

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

Preventive Martial Law

The question of executive power in the presence of civil disorder is dealt with in modern terms in *Moyer v. Peabody*,⁷⁴⁴ to which the *Debs* case⁷⁴⁵ may be regarded as an addendum. Moyer, a labor leader, sued Peabody for having ordered his arrest during a labor dispute that had occurred while Peabody was governor of Colorado. Speaking for a unanimous Court (with one Justice absent), Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. . . . The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him."

". . . In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."

". . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."⁷⁴⁶

The Debs Case.—The *Debs* case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidentally with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the United States circuit court forbidding the strike because of its interference with the mails and

⁷⁴⁴ 212 U.S. 78 (1909).

⁷⁴⁵ *In re Debs*, 158 U.S. 564 (1895).

⁷⁴⁶ 212 U.S. at 84–85. See also *Sterling v. Constantin*, 287 U.S. 378 (1932), which endorses *Moyer v. Peabody*, while emphasizing the fact that it applies only to a condition of disorder.