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David E. Engdahl, *The Legal Background and Aftermath of the Kent State Tragedy*, 22 Clev. St. L. Rev. 3 (1973)
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The Legal Background and Aftermath of the Kent State Tragedy

*David E. Engdahl**

EVENTS OF TRAGIC VIOLENCE OCCUR WITH SUCH COMMONNESS TODAY that they are greeted most frequently either with a callous indifference or a generalized despair. Yet to thoughtful observers, there is an essential difference between those tragedies attributable to extremist and criminal factions, and those which result from overbearing acts of the agents of government themselves. Jackson State and Attica are only two of the most recent examples of events that test the strength of our modern commitment to the standards of government behavior our heritage had led us to expect. Even among the recent instances of tragic government violence, however, the sustained military rifle barrage against unarmed students scores of yards away, which took place at Kent State University on May 4, 1970, holds a singular place. Kent State has already become, and will long remain, a more poignant and significant recollection than any other single incident in our recent national life.

The reason for its singular significance is not the number of persons killed and crippled or otherwise wounded by the shooting at Kent, although for those personally touched by the tragedy its effect is especially profound. What is most significant about Kent State is that it confronts us squarely with some of the very issues and values that gave this nation birth. The parallel between Kent State in 1970 and the tragic "massacre" in colonial Boston exactly two hundred years before is a compelling and disturbing one. It is instructive to review some features of our history, for centuries even before the settlement of this continent began, bearing in mind the familiar precept that a rule which reflection upon the historic institutions and values of Anglo-American law discloses to be fundamental, must be recognized as essential to due process of law.[1]

The Legal Background

Almost from the time when Henry II in the year 1181 first ordered that all free men in England were to be sworn to arms, English law drew a distinction between how armed force was to be used in peace and in war. As a force for defense of the realm in case of war, these armed men — the *jurata ad arma* — were placed under the control of military officials and governed by rules of law outside the scope of the common law, administered by the Court of the Constable and

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[1] Duncan v. Louisiana, 391 U.S. 145 (1968).

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Marshal, a prerogative tribunal. As a force for the arrest of malefactors and for the suppression of domestic unrest and disorder these same *jurata ad arma* were placed under the control of the sheriffs in their respective counties and governed, like the sheriffs, by the rules of the fledgling common law. Thus the same body of armed men constituted at once the *militia* and the *posse comitatus*, the essential distinctions between the two forces being the officers who had control over them and the rules of law to which they were subject.[2]

The crucial distinction between governing the realm in accordance with reasoned rules of law and governing by sheer force and prerogative was recognized when King John by Magna Carta promised to deal with his nobles in accordance with "the law of the land."[3] In the fourteenth century that pledge was taken as authority by the Parliament for holding that it was unlawful for the King to seize traitors and try them and execute them for treason by military process; so long as the common law courts were open and able to function, to proceed by military process was to derogate from "the law of the land."[4] When the *jurata ad arma* rose up to suppress the Peasant's Revolts of 1381, using measures of force more appropriate to their role as a military force than to their role as the *posse comitatus*, the common law would have punished them for their overzealous restoration of order if King Richard II had not extended his pardon to them for suppressing and punishing the rioters *"sanz due proces de loye"* — without due process of law.[5]

The first English riot act was enacted in 1411. In accordance with what had already become tradition, it provided for suppression of riots by the *posse comitatus* under the command of civil officers and made no provision whatsoever for military intervention.[6] During the Wars of the Roses and under the Tudors, absolutist monarchs did resort to the expedient of putting down civil disturbances with military force; but legal scholars of that period and of our own agree that those monarchs' actions were in violation of the law of the land.[7] What had been suffered under the Tudors was to cause revolution under the Stuarts. When Charles in 1627 sent military troops instead of relying on the civilian *posse comitatus* to suppress riots in several towns, Parliament postponed all its other business to prepare, under

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[2] For a more detailed discussion and documentation of this history, see Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971).

[3] Magna Carta, c. 39 (1215).

[4] THOMAS EARL OF LANCASTER'S CASE IN 1 HALE, PLEAS OF THE CROWN 343-46 (1st Am. ed. 1947); EDMUND EARL OF KENT'S CASE, IN HALE, HISTORY OF THE COMMON LAW 40-41 (2d ed. 1716); *see also Supra* note 2 at 5-6.

[5] 5 Rich. 2, stat. 1, e. 5 (1381).

[6] 13 Hen. 4, c. 7 (1411); *see also Supra* note 2 at 8.

[7] *See* F. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 266-68 (1908).

the leadership of the former Chief Justice Lord Coke, the Petition of Right of 1628. That historic document declared that the practice of dealing with riots by military means was "wholly and directly contrary to the said laws and statutes of this your realm."[8] Later, in his landmark *Institutes of the Laws of England,* Coke elaborated upon this thesis, and added that for a soldier to kill a civilian under a claim of military authority, at a time when civilian courts were open, would be murder.[9] When Charles persisted in employing military measures to solve domestic problems even after the Petition of Right, it led directly to revolution and the execution of the King.[10] After the Restoration, the principle that military measures must never be employed domestically so long as the civilian institutions of the law remain operable was reiterated by Lord Chief Justice Hale,[11] and reconfirmed by enactment of the 1689 Bill of Rights.[12]

When England was beset with scattered riots and disturbances in protest of the Hanoverian succession in 1714, Parliament enacted a new riot act to correct the defects which the developments of three centuries had created in the old. Just like the 1411 statute, however, the 1714 riot act provided for suppressing riots by the *posse comitatus* under the control and command of the ordinary local civilian officers, and contained not a hint of any authorization for the use of military troops to suppress any civil disorder, however aggravated the circumstances might be.[13] This was no mere accident, but rather a confirmation of what the struggles of the seventeenth century had reaffirmed as a fundamental precept of due process of law. Blackstone, writing on the eve of American independence, ratified this fundamental doctrine;[14] and his restatement served to punctuate the colonists' assertion of their heritage of due process.

The colonial charter reflected the struggle in England over military troops and civil disorders during the late sixteenth and seventeenth centuries.[15] The explicit provisions of those charters, together with an acute awareness of the due process tradition, explain why the colonists were so incensed when General Gage repeatedly employed military troops to suppress disorders in the colonies. The tragedy at Boston on March 5, 1770, became known as the Boston Massacre and served as the catalyst for revolution, not because the unruly mob that was fired upon was innocent or worthy of any praise, but because the employment of military troops against even a riotous

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[8] 3 Car. 1, c. 1, §8.

[9] COKE, THIRD INSTITUTE, c. vii, at 52; FOURTH INSTITUTE, c. xvii.

[10] *Supra* note 2 at 10-14.

[11] HALE, HISTORY OF THE COMMON LAW 39-40 (2d ed. 1716).

[12] 1 W. & Mary, sess. 2, c. 2 (1689). *Supra* note 2.

[13] 1 Geo. 1, stat. 2, c. 5 (1714).

[14] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (1765).

[15] *Supra* note 2 at 18-22.

assembly found no warrant in the Massachusetts Charter and was a brazen affront to the colonists' claim of the right to be treated, as Englishmen, in accord with the principles of due process of law.[16]

Continued use of military troops to suppress colonial disorders, as well as related militaristic measures, fueled the rising fires of discontent until independence was declared in 1776. As they had done before in resolutions of colonial legislatures and in acts of their Continental Congress, the patriots charged in their Declaration of Independence that the King had "affected to render the Military independent of and superior to the Civil Power," and had contrived to exempt from trial and punishment British troops accused of "murdering" disorderly colonists under color of military authority.[17] The constitutions and bills of rights enacted during the revolutionary era by the newly independent states contained provisions which, when viewed against this background, appear deliberately tailored to guarantee that military steps would not be used to deal with domestic emergencies so long as civilian institutions were capable of functioning.[18]

A crucial development in the law occurred in England in 1780. A major riot in London, lasting several days, was finally suppressed by the use of soldiers. Afterwards the members of Parliament heatedly debated whether this was not a violation of the principle just discussed. The view which prevailed was that which was articulated by Lord Chief Justice Mansfield. Mansfield's doctrine acknowledged that riots were to be suppressed only by civilian officers and the *posse comitatus*, and never by military force. He pointed out, however, that the same persons who were members of the army were also members of the *posse*, which included all able-bodied men of age; and he concluded that, regardless whether they happened to wear army uniforms or not, they could be called upon to suppress a riot "not as soldiers, but as citizens."[19] The critical point was that when employed to suppress a riot the members of the armed forces acted in their capacity as members of the civilian *posse*, and not at all as soldiers, and were therefore subject to civilian law and civilian command exactly like any other citizen called to aid a sheriff or other civilian official. Only on this view could the use of "soldiers" to suppress a civil disorder be reconciled with the historic principle of due

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[16] *Supra* note 2 at 21-25.

[17] *Supra* note 2 at 26-28.

[18] *Supra* note 2 at 28-31.

[19] 21 PARLIAMENTARY HISTORY OF ENGLAND 688-98. An account of the 1780 riots, together with major excerpts from Lord Mansfield's speech, is printed in 3 CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 421-31 (1831).

process of law.[20] This Mansfield doctrine was promptly applied judicially in England.[21]

A careful review of the records of the Constitutional Convention, the ratification debates, the congressional preparation of the Bill of Rights, and the legislation of the first sessions of Congress concerning the army and the militia discloses unmistakably that the traditional prohibition against using military troops in civil disorders, as adapted by the Mansfield doctrine, was well understood and was consciously and deliberately preserved as inherent in the concept of due process of law.[22] Throughout the first half of the nineteenth century, both state militiamen and members of the national armed forces were occasionally employed as an auxiliary peace force to enforce the law or restore order; but it was clearly understood that when so employed they were essentially civilians, not soldiers, and were subject to control by local civilian officials and governed by the rules of civilian law. They were in fact conceived of as members of the civilian *posse*.[23] Soldiers were held personally liable for official acts they committed against civilians in violation of civilian laws, even though they acted under military orders.[24] The Supreme Court of Louisiana branded as "preposterous" the notion that a military commander could exercise any authority in derogation of the local civilian law and its officials.[25] The Attorney General of the United States, explaining the practice in 1854, made specific reference to Lord Mansfield's doctrine that members of the armed forces could be used not as soldiers but as civilians, as members of the civilian *posse comitatus*, in domestic law enforcement situations.[26] This familiar practice even formed the basis of the misunderstanding that President Buchanan used as an excuse for refusing to send troops into the South on the eve of the Civil War.[27]

Abraham Lincoln avoided Buchanan's error, but erred on the other side. It was Lincoln who reintroduced into America the habit of using military force against civilians even while civilian institutions could function.[28] The United States Supreme Court and other

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[20] *Supra* note 2 at 31-35.

[21] Rex v. Kennett, 172 Eng. Rep. 976, 984 (K. B. 1781); Rex v. Pinney, 172 Eng. Rep. 962, 967 n. (b) (Spec. Comm'n, 1832).

[22] *Supra* note 2 at 35-49, n. 23, 24.

[23] *See* United States v. Stewart, 27 F. Cas. 1339, 1342-43 (No. 16401a) (Crim. Ct. D. C. 1857); Ela v. Smith, 71 Mass. 121, 142 (Sup. Jud. Ct., Norfolk County, 1855).

[24] Wise v. Withers, 7 U.S. (3 Cranch) 330, 337 (1806); Hyde v. Melvin, 11 Johns. 522 (S. Ct. of Jud. N.Y. 1814); McConnell v. Hampton, 12 Johns. 234, 235-38 (S. Ct. of Jud. N.Y. 1815); Smith v. Shaw, 12 Johns. 257, 266 (S. Ct. of Jud. N.Y. 1815).

[25] Johnson v. Duncan, 3 Martin 530 (La. 1815).

[26] 6 Op. Att'y Gen. 466 (1854).

[27] *Supra* note 2 at 52-53.

[28] *Supra* note 2 at 53-54.

courts, as rapidly as cases could reach them, declared that Lincoln's employment of military force in those states where local civilian governments were operable was utterly unconstitutional and incompatible with due process of law.[29]

The resolute judicial insistence upon due process of law, however, was not enough to prevent the surge of militaristic sentiment accompanying the Civil War from having its effect. Military governments were created to reconstruct the South, even where civilian post-war governments were already in operation; and old federal statutes were amended and new ones enacted to facilitate expanded use of military troops to control civil disorders.[30] Effective judicial denunciation of these developments was brazenly choked off by the radicals in Congress and, although the courts continued to reiterate the settled anti-militaristic principle of due process whenever they had occasion to do so,[31] the reconstructionists saved their militaristic schemes from wholesale invalidation by shamelessly manipulating the Supreme Court's jurisdiction.[32]

By the mid-1870's, the violence of a homeland war and the experience of soldiers serving on their own soil in an avowedly military capacity had caused the notion that troops could be employed domestically only as civilians under civilian officers and laws to become obscured.[33] Repeated instances of military displacement of civilian officials and intimidation of citizens became a national scandal, which by 1878 produced a congressional response; but since the Senators and Representatives themselves so imperfectly recalled the due process principle and the practice of using military troops "not as soldiers, but as citizens" in civil disorders, the act which they passed in 1878 actually served to further obscure in the public mind the principle that had been so vigorously and consistently followed until the Civil War.[34]

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[29] *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 124-25 (1866); Beckwith v. Bean, 98 U.S. 266, 296-98 (1878); Milligan v. Hovey, 17 F. Cas. 380, 381 (No. 9605) (C.C.D. Ind. 1871); Johnson v. Jones, 44 Ill. 142 (1867); Griffin v. Wilcox, 21 Ind. 370 (1863).

[30] The statutes are examined in Part 1, Engdahl *"The Legislative History," of the Law Revision Center, A Comprehensive Study of the Use of Military Troops in Civil Disorders, With Proposals for Legislative Reform,* 43 U. COLO. L. REV. at 399-420 (1972); *Supra* note 2 at 55-62.

[31] *See e.g.* Beckwith v. Bean, 98 U.S. 266 (1878); Raymond v. Thomas, 91 U.S. 712, 716 (1875); Milligan v. Hovey, 17 F. Cas. 380 (No. 9605) (C.C.D. Ind. 1871); McCall v. McDowell, 15 F. Cas. 1235 (No. 8673) (C.C.D. Cal. 1867); McLaughlin v. Green, 50 Miss. 453 (1874); *In Re* Egan, 8 F. Cas. 367 (No. 4303) (C.C. N.D. N.Y. 1866).

[32] *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

[33] The use of troops in their character as soldiers in the rebel states during the duration of hostilities was certainly compatible with the traditional due process principle. Familiarity with their employment in that context, however, conditioned the country to tolerate their use in other contexts as well, where their use could not be squared with the traditional rule.

[34] *See "The Legislative History" supra* note 30.

Courts, with their commitment to authority and precedent, were somewhat slower to forget the traditional rules of due process governing the domestic employment of military troops than the political branches of the state and federal governments were. Thus, for example, a Pennsylvania court held in 1898 that in the event of a riot "[t]he sheriff may avail himself of the services of military organizations. He may order them into his *posse*, not as soldiers, but as citizens, trained and disciplined for effective service in critical emergencies."[35] And even more notable, in light of the tragedy at Kent State University in Ohio in 1970, is the instruction of an Ohio trial judge instructing a jury in accordance with the traditional due process principle in a case in 1897. The judge explained that a National Guard colonel and his regiment called to help enforce the laws could

> act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statutes, as to the specific duty or service which they are to perform; nor can the sheriff or magistrate delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power, to take any step or do any act to prevent or suppress a mob or riot.[36]

The United States Supreme Court itself in 1932 took note of the traditional due process rule, affirming the holding of a three-judge District Court that conditions of violence, disorder, and riot are only "breaches of the peace, to be suppressed by the militia as a civil force," and not by uniquely military force.[37] By far the majority of state and lower federal courts which have had occasion to face the issue during the twentieth century have instinctively recoiled from the assertion that military force is permissible in domestic law enforcement situations.[38]

There have been some cases, however, in which judges have lost sight of the traditional rules in this area as completely as the political branches have.[39] The most significant of these cases, because it is always claimed as controlling authority by those who seek to justify military force and discretion in the control of disorders, is *Moyer v. Peabody*.[40] What the Court held in *Moyer v. Peabody* was that in the event of insurrection military troops could be used "as soldiers." If by insurrection was meant an avowed armed assault which had suc-

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[35] Commonwealth v. Martin, 7 Pa. Dist. Rep. 219, 224 (1898).

[36] State v. Coit, 8 Ohio Dec. 62, 63 (Pickaway, C.P. 1897).

[37] Sterling v. Constantin, 287 U.S. 378, 391 (1932), quoting from Contantin v. Smith, 57 F. 2d 227, 231 (E.D. Tex. 1932).

[38] *Supra* note 2 at 67-70.

[39] *Supra* note 2 at 65-67 note 318.

[40] 212 U.S. 78 (1909).

ceeded in disabling the established institutions of government, as distinguished from a mere riot or civil disorder, this holding would not have lacked precedent.[41] But *Moyer v. Peabody* also held that the governor's determination that an insurrection existed was conclusive. Under that rule a governor could declare a mere riot or even a potential disorder to be an "insurrection" and thus by verbal sleight-of-hand justify its suppression by military force. Thus, in effect, the Court in *Moyer* gave *carte blanche* approval to military force for suppression of civil disorders, in the uncontrolled discretion of the executive.

The Court's opinion in *Moyer v. Peabody* was written by Justice Holmes — a circumstance which has tended unwarrantably to magnify the significance of the case. Always less thoughtful and perceptive as the voice of a majority than when the dialectic of dissent brought his mental skills to their peak, Holmes casually endorsed a position in *Moyer* to which he himself, after further reflection, was unable to adhere.[42] And in 1932 the proposition of *Moyer*, that the executive could determine with finality whether the circumstances justifying military force and suspension of civilian law and authority were present, was directly overruled.[43]

In a second respect, as well, *Moyer* has been flatly overruled. *Moyer* held that when an "insurrection" existed normal due process standards were relaxed or suspended so that persons could be jailed or shot in good faith but "without sufficient reason."[44] In *Sterling v. Constantin*, however, the Court reviewed the facts behind the *Moyer* litigation, and instead of crediting the allegation of the *Moyer* pleadings that there was no sufficient reason, declared that "In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection . . ."[45] Having thus radically restated the facts of *Moyer*, so as to supply reasonable grounds for those acts of the governor which the *Moyer* Court had presumed to be without reason, the *Sterling* Court warned that the "general language" of the *Moyer* opinion "must be taken in connection with" the restated facts of the case.[46] Consequently, since *Sterling v. Constantin* was decided,

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[41] *Supra* note 2 at 49-50.

[42] Holmes recognized that the final decision cannot be left to a political branch on a question of "emergency" that determines the scope of the branch's own power. Although the declaration of a legislature as to present exigencies is entitled to respect, Holmes wrote for the Court in 1924, "a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." Chastleton v. Sinclair, 264 U.S. 543, 547 (1924).

[43] In Sterling v. Constantin, 287 U.S. 378 (1932), the Governor of Texas had declared certain counties to be in a state of insurrection, and thereupon had invoked martial law. The Court reviewed the facts of the situation, found no genuine insurrection to have been present and held the Governor's declaration and ensuing actions void.

[44] 212 U.S. 78, 83-85.

[45] 287 U.S. 378, 400.

[46] *Id.*

in 1932, *Moyer v. Peabody* has been no authority for governmental acts unsupported by sufficient reason, even in a situation of "insurrection"; and *a fortiori, Moyer* is no authority whatsoever for any relaxation of the ordinary standards of civilian due process for governmental action in the event of a riot or a civil disorder not approaching an "insurrection."

In a series of recent cases, the United States Supreme Court has vindicated the ancient anti-militaristic principle of due process by restricting the "judicial" power of the military over civilians.[47] The principle which underlies these recent cases is exactly the same historic principle of due process that forbids the use of soldiers under military commanders and military law and discipline as an "executive" force to enforce civilian law and preserve or restore order.

Summary of the Due Process Principle

It is characteristic of due process principles that they have a content and application clear from their history but not easily reduced to simple statement in a phrase or a few sentences. The major features of the seven-centuries old due process rule governing the use of military troops in domestic situations, which the reader would find very fully elaborated and confirmed if he were to go to the sources referred to in the foregoing brief account, may be summarized for our present purposes as follows:

1. Military troops may be used as soldiers — as a uniquely military force — only in those extremely rare and highly exceptional circumstances where civil authority has been incapacitated, whether by foreign attack or domestic rebellion *(i.e.,* genuine insurrection). The traditional criterion for determining whether military force could be used was whether the courts of law were closed. This criterion dates back to the time when judges along with the rest of the king's officials and advisors would join him in going off to war, so that the courts could be open for their regular business of administering the civilian law only when the realm was at peace.[48] The traditional test — whether the courts are closed — has been adopted in American law.[49] For modern times the closure of the courts is not

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[47] Relford v. Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969); McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

[48] *Supra* note 4.

[49] *E.g* Sterling v. Constantin, 287 U.S. 378 (1932); Prize Cases, 67 U.S. (2 Black) 635 (1863); Constantin v. Smith, 57 F. 2d 227 (E.D. Tex. 1932); Middleton v. Denhardt, 261 Ky. 134, 87 S. W. 2d. 139 (1935); Seaney v. State, 188 Miss. 367, 194 So. 913 (1940); Bishop v. Vandercook, 228 Mich. 299, 200 N. W. 278 (1924); *Ex Parte* McDonald, 49 Mont. 454, 143 P. 947 (1914); Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P. 2d 582 (1933); Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959); Faubus v. United States, 254 F. 2d 797 (8th Cir. 1958).

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a very satisfactory criterion: modern judges do not ride off to war with their king; an unruly assembly which occupies a courthouse may be no more serious threat to civil government than one which occupies the executive or legislative chambers or a university building or a city street; and it is generally held that a judge does not lose his power or ability to function merely because his chambers or courtrooms are closed.[50] It would better preserve the substance of the traditional criterion if one were to inquire whether civilian executive force could effectively enforce the civilian laws, including such orders as a civilian court might issue. In any event, military troops cannot be used *as soldiers* on the mere pretext that civilian peace forces are overtaxed or undermanned; for all of the manpower available from the National Guard or other military forces is available to be used as a force of civilians under civilian command and under civilian law and limitations. To pass from ordinary civilian peace forces directly to military troops in their military character, neglecting the possibility of using the military personnel as a supplementary civilian force, is to overlook the entire law and history of domestic use of military troops in the due process tradition.

2. Whether circumstances warrant the domestic employment of military personnel in their character as soldiers is a question that will of course have to be determined in the first instance by the chief executive, either of a state or, in appropriate cases, of the nation. This is not the same as determining whether military troops are to be used at all. So far as due process is concerned, a state is free to utilize whatever civilian force it might choose for whatever purposes it might choose, so long as the state respects the sundry rights of the people. So long as the force used is essentially civilian, it is entirely a matter of non-constitutional and normally state law whether and under what circumstances members of military organizations are to be employed to subdue riots or disorders, police disaster areas, perform rescue services, collect garbage, operate utilities, or perform any other function. The only time that the due process safeguard against military oppression comes into play as a limitation on the chief executive's power to utilize military troops, is when the executive contemplates the utilization of those troops as a military, rather than as a civilian, force. Because exigencies calling for uniquely military force, exceedingly rare as they are, do not ordinarily allow for more, in advance, than informed unilateral executive action, the initial determination whether uniquely military action is warranted must rest necessarily with the executive. The cases, however, make no point more clear than that this determination by the executive is subject to review by the judiciary; while some lati-

[50] For an example of the unsatisfactory results to which a technical application of the traditional criterion, without regard to its substance or purpose, can lead, *see* Valdez v. Black, 446 F. 2d 1071 (10th Cir. 1971), *cert. denied,* 405 U.S. 963 (1972).

tude is allowed for judgment on the part of the executive, the ultimate determination of the issue whether military as distinguished from civilian force was warranted must always be made independently by the courts.[51] In other words, in determining to employ military personnel as a military rather than a civilian force, the executive acts at his peril.

3. One of the two factors that has served to distinguish between a civilian and a military force since at least the thirteenth century is the officers who have the rights and responsibilities of command. Due process regards military personnel as a civilian force only so long as the ordinary local civilian officers who would have borne responsibility had the troops not been employed remain in command. The requirement of military subordination to civilian power is not satisfied by merely designating the civilian chief executive the "commander-in-chief." Neither is it permissible to assign a military officer a general task and trust to his discretion for the means of accomplishing that task. As one Ohio judge correctly stated the rule, the troops, if they are to be regarded as a civilian force, are under the "absolute and exclusive control and direction" of the local civil officers, and the sheriff or other officials *cannot* delegate any of their authority to, or vest any discretionary power in, any military authorities.[52] At an earlier day, even the question whether to use military troops at all as a civilian force had been entirely in the discretion of the local officials themselves; the federal legislation of 1878[53] and comparable developments in most of the states have given chief executives control over the decision whether military troops as a civilian force will be used at all, but this gives the chief executives no power to authorize the use of troops without complete subordination to local civilian officials. Such subordination to the local officials remains a due process imperative except where civilian government has failed, and troops can lawfully be employed as a uniquely military force.

4. The other historic factor distinguishing between a civilian and a military force is the law by which the members of the force are governed. Military troops employed in any domestic situation, whether riot, disorder, disaster, catastrophy, or whatever, can be regarded as a civilian force only so long as civilian law continues to govern not only the citizenry but the troops themselves. Military troops employed as a civilian force are subject to the same standards of behavior as civilian peace forces or civilians assisting the ordinary peace forces, and are subject to subsequent civilian judicial review

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[51] *See* Sterling v. Constantin, 287 U.S. 378, 400-02 (1932), and *Supra* note 2 at 67, n. 319.

[52] *Supra*, note 36.

[53] *Supra*, note 34.

of their actions. They cannot be judged by the rules of, or subjected to the sanctions of, military law including the Uniform Code of Military Justice; nor can they be excused for their actions because those actions comport with military standards of self-defense or unflinching obedience to orders. Like civilians officers, they must be held to act at their peril under a standard of reasonableness under the circumstances.

This summary statement of the main tenets of the due process tradition concerning military troops in civil disorders provides an adequate background for reviewing the facts culminating in the tragic shooting at Kent State University on May 4, 1970.

It should be noted at the outset, before looking at the particular facts of that tragedy, that in the light of the due process principles outlined above the statutes under which Ohio National Guard troops are currently used in civil disorders are in several respects unconstitutional on their face. Ohio Revised Code §§5923.24 and 5923.26 enacted in 1953 conflict with due process insofar as they provide that troops on duty in civil disorders (as distinguished from genuine insurrections) are subject to the discipline of military law and courts-martial. Ohio Revised Code §5923.23, also enacted in 1953, conflicts with due process and with the rule which Ohio earlier had respected, by providing that although military commanders should consult with civil authorities as to the general objects to be accomplished, "the mode and means of execution shall be left to the discretion of the commanding officer." And Ohio Revised Code §5923.37, enacted in 1967, creates a generous and unconstitutional special immunity exclusively for military troops, which, unlike the immunity conferred equally upon civilian and military personnel by Ohio Revised Code §2923.55, is not limited to acts which are reasonably "necessary and proper" to subduing the disorder. The 1967 statute purports to give a special immunity exclusively to military troops for acts which cannot satisfy the test of reason, so long as they are not acts of "willful or wanton misconduct."

Article I, Section 4 of the Ohio Constitution contains the same language inserted in several of the original state Constitutions after the Revolution of 1776, which was designed to constitutionalize the common law rule. It provides that the military shall be in strict subordination to the civil power. But apparently the real significance of this provision has been completely forgotten, and legislators in Ohio mistakenly believe that it is satisfied by simply keeping the civilian governor as commander-in-chief.

The Kent State Tragedy

Since the facts of the Kent tragedy have not yet been subjected to judicial trial, the nearest that one can come to an authoritative

objective assessment of what happened is the Report of the President's Commission on Campus Unrest. The account which follows is a condensation of the Commission's account,[54] emphasizing the facts that have particular significance to the legal points.

Northeastern Ohio late in April, 1970, was beset with wildcat trucker strikes. To deal with striker violence, the Governor on April 29 issued a proclamation calling out the National Guard. That proclamation mentioned seven counties of the state by name; Portage County, the location of Kent, was *not* one of those specified. The text of the April 29 proclamation is reproduced below.[55] Several things are notable about this proclamation. Although the preamble recited that sheriffs and police had proved "unable with their own forces to bring about a cessation of violence," and that "the Mayors of many Ohio cities . . . have urgently requested" National Guard aid, these findings had to do with the truck strike disturbances, not with any anticipated campus unrest. Furthermore, while the military forces were to "act in aid of the civil authorities," the import of this was apparently not that the guardsmen should act as subordinate civilian peace officers, but rather merely that the military commanders should "consult with [the civil authorities] to the extent necessary to determine the objects to be accomplished"; notwithstanding the rules of due process which had been recognized in Ohio at an earlier day,[56] it was specifically provided that "the procedure of execution" was to be left to "the discretion of the commanding military officer designated by the Adjutant General." No control over the discretion of the military officers was reserved by the proclamation even to the Governor himself; the Adjutant General was left free to designate whatever and however many units he chose, and in his own discretion "to take action necessary for the restoration of order throughout the State of Ohio." When a few days later the language, "throughout the State," was given application to localities as to which no formal

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[54] U.S. PRESIDENT'S COMMISSION ON CAMPUS UNREST, REPORT, 233-290 (1970).

[55] WHEREAS, in northeastern Ohio, particularly in the counties of Cuyahoga, Mahoning, Summit and Lorain, and in other parts of Ohio, in particular Richland, Butler and Hamilton Counties, there exist unlawful assemblies and roving bodies of men acting with intent to commit felony and to do violence to person or property in disregard of the laws of the State of Ohio and the United States or America; and

WHEREAS, said unlawful assemblies and bodies of men have by acts of intimidation and threats of violence put law abiding citizens in fear of pursuing their normal vocations in the transportation industry; and

WHEREAS, local government officials, including sheriffs and their deputies and municipal police departments, are unable with their own forces to bring about a cessation of violence and reduce the believability of threats of violence; and

WHEREAS, troops of the Ohio National Guard, in coordination with the Ohio State Highway Patrol and local peace officers, can bring about a restoration of confidence in ability of citizens to move freely in the conduct of their business over the streets and highways of the State; and

(Continued on next page)

finding of civilian incapacity had been made, the tremendous scope of this purported abandonment of civilian power into military hands was underscored.

While the Ohio National Guard was on duty for the truckers' strikes, the President's war policy in Southeast Asia took a dramatic new turn. On the night of April 30, the President announced that he had ordered United States troops into Cambodia. The daylight hours of May 1 at Kent State were marked only by some peaceful protest assemblies; but that evening a series of incidents more or less related to unhappiness over the new turn in war policy produced about $10,000 in property damage to about 15 business buildings in downtown Kent, some minor property damage on the University campus, two police injuries from rocks or other missiles, and 15 arrests. During the night, at the request of the Mayor of Kent, a National Guard liaison officer was sent to survey the situation in Kent, but no military troops were authorized or sent.

On May 2, among several other steps taken to prevent a recurrence of violence and disorder, an injunction was procured against damage or destruction of buildings or other property. There was no injunction, however, against assemblies or rallies, a fact that was specifically pointed out in leaflets distributed on the University campus by University officials. Late in the afternoon of May 2, in the face of rumored new violence, the Mayor of Kent telephoned the Governor's office with a request for National Guard assistance. The jurisdiction of the Mayor of the City of Kent over the campus of Kent State University is dubious at best. City police in Kent regarded the campus as outside their jurisdiction, and subject to the Univer-

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WHEREAS, the Mayors of many Ohio cities, after taking counsel with each other, have urgently requested that the Governor make available the troops of the Ohio National Guard to assist in maintaining order, and in restoring freedom of transportation movement,

NOW, THEREFORE, I, JAMES A. RHODES, Governor and commander-in-chief of the militia of the State of Ohio, do hereby order into active service such personnel and units of the militia as may be designated by the Adjutant General to maintain peace and order and to protect life and property throughout the State of Ohio; and said Adjutant General, and through him the commanding officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio. The military forces involved will act in aid of the civil authorities and shall consult with them to the extent nessary to determine the objects to be accomplished, leaving the procedure of execution to the discretion of the commanding military officer designated by the Adjutant General.

The Adjutant General shall provide all transportation, services, and supplies necessary for the militia; and all statutory provisions requiring advertisement for bids in relation to their procurement are hereby suspended.

I command all persons engaged in riotous and unlawful proceedings to cease and desist from such activities.

The active military duty herein ordered is hereby designated as service in a time of public danger.

This proclamation shall continue in force until revoked.

[56] *Supra* note 36.

sity's campus police. The University officials privy to the Mayor's request for the National Guard were under the impression that the Guard was being requested for duty only in the city of Kent and not on the Kent State campus. No University official ever requested National Guard assistance, on that day or on any other.

Considering the language of his April 29 proclamation, "throughout the State of Ohio," to be adequate to cover the Kent situation, the Governor verbally authorized the commitment of guardsmen to Kent without any written proclamation.[57] Guardsmen bivouaced at Akron, ten miles from Kent, were placed on standby. In the evening on May 2, a crowd growing to about 1,000 persons gathered on the campus, and after a short while moved toward the ROTC building. No effort was made by the campus police or any other civilian forces to prevent persons in the crowd from stoning or otherwise damaging the ROTC building. Even after the building had been set afire, no police were deployed until after firemen had arrived and been forced to withdraw. Only then did the campus police appear, using tear gas to drive the crowd away from the burning ROTC building. Meanwhile, a few minutes before the ROTC fire had been started, the Mayor of Kent (but no University official) had secured the dispatch of the alerted National Guardsmen into Kent.

Upon arriving in Kent and conferring with the Mayor, but without consulting with or requesting or receiving permission from any University official, the Adjutant General of Ohio sent National Guard troops onto the campus. By midnight, without benefit of any request or instructions from University officials, the National Guard had cleared the campus with tear gas, and held it secure.

On the morning of May 3 the Governor arrived in Kent, and held a news conference in which he vehemently denounced campus violence and pledged to "eradicate the problem." After two hours the Governor left, having done nothing to resolve the uncertainties about applicable rules and relative authority that still had the various civilian officials and peace forces confused. The University officials, in particular, concluded that their authority had been preempted, and abdicated to the National Guard, passing on to the University community their own understanding that all assemblies had now been banned, not by University or City officials, but by the National Guard or the Governor as commander-in-chief. That evening, at about 9 p.m., the National Guard dispersed a crowd from the Campus Commons, and after two hours of ensuing non-violent demonstrations, a

[57] A *post facto* proclamation covering Kent and the Kent State University campus was issued three days later, on May 5, after the Guard had been present there for more than two days and after the tragedy of May 4 had already occurred.

half-hour of rock throwing, tear gas, minor injuries and arrests ended the day. That is the factual background of May 4.

May 4 was a Monday. Classes were scheduled and held as usual. Both at the University and in the City of Kent, the ordinary functioning of institutions was unimpaired. The courts were open and operating, and city as well as University officials performed their duties without interference. No buildings or public places were occupied or obstructed. Yet all was not like normal; the campus was being patrolled by armed military troops.

There still had not been any request or invitation from University officials for assistance or protection by the National Guard. The University president believed his authority had been superseded, and he simply resigned himself to the Guard's control. As the morning advanced, plans for a noon rally were rumored around the campus. No local civilian authority had forbidden such a rally, but the National Guard commander determined that it should be banned. By about 11:45 a.m., about 500 persons had gathered on the Campus Commons. No acts of violence had taken place. No speakers were inciting the crowd. No unlawful intent was apparent in the assembly. The Adjutant General nevertheless order the crowd dispersed.

The troops were ordered to "lock and load" their weapons thus chambering ammunition ready to fire. A University policeman riding with riflemen in a National Guard jeep approached the crowd to order it to disperse, and some rock throwing and chanting began. A few hundred more students by now had joined the crowd, and the Guardsmen, fixing baynets and firing tear gas, began to move them out. For the next thirty minutes, tear gas and epithets, and occasionally rocks, filled the air. One group of the guardsmen drove a part of the crowd past the administration building and down a hill to a parking lot adjoining a football practice field. For about ten minutes the guardsmen remained on the practice field, separated from the parking lot by a high chain link fence. Rocks and tear gas canisters flew back and forth. At one point the members of Cavalry Troop G huddled in an apparent conference; at another point they knelt and aimed their rifles at the crowd. After about ten minutes on the practice field, the guardsmen were ordered by the Adjutant General to return up the hill. As they did so, the men of Troop G lagged and fell out of formation as they looked back over their shoulders at the dwindling parking lot crowd. At the crest of the hill, several members of Troop G turned in unison approximately 135 degrees, retraced a few steps, and began to fire. Other guardsmen then turned and joined in the fusilade. The thirteen-second barrage of more than 60 shots was concentrated in the parking lot, more than 100 yards away. Some of those killed or injured had been participants in the violent disorder that had followed the commander's decision to dis-

perse the noon assembly; others had been bystanding observers; still others were mere hapless passers-by.

In its Report on Kent State the President's Commission on Campus Unrest refrained from detailing certain of the facts for fear of interfering with the criminal prosecutions which were expected to ensue. When more than a year passed without any federal prosecutorial action, the Chairman and several other members of the Commission became some of the most outspoken critics of the delay. The Justice Department's own summary of the evidence compiled by the Federal Bureau of Investigation, which evidence had been made available to the Commission, helps to explain the Commissioners' criticism. Among the conclusions contained in the Justice Department Summary were the following:[58]

> (1) Just prior to the time the Guard left its position on the practice field, members of Troop G [107th Armoured Cavalry] were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .
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> * * *
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> The Guard was then ordered to regroup and move back up the hill past Taylor Hall.
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> (2) The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistance. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded.
>
> (3) Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation.
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> (4) We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions.

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[58] A copy of the Justice Department Summary was given by Jerris Leonard, head of the Civil Rights Division of the Department of Justice, to Senator Stephen Young of Ohio. Young referred to the Summary on serveral occasions in statements on the floor of the Senate during the fall and winter of 1970, and the Summary was then published in full (without Justice Department approval) as Chapter 4 of STONE, THE KILLINGS AT KENT STATE: HOW MURDER WENT UNPUNISHED (1971).

(5) [One guardsman] admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students.

(6) Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons.

(7) No verbal warning was given to the students immediately prior to the time the Guardsmen fired.

(8) There was no request by any Guardsmen that teargas be used.

(9) There was no request from any Guardsmen for permission to fire his weapon.

(10) The Guardsmen were not surrounded.

(11) No Guardsman claims he was hit with rocks immediately prior to the firing.

(12) There was no sniper.

(13) The FBI has conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon.

(14) At the time of the shooting, the National Guard clearly did not believe that they were being fired upon.

(15) Each person who admits firing into the crowd has some degree of experience in riot control. None are novices.

(16) A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds.

(17) Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student.

(18) Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons.

(19) Four students were killed, nine others were wounded, three seriously. Of the students who were killed, Jeff Miller's body was found 85-90 yards from the Guard, Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot.

(20) Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day.

(21) No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away; another, 75 yards; another 95 or 100 yards; another 110 yards; another 125 or 130 yards; another 160 yards, and the other, 245 or 250 yards.

(22) Seven students were shot from the side and four were shot from the rear.

(23) Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC building on Saturday, May 2, 1970.

(24) As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and Wrentmore were merely spectators to the confrontation.

Aftermath of the Kent State Tragedy

After the shootings, National Guard and state officials were quick to offer justification. Many of the residents of northeast Ohio, who had seen and heard broadcast reports of the preceding days' violence, took the view that the students had gotten what they deserved. On the other hand, the Vice President of the United States let slip the opinion that the shootings constituted at least second degree murder;[59] but his opinion seems to have carried no more than its accustomed weight. More comprehensive investigations, however, confirmed the view that the guardsmen had committed a serious wrong. The President's Commission on Campus Unrest, after an exhaustive set of hearings and studies concluded that the shooting was "unnecessary, unwarranted, and inexcusable."[60] The FBI, conducting its own investigation, concluded that there were grounds for criminal charges against at least six of the guardsmen.[61] None of the incriminating evidence, however, was laid before the state grand jury convened to review the days of disorder, and that grand jury accord-

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[59] David Frost television show, May 7, 1970; Pretrial transcript appears as Appendix II in STONE, THE KILLINGS AT KENT STATE (1971).

[60] *Supra* note 54 at 289.

[61] JUSTICE DEPARTMENT SUMMARY OF F.B.I. INVESTIGATION, as reported in Akron Beacon Journal, July 23, 1970.

ingly exonerated the guardsmen while indicting a number of students and faculty. (The state grand jury's report was expunged by federal court order[62] and the indictments were later dismissed for lack of evidence.) No federal grand jury has even been convened to investigate the incident.[63]

The offenses with which some of the guardsmen might be charged include not only homicide and assault under Ohio law, but also criminal offenses under the Federal Civil Rights Acts. Some persons have suggested that the huddle of Troop G on the football practice field, that same Troop's demeanor on the return march up the hill, and the turning and firing in unison by several members of Troop G, as if on a signal, suggest a conspiracy in violation of 42 U.S.C. §241.[64] Announcing his refusal after fifteen months to place the matter before a federal grand jury, the Attorney General of the United States opined that there was "no credible evidence of a conspiracy";[65] but he said nothing at that time or at any other time to explain his opinion, or to explain how, regardless of any conspiracy, the facts could fail to be seen as a probable violation of 42 U.S.C. §242.[66] Violation of that section, where death results, is a federal felony.

The Boston Massacre, on facts showing somewhat greater immediate danger to the military troops, resulted in prompt prosecutions by colonial authorities and the conviction and punishment of the principal soldiers involved on charges of manslaughter. In contrast, the Kent shootings have not even been brought before a grand jury. Instead, the research files of the President's Commission on Campus Unrest, as well as the full F.B.I. investigatory report, have been sealed in the National Archives, cut off from any inquiry for a

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[62] Hammond v. Brown, 323 F. Supp. 326 *aff'd*, 450 F. 2d 480.

[63] A suit was filed Oct. 12, 1972, in an effort to compel a federal grand jury investigation. Schroeder, et al. v Kleindienst, Civ. Action No. 2048-72 (D. D. C.)

[64] *See* Davies, *An Appeal for Justice,* printed in 117 Cong. Rec. at E8144-E8158 (daily ed., July 22, 1971). 18 U.S.C. §241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having so exercised the same . . .
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years or both; and if death results, they shall be subject to imprisonment for any term of years or life.

[65] STATEMENT OF ATTORNEY GENERAL JOHN N. MITCHELL, released by the Justice Department August 13, 1971.

[66] 18 U.S.C. §242 provides

> Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results, they shall be subject to imprisonment for any term of years or life.

period longer than the life expectancy of most persons now alive.[67]

Even more clearly than they contain criminal implications, however, the apparent facts of the Kent State tragedy give rise to civil claims; and the inability of the aggrieved persons after almost three years of diligent efforts to even get a hearing on their allegations in a civil court is an even more disturbing commentary upon contemporary American justice and the inefficacy of the criminal law.

They are referred to here only to emphasize the different grounds on which redress is being sought. Ohio, by a statute enacted in 1967,[68] purports to protect National Guardsmen from civil suit in state courts for acts performed on duty in a disorder "unless the act is one of willful or wanton misconduct." As to actions in federal courts under 42 U.S.C. §1983[69] the leading case law affords the guardsmen a personal privilege for acts done in good faith and with reasonable belief in the existence of probable cause.[70] The complaints in the several actions brought against the guardsmen implicated at Kent are tailored to surmount these defenses as a matter of pleading, and the attorneys for the plaintiffs are satisfied that they can sustain their burden of proof. But these defenses, even if they were established, would not negate the unlawfulness of the acts which were done. Even if it were impossible to prove allegations that the shootings at Kent State amounted to willful and wanton misconduct, or even to prove bad faith or the lack of reasonable belief in probable cause, a grave and unrequited wrong would still have been done.

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[67] 18 U.S.C. §4 provides:

> Under 5 U.S.C. §555 (c), even F.B.I. investigative files cannot be withheld from Congress except on a claim of executive privilege. Nevertheless, without attemping to invoke executive privilege, two successive Attorneys General have denied repeated requests of a United States Senate Subcommittee during 1971 and 1972 seeking access to the Kent State F.B.I. report.
>
> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both. Obstructions by National Guard officials of investigation have been charged, which arguably constitute violations of this section. Moreover, the national administration seems to have taken care to keep the facts of the Kent matter concealed. While the latter is probably not indictable under 18 U.S.C. §4, that statute's existence does emphasize the gravity with which the concealing of crimes should be viewed.

[68] OHIO REV. CODE ANN. §5923.37 (Page Supp. 1970).

[69] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[70] Pierson v. Ray, 386 U.S. 547 (1967); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339 (2d Cir. 1972).

The official lawlessness that proximately caused the gunshot deaths and injuries at Kent was not merely the bad faith or malicious conduct of a few armed soldiers; the lawlessness to which the whole tragedy is primarily attributable was the utter disregard of the rules of due process for the use of military troops in civil disorders. The guardsmen at Kent State presented and comported themselves as a superseding military force. Civilian authority abdicated its control. No local civilian officer asserted the prerogatives of command. The Governor's proclamation by its terms unlawfully provided that "the procedure of execution" of the general objectives to be accomplished were left "to the discretion of the commanding military officer . . ."[71] It was the military commander's decision, not that of any civil officer, that forbade and dispersed the peaceful noon assembly on May 4, triggering the disorder that resulted in the shootings. The troops were under the regime of military law and orders, and their weapons as well as their tactics were appropriate to a militarily occupied zone. Yet by no colorable pretense were those rare and extreme facts presented which would justify the displacement of civil by military authority and force.

It is this that gives the tragedy of Kent State a significance far greater than any simple act of official vindictiveness under color of law. It is this that makes Kent a model of exactly the kind of military suppression of civil disorders that the historic principle of due process forbids. And yet, ironically, this most flagrant violation of the most ancient traditions of due process has thus far eluded all attempts at redress.

The traditional device in American law for redressing unlawful or unconstitutional positive acts by the state has been personal suit for damages against the officer who performed the act on the state's behalf. However, the statutory and case law rules of official privilege referred to earlier,[72] which have come to flourish in the last very few years, have transformed this traditional remedy for governmental wrongdoing into little more than a remedy for personal wrongdoing by persons masquerading in the role of the state. The gradual course of this profound transformation in the doctrine that once was the guarantor of enforcible constitutional limitations is much to complicated to reiterate here; it is traced in another comprehensive article recently published.[73] It is sufficient here to note that, because of the

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[71] *Supra* note 55.

[72] *Supra* notes 66 and 68.

[73] Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972).

modern personal official privilege rules, it is no longer possible, as it formerly was,[74] to obtain redress against officers personally for their unconstitutional official actions despite good faith, reason, and commendable intent.

Since not only problems of proof but also practical problems of jury persuasion under the modern rules of personal official privilege are difficult obstacles to surmount, the attorneys for the Kent State plaintiffs have supplemented their actions against the principal officers personally with actions directly against the State of Ohio. Here, of course, they confront the familiar barrier of soverign immunity. Some of the arguments by which they propose to surmount that barrier, however, are not likely to be found familiar to many lawyers at all. Those arguments are treated elsewhere in this symposium.

It may be that, as important as the vindication of the due process principle governing the use of military troops in civil disorders certainly is, the greatest significance of the Kent State litigation will be its illumination of the crisis that recent changes in official privilege doctrine have unwittingly created. If a notorious violation of the deepest traditions of due process can go without redress, and without even an opportunity for hearing, then the concept of enforcible and effective legal restraints upon government has encountered a great crisis indeed.

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[74] *See e.g.* Beckwith v. Bean, 98 U.S. 266, 274-75 (1878); Mitchell v. Harmony, 54 U.S. (13 How.) 126, 137 (1851); Luther v. Borden, 48 U.S. (7 How.) 1, 46 (1849); Milligan v. Hovey, 17 F. Cas. 1235 (C. C. D. Cal. 1867); McLaughlin v. Green, 50 Miss. 453, 461-63 (1874); Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159 (1867); Griffin v. Wilcox, 21 Ind. 370 (1863); Smith v. Shaw, 12 Johns. 257 (N.Y. 1815); McConnell v. Hampton, 12 Johns. 234 (N.Y. 1815); STORY, COMMENTARIES ON AGENCY 320 (5th ed. 1857); *see also* United States v. Russell, 80 U.S. (13 Wall.) 623, 627-28 (1871); Wise v. Withers, 7 U.S. (Cranch) 330 (1806). The same liability attached to the officer who acted under orders but in violation of a statute, as distinguished from the Constitution, *see e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Hyde v. Melvin, II Johns. 521 (N.Y. 1814).