The Power and Authority of the Governor and Militia in Domestic Disturbances

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A BRIEF

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The United States Commission on Industrial Relations invited Mr. Hersey to contribute to its work by preparing for it a brief or analysis of the Moyer decision rendered by the Colorado Supreme Court in 1904 and the decisions preceding and following it upon the same lines and in response to that invitation he prepared this brief. Mr. Hersey was Deputy Attorney General of Colorado during the labor strike in that state in 1903 and 1904 and represented the state in the numerous habeas corpus cases during that period which grew out of the arrest and detention of the labor leaders by the military authorities.

The Moyer case (reported in volume 35 of the Colorado Supreme Court Reports beginning at page 159) is the leading case upon the powers and duties of the governor and the militia, acting under his orders, in domestic disturbances. The decision in that case has since been approved by the United States Supreme Court and by the courts of other states where similar cases have arisen.

The accompanying brief is the result not only of Mr. Hersey's work in the Moyer cases, but also of further work in the ten years since those cases were decided.

JOHN CHASE,
The Adjutant General, State of Colorado.

Corrections of Typographical Errors

In the printed brief of Mr. Henry J. Hersey on "The Power and Authority of the Governor and Militia in Domestic Disturbances."

On Page 3 in next to the last line of the second paragraph, 2nd Column, change "Auray" to "Ouray"

On Page 4 in fourth line from end of second paragraph of 1st Column, change "sent" to "sued".

On page 5 in the first line of sixth paragraph of 1st Column erase the comma after "proposition".

On Page 6 in second line of paragraph (2) change "illegal" to "legal".

On Page 7 in fourth line of next to last paragraph change "necessity" to necessities".

JOHN CHASE,
The Adjutant General, State of Colorado

Honorable Frank P. Walsh, Chairman United States Commission on Industrial Relations, Washington, D. C.:

Dear Sir:

In response to your request that I give the commission "an analysis of the Moyer decision," decided by the supreme court of Colorado in 1904, "and the decisions preceding and following it upon the same lines," I am pleased to submit the following:

Before entering upon the discussion of legal questions involved, it is necessary to have a general statement of facts.

In 1903, the Western Federation of Miners ordered a strike of the metalliferous miners in the Cripple Creek and Telluride districts in Teller and San Miguel Counties.

Thereupon, armed forces of miners engaged in open resistance to the enforcement of the laws of the state, overpowering the civil authorities and destroying property and life until the sheriffs and other public officers and citizens of the respective counties were compelled to petition the governor to order out the National Guard for the enforcement of the laws and the protection of life and property. By these petitions, as well as by personal appeals, the governor was informed that the civil authorities were wholly unable to enforce the laws, or to provide safety to persons and property, or to suppress the armed forces of the strikers and their sympathizers. An insistent demand was made upon the governor that he perform his constitutional duty to enforce the laws, suppress the insurrection, restore peace and order and protect life and property by sending the militia into these districts for those purposes.

After due consideration the governor issued his proclamation declaring the county of San Miguel, where Telluride is situated, to be in a state of insurrection and rebellion, and ordered the Adjutant General to proceed to that county with the necessary troops and use such means as he might deem right and proper, acting in conjunction with or independently of the civil authorities of said county, as in his judgment and discretion the conditions demanded, to restore peace and good order and to enforce obedience to the constitution and laws of the state.

In pursuance of such executive order by the governor, as Commander-in-Chief of the militia, the Adjutant General proceeded with the troops to San Miguel County, and as a necessary means, in his judgment, of suppressing the insurrection and rebellion and of enforcing obedience to the constitution and laws and restoring peace and order in said county, he caused the arrest of C. H. Moyer, who was the president of the Western Federation of Miners, because, in his judgment, Moyer was an important factor in fomenting disorder, lawlessness and insurrection.

I may digress here to say that previous to the arrest of Moyer, three other persons had been arrested and detained in the Cripple Creek district by the military authorities, where the militia had been sent some months previous, under the proclamation and orders of the governor for the same purpose as they were subsequently sent into the Telluride district. Each of these three persons were represented in their attempts to secure release from military custody by the aid of Writs of Habeas Corpus, by the general attorneys of the Western Federation of Miners, Richardson and Hawkins, who appeared as the personal attorneys of each of these persons. The first two arrested and detained by the military authorities were Victor Poole and A. G. Paul. Each of them applied on the same day—Dec. 16, 1903—to the supreme court of the state of Colorado for a Writ of Habeas Corpus against the military authorities, which Writs were granted. The final result in each case, however, was the dismissal of the proceedings. The other of the three persons arrested and detained by the military authorities in the Cripple Creek district, was one Sherman Parker. Evidently his attorneys, who had failed to get release for their former clients, Poole and Paul, in the state supreme court, thought they would fare better in the United States court, so on the 19th day of January, 1904, they presented Parker's petition for a Writ of Habeas Corpus to Judge Hallett of the United States Circuit Court at Denver. I appeared for the state (being Deputy Attorney General during all this period) and resisted the application. Judge Hallet took the matter under advisement and the next day denied the petition for the Writ and dismissed the proceeding. Judge Hallett's opinion has never been officially published, but in the course of his opinion, he fully sustained the power of the governor and the military authorities to do all that they had done in arresting and detaining the petitioner and held that it was entirely legal.

The arrest of Moyer by the military authorities at Telluride occurred on the 29th day of March following, some two months later than the Parker case, and the same attorneys appeared again, this time for Moyer, and applied for a Writ of Habeas Corpus to Judge Stevens of the district court at Auray, Colo., a county adjoining Telluride.

The Writ was issued and served on the Adjutant General and the Captain of the militia at Telluride, and upon the return day thereof the Attorney General and myself appeared before Judge Stevens at Ouray and by proper motions and pleadings resisted the application of Moyer for release upon Habeas Corpus.

In the answer or return to the Writ, we set forth the proclamation and executive orders of the governor above referred to, and the existence of a state of insurrection and rebellion so proclaimed and declared by the governor, and that it was the intention of the military authorities, at the earliest day practicable and consistent with the administration of justice in the suppression of the insurrection, and the restoration of order and peace, to turn Moyer over to the civil authorities and civil courts, but that under existing conditions it was unsafe to do so; the answer also stated that they had been commanded by the governor, as Commander-in-Chief of the militia, to decline to produce the body of Moyer before the court.

In the answer or return we also contended that, under the facts shown by the return, the court had no further jurisdiction to proceed with the cause.

Judge Stevens declined to permit us to present authorities or to be heard in defense of the state's position, and notwithstanding the supreme court and the United States Circuit Court had, previously, in the three cases above referred to, under similar circumstances denied

similar petitions for Habeas Corpus, yet Judge Stevens immediately, without even hearing us, fined the Adjutant General and Captain of the militia, five hundred dollars ($500) each, for not producing Moyer in court and ordered the sheriff to arrest and imprison them without bail until they should obey the Writ of Habeas Corpus, and also, ordered that they pay the fines to said Moyer.

The military authorities, however, declined to recognize the order of the court and refused to be arrested by the sheriff, to pay the fines or to release Moyer. Notwithstanding the three previous decisions of the state supreme court and the federal court had established the legality and soundness of the position of the governor and the military authorities, yet desiring that the questions involved should be still more thoroughly tested in the courts, upon the advice of the Attorney General and myself, Adjutant General Bell sent out a Writ of Error from the supreme court to the district court of Ouray County for the purpose of reviewing Judge Stevens' orders and judgment.

We applied to the supreme court, in behalf of the military officers, for a supersedeas to stay the orders and judgment, above referred to, which supersedeas was unanimously granted.

At the same time, Moyer's attorneys applied in his behalf to the supreme court for a new Writ of Habeas Corpus, setting forth all the proceedings in Judge Stevens' court, as well as the refusal of the military authorities to obey the district court's orders.

Simultaneously with the filing of Moyer's petition for a Writ of Habeas Corpus, he applied to the supreme court for an order admitting him to bail, to secure his release from the custody of the military authorities pending final hearing. Elaborate arguments were made by counsel for Moyer for his release upon bail and opposed by us after which the supreme court unanimously denied Moyer's application for release upon bail. The opinion was rendered by Mr. Justice Steele, and will be found in volume 35, Colorado Supreme Court Reports, page 154. Upon the refusal of the supreme court to admit Moyer to bail, he was, by order of that court remanded to the custody of the military authorities pending the final hearing and determination of his case.

The Writ of Habeas Corpus was issued, however, and served upon the Adjutant General and Captain of the militia; and later, when the case was before the supreme court for oral argument upon final hearing, Moyer was produced in court by the military authorities and remained present during all the time his case was being heard, but, of course, he was attended by the Adjutant General and the Captain of the militia, in whose custody he was and who were respondents or defendants in the Habeas Corpus proceedings.

Previous to the oral argument of the case, however, the Adjutant General, following the usual course in Habeas Corpus proceedings, made his answer or return to the Writ, in which he set forth the proclamation of the governor, above referred to, declaring San Miguel County to be in insurrection and rebellion, and also the executive order of the governor, above referred to, ordering the Adjutant General to proceed to San Miguel County and suppress the insurrection.

The answer or return also stated that in the judgment of the governor and military authorities it was necessary to arrest and detain Moyer in order that the insurrection might be suppressed and peace and order restored and obedience to the constitution and laws enforced. To this return was appended a certificate by the governor asserting the truth of the facts stated in the return or answer of the Adjutant General and, in addition thereto, advising the supreme court fully of the gravity and seriousness of the situation, even giving the court a portion of the evidence submitted to the governor before he issued his proclamation and orders, among which was the statement of the sheriff and others as to the lawless conditions in San Miguel County and the total inability of the civil authorities to protect life and property, and their request to and demand of the governor that he immediately order the National Guard into active service in that county. The governor also certified to the supreme court that the insurrection and rebellion, declared in his proclamation to exist had not been fully suppressed, owing to its magnitude and the number of lawless persons aiding and abetting the same, and that the ordinary civil authorities were wholly powerless to cope with the situation.

Moyer, through his attorneys, sought to take issue with the facts set forth in the answer or return of the Adjutant General and the certificate of the governor by formal reply thereto, denying the existence of the facts stated by the Adjutant General and the governor.

As both the facts, out of which this case arose, and the legal questions involved and decided therein, have been misstated, not only by some persons who have testified before your commission at its hearings in Denver, but also from time to time in the public press and in public meetings, it is most important to remember that the proposition of law for which we contended and which the courts have sustained was this:

That when the answer or return of the military authorities has been filed and presented to the court showing that the governor, in pursuance of his constitutional power and duty to enforce the laws and suppress insurrection, *had issued a proclamation declaring a portion of the state to be in insurrection and rebellion* and that the governor had ordered the militia into the field to suppress such insurrection and enforce obedience to the constitution and laws and to restore peace and order, *and when such return also showed that as a means thereto, the military authorities,* acting under the governor's orders as governor and Commander-in-Chief, *had deemed it necessary to arrest and detain any person* or persons in their judgment aiding and abetting the insurrection and had arrested and detained such persons *that thereupon the jurisdiction of the court immediately ceased.*

That is quite different from the proposition that either the Writ, or the privilege of the Writ of Habeas Corpus was or could be suspended by the governor; that proposition was not involved in the Moyer case and neither was the question of martial law involved; so I shall not discuss them here. I only mention them because it has been erroneously stated that those matters were involved.

It is also important to know that we contended that the governor and military authorities in acting as they did were as fully and truly within the constitution and laws of the state as are the civil authorities when upon filing of a criminal complaint the court issues a warrant and the sheriff arrests the person charged with the crime and puts him in jail; in other words, *if the governor in obeying the express command of the constitution* to "take care that the laws be faithfully executed," and "to suppress insurrection," *finds it necessary to arrest and detain a person, that is as truly a legal act and a legal arrest and detention, and also as definitely required by the constitution and statutes, as is an arrest* and detention *by a sheriff* upon a criminal warrant.

The former is a summary procedure to effectively meet extreme cases and conditions threatening the very life of the state, while the latter is a more common and familiar procedure to meet the ordinary and usual violations of law not striking at the very existence of the government.

The above proposition was not only sustained by the Colorado supreme court in the Moyer case, but by the United States circuit court in two cases (In re Sherman Parker, *supra*, and Moyer v. Peabody, *infra*), but later by the United States supreme court in Moyer v. Peabody, *infra*.

Briefly stated the first and fundamental proposition involved in the Moyer case was:

(1) *That under the constitution and statutes of the state of Colorado, it is the duty of the governor to determine as a fact when such conditions exist as constitute an insurrection and which require him to call out the militia to suppress it, and that his determination of that fact cannot be disputed, and is conclusive upon all other departments of government and upon all other persons whomsoever.*

That proposition, the supreme court of Colorado in the Moyer case held was sound and in so holding, it followed the law as it has existed in this country from the earliest times to the present day, as we shall now see.

Under the constitutions of our several states, as well as under the federal constitution, our state and national governments are divided into three separate departments each distinct and supreme in its own sphere, neither of which can encroach upon the other and none of which can control any of the others in the exercise of its special functions.

The provisions of the Colorado constitution upon the matters now under discussion are in no essential particulars different from the constitutions of other states.

The constitution expressly imposes upon the governor certain important executive powers and duties, namely:

"The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."—Colo. Const., Sec. 2, Article 4.

It also provides that the governor "shall be Commander-in-Chief of the military forces of the state" and that "he shall have power to call out the militia to execute the laws, suppress insurrection or repel invasion."—Colo. Const., Sec. 5, Article 4.

These are the positive and express commands by the whole people to the governor, embodied in their constitution, and neither the judicial nor the legislative department can usurp any of these powers nor interfere with them. All that either of the other two departments can do, and what they must do under the constitution, is to aid the governor and not hinder or prevent him in performing his constitutional duties.

The legislature of Colorado to aid the governor, early in its history, passed a National Guard act which has since been amended from time to time. When the Moyer case arose, and for some years prior thereto, the National Guard act provided as follows:

"*The National Guard* of Colorado *shall be governed by the military law of the state*, the code of regulations, *the orders of the governor*, and wherever applicable by the regulations, articles of war, and customs of the service in the United States Army."—Colo. Session Laws, 1897, page 198, Sec. 1.

The same act also provided that:

"When an invasion of or insurrection in the state is made or threatened, the governor shall order the National Guard to repel or suppress the same."—Colo. Session Laws, 1897, P. 204, Sec. 2.

These statutes show not only the purpose of the legislative department to aid the executive department in the performance of the latter's constitutional duties, but also clearly evidence the intention of the legislature to eliminate all possible question or controversy that "*the orders of the governor*" to the National Guard *are as much the law of the state when the* militia is called out by the governor to aid him in the enforcement of the laws, or in suppressing an insurrection, *as are the orders of any court* in matters properly before it.

The duty therefore having been imposed upon the governor by the constitution to "take care that the laws be faithfully executed" and "to call out the militia to execute the laws, suppress insurrection or repel invasion" *as the exclusive duty and function of the executive department of the government* it follows, under our theory and form of government, that *neither the legislative nor judicial department can encroach upon that exclusive jurisdiction*, or function, of the executive department *by interfering with, or controlling, the discretionary exercise of his constitutional powers and duties.*—14 American and Eng. Ency. of Law (2nd Ed.), 1106; 6 American and Eng. Ency. of Law (2nd Ed.), 1006 (1); 1008 (b); 1010 (2a); 1012 (c); 1014 (title, "Governor").

For a very able opinion, out of many, upon the above proposition, I refer to the following rendered in 1839 by the supreme court of Arkansas.—Hawkins v. Governor, 1 Arkansas 570, 589-596.

In other words, where the governor under the constitution and statutes has a duty to perform he is required to exercise his discretion, and, when he has determined the existence of the facts necessary to call into exercise that discretion, no court has jurisdiction to inquire into the truth or falsity of the facts, for the governor alone is the sole judge.

Perhaps the earliest case in the United States where this proposition was announced was the celebrated case of Marbury v. Madison, decided by the supreme court of the United States in 1803, wherein that great chief justice, John Marshall, said for the court that

"By the constitution of the United States,

the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."—Marbury v. Madison, 1 Cranch (U. S.), 137, 165-166.

The court then immediately after the above quoted sentence, discussed the act of Congress authorizing the President to appoint certain officers to act by his authority and under his orders and held that their acts are the President's acts, adding,

"*And whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.*"

And the court further held that,

"*The acts of such an officer, as an officer, can never be examinable by the courts.*"—Idem, 166.

We see, therefore, that the first and fundamental proposition involved in the Moyer case was decided to be the law in this country over one hundred years before the Moyer case was decided.

The next case was decided by the supreme court of New York in May, 1814. In that case it was necessary to determine the question of the President's powers under an act of Congress approved Feb. 28, 1795, which gave to the President authority to call forth the militia "to execute the laws of the Union, suppress insurrections, and repel invasions" (it should be noted that the language of this act is practically identical with the Colorado constitution and statutes which I have quoted above).

The supreme court of New York in that case held that *the President of the United States alone is made the judge of the happening* of the event which requires the calling out of the militia, and that in such case the President acts upon his own responsibility, under the constitution.—Vanderheyden v. Young, 11 Johnson's Reports (N. Y.), 150, 158.

The same act of Congress, and the same question, was before the United States supreme court in 1827, and that learned tribunal followed the New York case and held, in an opinion by Mr. Justice Story,

"That *the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.*"—Martin v. Mott, 12 Wheaton (U. S.), 19, 30.

In our briefs in the Moyer case we cited the foregoing cases, as well as others, among them, another case decided by the United State supreme court in 1849, growing out of Dorr's Rebellion in Rhode Island, wherein the supreme court of the United States again held to the same effect.—Luther v. Borden, 7 Howard (U. S.), 1, 43-45.

All these cases were considered by the supreme court of Colorado and followed in the Moyer case.

We find, therefore, that the fundamental proposition involved in the Moyer case, has always (and necessarily so under our theory and form of government) been the unquestioned law in this country.

In our briefs and arguments in the Moyer case, we cited numerous other cases in support of the various propositions involved, among others, an Idaho case growing out of the Coeur d' Alene strike, where the supreme court of Idaho went much farther than the supreme court of Colorado was asked to go, or did go, in the Moyer case. In that case, the supreme court of Idaho, held not only that the facts set forth in the governor's proclamation could not be disputed and would not be inquired into, or reviewed, by any court, but also held that the privilege of the Writ of Habeas Corpus might be suspended by executive action.—In re Boyle, 6 Idaho, 609.

But, as I have before stated, the governor of Colorado did not suspend the privilege of the Writ of Habeas Corpus in the Moyer case and so that proposition was not involved and I, therefore, do not discuss it here.

The next question involved in the Moyer case, and the really practical question, was this:

(2) Were the arrest and detention of Moyer under the facts narrated, illegal?

The answer to this question, we shall now see, must be in the affirmative.

Of course, to answer this question correctly the fundamental proposition which I have just discussed and which was briefly stated in the paragraph I have numbered (1) above, had to be first answered; and perhaps I should have made this second question the first, but as I consider the other more fundamental and as rather leading up to this practical question, I have discussed it here first.

It is an elementary rule of constitutional and statutory construction (as was held in the Moyer case) that

"When an express power is conferred, all necessary means may be employed to exercise it which are not expressly or impliedly prohibited."—In re Moyer, 35 Colorado Supreme Court Reports, 159, 166; citing 1 Story on the Constitution, Sec. 434.

The constitution having, therefore, by its express commands imposed upon the governor the duty to "take care that the laws be faithfully executed," and having expressly made him "Commander-in-Chief of the military forces of the state" and also commanded him "to call out the militia to execute the laws, suppress insurrection," etc., it necessarily follows, that he may and can employ all the means which, in his judgment, are necessary to be used to execute the laws and to suppress insurrection.

It also necessarily follows from the foregoing that the executive (being the President in the case of the national government and the governor in the case of the state government) when he has called out the militia to enforce the laws, or to suppress an insurrection and has determined that it is necessary to arrest and detain any person, and has made such an arrest and detention, has done a perfectly lawful act, and his decision cannot be questioned or interfered with, or set aside, by the courts, or any other department of government.

Ultimate authority must rest somewhere, and, under both our federal and state constitutions in such cases and under such conditions as we are now considering, *it rests with the Chief Executive* of the nation, or state, according to whether it is a national or state matter.

The law as to ultimate authority was well stated by that eminent constitutional jurist, Judge Cooley, in rendering the opinion of the supreme court of Michigan, where the court held that

"The law must leave the final decision upon

every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial."—People Ex rel Sutherland v. Governor, 29 Mich., 320, 330-331.

In the recent strike of the coal miners in Colorado it became necessary for the President of the United States to send the federal troops into Colorado, and I have yet to hear that anyone, lawyer or layman, has had the temerity to even suggest that the President's action was illegal, or that the courts could inquire into the necessity of such act, or in anyway interfere with it. To state the proposition is to make its absurdity immediately apparent.

The constitution and statutes having vested the governor with the exclusive powers and duties above referred to, and all the courts (beginning with Marbury v. Madison, supra decided by the United States supreme court in 1803) having uniformly sustained the power and duty of the Chief Executive in the premises and having also decided that he is the sole and exclusive judge of the existence of facts calling into operation his executive powers and duties and that he cannot be controlled or interfered with in the performance of such duties by any other department of the government, it naturally followed that the supreme court of Colorado, when the Moyer case came before it, in obedience to the constitution was compelled to decide, as it did decide:

(a) That where the governor has called out the militia to suppress an insurrection the militia has authority to arrest and imprison any person participating in, or aiding, or abetting, such insurrection and to detain such person in custody until the insurrection is suppressed:

(b) That under such circumstances the military authorities are not required to turn such arrested persons over to the civil authorities during the continuance of the insurrection, but can detain them until the insurrection is suppressed, when they should be turned over to the civil authorities to be tried for such offenses against the law as they may have committed:

(c) *And as a further logical conclusion, that where the* militia is engaged in suppressing an insurrection and has arrested a person for aiding and abetting such insurrection, *his arrest is legal, and his detention in the custody of the military authorities* until the insurrection is quieted *is also legal*, and the court will not interfere to release such person upon a Writ of Habeas Corpus.—In re Moyer, 35 Colo. Supreme Court Reports, 159.

The foregoing propositions have all been sustained, since the Moyer decision, by the federal courts in litigation instituted and prosecuted by Moyer after peace and order had been restored and Moyer had been released from military custody by the military authorities.

After the strike was over Moyer's attorneys, Richardson and Hawkins, brought a suit for him in the United States court at Denver against Governor Peabody, the Adjutant General and the Captain of the militia at Telluride, claiming that because of his arrest and detention by the military authorities, acting under the orders of the governor, Moyer's constitutional rights had been violated and that he had been damaged in the sum of one hundred thousand dollars ($100,000) and asked for body execution. In that suit Moyer claimed in substance that the Colorado supreme court's decision in the Habeas Corpus case, above discussed, had violated the federal constitution by depriving him of his liberty without due process of law. In this case the same questions were again involved and argued as were involved and argued in the Habeas Corpus case and again Moyer was defeated in his contentions. Judge Lewis, who sat in the trial of the case, dismissed the case and in his opinion fully sustained the power and duty of the governor and military authorities in the premises and followed the decision of the supreme court of Colorado in the Moyer case.—Moyer v. Peabody et al., 148 Federal Reporter, 870.

Moyer then took the case to the United States supreme court and in January, 1909, that learned tribunal, in an able opinion by Mr. Justice Holmes, unanimously reached the same conclusions as had five years before been reached by the Colorado supreme court and fully sustained the power and duty of the governor to do all that was done in the Moyer case.—Moyer v. Peabody, et al., 212 U. S. Supreme Court Reports, 78.

I shall not quote the learned opinion in full, hoping that the commission will read it from the official report above cited, but I feel it important to give a few extracts therefrom.

It is interesting to know from the opinion in that case, that Moyer and his attorneys had, during the intervening years, learned that they could not lawfully dispute the facts of the governor's declaration or proclamation, for the United States supreme court says in its opinion,

"*It is admitted*, as it must be, *that the governor's declaration that a state of insurrection existed, is conclusive of that fact.*"—Idem 83.

The court, after discussing other familiar summary proceedings such as in tax matters and executive decisions for exclusion of aliens from the country, and the Colorado constitution and statutes involved, and referring to the arrests by the military authorities as a means of suppressing insurrection, says,

"Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power."—Idem 84-85.

The supreme court of the United States later in the opinion shows clearly that such arrest and detention is perfectly legal and as truly so, as is the arrest and detention under the ordinary process of the civil courts, when the court said,

"*When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessity of the moment. Public danger warrants the substitution of executive process for judicial process.*"—Idem 85.

And thereby the United States supreme court held that the arrest and detention of Moyer by the military authorities was perfectly legal and sustains the proposition that I announced earlier in this letter that if the governor in obeying the express commands of the constitution to "take care that the laws be faithfully executed," and "to suppress insurrection" finds it necessary to arrest and detain a person, that is as truly a legal act and detention, and also as definitely required by the constitution and statutes, as is an arrest and detention by a sheriff upon a criminal warrant.

Since these several Moyer cases were decided by the supreme court of Colorado and the federal courts, similar cases have arisen in the states of West Virginia and Montana, each of which states has followed the decision of the Moyer cases in the supreme court of the state of Colorado and in the federal courts.

The first of these cases was before the supreme court of appeals of West Virginia, several Habeas Corpus cases being heard and decided together. Among them was one in which it appears that Mary Jones (who has also figured in the recent Colorado coal miner's strike, and is commonly known as "Mother" Jones) who had been arrested and imprisoned by the military authorities of West Virginia, acting under the orders of the governor of that state, sought release therefrom by a Writ of Habeas Corpus.

Similar questions were involved in that case as were involved in the Moyer case and the same conclusion was reached by that court as had been previously reached by the supreme court of Colorado and the United States supreme court; and the cases cited in the opinion of that case, in support of its decision, were also cited and presented to the supreme court of Colorado for its consideration in the Moyer case.—In re Jones (and three other cases), 71 West Virgina, 567; Ann. Cas., 1914 C., page 31.

That case was decided March 21, 1913, and, just one year thereafter, on March 31, 1914, another case, involving similar questions, was before the supreme court of appeals of West Virginia. In the latter case, that court issued its Writ of Prohibition against one of the circuit courts of that state prohibiting it from entertaining jurisdiction in a certain action there pending brought against the governor of the state, as governor and Commander-in-Chief of the military forces and certain officers of the National Guard, acting under the governor's orders, who had suppressed and destroyed a Socialist newspaper, as a means of suppressing an insurrection existing in said state.

The basis of the decision, prohibiting the lower court from hearing the case, was that the governor could not be held to answer in the courts in an action for damages resulting from the carrying out of his orders issued in the discharge of his official duties and that his proclamation, warrants and orders made in the discharge of his official duties are as much due process of law as the judgment of a court. In this decision the supreme court of appeals of West Virginia again followed the decisions in the Moyer cases above referred to and the other cases which the Moyer cases followed.—Hatfield v. Graham (West Virgina), 81 Southeastern Reporter, 533.

The Montana case, to which I have referred, was one in which the militia had arrested and detained the petitioners who sought their release from military custody by Habeas Corpus upon the same grounds as did Moyer in the Colorado case. The supreme court of Montana rendered its decision on October 8, last. In that case, following the Moyer cases in Colorado, and the other cases above referred to, the supreme court of Montana held that the governor had authority to proclaim a state of insurrection to exist in a county of the state and to detail the militia of the state to suppress it and that his determination of the existence of an insurrection was conclusive and binding upon the court and all other authorities.

The Montana supreme court in specifically referring to the Moyer cases decided by the Colorado supreme court and the United States courts after quoting extensively from them said,

"*The reasoning of these cases*, properly understood and strictly confined to its proper sphere, *we take to be unanswerable*, and to be entirely applicable to the right and duty of the governor and the militia, under our constitution and laws."—Ex Parte McDonald, et al. (Montana), 143 Pacific Reporter, 947, 949, 951.

In the foregoing analysis, I have by no means exhausted the adjudicated cases upon the questions involved, for to do so would prolong this brief beyond all reasonable limits. What I have endeavored to do is to show that the opinion and judgment of the supreme court of Colorado in the Moyer case is based upon the positive and express mandates of the constitution; that it is not an isolated case, but, on the contrary is one of many cases upon similar propositions decided by the highest courts of our country, beginning with Chief Justice John Marshall's decision in Marbury v. Madison in 1803 down to the present time.

For the supreme court of Colorado to have rendered any other decision than it did would have been an encroachment by the judicial department upon the exclusive functions of the executive department and to have been a deliberate violation of the constitution.

Hoping that the above analysis complies with the request with which you have honored me, I am, Yours very respectfully,

HENRY J. HERSEY.

Note.—While the question of whether or not an insurrection exists is to be determined solely by the executive department, and is not open to question, it is not out of place to here give the accepted definition of that word.

Insurrection Defined.—"An insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state." —16 American and Eng. Ency. of Law (2nd Ed.), 977. See also 22 Cyc, 1451-2.