for a force sufficient to execute the laws and to prevent resistance thereto, to suppress riots, execute process, and preserve the peace.

N.D. CENT. CODE § 12-19-16 (1943).

29. N.D. CENT. CODE §§ 37-01-04, -06 (1943).

In case of insurrection, invasion, tumult, riot, or breach of the peace, or imminent danger thereof, the governor may order into the active service of this state any part of the national guard that he may deem proper. When the national guard of this state, or a part thereof, is called forth under the constitution and laws of the United States, the governor shall order out for service the remaining troops or such part thereof as may be necessary. If the number of available

support of national defense.[31] An analysis of these categories will be made to delineate the emergency powers the North Dakota governor presently has at his disposal. Further, these powers will be compared to the emergency powers of governors in other states to provide a basis of measuring the adequacy or inadequacy of the state's gubernatorial emergency powers.

A. PRESERVATION OF THE PEACE

North Dakota Century Code section 12-19-15 authorizes the governor, upon the application of a county sheriff or judge, to order adequate force from other counties in order to suppress riots and preserve the peace.[32] This statute further provides that it is a misdemeanor for the ordered or summoned persons to refuse or neglect to obey the command. Reference is made to the provision that the governor, "must order such a force from any other county or counties as is necessary. . . . "[33] This provision has never been clarified by case law, but it appears that this force would not be restricted to civil authorities and could conceivably be a force of national guard troops. Because of the phrase "as is necessary,"[34]

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troops is insufficient, the governor shall order out such part of the reserve militia as he may deem necessary.

N.D. CENT. CODE § 37-01-04 (1943).

The governor, as commander in chief of the military forces of this state, may take any measure necessary to prevent or avert any impending disaster or calamity which threatens to destroy life or property in this state, or which may entail loss of life or property, or result in great suffering or hardship among the people of this state.

The statute also specifically provides for the seizure of property by the governor,

In the event of any strike or lockout, or threatened strike or lockout, of the employees of any coal mine or public utility which threatens to endanger the life and property of the people of this state. . . .

N.D. CENT. CODE § 37-01-06 (1943).

30. N.D. CENT. CODE § 37-17.1-05 (Supp. 1973). This section provides powers to the governor for meeting disaster emergencies. Some of the more salient emergency powers under this section are:

1. The governor is responsible for meeting the dangers to the state and people presented by disasters.

2. [T]he governor may issue executive orders, proclamations, and regulations and amend or rescind them.

3. A disaster emergency shall be declared by executive order or croclamation of the governor if he finds a disaster has occurred or that this occurrence or the threat thereof is imminent.

4. An executive order or proclamation of a state of disaster emergency shall activate the disaster response and recovery aspects of the state, local, and interjurisdictional disaster emergency plans. . . .

5. During the continuonce of any state of disaster emergency declared by the governor, the governor is commander-in-chief of the disaster emergency services organization and of all other forces available for emergency duty.

31. N.D. CENT. CODE § 54-07-01.1 (Supp. 1973).
In emergencies in support of national defense, the governor may cooperate with any officer or agency of the United States in the transportation of persons or property and the conservation and utilization of vital transportation equipment, materials, and supplies, and when requested by such officer or agency, may issue executive orders related thereto. . . .

32. N.D. CENT. CODE § 12-19-15 (1943).

33. N.D. CENT. CODE § 12-19-15 (1943).

34. N.D. CENT. CODE § 12-19-15 (1943).

the governor has discretionary use of the power granted by this statute when the particular situation falls within the criteria of the statute.[35]

Expanding the power granted to the governor in section 12-19-15, North Dakota Century Code section 12-19-16 authorizes the governor to apply to the military authorities of the United States.[36] This power is authorized if the civil and military power of the state is not sufficient to suppress riots, execute the laws, and preserve the peace.[37]

Most states have structured their civil defense statutes broad enough to include this emergency power found in North Dakota.[38] Other states have enacted statutes which specifically provide for such an emergency power.[39] Under North Dakota's Disaster Act,[40] it would seem that the need for the "preservation of the peace" emergency power becomes non-essential.[41]

B. MILITARY AUTHORITY

There are many definitions of marital law within the legal system. A common definition is that:

> [M]artial law is the exercise of the power which resides in the executive branch of the Government to preserve order and insure 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.[42]

Martial law is in existence when the military performs the functions of the civil government. The immediate and specific purpose of martial law is to restore order so that the normal functioning of the civil authorities can be re-established. It is thus apparent that as soon as the civil authorities are capable of again taking charge and carrying out the duties of their respective offices, martial law should be terminated.[43]

Within the executive position in North Dakota lies the power to declare martial law. Authority for this emergency power stems from

35. The conclusion is based on this author's prognosis of how a governor would interpret this phrase in determining the parameters of his power.
36. N.D. CENT. CODE § 12-19-16 (1943).
37. This statute is applicable under the circumstances in which section 12-19-15 is applied.
38. *See, e.g.*, CAL. MIL. & VET. CODE ANN. § 1505 (1955); MINN. STAT. ANN. § 12.33 (1951).
39. *See, e.g.*, MONT. REV. CODE § 94-5303 (1921); S.D. COMP. § 33-9-1 (1951).
40. N.D. CENT. CODE ch. 37-17 (Supp. 1973).
41. *See* N.D. CENT. CODE § 37-17.1-05 (Supp. 1973). *See also* notes 50-56, *infra*, for an explanation of this Act.
42. Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946).
43. *See* R. RANKIN, WHEN CIVIL LAW FAILS 173-205 (1939). *See generally* F. WEINER, A PRACTICE MANUAL OF MARTIAL LAW 62-102 (1940). Mr. Weiner analyzes many cases wherein the courts held that martial law must be terminated when the civil authorities regained control.

North Dakota Century Code section 37-01-04 which enables the governor to order into active service any part of the national guard "in case of insurrection, invasion, tumult, riot, or breach of peace, or any danger thereof."[44] This statute also authorizes the activating of the reserve militia if the number of national guard troops is insufficient.

In addition to these powers, North Dakota Century Code section 37-01-06 provides for other military powers. It authorizes that:

> The governor, as commander in chief of the military forces of the state, may take any measure necessary to prevent or avert any impending disaster or calamity which threatens to destroy life or property in this state, or which may entail loss of life or property, or which may result in great suffering or hardship among the people of the state.[45]

In addition, this section specifically authorizes the governor to seize and operate any coal mine or public utility during any emergency where a strike or lockout occurs or threatens to occur.[46]

In most states, the statutory military authority is premised upon codification of the governor's constitutional authority.[47] The statutes of other states authorizing the emergency power of military authority are similar to those of North Dakota.[48] They consistently give the governor sufficient emergency power in the form of military authority, but impose no guidance in ascertaining when this power should be invoked.[49] The governor becomes the sole discretionary judge in the use of the power.

C. CIVIL DEFENSE

North Dakota recently enacted new civil defense legislation; the North Dakota Disaster Act of 1973.[50] This Disaster Act provides the

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44. N.D. CENT. CODE § 37-01-04 (1943).

45. N.D. CENT. CODE § 37-01-06 (1943).

46. N.D. CENT. CODE § 37-01-06 (1943).

47. *See, e.g.*, COLO. CONST. art. IV, § 5; MINN. CONST. art. V, § 4 (Supp. 1973); N.D. CONST. art. III, § 75.

48. *See, e.g.*, CAL. MIL. & VET. CODE ANN. § 146 (1951); MICH. COMP. LAWS § 32.551 (Supp. 1973); N.Y. MIL. LAW. ANN. art. I, § 6 (Supp. 1973); WISC. STAT. ANN. § 21.11 (1969). A typical statute provides:

> In case of war, insurrection, rebellion, riot, invasion, resistance to the execution of the law of this state or of the United States, or in the event of public disaster or upon application of any marshall of the United States, the mayor of any city, or any sheriff in this state, the Governor may order into active service all or any portion of the national guard.

S.D. COMP. LAWS § 33-9-1 (1951).

49. *See, e.g.*, CAL. MIL. & VET. CODE ANN. § 146 (1951); MICH. COMP. LAWS § 32.551 (Supp. 1973); N.Y. MIL. LAW. ANN. art. I, § 6 (Supp. 1973); S.D. COMP. LAWS § 33-9-1 (1951); WISC. STAT. ANN. § 21.11 (1969).

50. N.D. CENT. CODE ch. 37-17.1 (Supp. 1973). The 43rd Legislative Assembly of North Dakota adopted this Disaster Act. It became effective July 1, 1973, and repealed N.D. CENT. CODE ch. 37-17, relating to civil defense. In this repealed chapter, civil defense was used in the context of preventing, minimizing, and repairing any "injury and damage resulting

governor with relatively complete disaster-emergency powers for combating emergencies. The primary focus of the Disaster Act is on natural disasters such as floods and tornadoes; however, riots or hostile military or paramilitary actions are also included.

North Dakota Century Code section 37-17.1-05 sets forth the emergency powers of the governor in confronting a disaster. Extensive powers are granted to the governor in declaring an emergency and issuing executive orders, proclamations, and regulations.[51] It authorizes the governor to declare a disaster emergency by proclamation or executive order if he finds that a disaster has occurred or is threatening. This disaster emergency would continue until the danger that caused the declaration has passed or has been dealt with, but would not continue for longer than thirty days unless renewed by the governor. The legislature, by concurrent resolution, could terminate a state of disaster emergency at any time.[52] The section designates the governor as commander-in-chief of disaster emergency services and of all forces available for emergency duty.[53] Under subsection (6) of section 37-17.1-05, the governor is authorized to suspend the provisions of regulatory statutes prescribing the procedures for conduct of state business or the rules, regulations, or orders of any state agency; reorganize the administration of state government; utilize all available resources of the state government; commandeer or utilize private property; direct and compel evacuation of the population; control traffic in the disaster areas; suspend or limit the sale of alcoholic beverages, firearms, explosives, and combustibles; and make provisions for temporary housing of disaster victims.[54] Furthermore, the Disaster Act[55] allows the gover-

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from disasters caused by enemy attack, sabotage, or other hostile action."

The Law of March 14, 1961, ch. 248, § 1, [1961] N.D. Laws (repealed 1973) granted the supervision and control of the civil defense division to the governor. The governor was authorized to make rules and regulations to carry out civil defense programs and prepare comprehensive plans for the defense of North Dakota. The governor was further empowered to take steps to ensure mobilization of the civil defense organization, survey industries and resources of North Dakota to ascertain capabilities for civil defense, and to plan for their efficient emergency use.

Under the Law of March 14, 1961, ch. 248, § 1, [1961] N.D. Laws (repealed 1973) the governor was authorized to proclaim a state of emergency, or the legislature could have done so by concurrent resolution, if there had been an actual or anticipated attack upon the United States. This "actual" or "anticipated" attack was the prerequisite for the "existence of a state of civil defense emergency." This section also authorized the governor, if a civil defense emergency existed, to enforce all civil defense rules and regulations subject to constitutional restrictions. This included transferring public materials, removing non-responsive officials from office, evacuating the population, and generally carrying out the civil defense responsibilities.

The Law of March 14, 1961, ch. 248, § 1, [1961] N.D. Laws (repealed 1973) authorized the governor to invoke the aid of the civil defense division during natural disasters. However, the governor's powers were severely limited under this authority by other restrictions within the chapter.

51. N.D. CENT. CODE § 37-17.1-05 (2) (Supp. 1973).

52. N.D. CENT. CODE § 37-17.1-05 (3) (Supp. 1973).

53. N.D. CENT. CODE § 37-17.1-05 (5) (Supp. 1973).

54. Under chapter 37-17, which has been repealed, only those powers pertaining to procurement of supplies and equipment, evacuation of threatened or stricken areas, and providing of temporary housing for disaster victims were conferred upon the governor, and the

nor to declare an emergency in the event of a nonmilitary disaster.[56]

Many other states have civil defense statutes which confer broad emergency powers upon the governor,[57] authorizing powers similar to those extended the governor of North Dakota under the Disaster Act.[58] The use of this power has generally been extended to all forms of emergencies and is not limited to those emergencies created by enemy attack, war, or natural disasters.[59] By this extension, a wide range of discretion is given the governor in coping with and responding to emergencies of all types.

The North Dakota Legislature has provided the state with a disaster-emergency program which includes disaster prevention, preparedness response, and recovery for all types of disasters or emergencies that threaten the health and welfare of North Dakota citizens.[60] The Disaster Act appoints the governor as the primary controller of the program and provides him with flexible and comprehensive provisions to aid him in making the discretionary decisions he may be called upon to make.

D. Support of National Defense

A statute concerned with the support of national defense is another recently enacted emergency power granted to the governor in North Dakota.[61] This section authorizes the governor to cooperate with any officer or agency of the United States in the transportation of persons or supplies and to regulate the conservation and utilization of transportation equipment, materials, and supplies. Most other states have similar provisions, but these provisions are usually in-

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latter two only if there had been an actual or threatened attack upon the United States.

55. The repealed chapter, 37-17, did not provide for the taking of property and compensation for it in a civil defense emergency.

56. N.D. CENT. CODE § 37-17.1-05(3) (Supp. 1973). The old charter 37-17 which has been repealed did not authorize the governor to declare an emergency in the event of a non-military disaster unless Law of March 14, 1961, ch. 248, § 1, [1961] N.D. Laws (repealed 1973) can be broadly interpreted to grant this power.

57. *See, e.g.*, ARIZ. REV. STAT. § 26-303 (Supp. 1972-73); MINN. STAT. ANN. § 12.21 (1967), *as amended*, (Supp 1973); S.D. COMP. LAWS § 33-15-8 (1967); WISC. STAT. ANN. § 22.16 (3) (1971).

58. N.D. CENT. CODE ch. 37-17.1 (Supp. 1973).

59. *See, e.g.*, ARIZ. REV. STAT. § 26-301 (Supp. 1972-73); WISC. STAT. ANN. § 22.16 (2) (1971). Generally, the following provisions are provided for in a typical statute:

> "Civil defense" shall mean the preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to prevent, minimize, repair injury and damage resulting from disasters caused by enemy attack, sabotage or other hostile action, or by fire, flood, snowstorm, windstorm, tornado, cyclone, drought, earthquake, or other natural causes and provide for the relief of distressed humans and livestock in areas where such conditions prevail whether affecting all or only a portion of the state.

S.D. COMP. LAWS § 33-15-1 (1967).

60. *See* N.D. CENT. CODE § 37-17.1-02 (Supp. 1973) for the purposes of the Disaster Act.

61. N.D. CENT. CODE § 54-07-01.1 (Supp. 1973). This statute has as its source N.D. Laws, ch. 266, § 3 (1971) which was S.B. 2082, Highway Action In National Defense Emergency. The bill relates to powers of the governor and the highway commissioner over highways, in supporting national defense.

corporated into the state's civil defense statutes.[62]

With the combination of these four emergency powers, preservation of the peace,[63] military authority,[64] civil defense,[65] and support of national defense,[66] the governor has adequate emergency powers. However, the prerequisites of their implementation require much discretionary decision-making. This discretionary judgment must conform to the state Constitution, the applicable statues, and present judicial holdings.

IV. JUDICIAL REVIEW OF GOVERNOR'S USE OF EMERGENCY POWERS

A. PRE-STERLING JUDICIAL REVIEW

Judicial review of emergency powers has been primarily in the area of reviewing a governor's decision to declare martial law. For many years the rule of conclusiveness was that the action of the governor, in declaring martial law to quell what he determined to be a disorder uncontrollable by the civil authority, was not reviewable by the courts.[67] In *Luther v. Borden*,[68] the United States Supreme Court held that the state shall determine when to declare martial law and that this decision is not open to judicial review.

> [U]nquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is necessary to the States of this Union, as to any other government. 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.[69]

Furthermore, courts have held that once martial law is declared, the civil authority becomes subordinate to the military authority during the reign of martial law.[70] During this *pre-Sterling* period

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62. *See, e.g.*, ARIZ. REV. STAT. § 26-303 (1972-73); MINN. STAT. ANN. § 12.21 (1967); S.D. COMP. LAWS § 33-15-16 (1967).

63. N.D. CENT. CODE §§ 12-19-15, -16 (1943).

64. N.D. CENT. CODE §§ 37-01-04, -06 (1943).

65. N.D. CENT. CODE § 37-17.1-05 (Supp. 1973).

66. N.D. CENT. CODE § 54-07-01.1 (Supp. 1973).

67. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 48 (1849); In re Moyer, 35 Colo. 159, 85 Pac. 190 (1905); Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. 165, 55 Atl. 952, 955 (1903).

68. 48 U.S. (7 How.) 1 (1849).

69. Here the plaintiff and his associates were attempting to overthrow the government of the state of Rhode Island. The governor declared martial law and the plaintiff challenged this declaration of martial law. *Id.* at 48.

70. Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. 165, 55 Atl. 952, 954 (1903);

when attempts were made to impose judicial review upon the discretionary use of gubernatorial emergency powers, courts did not feel that the use of these emergency measures was substantially restricted by state or federal due process requirements.[71]

In 1909, the Supreme Court in *Moyer v. Peabody*[72] reaffirmed the doctrine of nonreviewability established by previous cases. Justice Holmes stated:

> [H]e [the Governor] shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those who he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made *in good faith and in the honest belief that they are needed* in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground for his belief.[73]

This "conclusiveness" rule reigned for many years as the standard of determining the boundaries of the emergency powers. However, governors tended to abuse this doctrine, thereby causing the Supreme Court to re-evaluate the rule.[74] In 1932, the case of *Sterling v. Constantin*[75] restricted the doctrine of conclusiveness and

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see R. RANKIN, WHEN CIVIL LAW FALLS 65-84 (1939); F. WEINER, A PRACTICE MANUAL OF MARTIAL LAW 6-15 (1940). In Commonwealth ex rel. Wadsworth v. Shortall, *supra*, the court stated:

> [I]f the situation . . . requires the full power of the state, the Governor intervenes as the supreme executive, and he or his military representative becomes the superior and commanding officer.
>
> The resort to the military arm of the government, therefore, means 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. To call out the militia and then have them stand quiet, and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.
>
> The effect of martial law, therefore, is to put in operation the power and method vested in the commanding officer by military law. So far as his powers for the preservation of order and the security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. 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.

Id. at 954-55.

71. *See* In re Moyer, 35 Colo. 159, 85 Pac. 190, 207 (1905); In re Boyle, 6 Idaho 609, 57 Pac. 706 (1899). *Contra* Franks v. Smith, 142 Ky. 232, 134 S.W. 484, 489 (1911).

72. 212 U.S. 78 (1909).

73. Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) [emphasis added]. The plaintiff was a leader of an outbreak which caused disorder in a county of Colorado. The governor declared that an insurrection existed in this county, ordered out the militia, and had the plaintiff arrested for his safety and until he could be delivered to civil authorities. The plaintiff was imprisoned for seventy-seven days. *See generally* Comment, *Constitutional Law—Fourteenth Amendment—Martial Rule in Labor Disputes*, 1938 WIS. L. REV. 314, 318-20 (1938).

74. *See* Weiner, *Martial Law Today*, 55 A.B.A.J. 723, 724 (1969). Mr. Weiner suggests that governors declared martial law in circumstances when there was no need to do so.

75. 287 U.S. 378 (1932).

allowed judicial review of a governor's discretionary use of his military emergency powers.

B. *STERLING* AND SUBSEQUENT JUDICIAL REVIEW

As a prelude to *Sterling*, the Texas legislature passed an amended oil and conservation act to control heavy oil production. In enforcing this act, Governor Sterling proceeded to issue a proclalmation stating that certain counties were in "a state of insurrection, tumult, riot, and a breach of the peace," and declared martial law in those areas. The plaintiff's properties were located within these areas. Brigadier General Wolters of the Texas National Guard was appointed commander of the military district and was to enforce orders issued by the Railroad Commission under the new conservation act. The Railroad Commission ordered that oil production was limited to 165 barrels per well.[76] Subsequently, plaintiffs commenced an action against members of the Railroad Commission, the Attorney General of the State, Brigadier General Wolters, and others, to restrain the enforcement of the orders limiting oil production. Pending a hearing on the application for preliminary injunction, the court issued a temporary order restraining the defendants from limiting plaintiffs' production of oil below 5,000 barrels per well. Governor Sterling then ordered Brigadier General Wolters to limit oil produtions as was prescribed by the Railroad Commission through the use of military force, the area being under proclamation of martial law. The plaintiffs then filed an amended bill making Governor Sterling and W. W. Sterling[77] parties to the suit. The Federal District Court granted the injunction sought by plaintiffs,[78] and defendants appealed to the United States Supreme Court.

In *Sterling*, the United States Supreme Court limited the conclusiveness doctrine of *Moyer* to situations involving actual violence.[79] It held that the jurisdiction of federal courts extends to this case under the principle that "where state officals, purporting to act under state authority, invade rights secured by the Federal Constitu-

76. Each of plaintiffs' wells could produce 5,000 barrels a day without waste of gas or oil. The Railroad Commission's order limited production of each well to 165 barrels a day.

77. W. W. Sterling was the Adjutant General of the state at the time of the action.

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

79. Sterling v. Constantin, 287 U.S. 378, 399-400 (1932).

> By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. . . . The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.
> *Id.*

tion, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief;"[80] that this principle is equally applicable to the governor of a state as it is to other state officials;[81] that the court is not deprived of its jurisdiction because the state officer exceeded his authority "while acting under color of state law;"[82] that since the plaintiffs did own the property, their right to use and enjoy the property, "subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment."[83]

Sterling held that the discretionary decisions of the governor in enacting emergency powers is subject to judicial review. Chief Justice Hughes stated:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.[84]

Before this case, it was thought that judicial review was not applicable to declarations of martial law and proclamations of insurrection by the governor.[85] Such actions were held to be conclusive. However, *Sterling* reversed that thinking and gave the courts a legal tool with which to thwart abusive use of the emergency power.

Following *Sterling*, various governors seemed to ignore the holding by continuing to apply martial law emergency power in unwarranted situations. The governor of Oklahoma sought to curtail oil production by declaring martial law. His purpose was to enforce state laws controlling waste in oil fields; however, he was enjoined from taking such action.[86] Later, the same governor attempted to force a city council to adopt an unconstitutional zoning ordinance

80. Sterling v. Constantin, 287 U.S. 378, 393 (1932), *citing* Ex parte Young, 209 U.S. 123, 155-56; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U.S. 278, 292-93; Traux v. Raich, 239 U.S. 33, 37-38; Cavanaugh v. Looney, 248 U.S. 453-56; Terrance v. Thompson, 263 U.S. 197, 214.

81. *Id.* at 393, *citing* Davis v. Gray, 16 Wall. 203, 210, 233; Continental Baking Co. v. Woodring, 286 U.S. 352; Binford v. McLeaish, 284 U.S. 598; Sproles v. Binford, 286 U.S. 374.

82. *Id.* at 393, *citing* Iowa-Des Moines Bank v. Bennett, 284 U.S. 239, 246; Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426, 434.

83. *Id.* at 396, *citing* Ohio Oil Co. v. Indiana, 177 U.S. 190, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61; Walls v. Midland Carbon Co., 254 U.S. 300; Bandini Petroleum Co. v. Superior Court, 284 U.S. 8; Champlin Refining Co. v. Corporation Commission, 286 U.S. 210.

84. *Id.* at 400-01.

85. *See* note 67, *supra.*

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

by declaring martial law. He was again enjoined.[87] Another Oklahoma governor declared martial law in an attempt to stop a federal dam project. This governor was also enjoined.[88]

Dispensing National Guard troops in an attempt to prevent registered voters from voting, the governor of Tennessee hoped to influence a primary election in his favor. This action was enjoined by the court.[89] In South Carolina, the governor declared the highway department to be under martial law and invoked his military authority to have the highway commissioner removed. The governor was enjoined.[90] In two Minnesota labor-strike cases, the courts involved also enjoined both governors.[91] However, not all declarations of matial law were invalidated by the courts following *Sterling*.[92]

From these cases, certain requirements[93] surface as prerequisites of a declaration of martial law by a governor.[94] They are as follows: (1) there must be a danger "immediate and impending" creating a necessity consisting of urgency for the public safety and welfare;[95] (2) the local civil authorities were "not able to cope" with the situation or the local government "has completely broken down;"[96] and (3) the use of martial law must be "directly related to the quelling of the disorder" or at attempting to prevent its continuance.[97] Once the situation has been assessed as being one justifying the use of martial law, the governor must proclaim his orders within two other limitations imposed on this emergency power: (1) that the military forces were the minimum amount of force necessary to restore peace and order and reinstate the local civil authorities,[98] and (2) that the discretionary decision he made and all of the orders and military force associated with that decision are subject to judicial review.[99]

V. CONCLUSION

State constitutions and statutes have authorized governors to use

87. Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935).
88. U.S. v. Phillips, 33 F. Supp. 261 (N.D. Okla. 1940).
89. Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939).
90. Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935).
91. Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959); Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D.Minn. 1936). These cases dealt with declaring martial law to control labor disputes, which included closing down the factories for a period of time by the military authority.
92. Cox v. McNutt, 12 F. Supp. 355 (S.D.Ind. 1935); Powers Mercentile Co. v. Olson, 7 F. Supp. 865 (D.Minn. 1934); McBride v. State, 221 Miss. 508, 73 So. 2d 154 (1954).
93. *See generally* Comment, *Constitutional Law—The Power of a Governor to Proclaim Martial Law and Use State Military Forces to Suppress Campus Demonstrations* 59 KY. L.J. 547, 562-64 (1970), for a very exhaustive analysis of the case law relating to these requirements.
94. These requirements establish standards and provide guidelines which governors can look to when faced with the burdensome task of deciding whether or not to declare martial law.
95. *See* Sterling v. Constantin, 287 U.S. 378, 401 (1932).
96. *See* Wilson & Co. v. Freeman, 179 F. Supp. 520, 525 (D.Minn. 1959).
97. *See* Sterling v. Constantin, 287 U.S. 378, 399-400 (1932).
98. *See* Franks v. Smith, 142 Ky. 232, 134 S.W. 484, 489-90 (1911).
99. *See* Sterling v. Constantin, 287 U.S. 378, 400-01 (1932).

certain emergency powers. The governor of North Dakota has four statutory emergency powers: preservation of the peace, military authority, civil defense, and support of national defense. Prior to the passage of the North Dakota Disaster Act of 1973,[100] the most important emergency power the governor possessed was military authority—declaring martial law.

Martial law is the law of necessity.[101] The governor has the perogative to declare martial law whenever he thinks it is necessary. However, this action is subject to judicial review in order to ascertain whether the necessity justified the emergency power invoked. Whatever the degree of necessity in a martial law situation, the purpose of declaring martial law must be for the restoration of civil authority. The duties, limitations, and liabilities of the executive emerging from the declaration of martial law are nowhere specifically enumerated. Therefore, reliance and trust must be placed in the good faith efforts of the courts to review the governor's discretionary judgment and to invoke the standard of necessity.

Within the executive are combined the highest civil and military authority of the state. To prevent the possibility of dictatorial powers being placed within the office of the governor, courts and

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100. N.D. CENT. CODE ch. 37-17.1 (Supp. 1973).

101. *See* R. RANKIN, WHEN CIVIL LAW FAILS, 204-05 (1939). In his analysis of martial law, Mr. Rankin stated seven conclusions which I feel precisely summarize martial law. They are:

> First.—Martial law is an emergency measure and can be used when necessary. The President of the United States and the governors of the several states judge the necessity, subject to disallowance by the courts.
>
> Second.—There are under the general term of martial law several distinct forms. Martial law in time of war may extend over (a) enemies and/or (b) civilians. Martial law in time of peace may be either (a) preventive or (b) punitive: punitive in time of insurrection or rebellion when the courts are not functioning in the proper manner, and preventive when it is desired that the troops restore order during industrial strife and minor disturbances.
>
> Third.—Martial law is a constitutional measure. It may be used as an incident to the war power; it may be used as a means of the executive to see that the laws are faithfully executed; or it may be used as an emergency measure resulting from the exercise of inherent power recognized by the Constitution.
>
> Fourth.—The President by virtue of his office and the powers delegated to him by Congress has the power to declare martial law and carry it into effect. In the different states, the governors exercise this power.
>
> Fifth.—Punitive martial law suspends the writ of habeas corpus. Martial law and the suspension of the privileges of the writ are not the same thing. Martial law is by far the broader term. The writ of habeas corpus may be suspended when there is no martial law, but martial law necessarily includes the suspension of the writ.
>
> Sixth.—There are certain restrictions placed upon the use of martial law. It cannot be used in time of war outside the war zone. In time of peace, it can only be used when the civil courts are not functioning in the proper manner. The person who institutes martial law is always liable to impeachment, and his actions, if arbitrary, are subject to disallowance by the civil courts.
>
> Seventh.—In conclusion, it must be remembered that martial law is not suspensory in nature but restorative. It does not supplant the Constitution, but it is the means employed to restore it to full operation. In short, we may say that martial law is not a suspension of the Constitution, but that its possibility was contemplated by the Constitution, its validity is tested by the Constitution, and the authority to establish it in proper cases is bestowed by the Constitution.
>
> *Id.*

states have imposed limitations as to what uses can be made of state military forces. These limitations have been especially evident in the area of social and economic crises. Courts have frequently invalidated the declaration of martial law as a preventive tool for ailments in these areas. Therefore, when confronted with such situations, the governor must either declare martial law and await judicial review of his decision or use another alternative. In North Dakota, this other alternative is the civil defense statute.[102]

To be responsive to arising emergencies and unencumbered by judicial restraints, it is better to provide adequate civil defense emergency powers than to rely upon military authority. Statutory specifications contained within civil defense statutes can provide the executive with the needed guidance, assistance, and power to control any social or economic emergency. The North Dakota Legislature has provided the governor with such a civil defense statute, which, when combined with his military authority, affords the North Dakota governor adequate emergency powers for all conceivable situations.

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102. N.D. CENT. CODE ch. 37-17.1 (Supp. 1973).

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