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THE USE OF THE NATIONAL GUARD DURING TUMULTS AND DISASTERS

By William Lawrence Shaw*

INTRODUCTION

The years 1964-1967 have witnessed an increasing resort to the local use of the National Guard, both Army and Air. In 1966 and 1967 on at least twenty occasions, the National Guard were called out in various states in a variety of situations, such as flood, fire, and civil unrest. In Watts, California, a widespread tumult led to one week of violence that claimed at least 34 lives and led to the destruction of millions of dollars worth of property. The National Guard were called to restore order and control certain lawless elements within the population. A like situation arose in Michigan and in New Jersey.

This writing will supplement a prior article which discussed the relationship of the National Guard and the U. S. Army.¹ There will be considered instances of the actual use of the Guard in times of disasters and tumults, the involvement of the governor of the state,

his proclamation or order as commander-in-chief, state versus federal service of the Guard, and the actual proclamations and orders utilized in one particular call of the Guard upon a large scale basis.

I. What Is the National Guard?

As a starting point, one may well inquire: What is the National Guard? At the turn of the century, it was declared in *State ex rel. Madigan vs. Wagener*:

"Under our Military Code [Minnesota], the active militia or National Guard are organized and enrolled for discipline, and not for military service, except in times of insurrection, invasion, and riot. The men comprising it come from the body of the militia of the state, and, when not engaged, at stated periods, in drilling or training for military duty, they return to their usual avocations, subject to call when public exigencies require it, but may not be kept in service, like

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¹ The Interrelationship of the United States Army and the National Guard, 31 *Military Law Review* 39 (1966).

standing armies, in times of peace.”²

In *Dunne vs. People of the State of Illinois*,³ the issue before the court was the validity of the State Military Code⁴ set forth in “An Act to Provide for the Organization of the State Militia”. A provision of the statute exempted an active militia member from serving on juries. Dunne, aged 22 years was an enlisted, active member of Company “G”, 1st Regiment, Illinois National Guard organized under the state Military Code. Dunne was summoned to serve as a juror in Cook County Criminal Court, claimed exemption under the Code, met with a refusal, declined to serve as juror, and was fined \$50—which he did not pay. On appeal by Dunne, the judgment was reversed. The Illinois Supreme Court upheld the Military Code in all particulars. The court recognized that the states might organize such portion of the unorganized militia as may be deemed necessary for the execution of the laws and to aid in

maintaining domestic tranquility. In right of its sovereignty, the state could employ the militia to preserve order. An active state militiaman was required to take an oath to obey the orders of the governor as commander-in-chief when the militiaman was on state service. The state might refuse recognition to any association or body of armed men other than the organized state militia and this was a valid exercise of the police power.⁵

In *Dunne*, the court upheld the code provision that “all able-bodied male citizens of the State, between the ages of 18 and 45 years, except such as are expressly exempted . . . shall be subject to military duty . . .”. The court declared: “The active militia of the State is simply a reserve force, that the executive is authorized by the constitution to call to his aid in case of a sudden emergency. Lexicographers and others define militia, and so the common understanding is, to be ‘a body of armed citizens trained to military duty, who may be

² 74 Minn. 518, 77 N.W. 424, 425 (1898) General Lafayette brought the term ‘National Guard’ to the United States in his visit in 1824-1825. During the French Revolution, he had commanded a French volunteer trained force, called the ‘national guard’. In New York City in 1825, an organized, trained militia battalion assumed the same appellation “National Guard” which captured the public appreciation: Cutler, *History of Military Conscription*, p. 54 (1922).

³ 94 Ill. 120, 137-38, 34 Am. Rep. 213 (1879).

⁴ Act of 28 May 1879, *Laws Illinois, 1879*, pp. 193 *et seq.*

⁵ *Presser vs. Illinois*, 116 U.S. 252 (1886): State statute may restrict membership in the State Militia to approved, organized companies, and prohibit other military organizations from parading or drilling with arms: *Commonwealth vs. Murphy*, 166 Mass. 171, 44 N.E. 138 (1896) in accord.

called out in certain cases', but may not be kept on service like standing armies, in time of peace! That is the case as to the active militia of this State"

In *Burroughs vs. Peyton*,⁶ the Virginia Supreme Court distinguished 'militia' from the body of men called by the Confederate government for indefinite full-time service to the central (national) government. "An army is a body of men whose business is war: the *militia* a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it."

The militia was declared not to be the posse comitatus in *Worth vs. Craven County Commissioners*⁷ where the governor of North Carolina called out seven companies of the 1st Regiment of the state Guard to aid a sheriff to enforce a writ of possession after a sufficient number of men had not responded to the sheriff's call for a posse

comitatus. The resulting costs were to be met by the state and could not be assessed against the county. The court ruled:

"The militia, when called out, retains its own officers and organization, . . . is commanded by and acts under its own officers. When the posse comitatus is called out by the sheriff, he is its head and commander, and it acts under his authority. Besides, its constituency is not the same. The militia are composed of men of military age, whereas the posse comitatus is composed of all able-bodied persons of sound mind and sufficient ability to aid the sheriff and may be younger or older than the military age."

In 1894, when the active militia was called into an urban area, it was engaged in state business and not that of the *city*.⁸ The governor during unrest, had sent five regiments of National Guard into Chicago. The troops occupied a baseball park for purposes of a campsite without the consent of the

⁶ 57 Va. (16 Gratt.) 470, 475 (1864), the court upheld the constitutionality of the Conscription Act by the Confederate Congress, 16 April 1862 (Pub. Laws, CSA, 1st Cong., 1st Sess., ch. 31, pp. 29-32: also set forth in Official Records, ser. IV, vol. I, 1095-97).

⁷ 118 N. C. 112, 24 S.E. 778, 779 (1896). Do not confuse the workings of a county posse comitatus with the Federal Posse Comitatus Act of 1878 (Sec. 15, 20 Stat. 154, Act of 18 June 1878). This Act is now codified as 18 U.S.C. #1385 (1964). Subject to certain exceptions, the Act of Congress prohibits the use of personnel of the Regular Establishment including the Army to enforce federal or state laws.

⁸ *Chicago vs. Chicago League Ball Club*, 196 Ill. 54, 63 N.E. 695, 696 (1902).

owners. It was held that the city was not liable to the owners. "Primarily, the duty of protecting the lives and property of the citizens from the unlawful violence of mobs or rioters rested in the state."

Succinctly, the militia has been defined by the United States Supreme Court as a "body of citizens enrolled for military discipline".⁹ The emphasis, of course, is on the word 'citizens'.¹⁰

II. State Versus Federal Power Over the National Guard

The United States Constitution effective in 1789, sought to achieve a balance between the inherent power of the states over their militia and a new delegated authority in the federal government over the same militia. Thus, the Constitution provides:

The President shall be Commander-in-Chief of the Army and Navy or the United States, and of the Militia of the several States, when called into the actual Service of the United States; (Article II, section 2, clause 1)

The Congress shall have power to raise and support Ar-

mies (the 'Army Clause'): (Article I, section 8, clause 12)

To make Rules for the Government and Regulation of the land and naval Forces: (Article I, section 8, clause 14)

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions: (Article I, section 8, clause 15)

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, . . . (Article I, section 8, clause 16) (The 'Militia Clause' is commonly construed as Clauses 15 and 16.)

Within the Bill of Rights are the following:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. (Amendment II)

No person shall be held to answer except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger . . . (Amendment V)

⁹ *United States vs. Miller*, 307 U.S. 174, 179 (1939). The issue before the court was the validity of the National Firearms Act of 26 June 1934 (26 U.S.C. #1132c) which regulated and taxed the transfer of certain firearms and required their registration.

¹⁰ See *State ex rel. McGaughey vs. Grayston*, 349 Mo. 700, 163 S.W. (2) 335, 337 (1942); *Critchlow vs. Monson*, 102 Utah 378, 131 Pac. (2) 794 (1942).

In *People ex rel. Leo vs. Hill*,¹¹ the issue before the New York Court of Appeals in 1891 was whether the governor as commander-in-chief of the state national guard might disband a company of the organized militia, and, in so doing, render the company officers super-numerary or surplus. The court ruled that the surplus officer was not *removed* from his office, but, rather was relieved from active service pending a possible re-assignment. The court upheld an act of the legislature set forth in the Military Code¹² which authorized the governor to disband an existing unit of the National Guard. The court saw no resulting conflict with the authority in Congress over the militia and stated:

"The power conferred upon Congress [by Article I, section 8, clause 16] . . . does not exclude state legislation upon the same subject, unless the power conferred on Congress is actually exercised. The power to control and organize the militia resided in the several states at the time of the adoption of the Constitution of the United States and was not taken away by that instrument. The power of legislation

over the subject, after its adoption, was concurrent in the states and in congress, and the power of state legislation remained until Congress, in the exercise of the power conferred upon it by the constitution, had legislated. State legislation, in relation to the militia, is only excluded when repugnant to or inconsistent with federal legislation . . ."

In a more recent case in 1948,¹³ the statement was made that the state has an inherent power to organize its militia. It was held that the state could utilize an armory for National Guard training purposes. In upholding the Illinois Armory Board Act,¹⁴ the court said that "the building of armories to insure the defense of the State is for a public and not for a private purpose".

The entire regulation of the National Guard is by the states when the organized militia is not in federal service. Thus, the South Carolina Militia Act of 1794 could require aliens to perform militia duty and this did not conflict with the United States Constitution or the law of nations.¹⁵

Where there is no federal conflict, the states by constitution and

¹¹ 126 N.Y. 497, 27 N.E. 789, 790 (1891).

¹² Laws New York 1883, ch. 299, as amended by Laws 1886, ch. 332.

¹³ *Loomis vs. Keehn*, 400 Ill. 337, 80 N.E. (2) 368, 370, 373 (1948).

¹⁴ Ill. Laws 1935, p. 1416, Act of 8 July 1935.

¹⁵ *Ansley vs. Timmins*, 3 McCord 329 (S.C. 1825).

statute may regulate their National Guard.¹⁶ In *Hamilton vs. Regents of University of California*,¹⁷ the United States Supreme Court in a unanimous decision in 1935 declared that every state has the authority to train its able-bodied male citizens to serve in the state militia, in the United States Army, or as members of local constabulary forces. To achieve this result, the state may avail itself of the services of officers and equipment belonging to the military forces of the United States. A compulsory requirement of completion by a male student of a course in military science and tactics infringed neither the due process clause of the fourteenth amendment nor the privileges and immunities clause.

When not in federal service, the National Guard are not "troops of the United States".¹⁸ Thus, National Guard units organized under the National Defense Act of 1916¹⁹

were held not to be in the service of the United States while *traveling* to and from training camps provided by the United States. It was immaterial to the result that the National Guard personnel have subscribed to the dual oath of allegiance to the United States and their state of residence.

A clear cut decision was *Nebraska National Guard vs. Morgan*²⁰ where the court pronounced the National Guard to be a "governmental agency of the state" and "essentially a state institution". The holding of an encampment although on grounds furnished by the United States was a part of the business or occupation of the National Guard. Under the facts, the defendant, a carpenter, hired in a civilian status to construct a field kitchen shed for the encampment could bring a proceeding under a state workmen's compensation statute for injuries sustained.

¹⁶ *Betty vs. State*, 188 Ala. 211, 66 So. 457 (1914); *Commonwealth vs. Thaxter*, 11 Mass. 386 (1814); *State vs. Wagener*, op. cit. supra, note 2; *State ex rel. Mills vs. Dixon*, 66 Mont. 76, 213 Pac. 227 (1923); *Hamilton vs. Regents of University of California*, 293 U.S. 245 (1935) rehearing denied, 293 U.S. 633 (1935).

¹⁷ Op. cit. supra, note 16.

¹⁸ *Oregon-Washington Railroad & Navigation Co. vs. United States*, 60 Ct. Clms. 458 (1925); *Alabama Great Southern Railroad Co. vs. United States*, 49 Ct. Clms. 522 (1914); where National Guard troops being transported to joint camps of instruction with Regular Army units for joint maneuvers were not in federal service en route.

¹⁹ Ch. 134, 39 Stat. 166, Act of 3 June 1916, commonly called the "Hay Act".

²⁰ 112 Neb. 432, 199 N.W. 557, 558-59 (1924); in accord, *State vs. Johnson*, 186 Wis. 1, 202 N.W. 191 (1925) where a Guardsman injured at target practice, could recover under the state workman's compensation law.

Although the state National Guard had been federally recognized, inspected, armed, equipped, and paid, it was still a State force when not called to active federal service.²¹ Even while the National Guard were on active federal service, they remained identified with the State. In *People vs. Campbell*,²² this concurrent jurisdiction principle was applied. An officer of a New York National Guard regiment mustered into federal service and stationed in New York was held exempt from service of civil process upon him within the state under a statute which extended such protection to the state militia.

In *Betty vs. State*,²³ the defendant was an aide to the Governor and was ordered to accompany the Governor of Alabama to Washington, D.C. for the inauguration of Woodrow Wilson as President in 1913. The Alabama Supreme Court allowed recovery of payment previously made by the State for trav-

el and expense as there was no "active service" for annual training, nor was there a call of the militia by the governor in order to "execute the laws". Although the governor is Commander-in-chief, he "cannot by the mere device of a military order, create new forms and enter new fields of military activity". The *provisions of state law must govern all phases of militia activity*.²⁴ If state law did not recognize out-of-state duty, the governor could not order the performance of such duty.

Concurrent jurisdiction in the state and in the United States did not mean that the National Guardsman on federal service was jointly serving the two sovereignties at one and the same time. In *McCaughey vs. Grayston*,²⁵ a Missouri circuit judge, who was also a Colonel in the National Guard, in entering upon active federal service did not violate a state constitutional restriction against holding a

²¹ *State vs. Industrial Commn.*, 186 Wis. 1, 202 N.W. 191 (1925); *United States ex rel. Gillette vs. Dern*, 74 Fed. (2) 485 (App. D.C. 1934); *Re Bianco vs. Austin*, 204 App. Div. 34, 197 N.Y. Supp. 328 (1922).

²² 40 N.Y. 133 (1869). See *State vs. Handlin*, 38 S.D. 550, 62 N.W. 379 (1917); *State ex rel McCaughey vs. Grayston*, op. cit., supra, note 10; *Jones vs. Looney*, 107 F. Supp. 624 (D. Mich. 1952).

²³ Op. cit. supra, note 16.

²⁴ See *Smith vs. Wanser*, 68 N.J.L. 249, 52 Atl. 309 (1902) where the state constitution provided the mode of selection of a brigadier general in the National Guard, the legislature cannot substitute another method.

²⁵ Op. cit. supra, note 10; in *Ex parte Dailey*, 93 Tex. Crim. Rep. 68, 246 S.W. 91 (1922) a state district court judge accepting a commission in the Texas National Guard (not in federal service) did not thereby assume an office of the United States.

state office and a federal office for profit at the same time.

III. Instances of the Use of the National Guard in Time of Emergency

Within this writing, there will be cited or discussed, among other cases, the use of the National Guard in connection with a flood,²⁶ the enforcement of anti-gambling laws,²⁷ a dispute over the Colorado River,²⁸ a labor dispute,²⁹ adoption of a racial zoning ordinance,³⁰ to prevent a horse racing meet,³¹ remove highway commissioners and

reorganize a highway department,³² prevent the conduct of a hearing by the National Labor Relations Board,³³ curtail oil production,³⁴ control a primary election,³⁵ operate coal mines to supply the public,³⁶ in a labor strike, four counties being in a "state of war",³⁷ incidental control of a newspaper,³⁸ prevent students from attending high school,³⁹ control of crowds during a visit of the president,⁴⁰ dispersal of a lynch mob assaulting a county court house to seize a prisoner,⁴¹ and moving a county seat to a new location chosen by the gov-

²⁶ *McKittrick, Attorney General in behalf of Donaldson, Sheriff vs. Brown*, 337 Mo. 281, 85 S.W. (2) 385 (1935).

²⁷ *McPhail vs. State*, 132 Miss. 360, 180 So. 387 (1938).

²⁸ *United States vs. Arizona*, 295 U.S. 174 (1935).

²⁹ *Powers Mercantile Co. vs. Olson*, 7 F. Supp. 865 (D. Minn. 1934).

³⁰ *Allen vs. Oklahoma City*, 175 Okla. 421, 52 Pac. (2) 1054 (1936).

³¹ *Narragansett Racing Assn. vs. Kiernan*, 59 R. I. 90, 194 Atl. 692 (1937).

³² *Hearon vs. Calus*, 173 S.C. 381, 183 S.E. 13 (1935).

³³ *New York Times*, 31 July, 1-5 Aug. 1966.

³⁴ *Sterling vs. Constantin*, 287 U.S. 378 (1932).

³⁵ *Joyner vs. Browning*, 30 F. Supp. 512 (D.W. Tenn. 1939).

³⁶ *Dakota Oil Co. vs. Fraser*, 283 Fed. 415 (D. N.D. 1922); see *Dakota Oil Co. vs. Fraser*, 267 Fed. 130 (8 Cir. 1920) appeal dismissed as moot.

³⁷ *State ex rel. Mays vs. Brown*, 71 W. Va. 519, 77 S.E. 243 (1912); *Ex parte Jones*, 71 W. Va. 567, 77 S.E. 1029 (1913).

³⁸ *Hatfield vs. Graham*, 73 W. Va. 759, 81 S.E. 533 (1914).

³⁹ *Aaron vs. Cooper*, 156 F. Supp. 220 (D. Ark. 1957).

⁴⁰ *Manley vs. State*, 62 Tex. Cr. 392, 137 S.W. 1137 (1911); *Manley vs. State*, 69 Tex. Cr. 502, 154 S.W. 1008 (1913)

⁴¹ *State of Ohio vs Coit*, 8 Ohio Decisions 62 (1896).

ernor.⁴² This cross-section of instances of the use of the National Guard has been selected because of the variety of issues posed and the principles enunciated.

A. *Flood Ravages: Court-Martial Jurisdiction*

Perhaps the leading case in the matter of the use of the National Guard during emergencies and disasters is *McKittrick, etc. vs. Brown*.⁴³ This was an original proceeding in habeas corpus before the Missouri Supreme Court to obtain custody of a Private Bexler from a sheriff holding the prisoner for court-martial at the instance of the adjutant general. "The ultimate question to be determined is whether the trial of the prisoner shall be in the state circuit court or in the military court". The ultimate outcome was a denial of the writ and remand to the adjutant general.

The accused (prisoner) in the National Guard was on active state service with his company in March 1935, when the St. Francois River flooded areas of Dunklin and other counties. The governor had declared a state of emergency and provided for "the use of such military forces of the state as may be necessary for the preservation of life and property and the maintenance of law and order". The adjutant general of the state mobilized

a provisional battalion which included the unit of the accused. At a bridge crossing the flooded river, flares and "slow" signs were placed. The accused was stationed as a guard to flag and slow down vehicles. If a halt sign was disregarded, he was to fire a shot to appraise the next guard of the vehicle approach. On the night of 21 March, while it was raining and dark, a Miss Hasty drove her vehicle on the highway. Approaching the accused, according to his explanation, Miss Hasty failed to heed his shout to stop, and he attempted to fire his rifle into the air. He was holding a lantern in his right hand, and, as he pulled the trigger of the rifle in his left hand, the butt slipped on his wet clothing. The bullet struck Miss Hasty who died the next day. The accused was immediately placed under arrest and in confinement at the armory. After investigation, he was charged two days later with a violation of the 92d article—murder in the first-degree—and of the 93rd article, murder in the second-degree.

The accused's unit was demobilized by the governor on 23 March. On 25 March, the prosecuting attorney of Dunklin County filed a warrant charging the accused with second-degree murder. This case resulted. The attorney general relied upon that provision of the Missouri

⁴² *Fluke vs. Canton, Adjutant General*, 31 Okla. 718, 123 Pac. 1049 (1912).

⁴³ *Op. cit. supra*, note 26.

Constitution, Article 2, Section 27, which set forth "the military shall always be in strict subordination to the civil power".

The Missouri Supreme Court noted that the power to decide whether a public exigency existed which would justify calling out the 'militia' was in the governor. "Public danger" under the state constitution prevailed during the flood emergency which would warrant a court-martial of a militiaman who had been on state active service. However, the court-martial would only have jurisdiction to try for second-degree murder, under the facts, which was a non-capital offense. Jurisdiction of courts-martial was concurrent with that of the state courts. The court-martial could proceed as to an offense committed while the articles of war were in force at the time, and jurisdiction was not lost although the emergency ended before the accused was put on trial. The court cited and distinguished the result in *Caldwell vs. Parker*⁴⁴ where in time of war, there was jurisdiction in a state court to try a soldier for the murder of a civilian committed on non-military property and where the federal military authorities did not seek jurisdiction over the defendant. Here, the adjutant general claimed jurisdiction and was prepared to proceed.

B. Labor-Unrest: Urban Disorder

In *Dakota Coal Co. vs. Fraser*,⁴⁵ a strike in November 1919 extended through the coal mines of North Dakota threatening the source of supply to consumers faced with a severe winter. The governor ordered the adjutant general to operate the mines in order to supply the public. The adjutant general could call to his aid, such persons as he deemed necessary, could prevent any interference, make arrests, and control the situation until the mines resumed normal operation. The owners of the mines sought, but were denied, an injunction to prevent interference with their property. The federal court held that the governor had acted to prevent widespread disaster to the consumers, namely, the public.

In *Powers Mercantile Co. vs. Olson*,⁴⁶ a truck strike led to violence, and the Minnesota National Guard were called at the request of the sheriff and the superintendent of police. The strike seemed settled and the National Guard withdrew. Two months later, another strike took place accompanied with violence and few trucks were moving. At the request of the local authorities, the National Guard were called. Mediators proposed a settlement which was approved by the employees, but not by the employers. The governor proclaimed par-

⁴⁴ 252 U.S. 376 (1920).

⁴⁵ Op. cit. supra, note 36.

⁴⁶ Op. cit. supra, note 29 at p. 869.

tial law and, in his executive order, permitted only adherents to the mediation proposal to operate. The petitioners were non-adherents seeking in federal court to restrain the governor. Although the court did not agree with the governor's solution, an injunction was refused, the court stating: "While we may personally disagree with the Governor as to the manner in which he has handled the entire situation, that will not justify nor permit the relief prayed for."

The vital feature in *Powers Mercantile* was that the use of the National Guard favored the employees in the dispute. In *Dakota Coal*, it was the public which benefited from the presence of the National Guard.

*Strutwear Knitting Co. vs. Olson*⁴⁷ was an instance of a federal court enjoining a governor of Minnesota at the behest of the employer. The plaintiff's factory in Minneapolis was in strike, the local authorities sought assistance, and the National Guard were called by the governor. The mayor asked that the plant be closed, and it was closed to forestall rioting. The court granted an injunction against the governor, the mayor, and the adjutant general on the grounds that an employer was entitled to keep his plant open although disorder might result.

C. Labor Unrest: Rural Areas

To this point, the cases have mainly involved the use of the National Guard in cities. In *Chapin vs. Ferry*,⁴⁸ the National Guard were called because of disorders and violence in sparsely-settled rural areas. In June-July 1891, rioting occurred in several Washington counties due to coal mine operations. The civil authorities being unable to control the situation, the governor ordered a regiment of National Guard into the localities. The State Militia Act of 1890,⁴⁹ in the event of riot, prescribed that certain local officials should first command the rioters to disperse, and, that failing, then the Guard might be summoned. In one county, after a pitched night battle between contesting elements, the governor, without any preliminaries, sent in the Guard, at dawn. After three weeks of duty, the National Guard were withdrawn as peace was restored. The court held that (1) the National Guard when ordered out by the governor did not become a part of the sheriff's posse comitatus, (2) local officials could call on the governor for aid, (3) when the governor in his judgment deemed riots imminent, he might without any formalities send in the Guard, and, especially, to a "remote, unpoliced county" where several hun-

⁴⁷ 13 F. Supp. 384 (D. Minn. 1936).

⁴⁸ 3 Wash. 386, 28 Pac. 754 (1891).

⁴⁹ Wash. Laws 1889-1890, ch. 20, p. 628, Act of 25 February 1890.

dreds of persons were rioting, and (4) even if there should exist a legal question whether the National Guard should have been called or if all technicalities had been observed, the collective National Guard were to be promptly paid for their military service. The court cited and relied upon *Ela vs. Smith*,⁵⁰ which involved the call of two companies of active military to assist a United States marshal to convey a fugitive slave in Boston to a ship wharf for return to the slave's owner. The call-out of the troops was independent of the cause of a tumult. Payment of the individual guardsmen did not hinge on the final outcome of any court proceedings which might result.

D. Racial Disorders

In September 1966, the Wisconsin National Guard were called to restore the peace after several nights of disorders arising when a racial minority threatened a march into a Milwaukee suburb to protest that a circuit court judge was a member of an allegedly segregated fraternal order. The order, at a national convention, had voted 3,018 to 288 to retain white membership. The judge was picketed

because he was known as a "liberal". Crowds of over 5,000 whites gathered. 500 Guardsmen in groups of 100 each diverted traffic and sealed off a trouble area which was 20 blocks long and 4 blocks wide. Gradually, the situation became calm and the Guard withdrew.⁵¹

During the summer of 1966, the governor of Michigan mobilized units of the National Guard following three nights of increasing mob violence at Benton Harbor and after the mayor had declared a state of emergency. The cause was an alleged lack of recreational facilities for enjoyment by members of a minority group.⁵² These are but two of various recent disturbances requiring the use of National Guard to restore order.

E. Oil Industry Regulation

A leading case is *Sterling vs. Constantin*,⁵³ which arose in an attempt by a governor to regulate the oil industry through the device of martial law. The Texas legislature had passed an oil-proration law⁵⁴ which the governor sought to enforce. Property owners then moved to enjoin the governor and the federal court issued a temporary restraining order. The governor di-

⁵⁰ 5 Gray 131, 66 Am. Dec. 356 (Mass. 1855).

⁵¹ Sacramento Union, 1 Sept. 1966, p. 2.

⁵² Ibid at p. 2.

⁵³ Op. cit. supra, note 34.

⁵⁴ Upheld in *Henderson vs. Railroad Comm.*, 56 Fed. (2) 218 (D. Texas 1931).

rected the adjutant general to use the military to enforce limits of production in an area of alleged insurrection. A three-judge district court granted an injunction against the governor and the adjutant general⁵⁵ and the governor appealed. The United States Supreme Court upheld the lower federal court. There was *no disquiet in the area* of the alleged insurrection and there were no signs of riots or unruly mobs. All courts were functioning and the civil authorities were available. As the "limits of military discretion . . . have been overstepped", this had become a judicial question and the courts would grant relief to the property owners.

In a somewhat analogous case, the Oklahoma Supreme Court curtailed the actions of the governor. In *Champlin Refining Co. vs. Corporation Commissioner*,⁵⁶ a "conservation" statute was sustained by the State Supreme Court, but because of vagueness in the enforcement provisions, the act was declared unconstitutional by the United States Supreme Court. The governor declared martial law *in a zone around each producing oil well*, ordered a military receivership, and placed within the state militia, the civilian clerks employed in oil-pro-

duction work. This result was invalidated by the state Supreme Court which enjoined the governor from following such methods.⁵⁷

F. Labor Unrest: Insurrection

*Moyer vs. Peabody*⁵⁸ led to the United States Supreme Court upholding action by the governor of Colorado. This was a proceeding by Moyer against a former governor of Colorado, a former adjutant general, and a lowly captain of a National Guard company for imprisonment of the plaintiff extending from 30 March to 15 June 1904. It was alleged that no form of complaint was filed against the plaintiff, and that he was prevented from gaining access to the courts which were open. The governor had declared a county to be in a state of insurrection, called out the National Guard, and ordered the arrest of the plaintiff (who was the President of the Western Federation of Miners), as a leader of the outbreak, until the plaintiff could be safely discharged. The plaintiff first proceeded, but failed, in the state courts.⁵⁹ It was then urged to the highest federal court that the method followed by the governor, and upheld by the state Supreme Court, became action of the

⁵⁵ 57 Fed. (2) 227 (D. Texas 1932).

⁵⁶ 286 U.S. 210 (1932).

⁵⁷ *Russell Petroleum Co. vs. Walker*, 162 Okla. 216, 19 Pac. (2) 582 (1933).

⁵⁸ 212 U.S. 78, 85 (1909).

⁵⁹ *Re Moyer*, 35 Colo. 159, 85 Pac. 190 (1904).

State of Colorado within the scope of the fourteenth amendment, and thus giving jurisdiction to the federal circuit court because of alleged deprivation of a constitutional right in the plaintiff. In a decision delivered by Mr. Justice Holmes, the high court concluded there was no jurisdiction in the circuit court and stated:

"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. See *Keely vs. Sanders*, 99 U.S. 441, 446. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case."

G. Miscellaneous Cases

In *Allen vs. Oklahoma City*,⁶⁰ the governor of Oklahoma in order to coerce a city council to adopt a

zoning ordinance, declared martial law and decreed a racial segregated zone. This device was rejected by the Oklahoma Supreme Court.

In order to remove highway commissioners from state office, the governor of South Carolina declared a state of insurrection to exist in the highway department, proclaimed martial law, called out the National Guard to take over the department offices and eject the commissioners, appointed within the department civilians who were termed volunteer militiamen, and directed certain banks to turn over funds to the new commissioners. The State Supreme Court rejected this procedure, and held that the governor could not, by a declaration of a state insurrection, achieve what amounted to a purge of his political opponents.⁶¹

Before a primary election in Tennessee in August 1938, a number of voters succeeded in *enjoining the governor* and the adjutant general and the Shelby County Election Commissioners *from calling out the National Guard* in order to prevent voters, registered in 1937, from voting. There was quiet in the area, and the petitioners were granted an injunction preventing the respondents from moving the National Guard into Memphis.⁶² In holding that a federal

⁶⁰ Op. cit. supra, note 30.

⁶¹ *Hearon vs. Calus*, op. cit. supra, note 32; see *Miller vs. Rivers*, 31 F. Supp. 540 (D.M. Ga. 1940) *rvsd.* as moot, *Rivers vs. Miller*, 112 Fed. (2) 439 (5th Cir. 1940); *Patten vs. Miller*, 190 Ga. 152, 8 S.E. (2) 786 (1940).

⁶² *Joyner vs. Browning*, op. cit. supra, note 35.

court had jurisdiction, the court noted that the right to vote was guaranteed by the United States Constitution and the governor of a state by use of the National Guard could not act to deprive citizens of the right.

In *Ex parte Jones*,⁶³ because of the existence of a widespread strike in 1912-1913 in West Virginia, the governor declared *Kanawha county to be in a state of war*. Ringleaders were arrested, tried by state military commission, charged with acts committed in some instances before the state of war was declared, convicted, sentenced, and confined in jail. The civil courts were functioning, but violence was generally prevalent. After he left office, the former governor was sued. The West Virginia Supreme Court by a divided vote held that the governor's proclamation of a state of war was conclusive even as applied to an area outside the war zone, and the suit was rejected.⁶⁴

In *Aaron vs. Cooper*,⁶⁵ it was held that the governor of Arkansas could not use the National Guard to prevent Negro pupils from attending a high school after a court order had directed their attendance.

During a coal strike in 1902 in Pennsylvania, the National Guard were on duty in an area where dynamiting had occurred. A soldier was stationed to guard a house which had once been dynamited. His orders were to halt intruders; if an intruder failed to halt, then he was told to shoot to kill. A man entered the house area; he was called upon several times to halt, but failed to stop. He was shot and killed. It was later learned that the man was deaf. The court held that the guardsman obeyed his orders, and he was not subjected to trial.⁶⁶

H. Visit of the President

A different result from the dynamite instance came about in *Manley vs. State of Texas*.⁶⁷ President William H. Taft visited Dallas in 1909 at the Fair Grounds. In response to a request from federal secret-service men, the mayor issued a call for a company of National Guard to do guard duty and to hold back people in a square about the President. Private Manley was posted at the spot, and was ordered not to let anyone pass beyond a wire extended near the place where the President's train

⁶³ Op. cit. supra, note 37.

⁶⁴ *Hatfield vs. Graham*, op. cit. supra, note 38.

⁶⁵ Op. cit. supra, note 39.

⁶⁶ *Commonwealth ex. rel. Wadsworth vs. Shortall*, 206 Pa. St. 165, 55 Atl. 952 (1903).

⁶⁷ Op. cit. supra, note 40.

would arrive. A stranger attempted to pass into the enclosed area, giving as a reason that he wished to catch a streetcar. He was struck with a rifle butt, and, after an exchange of remarks, received a bayonet thrust. His death resulted, and the defendant was tried and convicted of murder. A second trial resulted,⁶⁸ after a change of venue, and the defendant was sentenced to 40 years imprisonment. Factors which should be noted were that (1) it was an occasion of festivity or jubilation and not one of violence, and (2) the defendant should have exercised caution although his orders were extreme, namely, "not to let anyone pass". On the other hand, at the present time, with a greater awareness of the need for security protection for a visiting President, the severity of the sentence would likely be reduced even if the defendant should be convicted of more than manslaughter.

I. *The Use of Excessive Force*

In *State of Ohio vs. Coit*,⁶⁹ the colonel of a regiment of National Guard was tried for ordering his men to fire through the door at a mob breaking into the Washington Court House in 1894 to seize a Negro guilty of rape. Under the facts, the officer held back the firing until the door was destroyed. The court determined that he could

not reserve fire until the door was broken inward because force became futile after the breach of the door. The court required that in the instance of a riot, the troops should act with the civil authorities and not seek to supersede the functions of civil power. The troops must have acted as "armed police". However, the military officers aiding the civil authorities "have a discretion which they may freely use, as to the best methods to be employed to carry out an order". The court here concluded that the military officer was not entitled to any of the *legal presumptions* which apply in favor of the legality of the acts of public officers.

In *Coit*, the troops fired through the door as it was breached. There was no preliminary volley into the air, and no attempt at aimed firing, such as at the feet of the ring-leaders. The order would result in a volume of indiscriminate shooting. The use of force, i.e., shooting at random was grossly excessive and bound to endanger innocent members of the public on the streets or even in their homes or places of business.

In *Fluke vs. Canton, Adjutant General*,⁷⁰ as a result of an election, the county seat of Delaware County was to be moved to Jay from Grove within the county. The governor chose ten acres at Jay for

⁶⁸ Op. cit. supra, note 40.

⁶⁹ Op. cit. supra, note 41.

⁷⁰ Op. cit. supra, note 42.

county offices, but the county officials declined to move. The governor directed the adjutant general to move all county records, and this proceeding sought to restrain the adjutant general. The Oklahoma Supreme Court concluded that it could not restrain or control the adjutant general who was responsible solely to the governor.

The above cases illustrate that the employ of the National Guard in the event of disaster or tumult may lead to questions of (1) the existence of a state of actual insurrection or disorder, (2) a possible purpose in the governor to achieve political ends . . . i.e., remove office holders, regulate oil production, control an election, etc., (3) the use of possibly excessive force by the military . . . i.e., rifle butt or bayonet, (4) civil judicial review, if any, of the acts of the military, (5) availability of court-martial, and (6) authority in the

governor as commander-in-chief of the National Guard.

IV. Authority of the Governor.

As a general principle when the National Guard are not in federal service, the ultimate command at the state level is in the governor who is the commander-in-chief.⁷¹ Almost as a matter of necessity, the governor will seek to delegate or pass on his authority to duly appointed officers.⁷² However, the governor may remove a brigade commander—a general officer whom he had appointed—and appoint another brigadier, and his act could not be challenged judicially.⁷³ The highest New York court declared: "We can no more review his orders to his subordinates, in relation to the military affairs committed to his discretion . . . than we can review his acts in granting pardons or nominating to office."⁷⁴ A governor

⁷¹ *Baker vs. Harris*, 178 Ark. 1001, 13 S.W. (2) 33 (1929); *Chapin vs. Ferry*, op. cit. supra, note 48; *Dunne vs. People of the State of Illinois*, op. cit. supra, note 3; *McKittrick etc. vs. Brown*, op. cit. supra, note 26; *State vs. Harrison*, 34 Minn. 526, 26 N.W. 729 (1886); *Re McDonald* 49 Mont. 454, 43 Pac. 947 (1914); *State vs. Mead*, 52 Wash. 533, 100 Pac. 1033 (1909); *Mauran vs. Smith*, 8 R.I. 192, 5 Am. Rep. 654 (1865); *Worth vs. Craven County*, op. cit. supra, note 7; *People ex rel. Welch vs. Bard*, 209 N.Y. 304, 103 N.E. 140 (1913); *State vs. Newark*, 29 N.J.L. 232 (1861); *Winslow vs. Morton*, 118 N.C. 486, 24 S.E. 417 (1896); *Re National Guard Expenses*, 20 Pa. Co. 558 (1898).

⁷² *State vs. Mott*, 46 N.J.L. 328, 50 Am. Rep. 424 (1884); *State vs. Wilson*, 7 N.H. 543 (1835); *Mathews vs. Bowman*, 25 Me. 157 (1845); *Cutter vs. Tole*, 2 Me 181 (1822); *People ex rel. Lockwood vs. Scrughan*, 25 Barbour (N.Y. 1857) 216.

⁷³ *People ex rel. Lockwood vs. Scrughan*, Ibid.

⁷⁴ Ibid at p. 234; in accord, *State ex rel. Bend vs. Harrison*, 34 Minn. 526, 26 N.W. 729 (1886).

could appoint an additional general officer for the National Guard.⁷⁵

A. Conclusiveness of the Governor's Determination

The governor, in his sole discretion, could approve the formation of a company of active militia. Even though a statute required a certificate from a county judge that the applicants for militia (active) status were men of good character, this was merely directory for the information of the governor. He might approve the company personnel without the need for a certificate.⁷⁶ Under the facts, the company after formation and training was called to active state service following the assassination of the governor-elect and during a period of unrest while the legislature resolved the controversy of who was to take office as governor. Despite an irregularity in the formation of a company, the militia-men called to duty were entitled to full pay for their services.

A governor may recruit the National Guard to a maximum strength or he may elect to disband units.⁷⁷ Although a state statute authorized 33 companies for the National Guard, the governor in his discretion could muster out various companies to arrive at a lesser number of units. Enlistment in the National Guard was not a contract which bound the State, and the governor for the state could end any enlistment before the regular expiration date.

The cases mainly revolve about the issue of whether sufficient *necessity* existed to warrant calling the National Guard or active militia. In time of public danger, disorder or emergency, the governor may call the state troops.⁷⁸

Formerly, officials other than the governor were empowered in some jurisdictions to call the organized militia. The mayor in some states had statutory authority to call the militia.⁷⁹ Under a former New York statute, a Supreme Court

⁷⁵ *People ex rel. Gillette vs. DeLamater*, 287 N.Y.S. 979 247 App. Div. 264 (1936) reversing 157 Misc. 711, 283 N.Y.S. 499 (1935).

⁷⁶ *Haley vs. Cochran*, 31 Ky. L. 505, 102 S.W. 852 (1907); in accord, *Sweeney vs. Kentucky*, 118 Ky. 912, 82 S.W. 639 (1904).

⁷⁷ *Lewis vs. Lewelling*, 53 Kans. 201, 36 Pac. 351 (1894).

⁷⁸ *United States vs. Wolters*, 268 Fed. 69 (D. Texas 1920); *United States ex rel. Seymour vs. Fischer*, 280 Fed. 208 (D. Neb. 1922); *McKittrick etc. vs. Brown*, op. cit. supra, note 26; *Powers Mercantile Co. vs. Olson*, op. cit. supra, note 29; *State vs. Josephson*, 120 La. 433, 45 So. 381 (1908); *Re McDonald*, op. cit. supra, note 71; *Chapin vs. Ferry*, op. cit. supra, note 48; *Re Advisory Opinion to Florida Governor*, 74 Fla. 92, 77 So. 8 (1917).

⁷⁹ *Ela vs. Smith*, op. cit. supra, note 50; *Salem vs. Eastern Ry. Co.*, 98 Mass. 431 (1868); *State vs. Coit*, 8 Ohio Dec. 62 (1896) where apparently the Mayor and the Sheriff acted together, note 41, supra.

justice might call upon the National Guard for aid.⁸⁰ In 1916, the statute was amended to place authority in the governor to act when requested by a mayor or a sheriff.⁸¹

A governor may call for troops under his authority as commander-in-chief within the state, and he need not await the receipt of a request for aid from local authorities.⁸² In Shoshone County, over a period of more than six years, armed mobs would appear from time to time, and destroy property and menace lives. In response to the Idaho governor's request to Washington, D.C., *federal troops were sent into the county by the President*. The truth in the recitals in the governor's proclamation that a certain county was in a state of insurrection would not be inquired into at a hearing on a petition for writ of habeas corpus. The court ruled that the governor could suspend the writ of habeas corpus.

A leading case is *United States ex rel Seymour vs. Fischer*,⁸³ where a proclamation of the Governor of Nebraska declared that a "state of lawlessness" and disorder existed in Nebraska City beyond the control of the civil authorities and stated that the local officials had applied

for military assistance. The National Guard were ordered to "occupy the territory", and a military commission was appointed. Each of the petitioners for habeas corpus was charged with violation of regulations prescribed by the military against keeping open a prohibited place of business or the possessing of arms and ammunition. The state courts were functioning at all times. The court held that the *declaration by the governor was conclusive* as to the existence of what amounted to a state of insurrection, although the word 'insurrection' was not used. The petitioners could properly be tried by the military commander, who was not restricted to turning over offenders to the civil authorities for trial although he could have availed himself of the civil courts. A sentence of imprisonment by the military tribunal would continue after order was restored and the troops withdrew. The federal court saw no violation of due process as to the petitioners.

A like result was reached in *United States ex rel. McMaster vs. Walters*,⁸⁴ resulting from a declaration by the governor of Texas that there was danger of insurrection

⁸⁰ *People vs. Bard*, 81 Misc. 262, 142 N.Y.S. 26, affd. 209 N.Y. 303, 103 N.E. 140 (1913)

⁸¹ New York Laws, 1916, ch. 355, #1, amending Mil. Laws #115.

⁸² *Re Bogle*, 6 Ida. 609, 57 Pac. 706 (1899).

⁸³ Op. cit. supra, note 78.

⁸⁴ 268 Fed. 69 (D. Texas 1920).

in Galveston and proclaiming martial law. The defendant, a general in the National Guard, was directed to assume command of a military district including Galveston. A proclamation set forth that the mayor, city attorney, chief of detectives, four city commissioners, and others had failed to preserve the peace. The defendant took charge of the city hall, the police station, and all records, and directed that all persons charged with violations of city ordinances should be tried by a provost-marshal. Mc-Masters was arrested for exceeding the vehicle speed-limit, was denied a jury trial, convicted, fined \$50, and jailed. The court held that the question of whether there was a riot, insurrection, or breach of the peace was solely for the decision of the governor. The courts would not interfere with his discretion or inquire into the facts of the dispute. The suspension of the city officials was legal, and the city court could be set aside and a provost marshal sit to enforce municipal ordinances. Although the state constitution prohibited the suspension of a law, the suspension of a judge did not fall into this category.

In Re McDonald,⁸⁵ the governor of Montana issued a proclamation declaring Silver Bow County to be in a state of insurrection and placing it under martial law and under the jurisdiction of military authori-

ties. The court held that the *governor conclusively could determine whether an insurrection existed* and his determination could not be reviewed by the judicial authorities.

B. Judicial Restraint Upon the Governor

A case of curtailment of the governor's authority was *Bishop vs. Vandercook*.⁸⁶ This was an action for damages to the plaintiff's auto which at night struck a log-roadblock placed across a highway by a detachment of Michigan National Guard in order to halt traffic. The Monroe County sheriff had asked aid of the governor to stop the transport of liquor from wet to dry territory within the state. The governor directed Colonial Vandercook to proceed to Monroe County with a detachment of men, and he was instructed that "steps will be taken to protect the highways from lawless and viciously inclined drivers of autos". Later, the governor verbally authorized placing a log across the highway, but said "give everybody a warning as to the use of the log". If a car failed to stop at a signal post, a shot was to be fired into the air, the log would be pulled across the road, and red flashlights exhibited. The plaintiff, operating a taxi, picked up a fare in a saloon, and saw the fare hide an object under cover in the tonneau of the cab; then the plaintiff

⁸⁵ Op. cit. supra, note 71.

⁸⁶ 228 Mich. 299, 200 N.W. 278, 281 (1924).

drove with dim lights on the road at a speed of 50-60 miles. The plaintiff saw the military guards near the road block, but did not stop. A quantity of liquor was found in the wreckage. The Michigan Supreme Court affirmed a jury award of \$2,000 damages to the plaintiff. A state statute had provided that the military should "be privileged from prosecution by the civil authorities . . . for any acts . . . committed while on such service".

In *Vandercook*, the court determined that the statute did not grant an immunity to the military. "Military aid to civil authorities must act within and in accordance with the civil law. . . . There is no such thing as military power, independent of the civil power, while the civil power is functioning". The National Guard members were restricted to what could be done by peace officers on the scene, and were allowed no greater latitude. There was no unrest in the locality which was quiet. The court went on that there was no power vested in a sheriff to hold up travel over the public highway and halt travellers.

A difficult decision was that in *Franks vs. Smith*.⁸⁷ This was an action for damages for false imprisonment of Smith by Sergeant Franks and others. A judgment for \$1,000 for the plaintiff was affirmed on appeal. The governor of Kentucky, acting by the adjutant gen-

eral, called a small detachment of the active militia . . . the Kentucky State Guards . . . to quiet "night riding", which was a raid by armed men. On 26 November 1908, Franks and three others were directed that if they encountered men travelling at any unusual hour of the night on the highways in numbers of more than two, the military party was to halt them, receive their explanation, and, if necessary, search them, and if they were found to be carrying concealed weapons, arrest and bring them to 'camp', where the suspects would be turned over to county authorities. As a result, Franks and three others stopped Smith and five men moving on the highway. Smith and his party were searched, and pistols were found in Smith's buggy and on the person of one of the party. The group was taken to camp where Smith was detained. None was mistreated. Smith at the time actually was returning home from a lodge meeting.

The court in *Franks* upheld the right in the governor to call the active militia. The court went on to reason that the militia on active service were subordinate to the civil power. No military personnel could be given greater authority than that found in peace officers. The court expressed disagreement with the result in each of *In Re Moyer*⁸⁸ and *Commonwealth vs.*

⁸⁷ 142 Ky. 232, 134 S.W. 484, 487 (1911).

⁸⁸ Op. cit. supra, note 59.

Shortall,⁸⁹ where the respective Colorado and Pennsylvania highest courts permitted in certain emergencies the civil law to be suspended by military orders. The court concluded that to stop, search and detain Smith was unreasonable under the facts.

In *Commonwealth vs. Shortall*,⁹⁰ cited in *Franks*, the court had ruled that when the state troops had been called, in an emergency, they were not subordinate to the civil authority. When martial law was invoked, there was put into operation, the powers vested in the commanding officer. The only limit to his power rested in the necessities of the situation.

C. Assistance to Local Law Enforcement

In *Ela vs. Smith*,⁹¹ it was urged to the Massachusetts court that the military had been called to aid in the enforcement of a statute which might be unconstitutional. The mayor of Boston had called the organized militia when a riot threatened because of the purpose of a United States marshal to deliver a

run-away slave for return by vessel to his owner. It was suggested that the Fugitive Slave Act⁹² was unconstitutional. The court held that the power to call the militia was not impaired because the law which was impugned might be unconstitutional.⁹³ The court stated:

"Besides, the right and duty of calling out a military force to repress and prevent an anticipated riot cannot be made to depend, in any degree, upon the cause of such threatened disturbance of the peace. It is equally the duty of the civil officers to take all proper steps to prevent a threatened riot or mob, whether it was likely to arise from the enforcement of a constitutional or unconstitutional law If a law be unconstitutional, those whose rights are infringed or invaded by it must seek their redress through the appropriate channels in the constituted tribunals of the country. If they have recourse to illegal violence, they break down the very constitution which they claim as their protection."⁹⁴

⁸⁹ Op. cit. supra, note 66.

⁹⁰ Op. cit. supra, note 66.

⁹¹ Op. cit. supra, note 50.

⁹² 9 Stat. 462, Act of 18 September 1850.

⁹³ Subsequently in *Abelman vs. Booth*, 62 U.S. (21 Howard) 506 (1859) in a decision by Mr. Chief Justice Taney, the Supreme Court invalidated a Wisconsin decision purporting to determine that the Fugitive Slave Act was unconstitutional.

⁹⁴ *Ela vs. Smith*, op. cit. supra, note 50 at p. 142.

D. Enforcement of Gambling and Liquor Laws

Perhaps a 1938 decision in Mississippi has achieved a balance between military assistance to local authorities and the rights of citizens involved. In *State vs. McPhail*,⁹⁵ the governor ordered the National Guard to enforce the law near Jackson in an area known as the 'Gold Coast' in Rankin County. Within the locality, numerous places sold liquor contrary to state prohibition, and gambling flourished in various forms. The situation had existed for a considerable length of time, and was open and flagrant beyond the control of local law enforcement officers. The governor issued an executive order which set forth that a detachment of National Guard should enter the area "for the purpose of assisting in the enforcement of the criminal laws of the state". An officer of the National Guard made an affidavit before a justice of the peace and obtained a search warrant for the premises of McPhail. As a result of the use of the search warrant, a quantity of liquor was found and seized, and other evidence was obtained. The district attorney then moved to abate the premises of McPhail as a common nuisance, relying upon the results of the search warrant use. The chancellor (lower court) excluded the evidence as illegally obtained on the ground that the Na-

tional Guard should not have become involved.

The Mississippi Supreme Court reversed and remanded the cause. The action of the governor in utilizing the services of the National Guard was upheld. The court stated:

"The constitutional and statutory provisions requiring the Governor to see that the laws are executed have no obscure or technical meaning; neither were they intended as a mere verbal adornment of his office. . . . The Constitution makers did not leave any such loophole as to permit statutes enacted for general observance throughout the state to be set aside, or in practical effect repealed, in any particular section or area by the device of a failure or refusal of the local authorities to enforce such statutes . . . Thus the power to enforce the laws is not left as a matter of finality to the discretion of the local authorities or the local inhabitants; but power was placed in the head of the executive department to act, in case of need, for the whole state. [A]nd he may . . . determine to whom the civil process may be directed for execution . . . He may select the military as agents to act for him."

The court held that the National Guard officer "was a lawful officer"

⁹⁵ Op. cit. supra, note 27, at p. 389.

to execute the service of the search warrant. Further, the governor's order to the militia "does not have to contain any particular recitals. It is enough that it was an order and the facts *de hors* justified its issuance and its execution".

In *McPhail*, the court was confronted with open, extensive law violation over a period of time. In a 1940 decision,⁹⁶ the Mississippi Supreme Court was concerned with a *single offender* in Rankin County. The governor ordered the National Guard to proceed against one Seaney. A warrant was served by a corporal who with two other National Guard members searched the premises and seized eighteen cases of liquor, one pistol and three rifles. The defendant was convicted upon the evidence obtained, fined \$500, and sentenced to 90 days in the county jail. The state Supreme Court relied upon *State vs. McPhail*⁹⁷ to uphold the legality of the search by National Guardsmen called by the governor who was acting where local executive officers had failed or been unable to act. Such *National Guard personnel, as peace officers, might execute search warrants*. The governor need not await a request to him for assistance made by a sheriff or judge or other local officer.

In *McBride vs. State*,⁹⁸ the governor of Mississippi by executive or-

der on 18 December 1952 directed the adjutant general to call the National Guard to enforce the laws in certain counties. McBride leased premises to one Russell, who maintained slot machines, and kept and sold liquor openly on the premises over a considerable period of time. On 19 December, a major and four other National Guardsmen with a search warrant searched the premises, McBride being present. A substantial quantity of liquor was found. The lower court convicted McBride, and the conviction was sustained on appeal. The high court determined that "widespread violations justified the governor's action", and the evidence obtained by the Guardsmen was admissible.

In *Seaney* and in *McBride*, the use of the military was more difficult to justify than in *McPhail*. An unanswered question was why sufficient pressure could not be brought to bear upon a recalcitrant sheriff to perform his duties without resort to use of the state troops, however valid and effective that last resort might prove.

The cases indicate that, where the governor has declared that a state of insurrection exists, his determination is generally final. However, this is not a conclusive presumption, and in *Sterling vs. Con-*

⁹⁶ *Seaney vs. State*, 188 Miss. 367, 194 So. 913 (1940).

⁹⁷ Op. cit. supra, note 27.

⁹⁸ 221 Miss. 508, 73 So. (2) 154 (1954).

stantin,⁹⁹ the court ruled that there was not in fact, a state of insurrection in the absence of any unrest. Even if the courts view an insurrection to exist, the conduct of the military agents of the governor will be carefully scrutinized. What are the allowable limits of military discretion give rise to judicial questions. Excessive use of force by the military, as in *State vs. Manley*, during the course of the active state service may impose liability upon the offenders.

V. The Call and the Proclamation.

A. Condition of Martial Law

The calling of state troops by the governor is not in itself a declaration of martial law.¹⁰⁰ In 1933, the governor of Iowa proclaimed that there existed in Crawford County, breaches of the peace and open defiance of law enforcement by large groups, and that the state department of justice and civil authorities and peace officers were unable to enforce the laws. The adjutant general was directed to place troops on duty in the county and adjacent territory, and he was to arrest all persons engaging in acts of violence. The proclamation set forth that martial law "shall be invoked". In April 1933, a military

commission tried and sentenced more than twenty men who pleaded guilty to lawless acts. In October 1933, a suit for false arrest was brought against the persons who had arrested the plaintiffs. The matter arose in an original proceeding before the state Supreme Court for the issuance of a writ of prohibition to the lower court to prevent trial of the false arrest action. Prohibition was denied on technical grounds. The court declared that martial law did not exist merely because state troops were called by the governor. The *military personnel had more authority than peace officers*, concluded this particular court, although a use of excessive force might give rise to liability in the military.

The court in *O'Connor* avoided finding that a state of martial law existed regardless of recitals in the governor's proclamation. By way of dictum, the court would give to the state military personnel, a greater degree of protection than that extended to peace officers. The case is significant in upholding the governor, but also in avoiding the issue of whether or not martial law was involved.

Where the necessity arose for military aid to the civil authorities,

⁹⁹ Op. cit. supra, note 34.

¹⁰⁰ *State ex rel. O'Connor vs. District Court*, 219 Ia. 1165, 260 N.W. 73, 99 A L R 967 (1935). In *United States ex rel. Palmer vs. Adams*, 26 Fed. (2) 141 (D. Colo. (1928) appeal dismissed 29 Fed. (2) 541 (8th Cir. 1928), the court disapproved of the use of troops without a prior declaration of martial law.

a proclamation as such was not necessary. In an early Attorney-General Opinion by Caleb Cushing, it was stated; "The proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact".¹⁰¹

In *Cox vs. McNutt*,¹⁰² there was upheld a governor's proclamation of martial law during a general strike. A statutory three-judge federal district court¹⁰³ denied to the plaintiff an injunction against the Indiana adjutant general and other state officers. The plaintiff, who had been imprisoned by the troops in Vigo County, assailed the need for a declaration of martial law. There had been great violence in the locality, and a mayor, chief of police, prosecuting attorney, and board of public works and safety all had besought the governor to send the National Guard. The plaintiff urged that the general strike was merely a "labor holiday" of indefinite duration. The court held that the governor in his discretion could determine the need for martial law and the extent of its application. The provisions of the proclamation could validly prohibit assembly, the carrying of arms, ingress and egress from the city of Terra Haute, the gathering of crowds,

and could require all complaints to be made to the military. Specifically, 158 persons including the plaintiff could be detained in custody indefinitely. Generally, *during disorders, the arrest and detention of ringleaders is not actionable*.¹⁰⁴ The case illustrates that no particular form of procedure must be followed in the proclamation which may contain as much or as little as the situation requires.

B. *Emergency Rules: Troops on the Scene*

In the instance of a public disaster, such as a flood, earthquake, or fire, there may well be a need for prompt action by the state troops in the area, without time for orders and proclamations to be drafted and made effective.

In what is regarded as a primary case, it was held that the commanding officer of *troops on the scene of a flood* could make and enforce *reasonable rules* for the protection of life and property. An order had been issued excluding from a flooded area all persons without a pass. The troops were directed to arrest any trespasser or eject him from the area in order to forestall looting. In March 1913, unprecedented floods prevailed throughout Ohio,

¹⁰¹ 8 Opn. Atty. Gen. 365, 374 (1857).

¹⁰² 12 F. Supp. 355 (D. Ind. 1935).

¹⁰³ Sec. 266, Judicial Code, 28 U.S.C.A. # 380.

¹⁰⁴ *Moyer vs. Peabody*, op. cit. supra, note 58; *Re Moyer*, op. cit. supra, note 59; *Cox vs. McNutt*, op. cit. supra, note 102; *State ex rel. O'Connor vs. District Court*, op. cit. supra, note 100; *Re McDonald*, op. cit. supra, note 71.

and martial law was declared in some cities, but was not declared in the city of Warren. The governor sent in one company of the National Guard to aid the civil authorities in Warren. Acting in concert with the local authorities, the Guard established a picket line around a flooded district from which the dwellers had moved to higher ground. There was increasing danger of looting. The herein petitioner in habeas corpus forced his way through the picket lines and disregarded protests. "He did this upon the pretence that he desired to take some pictures, but . . . his real purpose was to show his defiance and contempt of authority and especially the authority of the citizen soldiery on duty".¹⁰⁵

The court in this case held that in the emergency situation pervading the locality, the Guard could either turn an offender over to the civil authorities, or try him by military commission. If the suspect was surrendered to the local authorities then the jurisdiction of the military ceased as to that individual. On a technical ground that the legislature had preempted the field, a local ordinance covering the same subject matter was invalid and the petitioner was discharged.

C. Order of a Superior

An instance of destruction of property by the military was involved in *Herlihy vs. Donahue*.¹⁰⁶ This was an action against officers of the organized militia who had destroyed the plaintiff's stock of liquors in his saloon. In September 1914, the governor of Montana ordered state troops into Silver Bow County which was declared to be in a state of insurrection. A major in charge of troops issued an order closing saloons. The order was later modified to establish open hours from 8 A.M. to 7 P.M. daily. Believing that the plaintiff was violating the restriction, the major ordered the removal of the liquors from the saloon and their destruction. The plaintiff prevailed at trial and the judgment was affirmed on appeal. The Montana Supreme Court held that there was *no necessity for the destruction* of the liquors and no involvement of the police power of the state. The plaintiff should have been given *notice* of the pending charge against him and should have been afforded an opportunity to refute the charge that he was violating the liquor restrictions. However, the court perceived that only the *superior officer who ordered the destruction should*

¹⁰⁵ *Re Edward S. Smith*, 14 Ohio NP NS 497, 499 (1913). As to the rule-making authority of local troops—commanders, consult "Federal Aid in Domestic Disturbances, 1903-1922" for the Secretary of War by the JAG (1922, Washington, D.C.), p. 313: Senate Document # 263, 67th Cong., 2d Sess., 20 Sept. 1922).

¹⁰⁶ 52 Mont. 601, 161 Pac. 604 (1916).

be held liable. The action was dismissed as to two defendants who were junior officers and who had carried out the actual destruction. The order to them from their superior, the major, seemed valid on its face, and subordinate officers could not refuse obedience.

There are definite advantages in the use of a proclamation by the governor. The formal proclamation generally receives wide publicity, and puts the public or elements of the public on notice that certain conduct is prescribed, such as a gathering of crowds, possession of fire arms, sale of liquors, curfew hours, etc. In borderline cases in which there may arise doubt as to the governor's purpose or motives, the use of the proclamation should aid in sustaining the governor's action.

The nature of a proclamation is summed up in the principle set forth in *State vs. McPhail*¹⁰⁷ that *if a proclamation is used by the governor, no special recitals are necessary*. However, as a practical matter, and with an eye to litigation which might follow the use of the troops, the word "insurrection" may be questionable in use. Numerous insurance policies refer to 'insurrection' as a term or status of *avoidance of liability under the policy*.

D. *The Watts Unrest*

In August 1965, there occurred in the Watts suburb of Los Angeles, at least six days of unrest in which 34 people lost their lives, over 1,000 were injured, more than 950 businesses and privately-owned buildings were looted, damaged or destroyed, and over 200 structures were burned to the ground. Participating in varying degrees were between eight and ten thousand persons apart from military personnel. The damage totaled many millions of dollars.¹⁰⁸ Discussion will be confined to the various proclamations and orders issued by the acting governor of California.

On 13 August 1965, the acting governor signed an order calling the California Army National Guard into the service of the state with regard to the applicable provisions of the state Military and Veterans Code. The order is Exhibit "A" of this writing. The order referred to a *condition of tumult and riot* which existed in the area.

On 14 August 1965, the acting governor signed a proclamation of a *"state of extreme emergency"* in Los Angeles County, and recited that the local authority was inadequate to cope with the peril. The proclamation is Exhibit "B" herein.

¹⁰⁷ Op. cit. supra, note 27.

¹⁰⁸ Momboisse, Ray M., "A Crossroads in History", *Law and Order*, September 1966, p. 34.

On 14 August 1965, a *state of disaster* in Los Angeles County was proclaimed by the acting governor. The proclamation referred to the chief of police and the county sheriff. This document was subsequent to the earlier proclamation on the same date, and is Exhibit "C" herein.

On 14 August 1965, there was issued by the acting governor, Rule # 1 referring to the state of extreme emergency and declaring a curfew between the hours of 8 P.M. and the time of sunrise. The area subject to curfew was delimited. Rule # 1 is Exhibit "D" herein.

On 15 August 1965, an Amended Rule # 1 was issued by the governor which altered in part the area subject to curfew. Amended Rule # 1 is Exhibit "E" herein. Each of Rule # 1 and Amended Rule # 1 referred to the specific authority of Section 1600 of the California Military and Veterans Code.¹⁰⁹

The California Air National Guard actively participated by transporting Army National Guard units from and return to their home stations. This was a joint Air-Army National Guard action.

About fourteen months after the Watts disorder, approximately 3,000 Guardsmen were called to active service in riot control in San Francisco from 28 September—1 October 1966 during unrest growing out of the arrest and shooting of an escaping teenager suspected of auto theft.¹¹⁰

Conclusion and Recommendation ¹¹¹

Essentially, state law regulates the National Guard when not in federal service. It is recommended that by statute the state should grant immunity to a Guardsman from civil and criminal liability for acts or omissions arising from state active service.¹¹² Additional-

¹⁰⁹ Sec. 1600 provides: Any person . . . who refuses or wilfully neglects to obey any lawful rule, regulation or order issued . . . shall be guilty of a misdemeanor . . . punishable by a fine . . . or by imprisonment . . . or by both such fine and imprisonment (Stats. 1st Ex. Sess. 1943, ch. 1, #2, p. 3388).

¹¹⁰ San Jose Mercury, 28 September 1966, p. G-1; Sacramento Union, October 1966, p. 1-4.

¹¹¹ In the preparation of this writing, every courtesy and assistance has been extended to the author by a most capable officer, Colonel William M. Blatt, JAGC, NGUS, National Guard Bureau, Washington, D.C.

¹¹² Among other states, Nevada has adopted what is regarded as a comprehensive immunity statute dating from 1965. There is waiver of governmental immunity for tort liability in behalf of the state, its agencies and political subdivisions. (Nev. Revised Stats. #1413, Sec. 41.010, et seq.) No action may be brought against an *employee* of a governmental unit including

[Footnote concluded on page 30.]

ly, the Guardsman should have the rights of a peace officer in the matter of arrest.

In the call of the National Guard, the proclamation of a governor need not contain any particular recitals. Generally, a governor's declaration that a state of insurrection exists will not be disturbed if any degree of unrest prevails in the locality. However, the Watts situation has disclosed that the terms "insurrection" or "riot" may be objectionable especially if the question of fire insurance or liability coverage is involved.

The second amendment to the

United States Constitution wisely has provided for a "well-regulated militia . . . necessary to the security of a free State". The National Guard, both Army and Air, is the twentieth century model of the active, organized militia of the several states. The National Guard is a ready and available, trained force within each state, subject to call by the governor, in order to undertake an assigned mission. Over a period in excess of two hundred years, the active militia has been used during natural disasters, such as flood or fire, and in the instance of tumults and civil disorders.

112 Continued

the National Guard. An award for tort damages may not exceed \$25,000 to a claimant and punitive damages are excluded. The state and a subdivision may insure against any liability including the expense of defending against any claim. No person "belonging to the military forces" is subject to arrest on civil process while going to, or remaining at, or returning from any place where he is performing military duty. The state attorney general must defend any civil suit against a member of the military. If a proceeding is criminal, the adjutant general shall designate a judge advocate to represent the defendant.

EXHIBIT "A"

EXECUTIVE DEPARTMENT
State of California

I, Glenn M. Anderson, Acting Governor of the State of California am satisfied that a condition of tumult and riot exists in a portion of the county of Los Angeles, and under the applicable provisions of the Military and Veterans Code I therefore order into the service of the State of California, the California Army National Guard in such number as I shall subsequently determine necessary.

I direct that this proclamation shall take effect immediately, effective August 13, 1965 and that as soon hereafter as possible this proclama-

tion be filed in the office of the Secretary of State of the State of California; and that widespread publicity and notice be given to this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the great seal of the State of California to be fixed.

Done at the City of Los Angeles this 13th Day of August, 1965.

/s/ Glenn M. Anderson

ACTING GOVERNOR OF CALIFORNIA

ATTEST:

SECRETARY OF STATE

EXHIBIT "B"

EXECUTIVE DEPARTMENT

State of California

PROCLAMATION

I, Glenn M. Anderson, Acting Governor of the State of California, having found a condition of extreme peril to the safety of persons and property within this state caused by a riot within the County of Los Angeles, and having found that local authority is inadequate to cope with this peril, and having found that such condition is by reason of its magnitude beyond the control of the services, personnel, equipment and facilities of the City of Los Angeles and the County of Los Angeles, therefore proclaim a state of *extreme emergency* in the County of Los Angeles.

I direct that this proclamation shall take effect immediately, effective August 14, 1965, and that as soon hereafter as possible this proclamation be filed in the office of the Secretary of State of the State of California; and that widespread publicity and notice be given to this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the great seal of the State of California to be fixed.

Done at the City of Los Angeles this 14th Day of August, 1965.

/s/ Glenn M. Anderson

ACTING GOVERNOR OF CALIFORNIA

ATTEST:

SECRETARY OF STATE

EXHIBIT "C"

EXECUTIVE DEPARTMENT
State of California

PROCLAMATION

I, Glenn M. Anderson, Acting Governor of the State of California, having found a condition of extreme peril to the safety of persons and property within this state caused by a riot within the county of Los Angeles, and having been informed by the Chief of Police of the City of Los Angeles and the Sheriff of the County of Los Angeles that local authority is inadequate to cope with this peril, and finding that such condition is by reason of its magnitude beyond the control of the services, personnel, equipment and facilities of the City of Los Angeles and the County of Los Angeles, therefore proclaim a *state of disaster* in the County of Los Angeles.

I direct that this proclamation shall take effect immediately, effective August 14, 1965, and that as soon hereafter as possible this proclamation be filed in the office of the Secretary of State of the State of California; and that widespread publicity and notice be given to this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the great seal of the State of California to be fixed.

Done at the City of Los Angeles this 14th Day of August, 1965.

/s/ Glenn M. Anderson
ACTING GOVERNOR OF CALIFORNIA

ATTEST:

SECRETARY OF STATE

EXHIBIT "D"

RULES AND REGULATIONS

In the light of the state of extreme emergency now existing in the County of Los Angeles and pursuant to the authority vested in me to promulgate, issue and enforce rules, regulations and orders, I deem the following rule and regulation necessary for the protection of life and property:

1. CURFEW

No person shall be upon the public street, avenue, alley, park, or other public place or unimproved private realty within the area bounded as follows:

Starting at the intersection of Washington Boulevard and Alameda Street, then proceeding westerly to Flower Street, then south on Flower Street to Adams Boulevard, then westerly on Adams Boulevard to Crenshaw Boulevard, then Southerly on Crenshaw Boulevard to Florence Avenue, then easterly on Florence Avenue to Van Ness Ave-

nue, southerly on Van Ness Avenue to Imperial Highway, then easterly on Imperial Highway to Broadway, southerly on Broadway to 120th Street, easterly on 120th Street to Alameda, northerly on Alameda to the starting point.

Between the hours of 8 p.m. and the time of sunrise of the following day. This curfew shall not apply to policemen, peace officers, firemen, other emergency personnel or civilians engaged in police or emergency work. This rule shall not apply to authorized representatives of any news service, newspaper, or radio or television station or network.

Any violation of this rule shall be punished as provided by section 1600 of the Military and Veterans Code.

/s/ Glenn M. Anderson

ACTING GOVERNOR OF CALIFORNIA

ATTEST:

SECRETARY OF STATE

EXHIBIT "E"

EXECUTIVE DEPARTMENT

State of California

AMENDED RULE NO. 1

In the light of the state of extreme emergency now existing in the County of Los Angeles, and pursuant to the authority vested in me to promulgate, issue and enforce rules, regulations and orders, I deem the following rule and regulation necessary for protection of life and property and hereby amend Rule No. 1 as previously issued on August 14, 1965, by Acting Governor Glenn M. Anderson, to be effective immediately as amended, as follows:

CURFEW:

No person shall be upon the public street, avenue, alley, park or other public place or unimproved private realty within the area bounded as follows:

Starting at the intersection of Washington Boulevard and Alameda Street, then proceeding westerly to Flower Street, then south on Flower Street to Adams Boulevard, then westerly on Adams Boulevard to Crenshaw Boulevard, then southerly on Crenshaw Boulevard to Florence

Avenue, then easterly on Florence Avenue to Van Ness Avenue, southerly on Van Ness Avenue to Rosecrans Avenue, then easterly on Rosecrans Avenue to Alameda, northerly on Alameda Street to the starting point, all named streets included, between the hours of 8:00 p.m. and the time of sunrise of the following day.

This curfew shall not apply to policemen, peace officers, firemen, other emergency personnel or civilians engaged in police or emergency work. This rule shall not apply to authorized representatives of any news service, newspaper, or radio or television station or network.

Any violation of this rule shall be punished as provided by Section 1600 of the Military and Veterans Code.

This rule shall remain in effect until such time as it is rescinded.

Dated: August 15, 1965.

GOVERNOR OF CALIFORNIA
/s/ [Illegible]

ATTEST:

SECRETARY OF STATE



Colonel Glenn E. Baird, USAR

THE PRESIDENT

Colonel Glenn E. Baird, USAR, elected president of JAA at the 1967 annual meeting in Honolulu, joined the Association as a charter member in 1943 while a student at The Judge Advocate General's School at Ann Arbor. He has served as an officer and director of JAA since 1963.

Colonel Baird served with the Army on active duty as judge advocate during World War II and during the Berlin Crisis, 1961-62. He has been awarded the Medal of the Legion of Merit and the Army Commendation Medal with two oak leaf clusters.

He is a member of the Chicago law firm of Griffen, Stout and Baird.



Major General Kenneth J. Hodson

THE JUDGE ADVOCATE GENERAL OF THE ARMY

Major General Kenneth J. Hodson was appointed The Judge Advocate General of the Army on 1 July 1967. A native of Kansas, General Hodson obtained his BA and LLB degrees at the University of Kansas. He was engaged in the private practice of law in Jackson, Wyoming, from 1938 until May 1941 when as a reservist he was called to active duty as a first lieutenant of artillery. He was transferred to the Judge Advocate Generals Department in September 1942 and as an Army lawyer he has served continuously since then in the Carribean Area, Europe, the Far East and here in the United States. He has graduated from The Judge Advocate General's School, the Command and General Staff College and the United States Army War College.

General Hodson was promoted to the rank of Brigadier General in

September 1962 and named Assistant Judge Advocate General for Military Justice, which position he held until his promotion to Major General on 1 July 1967 and designation as The Judge Advocate General. His decorations include the Legion of Merit, the Army Commendation Medal and the Medaille de la Reconnaissance Francaise.

General Hodson has served as President of the Pentagon Chapter of the Federal Bar Association, and as Chairman of the Criminal Law Section of the American Bar Association of which Section he is currently its Secretary. He is a member of the ABA's Special Committee on Minimum Standards for the Administration of Criminal Justice and is co-editor of the American Criminal Law Quarterly. He has been a member of the Board of Directors of the Judge Advocates Association since 1962.



Major General Lawrence J. Fuller

THE ASSISTANT JUDGE ADVOCATE GENERAL OF THE ARMY

Lawrence J. Fuller was promoted to Major General and appointed The Assistant Judge Advocate General of the Army on 1 July 1937. General Fuller is a native of Washington State and a graduate of the United States Military Academy. He obtained his law degree at the University of Michigan and is a member of the bar of the State of Michigan. Commissioned in June 1940 as an engineer officer, he served in the Pacific Theatre during World War II as a company and battalion officer for over two years. After several short tours of duty stateside, he next saw duty in the European Theatre as commander of a combat engineer battalion with the Third Army.

In July 1951, General Fuller was assigned to the Judge Advocate Generals Corps and has since that time filled assignments as an Army

lawyer in the Office of The Judge Advocate General and in Korea and Taiwan. Until his recent promotion and appointment, he served as Assistant Judge Advocate General for Civil Law. Among the many service schools attended by General Fuller, are the Command and General Staff College, the National War College, the Army War College, and the Judge Advocate General's School. His decorations include The Legion of Merit and The Army Commendation Medal.

General Fuller has an active interest in international and comparative law. He has published a number of works on the legal systems of the Republic of China, Okinawa and Thailand and other Asiatic countries. He is an active member of the American Bar Association and of the Judge Advocates Association.

LEGISLATIVE REPORT

By Cdr. Penrose Lucas Albright JAGC USNR
Chairman, Legislative Committee

After many years of urging by the JAA, a Judge Advocate Generals Corps in the Navy was established on 8 December 1967 when the President signed P.L. 179 of the 90th Congress. The law will eventually give the Navy JAGC four flag billets. Female officers are included in the JAGC, and Marine Corps officers performing legal duties can be designated as judge advocates. Separate selection boards are used for both Regular and Reserve JAGC officers. Primary credit for this major achievement belongs to Rear Admiral Wilfred Hearn, Navy TJAG, and Rear Admiral Robert H. Hare, Deputy JAG.

The Bennett Bill, H.R. 15971, has been reported out by its Subcommittee in the House. This bill establishes single law officer general and special courts martial with consent of the convening authority upon request of defense counsel. A BCD can only be adjudged where there is a complete record of proceedings and accused is afforded opportunity for lawyer counsel (except where military exigencies make this impossible). Pre-trial sessions are authorized for motions and rulings which can be made by the law officer without the presence of the court members. A petition for new trial on the basis of newly dis-

covered evidence of fraud on the court may be made within 2 years after approval by the convening authority. The JAA has long supported the aims of the bill and this support has been made known to the Armed Forces Committee of the Senate. However, problems may be encountered on the Senate side because essentially the same reforms are set forth in a more comprehensive package comprising the Ervin Bill, S. 2009.

The Pirnie Bill, H.R. 1040, which passed the House last Congress, seems stymied in the Congress due to opposition of the Department of Defense, pending a study of additional pay in recognition of post-graduate degrees. The main Congressional proponents of the bill are Congressmen Pirnie of New York, Leggett of California, and Senator MacIntyre of New Hampshire. The Bill merely equalizes the day-to-day pay of lawyers and others, having post-graduate degrees as a prerequisite for their commission, with contemporaries who were initially commissioned upon completion of college studies or graduation from a military academy. Obviously it is very difficult to retain lawyer-officers on active duty who learn they are being paid substantially less each month than their under-

graduate classmates. The JAGs are circumventing the handicap by permitting ROTC graduates, who accumulate longevity because of their reserve status, to attend law school on an extended leave program. There are both advantages and disadvantages to this procedure. The major disadvantage lies in the necessary guesstimate of how the individual will do in law school as opposed to the 20-20 hindsight which may be used in the procurement of law school graduates. In addition, with law students no longer deferred from the draft, the ROTC program will undoubtedly become attractive to those who desire to delay actual active duty.

The Pirnie Bill is, at best, only a partial answer to the critical retention problem of officers having graduate degrees. Even if the Bill becomes law, these individuals still will net substantially less over their productive lives vis-a-vis their classmates in the service who entered upon obtaining their bachelor's degree.

A person who invests time and money to acquire a skill expects to be, and generally is, reimbursed for his investment. Although this may not obtain in all cases, it will in most over a period of time by virtue of the laws of supply and demand. That is, oversupply of a particular skill will tend to adjust itself if its rewards fail to offset effort necessary to its acquisition.

A basic problem is that the present military pay system is not

geared to the procurement of large numbers of specialists requiring post-graduate training. JAA would like to feel that 100% of uniformed career lawyers rate "av." But if future career Judge Advocates are to be so, the pay system will have to be substantially revised to provide realistic career incentives.

The Ervin Bill, S. 2009, should be taken up by the Senate Armed Forces Committee, if not this year, then in the next session for further hearings. This Bill is a modified compilation of prior bills submitted by Senator Ervin which will, if it becomes law, have a far-reaching effect on military law. Briefly, it codifies and unifies, and somewhat strengthens, present administrative procedures dealing with undesirable discharges. The authority and prestige of law officers and boards of review are enhanced. The circuit system existing in the Army and Navy will be made mandatory for the Air Force, and the Correction Boards are unified under DOD. The JAA testified at length in the hearings on the previous bills and our position is basically unchanged. We agree with many of the objectives of the Bill. However, we have doubt as to the wisdom of legislation, as compared to a more flexible administrative approach, on the circuit system. As written, some danger exists that the boards of review, renamed "Courts of Military Review" might become patronage repositories. And, although certain

measures to increase the independence of correction boards might be in order, we have opposed their removal from the separate departments to DOD.

In addition to the foregoing, the JAA Legislative Committee has considered a number of bills now pending to make the Court of Military Appeals an Article I Court and the Hebert bill, H.R. 2636 dealing with uniform codes of justice for state national guards. The majority of the Committee favors the former and, to date, no firm posi-

tion has been taken on the Herbert bill. A number of other bills which have been studied by the JAA Legislative Committee are not dealt with here because of space limitations.

Presently, the Legislative Committee is preparing a draft of a Career Equalization Pay Act, the purpose of which will be to ensure that career officers having specialties requiring post-graduate degrees, are equitably compensated for the investment in time and money such degrees represent.

ANNOUNCEMENT OF 1968 ANNUAL MEETING

The twenty-fifth Annual Meeting of the Judge Advocates Association will be held in Philadelphia at 3:00 P.M. on 5 August, 1968 in the Chestnut Room, Center Building of the Philadelphia Civic Center. The Judge Advocates Generals of the Army, Navy and Air Force will report on the state of legal services in their respective services, and the Chief Judge of the United States Court of Military Appeals will report for the Court on the state of military justice. New officers and directors will be installed upon the filing of the report of the results of the annual election. The President, Colonel Glenn E. Baird, will preside.

The twenty-second Annual Dinner of the Association will be held

on the evening of 5 August 1968 at The Down Town Club on Independence Square in Philadelphia. Reception and cocktails will begin at 7:00 P.M. followed by dinner at 8:00 P.M.

The Committee on Arrangements is composed of Messrs. Louis D. Apothaker, Harold Cramer, Thomas P. Glassmoyer, Bruce H. Greenfield, Joseph Smith and Sherwin T. McDowell. Mr. McDowell serves as chairman. The Committee has made excellent arrangements for a JAA meeting and dinner equal to the best that tradition has long established is a highlight of the annual meeting of the American Bar. Reserve the date and make reservations early. The cost of the dinner will be \$10.00 per person.

In Memoriam

Since the last publication of the Journal, the Association has been advised of the death of the following members:

- Lt. Col. Rudolph W. Albrech, Texas
- Lt. Col. Noel B. Brown, Texas
- Lt. Col. Arthur Crownover, Jr., Tennessee
- Col. William S. Dolan, California
- Lt. Bernard J. Duffy, Pennsylvania
- Col. James W. Innes, New York
- Col. Royal R. Irwin, Colorado
- Cdr. Walter V. Johnson, Pennsylvania
- Col. Doane F. Kiechel, Nebraska
- Lt. Col. Norman C. Nicholson, New York
- Lt. Col. Richard H. Porter, Tennessee
- Lt. Harold F. Ronin, Illinois
- Col. Chester D. Silvers, Oklahoma
- Col. John T. Stuart, New York
- Col. Charles M. Trammell, District of Columbia

The members of the Judge Advocates Association profoundly regret the passing of their fellow members and extend to their surviving families, relatives and friends, deepest sympathy.

NORTHWESTERN'S SUMMER COURSES, 1968

The 11th ANNUAL SHORT COURSE FOR DEFENSE LAWYERS IN CRIMINAL CASES will be conducted this Summer by *Northwestern University School of Law* during the five-day period July 22-July 27, 1968. Leading defense lawyers and other authorities will discuss: *Trial Techniques—Recent Developments in the Law of Arrest, Search and Seizure, Confessions, Discovery—Scientific Methods of Proof—Prejudicial News Reporting—The Defense of Income Tax Cases*—and other subjects of importance to defense lawyers. Attendance is open to all attorneys interested in the practice of criminal law; to legal personnel in the Armed Forces; and to law professors.

Northwestern University will also conduct its 23rd ANNUAL SHORT COURSE FOR PROSECUTING ATTORNEYS during the five-day period August 5-August 10. The subject matters to be covered are similar to those offered at the defense counsel course. Attendance at the prosecutors' course is limited to attorneys holding state, city, or federal offices as prosecutor or assistant prosecutor; to attorneys who are nominees for such office at the next election; to legal personnel in the Armed Forces; and to law professors.

Copies of the course programs, or other information, may be obtained by writing to Professor Fred E. Inbau, Northwestern University School of Law, Chicago, Illinois, 60611.



LAW DAY USA PLANNED FOR PENTAGON

The Pentagon Chapter of the Federal Bar Association and the Judge Advocates Association will jointly sponsor Law Day Ceremonies on 1 May 1968 at 11:45 A.M. in the Pentagon courtyard. The principal speaker will be Mr. Earl F. Morris, President of the American Bar Association. The United States Navy Band and the WAVE Chorus will provide the music.

At the October meeting of the Board of Directors of the Association the death of the Executive Secretary's wife, Betty Schofield Love, was noted and the following resolution was passed:

The Board of Directors of the Judge Advocates Association on behalf of the Association and all its members mourn with its Executive Secretary on the death of his helpmate for twenty-five years, one, who like him, was devoted to the Association and whose passing caused a real loss to Richard Love and his family.

Betty Love was Dick's constant companion at all the Association's social activities over the years. Despite her increasing difficulties, she attended every occasion in the annals of the Association until the 1967 meeting in Hawaii when her illness and the distance proved too great. With Dick and his family we shall miss her much.



What The Members Are Doing . . .

CALIFORNIA

Col. John H. Finger (5th Off, S & F) of San Francisco is President of the California State Bar Association. Colonel Finger, a member of the firm of Hobert, Finger, Brown and Abramson, has served as member of the Board of Governors of the State Bar, director of the San Francisco Bar, president of the San Francisco Lawyers Club, many committees of the American Bar Association and as president of the Judge Advocates Association.

The Southern California Chapter of the Judge Advocates Association, formed as a perpetual memorial to the late Col. John P. Oliver, met at Monterey on September 26, 1967 coincident with the California State Bar Annual Convention. Distinguished guests included Col. James Garnett (4th Off, S & F) SJA Sixth Army, Col. Bruce T. Coggins SJA, Fort Ord. and Col. John H. Finger, president of the State Bar. Officers of the Chapter elected at the meeting were: Lt. Col. Edward L. McLarty, president; Lt. Col. David I. Lippert (25th Off), Col. Robert E. Walker, and Major Jess Whitehill, vice-presidents; and Col. Mitchell Zitlin, secretary-treasurer. The executive board of the Chapter is composed of Col. John Aiso, Col. James Brice (7th Off), Col. Robert D. Upp, Lt. Col. Milnor Gleaves, Lt. Col. Arthur T. Jones and Lt. Col. John C.

Spence. Those interested in the chapter and its activities should write Col. Zitlin at 1233 S. Olive Street, Los Angeles, 90015.

DISTRICT OF COLUMBIA

Col. James A. Bistline (5th OC) has been designated General Counsel for the Southern Railway System. Col. Bistline has continued an active interest as a reservist since World War II and is the current commander of the 1652nd Mobilization Designee Detachment (JA), U. S. Army Reserve.

Rear Admiral Wilfred A. Hearn and Mrs. Hearn, Rear Admiral Robert H. Hare and Mrs. Hare and Rear Admiral Joseph McDevitt and Mrs. McDevitt were honored by a dinner-dance sponsored by Navy Lawyers on 30 March 1968 at Ft. Myer's Officers' Club. Officers of all services and components and their ladies attended this colorful and enjoyable social event. The occasion was a farewell to Admirals Hearn and Hare and their ladies upon their retirement as The Judge Advocate General and The Assistant Judge Advocate of the Navy and a welcome to Admiral and Mrs. McDevitt upon the Admiral's appointment as the new Judge Advocate General of the Navy.

Capt. Ralph E. Becker (1st OC) has removed his offices for the gen-

eral practice of law to the Federal Bar Building West, 1819 H Street N. W.

FLORIDA

Major J. Herbert Burke (2nd OC) of Hollywood, formerly of Chicago, is serving as a member of the U. S. House of Representatives for the 10th Congressional District of Florida.

ILLINOIS

Major David M. Burner of Chicago, the SJA of the 85th (Tng) Division USAR was recently appointed Assistant Trust Counsel of the Harris Trust and Savings Bank.

Col. Thomas J. Cameron (25th Off) of Chicago who recently retired from the active service as SJA of the Fifth U. S. Army is currently serving as Assistant Director of State and Local Bar Services of the American Bar Association.

MISSOURI

Col. Tom B. Hembree of Joplin is a member of the Executive Committee of the Board of Governors of The Missouri Bar. Col. Hembree has secured the unanimous adoption by The Missouri Bar of a resolution to form a Military Law Committee within the state bar organization.

NEW YORK

The Association of the Bar of the City of New York by its Committee on Military Justice and Mili-

tary Affairs, in cooperation with the New York State Bar Association's Committee on Military Justice, the New York County Lawyers Association's Committee on Military Justice and the Judge Advocates Association on January 23rd, 1968 conducted a panel discussion on the question "Is there Justice in the Armed Services". The panel consisted of Col. Harold E. Parker, JAGC USA; Capt. George F. O'Malley, USN; Col. Myron L. Birnbaum, USAF; Dean Russell N. Fairbanks of Rutgers Law School; and Cdr. Frederick W. Read, Jr., USNR, Chairman of the sponsoring committee. As chairmen of the cooperating bar association's committees, Col. George A. Spiebelberg, Capt. Robert G. Burke and Col. Richard Love participated in the organization and plans for the meeting. Over 250 interested lawyers attended the very stimulating and enlightening discussion.

Samuel Rabinor of Jamaica, a member of this association for almost 20 years, was honored on January 17th at the Annual Dinner of The Queens Lawyers Division of the Federation of Jewish Philanthropies on the occasion of its Golden Anniversary.

OHIO

Earl F. Morris of Columbus serves as the President of the American Bar Association. Capt. Morris (9th OC), a member of JAA since 1944, is a member of

the firm of Wright, Harlor, Morris, Arnold & Glander.

OKLAHOMA

Lt. Col. Carmon C. Harris (8th Off) of Oklahoma City is serving as District Judge of Oklahoma County.

TEXAS

Col. Leon J. Jaworski (4th Off) of Houston, a member of the President's Crime Commission, has been appointed by ABA President, Earl F. Morris, as Chairman of ABA's Special Committee on Crime Prevention and Control.



MOVEMENT TO CUT ABA HOUSE OF DELEGATES OPPOSED BY JAA

A special committee on representation in the House of Delegates was created in February 1967 by a resolution adopted by the House. This resolution recited that:

1. "Conditions in the legal profession had changed substantially since the House of Delegates was created in 1936 and its composition last studied in 1968.
2. "Serious questions existed about whether representation of particular organizations in the House was authorized by current constitutional provisions; and
3. "The size of the House was becoming unwieldy because of present authorized categories of representation."

The special committee made a preliminary report to the House of Delegates at the meeting of the House in February 1968. One of the recommendations contained in this preliminary report would eliminate representation in the House of affiliated organizations, but these organizations would "be authorized by appropriate House rules to submit at the beginning of each House session any proposals they may have in their specialized fields of interest for consideration of the House."

If adopted this recommendation would eliminate representation in the House of The Judge Advocates Association. The Chairman of the Committee, Mr. Edward W. Kuhn, of Memphis, Tennessee, invited written comments on the preliminary report of the Committee. Colonel Ritchie, who represents The Judge Advocates Association in the House of Delegates wrote the following letter to Mr. Kuhn:

Mr. Edward W. Kuhn
150 E. Court Avenue
Memphis, Tennessee 38101

Dear Ed:

This letter is written in response to your gracious invitation at the recent meeting of the House of Delegates to submit written comments on the tentative report of your Special Committee on Representation in the House of Delegates. I shall address my remarks only to the recommendation of your Committee that will eliminate representation in the House of affiliated organizations. I suggest that this recommendation is unwise for the following reasons:

1. It denies representation in the House of segments of the profession which through their respective delegates may be able to bring useful information, insights, and viewpoints relevant to matters under discussion. I suggest that this criticism is not answered by the recommendation that affiliated organizations "be authorized * * * to submit at the beginning of each House session any proposals that may be in their specialized fields of interest for consideration of the House."

This recommendation would deny comment on proposals originating from sources other than affiliated organizations, however relevant these proposals might be to the areas of interest of affiliated organizations.

2. The reports of the deliberations of the House brought back to affiliated organizations by their respective representatives in the

House serve, I think, the valuable purpose of causing the membership of the affiliated organizations to feel a close tie with the policy making group of the American Bar Association. Through their representatives in the House the affiliated organizations feel that they are participating in policy decisions of the American Bar Association.

3. I venture to suggest that granting representation in the House to affiliated organizations encourages members of the affiliated organizations to become members of the American Bar Association. Withdrawal of representation might well discourage American Bar Association membership on the part of members of the affiliated organizations. Indeed the withdrawal, however tactfully explained, might well be construed as a rebuff of the affiliated organizations. In any event I feel that it would tend toward further fragmentation of the profession. The liaison between the American Bar Association and affiliated organizations now provided by the latter's delegates in the House symbolically I think ties the affiliated organizations to the American Bar Association and encourages the recognition of the American Bar Association as the spokesman for the profession.

Knowing full well that you will understand the spirit in which I write, I am, with all good wishes and warmest regards,

Cordially,

John Ritchie
Dean

The final report of the Committee on Representation in the House of Delegates will be submitted to the House at the annual meeting at Philadelphia. It seems probable that the final report will include the recommendation eliminating representation by affiliated organizations. It would be helpful if members of The Judge Advocates Association who know members of the House of Delegates would urge those members to vote against eliminating representation in the House of affiliated organizations.



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Executive Secretary and Editor

RICHARD H. LOVE
Washington, D. C.

