OFFICIAL OPINION NO. 66

MILITIA—NATIONAL GUARDSMEN—Power of Governor to Call Out Troops—Declaring Martial Law Not Necessary —Duty During Riot or Insurrection—Civil or Criminal Liability of Guardsman—Providing Legal Counsel —Re-employment Rights of Guardsman— Injury or Illness—While on Active Duty —Survivor Benefits— Processing Claims.

Opinion Requested by Maj. Gen. John S. Anderson, Adjutant General of Indiana

This is in response to your request for an Official Opinion concerning the many faceted problems arising from the use of National Guardsmen who have been ordered to duty to deal with natural disaster or civil disturbance.

Recent civil disorders, both within and without this state, have necessitated the activation of National Guardsmen resulting in the raising of innumerable legal questions. This opinion will endeavor to provide answers to some of those complex questions.

I.

POWER OF GOVERNOR TO CALL OUT GUARDSMEN GENERALLY AND POWER OF GUARDSMEN TO ARREST

The Constitution of Indiana provides in Article 5, § 12 that, "[T]he Governor shall be commander-in-chief of the military and naval forces, and may call out such forces, to execute the laws, or to suppress insurrection, or to repel invasion." Enabling legislation is found in Acts 1953, Ch.

187, § 203, the same being Burns § 45-1903, which provides the following:

> "The governor of the state shall be the Commander in Chief of the military forces of the state, and shall have supreme command of the military forces of the state while in the service of the state or until they are ordered and accepted into the service of the United States, and shall have such other powers as hereinafter granted."

One of the enumerated powers conferred upon the Governor was enacted in Acts 1953, Ch. 187, § 404 (Burns § 45-2104):

> "It shall be the duty of the governor and he is authorized and required, in case of . . . insurrection, public disaster, or breach of the peace or imminent danger thereof or any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary, to order on state duty the National Guard or any part thereof."

Language similar to the above was under close scrutiny by the Supreme Court of Colorado in *In re Moyer*, 35 Colo. 159, 85 P. 190 (1904). It was wisely noted therein that such laws must be given a construction that will effectuate the end sought to be attained. In suppressing an insurrection, extreme force has often been required against armed and riotous resistance. Without such force, "the presence of the military . . . would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct."

In affirming the above construction, Justice Holmes of the United States Supreme Court interpreted the same language to mean that the Governor,

> "[S]hall make the ordinary use of the soldiers to that end . . . that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not nec-

> essarily for punishment, but are by way of precaution to prevent the exericse of hostile power." *Moyer v. Peabody,* 212 U.S. 78 (1908.)

Consequently, as early as 1908 the principle that the military officers may detain rioters was established by a Supreme Court interpretation of language similar to that found in the Indiana Constitution and statutes. Since that date, temporary detentions in riot situations have unanimously been sustained. *Cox v. McNutt,* 12 F. Supp. 355 (S.D. Ind. 1935); *Ex parte McDonald,* 49 Mont. 454, 143 P. 947 (1914); *State ex rel. O'Connor v. District Ct.,* 219 Iowa 1165, 260 N.W. 73 (1935). See generally, 4 Wharton, Criminal Law and Procedure § 1600 (12th ed. 1957); 4 Am. Jur. Arrest § 34; and Wiener, *Helping to Cool the Long Hot Summers,* 53 A.B.A.J. 713 (1967).

Detention of rioters in jail until the riot is suppressed is often considered more desirable than actual arrest which necessitates a turning over to civil authorities and setting of bond. The latter method would frustrate the attempt of the military to suppress since the person would rejoin the rioters upon being released on bail. The court in *Moyer, supra,* held that a detention for as long as 75 days did not constitute a denial of plaintiff's liberty without due process of law.

It is recognized that "the detention doctrine was last approved by the Supreme Court thirty-five years ago, and much constitutional doctrine . . . has since gone over the dam." Wiener, *supra,* at 717. However, in an age when civil disorders are commonplace, one should be wary of weakening the remedies now available to those who are charged with suppressing the riot and restoring order. It must also be borne in mind that detention cannot rest on mere fiat; it is subject to review in a habeas corpus proceeding. The allowable limits of military discretion are subject to judicial review. *Sterling v. Constantin,* 287 U.S. 378 (1932).

In addition to the military officer's power to detain those who are aiding and abetting in the riot, he also has the authority to arrest without a warrant. In the riot situation, the guardsman's rights have been equated to those of a peace officer. *Franks v. Smith,* 142 Ky. 232, 134 S.W. 484 (1911);

State v. McPhail, 182 Miss. 360, 180 So. 387 (1938); *State v. District Court in and for Shelby County,* 219 Iowa 1165, 260 N.W. 73, 99 A.L.R. 967 (1935). See generally, Shaw, *Tort Liability and National Guard Personnel,* 39 JA.J. 7 (1967).

The court in *Franks v. Smith, supra,* at 493, in citing *Russell on Crimes,* Vol. 1, pp. 266-289 and *Blackstone's Commentaries* Vol. 4, p. 143, stated that "the militia of the state are in truth peace officers. The purpose of their existence is to preserve the peace and quiet of the state in its broadest sense. . . ." This analogy is only reasonable when viewed in the setting in which the Guard is called out. The Guard is called out when there has been a breakdown in control by the appropriate civil authorities. The existing condition is generally beyond the effective control of the local police officers and guardsmen are sent to suppress the riot and restore order. If they were not given the power to arrest but only stood quiet and helpless, the purpose behind calling out the military would be destroyed. *State v. Swope,* 38 N.M. 53, 28 P. 2d 4 (1933).

A peace officer in Indiana may arrest without a warrant (1) for a felony or misdemeanor committed in his presence or (2) a person whom the officer has probable cause for believing that he has committed or is committing a felony. 3 I.L.E. Arrest §§ 2-4.

It is a felony in Indiana for:

> "Any person or persons composing or taking part in any riot, rout, tumult, mob or lawless combination or assembly mentioned in this article, who after being duly commanded to disperse . . . willfully and intentionally fails to do so. . . ." Acts 1953, ch. 187, § 409 (Burns § 45-2109).

A misdemeanor also attaches in the following situation:

> "Whenever any rout, riot, or mob has occurred or is progressing, or is so imminent that any portion of the National Guard is or has been called out for the performance of any duty . . . it shall be lawful for the civil officer under whose orders the National Guard

> is acting, or the commanding officer of such National Guard . . . to prohibit all persons from occupying or passing on any street, or where the National Guard may be for the time being, and otherwise to regulate the passage and occupancy of such streets and places. Any person, after being duly informed of such regulations, who willfully and intentionally, without lawful excuse, attempts to go or remain on such street, road or place, and fails to depart after being warned to do so shall be guilty of a misdemeanor. . . ." Acts 1953, ch. 187, § 415, as last amended by Acts 1955, ch. 75, § 12 (Burns § 45-2115).

Therefore under the foregoing authority, guardsmen may arrest for statutorily defined felonies and misdemeanors.

Specific statutory authority to arrest is granted to *military officers* in Acts 1953, ch. 187, §§ 410, 415 (Burns §§ 45-2110, 45-2115). The pertinent parts specify:

> "After any person or persons, composing or taking part, or about to take part, in any riot, mob, rout, tumult, or unlawful combination or assembly . . . shall have been duly commanded to disperse, or when the circumstances are such that no such command is requisite . . . and the civil officer to whom such military force is ordered to report, or if there be no civil officer present, then such *military officer* (or if such command is acting under the direct order of the governor, then such officer within the limits provided in his instructions) shall take such steps for the arrest. . . ." (Emphasis added.) (Burns § 45-2110).
>
> "Any person, after being duly informed on such regulations [regarding occupying or passing on any street] . . . shall be guilty of a misdemeanor . . . and in such case the *officer* in command of the National Guard may forthwith arrest persons so offending and turn them over to some civil magistrate." (Emphasis added. (Burns § 45-2115).

The latter provision adds weight to the argument that a guardsman may arrest but limits his authority to those in-

stances in which he receives a direct order from a superior officer.

A converse argument with respect to a guardsman's authority to arrest is that he has no authority except that which is expressly given to him by the civil authorities to whom such military force is ordered to report. This argument is not supported by law nor reason. Indeed the law places the disposition and control of the guardsmen under the governor as commander-in-chief, and reason compels the conclusion that the repository of authority for the guardsmen could not practically rest with the local civil authorities.

Proponents of this theory attempt to find support for their position in the language found in Acts 1953, ch. 187, § 407 (Burns § 45-2107), wherein it says that the "commanding officer must obey all lawful written orders of such civil officer. . . ." It should be noted, however, that the dictates of § 45-2107 only become operative upon application of the calling out provisions of Acts 1953, ch. 187, § 406 (Burns § 45-2106). Consequently the above language only applies when "the exigencies of the situation are such as to render it impossible first to communicate with the governor or the adjustant-general. . . ." Burns § 45-2106, *supra*, and even then "such military officer may use his discretion as to the manner of carrying out such orders [orders of the civil officer], so long as he complies with their spirit." Burns § 45-2107, *supra*.

Further support is sought in Burns § 45-2110, *supra*, where the statute sets up a chain of command with reference to the arrest and grants to the military officer the authority to "take such steps for the arrest" only "*if* there be no civil officer present." (Emphasis added.) Also in Acts 1953, ch. 187, § 412 (Burns § 45-2112) which deals with quelling an assault on the guard, the statute states that "the commanding officer of such national guard need not await any orders from any civil magistrate, but may at once proceed to quell such attack. . . ." It is concluded by some that by negative inference, the commanding officer must await orders from the civil magistrate in all other instances.

The above attempted interpretations are without merit. It must be borne in mind that the governor is the commander-in-chief of the military forces in Indiana and any statutory construction which attempts to divest him of the powers and responsibilities of his position as commander-in-chief would render said statute unconstitutional. Since it is favored that we construe statutes to uphold their constitutionality, it must be concluded that the military force is not rendered subordinate to the local civil authorities nor do they receive their orders therefrom.

If the only way to suppress effectively the riot and restore order is to permit the guardsmen to arrest, they must be granted that power. There is no statutory provision which denies it! Indeed, as indicated herein, it is supported by case law and various writers. The granting of such authority in the chief executive which is in turn to be exercised by the guardsmen offers the most expeditious and efficient method of quelling the disorder. Any authority short of this is no authority at all!

Although the Indiana courts have not had occasion to come to grips with this very important and current question, I reach the following conclusions regarding the authority of a National Guardsman while performing state active duty in quelling civil disturbances:

(1) Guardsmen have the authority to arrest commensurate with that given to local peace officers.

(2) Guardsmen have the authority to detain persons who aid and abet in the civil disturbance. Such detention should be employed with discretion, i.e., ringleaders of the disturbance, etc., and with reasonableness since it is subject to judicial review.

II

GOVERNOR'S POWER TO CALL OUT INDIANA NATIONAL GUARD IN RELATION TO LOCAL CIVIL AUTHORITIES—PROCEDURE FOR CALLING OUT

"[I]n case of war, invasion, insurrection, public disaster, or breach of the peace or imminent danger thereof or any

forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary," the duty and authorization to call out the Indiana National Guard is vested solely in the Governor. Burns § 45-2104, *supra*; accord *State ex rel. Branigin v. Morgan Super. Ct.*, — Ind. —, 231 N.E. 2d 516, 12 Ind. Dec. 175 (1967).

In the Governor's absence, the duty to call out the National Guard in the above instances would be vested in the Adjutant General who is the exclusive and administrative head of the military department of the State of Indiana. Acts 1953, ch. 187, §§ 201, 202 (Burns §§ 45-1901, 45-1902).

In the event of insurrection, riot, tumult, etc., the procedure for ordering the National Guard into state active duty would be as follows:

(1) The sheriff of the county involved or other local civil officer acting in his stead should communicate to the Governor or Adjutant General relaying the facts and details of the situation. Such information should form the basis upon which the Governor can exercise his judgment. The Governor may order up the troops without a request from local authorities although generally a request by local authorities initiates the process.

(2) If the exigencies of the situation are such as to render it impossible to first communicate with the Governor or Adjutant General, a request in writing stating the facts and the nature of the service desired should be directed to the senior commanding officer of the nearest National Guard station.

(3) In the latter event, such officer may order out as many troops as he shall deem necessary and cause them to perform such duty as the circumstances require. Such commanding officer shall immediately report what he has done and all of the circumstances to the Governor. Upon so doing, it shall be deemed that the action was taken by order of the Governor. Burns § 45-2106, *supra*.

The civil officer calling out such military force, or the officer in command of the troops if the civil officer is not present, shall command the persons causing the riot to disperse and retire peaceably to their homes before using the military force in the dispersion. Acts 1953, ch. 187 § 408 (Burns § 45-2108). Such command to disperse need not be made when, in order to give it, the officer would necessarily be put in imminent danger of loss of life or great bodily harm or, when the assembly or mob is committing any forcible or atrocious felony.

Upon failing to disperse, the National Guard unit or the civil officer to whom such military force is ordered to report may exercise the authority designated in section I above.

III.

USE OF NATIONAL GUARD IN ASSISTNG LOCAL CIVIL AUTHORITIES VS. DECLARATION OF MARTIAL LAW: DISTINCTIONS AND EFFECT

As we noted in Section II, the Governor has the power to call out the Indiana National Guard in the case of insurrection or riotous conduct. This power is conferred upon the Governor by the Constitution of Indiana, Article 5, § 12, and is supplemented by Burns § 45-2104, *supra*; *State ex rel. Branigin v. Morgan Super Ct., supra.* Upon so ordering, the military is dispatched to the scene of the civil disorder with the primary responsibility of assisting the local civil authorities in suppressing the disorder.

In contrast, the more severe method of rule by martial law is also available to the Governor. Although some contend that this power can be exercised only by the Legislature, 31 Ind. L. J. 456 (1956), the fact remains that the executive has exercised this power on several occasions, *Cox v. McNutt, supra,* at 357 (Governor of Indiana declared Vigo County under military control and proclamation withstood constitutional attack); *Moyer v. Peabody, supra*; *Sterling v. Constantin, supra*; *Duncan v. Kahanamoku,* 327 U.S. 304, 307, (1946). The power of the Governor to declare martial law

is implied from other specific mandates outlined in the Constitution of Indiana, namely, that the Governor is the commander-in-chief of the military forces (Art. 5, § 12) and as such, is chargeable with the execution of its laws (Art. 5, § 16). In so doing, he is given the power by statute to call out the military to assist in the proper execution of the laws. Burns § 45-2104, *supra.* In *Cox v. McNutt, supra,* at 358, it was contended that in declaring martial law, the Governor had "usurped the power of the legislative branch of the government" by suspending "the operation of the civil law" thereby violating Art. 1, § 26 of the Constitution of Indiana which provides that the operation of the laws can be suspended only by the General Assembly. The Federal District Court for the southern division of Indiana held that the above provision did not preclude the Governor from declaring martial law in light of the other powers conferred upon him by the Constitution and General Assembly.

Some writers prefer to justify its existence on the basis of necessity. Weiner in *A Practical Manual of Martial Law,* 16 (1940) says, "martial law is the public law of necessity. Necessity calls it forth, necessity measures the extent and degree to which it may be employed." Chief Justice Stone in *Duncan, supra,* wrote in his concurring opinion that, "it is a law of necessity to be prescribed and administered by the *executive* power." (Emphasis added.) Accord, *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

Historically, martial law denotes the substitution of military rule for civil law and government in time of war. Theoretically, martial law is implemented only upon a complete breakdown in control by the civil government. In its strict interpretation, military courts are substituted for civil courts and a person's traditional constitutional guarantees as provided by the Bill of Rights may be denied. See generally, Kelly, *Theories of Emergency Government,* 11 S.D.L. Rev. 42, 54 (1966); Farrell, *Civil Functions of the Military and Implications of Martial Law,* 22 U. Kan. City L. Rev. 157 (1954); 31 Ind. L.J. 456 (1956).

The use of the term "martial law," however, has not been limited to a war-time measure. It has been utilized frequent-

ly in labor disputes, *Cox v. McNutt, supra,* and *Moyer v. Peabody, supra,* and has even been used by an Oklahoma Governor for the purpose of taking charge of ticket sales at a football game! Due to the wide disparity of uses, it becomes abundantly clear that the effect of martial law in any given case must depend upon the accompanying circumstances and purpose for which it was declared. It would be absurd, for example, in the case of the Oklahoma declaration to conclude that all civil law should be suspended and the military should be placed in total control. Illustrations of the above nature have given rise to the view that there are several gradations of martial law and the attendant effect will vary with the purpose for which it was declared. *Commonwealth v. Shortall,* 206 Pa. 165, 55 A. 952 (1903). Thus it would be improper to apply the serious consequences of substituting military for judicial trials which is at one end of the spectrum, to all of the uses to which martial law has been employed.

As a result of the above problems, a very important limitation was imposed on the implementation of martial law in the early case of *Ex parte Milligan, supra,* at 127, and has been coined the "open court" rule. It was stated therein that "martial rule can never exist when the courts are open, and in the proper and unobstructed exercise of their jurisdiction." "Proper and unobstructed exercise of jurisdiction" has been interpreted to mean that the court is capable of enforcing their orders, even if military assistance is required. 45 Mich. L. Rev. 86 (1946). The decision in *Duncan v. Kahanamoku, supra,* reaffirmed the "open court" rule by refusing to construe martial law broadly so as to supplant all civilian laws and to substitute military for judicial trials of civilians not charged with violations of the law of war as long as the civilian courts were open. It was felt that this interpretation was more consonant with our traditions of civil liberties; accord, *Lee v. Madigan,* 358 U.S. 228, 232 (1958). The concern expressed by the Supreme Court in the above cases as indicated by a reluctance to grant too much authority to the military in time of peace was not novel. Similar concern was proclaimed in the early 1600's by Sir Matthew Hale in

History of the Common Law, C. XI, when he stated that, "the exercise of martial law may not be permitted in times of peace when the king's courts are open. . . ." Identical views were expressed by Blackstone. 1 *Blackstone's Commentaries* 143. Immediately following the decision in *Duncan, supra,* writers in the United States also joined the bandwagon and voiced their approval. Barnett, *Martial Law and Civil Courts,* 25 Ore. L. Rev. 135 (1946); Anthony, *Hawaiian Martial Law in the Supreme Court,* 57 Yale L.J. 27 (1947); 45 Mich. L. Rev. 86 (1946).

Two decades have elapsed since the Supreme Court closely analyzed the status of martial law in the United States. Today, martial law must be viewed in the setting of its applicability to riots and other civil disorders. In light of the concern which has been expressed in the past over the use of martial law and the tremendous emphasis currently placed on a person's constitutional rights and liberties, it is safe to conclude that unless the judicial courts are unable to enforce court orders by the assistance of the military, martial law in its strict meaning cannot be proclaimed. It will take very dire circumstances to substantiate the supplanting of civil laws and to substitute military for judicial trials resulting in the denial of constitutional guarantees which have developed over the years and are of primary concern today.

In concluding, unless the riot reaches such proportion as to completely break down civil control and close the courts, there is no need to resort to any form of martial law. The Governor can handle the situation adequately by calling out the National Guard for assistance and if that is unsuccessful, by requesting Federal Troops.

It should be noted that the proclamation of martial law is no longer a talisman. The Governor's determination is subject to judicial review, *Sterling v. Constantin, supra,* and the acts of the military commanders do not automatically become lawful simply because it is an order. They too are reviewable by the courts and "judged accordingly to what was required by public safety."

IV.

UPON WHAT BASIS MAY A STATE USE FEDERAL TROOPS TO SUPPRESS A RIOT OR INSURRECTION WITHIN THE STATE AND UPON WHAT BASIS MAY THE PRESIDENT FEDERALIZE THE INDIANA NATIONAL GUARD

Use of Federal Troops — The use of federal troops in a state to quell domestic violence can originate by request of the state Legislature or Governor with consent of the President pursuant to 10 U.S.C. § 331.

The duty of the United States to protect each of the states against domestic violence is founded upon constitutional authority. Article 4, § 4, of the Constitution of the United States provides that,

> "The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence."

This constitutional mandate is implemented by 10 U.S.C. §§ 331-334. Section 331 regulates the basis upon which troops may be requested by a state. It specifies in pertinent part that,

> "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened . . . use such of the armed forces, as he considers necessary to suppress the insurrection."

Section 332 authorizes the President to send troops when it "is impracticable to enforce the laws of the United States in any State or territory by the ordinary course of judicial proceedings. . . ." This method has recently been utilized by the President in sending troops into Arkansas (Executive Order No. 10730, 22 Fed. Reg. 7628 (1957), Mississippi

(Executive Order No. 11053, 27 Fed. Reg. 9693 (1962), Alabama (Executive Order Nos. 11111 and 11118, 28 Fed. Reg. 5709, 9863 and Michigan (Executive Order No. 11364, 32 Fed. Reg. 10907 (1967). In all but the latter of such cases, a judicial order was first obtained and enforcement thwarted. In resorting to Section 332, the President does not have to obtain a request by the state. Indeed in all but the latter of the above cases, the respective state governments were primarily responsible for thwarting enforcement of the judicial decrees so it would have been a useless gesture to require a request for troops by the state government since none would have been forthcoming.

In summary, there are basically three prerequisites to the use of Federal Troops in a state in the event of domestic violence;

(1) A situation of severe domestic violence must exist in the state.

(2) The domestic violence is beyond the control of the law enforcement resources available to the governor, i.e., local and state police forces and the National Guard.

(3) The state Legislature or its Governor, if the Legislature cannot be convened, must request the President to employ Federal Troops or the President may do so on his own initiative when the situation makes it impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings.

The communication to the President should contain sufficient facts and detail to enable the President to exercise considered judgment. The President is vested with exclusive authority to decide whether the exigencies warrant the use of Federal Troops. The decision is left to his sole discretion. *Martin v. Mott,* 25 (12 Wheat) U.S. 19, 28 (1827).

If the President decides to employ Federal Troops, he must order, by proclamation, the insurgents to disperse and retire peaceably. 10 U.S.C. § 334.

Federalization of Indiana National Guard — The President may call into Federal service the militia of any state in the case of,

(1) insurrection or domestic violence when assistance is requested of the President by the state Legislature or Governor pursuant to 10 U.S.C. § 331, or

(2) inability to enforce the laws of the United States in any state or territory by the ordinary course of judicial proceedings due to lawful obstructions, combinations, assemblages or rebellion. 10 U.S.C. § 332.

In either of the situations above, the President has the authority to either send in Federal Troops or call into Federal service the state militia (National Guard).

The above provisions apply primarily, although not limited to, situations endangering the state. Similar provisions enable the President to federalize the Army National Guard units of any state whenever,

> "(1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;
>
> "(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
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> "(3) the President is unable with the regular forces to execute the laws of the United States. . . ." 10 U.S.C. § 3500. See also § 8500 for Air National Guard Units.

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V.

PROTECTION OF THE GUARDSMAN FROM CIVIL OR CRIMINAL ACTION RESULTING FROM HIS ACTIVITIES DURING CIVIL DISTURBANCE DUTY

A.

Civil Liability

Before reviewing Indiana statuory authority on the question of a National Guardsman's personal liability to or immunity, or both, from civil actions resulting from activities during civil disturbance duty (Burns §§ 45-2104, 45-2110, *supra*), it is imperative to first examine the guardsman's liability in relation to the sovereign immunity of the United States Government.

The Federal Tort Claims Act (hereinafter cited as FTCA) provides in pertinent part:

> "Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any *employee* of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (Emphasis added.) 28 U.S.C.A. § 1346 (b) (1958 ed.).
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> "As used in this chapter and sections 1346(b) . . . of this title, the term —
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> " 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States. . . ." 28 U.S.C.A. § 2671 (1958 ed.).

If a National Guardsman falls within the coverage of the above sections, in a very practical sense his personal liability

becomes less critical since claimants will take advantage of the waiver of sovereign immunity as evidenced in the FTCA and sue the United States directly. This, of course, is not to deny to the United States its common law remedy of indemnification from the responsible employee if there is no personal fault on the part of the United States. *Burks v. United States,* 116 F. Supp. 337 (S.D. Tex. 1953).

Any debate over the guardsman's status as a federal employee within the FTCA while performing state active duty was ended by the Supreme Court's decision in *Maryland v. United States,* 381 U.S. 41 (1965). Despite the fact that military members of the Guard are compensated with federal funds, must conform to strict federal requirements regarding training and promotion, operate federally owned arms and equipment, and are subject to being "federalized" by the President, Justice Harlan concluded that guardsmen, except when "federalized," are employees of the states and as such are not covered under the FTCA; accord, *Layne v. United States,* 295 F. 2d 433 (7th Cir. 1961), cert. den. 368 U.S. 990 (1962).

Congress rejected a 1960 proposal to extend coverage of the FTCA to include civilian and military personnel of the National Guard, S. 1764 and H.R. 5435, 86th Cong., 2d Sess., and in lieu thereof enacted an administrative remedy which gives the Secretary of the Army or Air Force authority to pay meritorious claims up to $5,000 for personal injury or property damage caused by National Guard personnel. Any amount exceeding $5,000 which is deemed meritorious can be submitted to Congress for their consideration. 32 U.S.C. § 715.

Indiana has supplemented the common law sovereign immunity doctrine by expressly granting personal immunity from civil liability for acts committed during the course of state active duty. The Indiana statute provides in pertinent part:

> "No member thereof [National Guard] who shall be ordered out for such duty shall be liable for civil prosecution for any act done by him in the discharge of his military duty. . . ." Burns § 45-2104, *supra.*

The critical inquiry in this apparently broad grant of immunity is, "what acts are encompassed within a guardsman's *military duty*?" This basically raises the agency question of "*scope*" of duty or employment. If the act committed is within the guardsman's scope of military duty, immunity ensues; if the act is outside the scope, personal liability attaches. Although the Indiana courts have not decided any question under this statute, other state courts reviewing similar statutes have dealt with questions of personal liability on a case by case approach.

In answer to a question concerning the criminal liability of a state guardsman (Indiana State Guard) who kills or wounds, with a non-issue personally owned pistol, a disorderly person in a situation in which the guard had been placed on active duty, the then Attorney General answered,

> "I am of the opinion there would be no increase in the civil or criminal liability, if any, of the State of Indiana or such guardsman in wounding or killing a disorderly person with a non-issue revolver . . . while acting in the performance of his duties under conditions of riot or insurrection. The *determining factor* would not be the weapon used but *would be the right to shoot such disorderly individual under the particular circumstances* with which such guardsman was required to cope in the particular instance." (Emphasis added.) O.A.G., p. 406 (1945).

The opinion above lends support to the argument that the statutory immunity is not absolute. To the contrary, upon the commencement of a law suit a review of the facts and circumstances would necessarily have to be conducted to determine the proper "scope" of the military duty.

Such factors as excessive force and exceeding military necessity, *Bishop v. Vandercook,* 228 Mich. 299, 200 N.W. 278 (1924); *O'Shee v. Stafford,* 22 La. 444, 47 So. 764 (1908), exceeding limits of authority, *Mallory v. Merritt,* 17 Conn. 178 (1845), obeying orders with excessive force, *Manley v. State,* 69 Tex. Cr. 502, 154 S.W. 1008 (1913), and obeying orders which are unlawful, *Curnutt v. Holk,* 41 Cal. Rptr. 174

(1964); *Herlihy v. Donahue,* 52 Mont. 601, 161 P. 164 (1916), have given rise to holdings of liability on the part of military personnel despite immunity statutes in some instances.

The order of a superior officer may be a defense to the guardsman who obeys if the command is "(a) lawful or (b) is believed by the actor to be lawful and is not so obviously unlawful that any reasonable man would recognize its illegality." Restatement (Second), Torts 2d § 146 (1963); accord, *Herlihy v. Donahue, supra*; see generally Shaw, *supra,* at 12.

In summary, as to those acts committed by a guardsman during civil disturbance duty which are (1) within the scope of his military duty and (2) are in execution of a superior officer's lawful order or command (or is believed by the guardsman to be lawful and does not bear marks of invalidity or want of authority on its face), immunity from civil action will attach.

B.

Criminal Liability

The statute providing for immunity from civil liability is silent on the question of criminal liability, Burns § 45-2104, *supra.* In keeping with the well recognized rule of statutory construction *expressio unius exclusio alterius,* the express mention of immunity from *civil* liability in § 45-2104 excludes express immunity from *criminal* liability and more importantly creates an inference that the legislators did not intend to grant immunity to guardsmen for criminal liability. 26 I.L.E. Statutes § 119.

The Indiana statute granting only *civil* immunity is to be distinguished from statutes in sister states which explicitly grant immunity from *civil* and *criminal* liability. Nevada law in this area is regarded by many as illustrating model legislation, Shaw, *supra,* at 23-24. Section 412.740 of the Nevada Revised Statutes (1959) provides, *inter alia,* that "[M]embers of the militia ordered into active service of the state by any proper authority shall not be liable civilly or criminally for any act done by them in line of duty." Similar immunity is specifically granted in other states, i.e., N.Y. Military Law § 235 (1); Cal. Military and Veterans Code,

§ 392; Fla. Stat. Ann., § 250.31 (1962); N.J. Stat. Ann., § 38A.4-9 (1966 Supp.).

Since the language used in other states granting both civil and criminal immunity is specific, it must be concluded that the Indiana legislators only intended to grant immunity to guardsmen from civil liability and in the appropriate circumstances, subject the guardsmen to criminal liability.

Although he may be subjected to criminal prosecution, Burns § 45-2110, *supra,* does afford some assistance on the question of guilt. Upon the necessary command to disperse and the subsequent failure to do so, the statute authorizes the civil or military officer to,

> "take such steps for the arrest, dispersion, or quelling of the persons composing or taking part in any such mob, riot, tumult, outbreak . . . and if, in doing so, any person is *killed, wounded, or otherwise injured* . . . by the . . . officer or *member of the National Guard* . . . such officer, *member* or person *shall be held blameless.*" (Emphasis added. Acts 1953, ch. 187, § 410.

VI.

PROVIDING LEGAL COUNSEL FOR GUARDSMEN

As a matter of law, the State of Indiana is under no obligation to provide legal counsel for a guardsman who has had a civil or criminal action commenced against him as a result of his conduct or activity during state active duty. In a few jurisdictions, the Attorney General appears *ab initio* in the guardsman's behalf in civil actions and the Adjutant General must designate the judge advocate general or one of the judge advocates to defend in a criminal action. Shaw, *supra,* at 23-24.

The Nevada "model" legislation is typical of those jurisdictions which provide legal counsel for guardsmen. Section 412.740 of the Nevada Revised Statutes specifies that,

> "(2) When a suit or proceeding shall be commenced in any court by any person against . . . any soldier (of militia) acting under the authority or order of

> any such officer . . . the attorney general shall defend such soldier.
>
> "(3) Where the action or proceeding is criminal the adjutant general shall designate the judge advocate general or one of the judge advocates to defend such officer or person."

Similar legislation is noted in other states, i.e., Cal. Military and Veterans Code, § 393 and (Smith-Hurd) Ill. Ann. Stat. § 220.90 (1966 Supp.). The latter statute interjects the feature that the state will be financially responsible for the expense of the defense of any civil or criminal action in the event private counsel is retained, provided the Attorney General approves the selection of the attorney and has the opportunity to assume responsibility for the defense at the outset.

Indiana must adopt a policy with equal scope. As the law is found today in Indiana, the National Guardsman is placed in the inequitable position of being called out in case of riot or insurrection to protect the state and public interests with the attendant threat of being subjected to civil or criminal prosecution for an act committed while performing his military duties. The expenses for the defense of any such action must be borne by the guardsman. No one will seriously contend that a guardsman may act with complete disregard for the civil laws while suppressing a riot unless marital law has been invoked, but it has been strongly contended that the state, whose interest the guardsman is protecting, should either defend or assume the costs of defense in actions brought against the guardsman for acts committed while performing his military duty. To deny this privilege is to create a state of apprehension about fulfilling and carrying out the orders of superiors in time of riot which will necessarily inhibit the guardsman's effectiveness. We should not ask a guardsman to protect the state if the state is unwilling to protect the guardsman.

Federal legislation extending the coverage of the FTCA to include National Guardsmen would certainly aid the plight of the guardsman since in practicality, "the govern-

ment (U.S.) rarely seeks indemnification from an employee in cases of ordinary negligence and the injured party would, more than likely, seek damages from the government (U.S.) rather than try to recover from the individual." 42 N.D.L. Rev. 370 (1966). As noted earlier, such a proposal was considered and rejected by Congress in 1960. "In 1966 such a measure passed the House, but came too late in the session for Senate action. (H.R. 17195, 89th Cong., 2d Sess.). There are indications that a similar bill may be introduced in the 90th Congress." Shaw, *supra,* at 25.

It is the policy of the present Attorney General that the office of the Attorney General will have the initial opportunity to conduct the defense in all civil actions commenced against an Indiana National Guardsman for acts committed by him in performance of his military duty. When so declining to defend, the Attorney General will ask that the Governor make the necessary arrangements to conduct said defense, the expense of which may be borne by his contingency fund. In the case of criminal actions, the adjutant general should make a like request upon the Governor.

Authority for the policy that the Attorney General will represent a National Guardsman in civil actions emanates from his statutorily defined *duty to,*

> "defend all suits that may be instituted by or against the State of Indiana . . . and [he] shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in the supreme court of this state." Acts interested in the supreme court of this state." Acts 1889, ch. 71, § 4, as last amended by Acts 1921, ch. 85, § 2 (Burns § 49-1902).

As noted earlier, a National Guardsman, except when federalized, is a state employee and is acting in that capacity when ordered to suppress a riot endangering the state. Provided the guardsman does not act outside his "scope" of authority, the Attorney General would be required to defend a civil action brought against the guardsmen since he would be acting for and on behalf of the state.

VII.

RE-EMPLOYMENT RIGHTS OF GUARDSMAN UPON RELEASE FROM STATE ACTIVE DUTY

The re-employment rights of a guardsman are specifically set out by statute in Indiana and they are as follows: Acts 1953, ch. 192, § 1, p. 719, as amended by Acts 1955, ch. 49, § 1 (Burns § 59-1019):

> "Any person who is a duly qualified member of the reserve components of the armed forces, who is a member of the Ready Reserve, who is a member of an organized unit and who, in order to receive military training with the armed forces of the United States not to exceed fifteen days in any one calendar year, leaves a position other than a temporary position in the employ of an employer, and who shall give evidence defining date of departure and date of return for purposes of military training ninety days prior to the date of departure and who shall further give evidence of the satisfactory completion of such training immediately thereafter, and, who is still qualified to perform the duties of such position, shall be entitled to be restored to his previous or a similar position with the same status and pay: Provided, That seniority shall continue to accrue during such period of absence, and such period of absence for military training shall be construed as an absence with leave, and within the discretion of the employer said leave may be with or without pay."

Regarding the additional rights besides seniority of an employee who is required to leave his position of employment because of military training we look at Acts 1953, ch. 192, § 2 (Burns § 59-1020): "Such absence for military training shall not affect the employee's right to receive normal vacation, sick leave, bonus, advancement and other advantages of his employment normally to be anticipated in his particular position."

However, Acts 1953, ch. 192, § 1, p. 719, as amended by Acts 1955, ch. 49, § 1, are superseded by Acts 1961, ch. 16, § 1 (Burns § 59-1022):

> "Any person who, as a reserve member of the armed forces of the United States, is called upon to receive temporary military training, shall be entitled to a temporary leave of absence from his employer, not to exceed fifteen days in any one calendar year: Provided, That such person is required to provide his employer with evidence of the dates of his departure and return as soon as practicable prior to his departure, and shall be required to furnish his employer upon his return, evidence of his satisfactory completion of such training. Upon his return, such person shall be restored to his previous, or similar position, with the same status as he held before leaving for his training period. Such leaves may be granted with or without pay within the discretion of the employer."

It is my belief that this above statute supersedes Acts 1953, ch. 192, § 1, p. 719, as amended by Acts 1955, ch. 49, § 1 (Burns § 59-1019) for the following reasons:

(1) The statute above provides that any employee shall be entitled to a temporary leave of absence from his employer when he is called upon to receive temporary military training and it does not distinguish between temporary and permanent employees.

(2) The employee is required to give evidence to his employer of the dates of his departure and return to work as soon as it is practicable prior to his departure and is not required to follow the ninety-day notice requirement found in Acts 1953, ch. 192, § 1, p. 719; 1955, ch. 49, § 1 (Burns § 59-1019).

Upon failure of an employer to comply with the statute granting leaves of absence to employees they become subject to Acts 1961, ch. 16, § 2 (Burns § 59-1023):

> "Any employer who refuses to grant an employee a temporary leave of absence, as provided in section 1 of this act, shall be subject to a suit in damages for any damages sustained by the person denied such leave of absence."

This above act appears to supersede Acts 1953, ch. 192, § 3 (Burns § 59-1021) which states:

> "If any employer fails to comply with any of the provisions of this act, the employee may, at his election, bring an action at law for damages for such non-compliance, or apply to the Circuit Court for such equitable relief as may be just and proper under the circumstances."

The reason behind this act being superseded by Acts 1961, ch. 16, § 2 (Burns § 59-1023), is that the 1961 Act makes all employers subject to a suit in damages while the 1953 Act gave the employee the election of bringing a suit in damages or bringing an equitable action against the employer in the circuit court.

The re-employment rights of guardsmen who are employed as officers or employees of the state, county, township, municipality or school corporations are regulated by Acts 1953, ch. 187, § 403, p. 660, as amended by Acts 1955, ch. 75, § 9 (Burns § 45-2103):

> "All officers and employees of the state and of any county, township, municipality or school corporations thereof, who are members of the Indiana National Guard or of reserve components or the retired personnel of the naval, air or ground forces, shall be entitled to leave of absence from their respective duties, in addition to regular vacation period, without loss of time or pay for such time as the members of the National Guard are in the military service on training duties of the State of Indiana under the order of the governor as Commander in Chief, or as members of any reserve component under the order of the component authority thereof, for periods of not to exceed fifteen days in any one calendar year."

You will notice that this statute does not require the guardsman to give notice to his employer that he will be leaving his job for a military tour of duty. However, I believe that Acts 1961, ch. 16, § 1 (Burns § 59-1022) makes the

general provision that the employee must inform his employer of his intended departure and return from his job a mandatory one for all guardsmen regardless of the nature of his employment. This statute also provides that a guardsman whose employer is one of those referred to in the statute is entitled to his regular pay during his absence. All other statutes regarding the pay of the guardsman during his absence are decided on the basis of an employer-employee relationship.

The statutes regulating the re-employment rights of a National Guardsman provide that he is entitled to fifteen (15) days in any one (1) calendar year away from his employment for the purposes of military training. Will a guardsman be guaranteed re-employment if he has been called out for a period exceeding fifteen (15) days in any one calendar year and for state duty which does not constitute training?

I believe that any military duty other than training which necessitates the calling out of the National Guard either by the Governor or any other competent authority would fall within the re-employment statutes. However, if this duty were to last longer than the prescribed fifteen (15) day limit in any one calendar year then I believe the guardsman has lost the protection which the statute afforded him concerning his re-employment.

VIII.

GUARDSMAN BENEFITS: STATE ACTIVE DUTY INJURY OR ILLNESS

What benefits accrue to a guardsman injured or who becomes ill while on State Active Duty?

Acts 1953, ch. 187, § 419 (Burns § 45-2119) provides in part as follows:

> "A member of the National Guard who shall, when on duty or assembled therefor, in case of riot, tumult, breach of peace, insurrection, invasion, public disaster or whenever ordered by the governor, the commanding general of the National Guard, or called to the aid of civil authorities, receive any injury, or incur

> or contract any disability or disease, by reason of such duty or assembly therefor, or shall, without fault or neglect on his part, be wounded or disabled while performing any lawfully ordered duty, which shall temporarily incapacitate him from pursuing his usual business or occupation, shall, during the period of such incapacity, receive the pay to which he was entitled while on or assembled for such duty, and actual necessary expenses for care and medical attention. . . . Under this article no disability shall be considered temporary which continues for more than ninety days from the date of receiving the injury or of incurring or contracting the disease or disability, and pay and expenses for care and medical attendance for more than the said ninety days shall not be allowed."

Acts 1953, ch. 187, § 420 (Burns § 45-2120) provides in part as follows:

> "Every officer or soldier wounded or disabled . . . shall be suitably provided for by the general assembly, as hereinafter provided."

Acts 1953, ch. 187, § 421 (Burns § 45-2121) provides in part as follows:

> "Every member of the National Guard who shall be wounded or disabled or has been so disabled in the performance of any actual service of this state within ten years preceding the application for pension under this article, in case of riots, tumults, breach of the peace, resistance to process, invasion, insurrection, public disaster or imminent danger thereof, or whenever called upon in aid of the civil authorities, or while engaged in any lawfully ordered parade, drill, encampment or inspection, shall, upon proof of the fact, as hereinafter provided, be placed on the roll of invalid pensioners of the state and shall receive out of any moneys in the treasury of the state, not otherwise appropriated, upon the audit of the adjutant general of the state and approval of the

> governor, the like pension or reward that persons under similar circumstances receive from the United States. . . . Nothing in this section contained shall be deemed to make applicable any of the provisions of the National Service Life Insurance law of the United States, and the pension or reward to be granted hereunder shall be that provided for by the pension laws of the United States, so far as the same may be applicable in substance, without regard to form."

It is clear from the foregoing that a guardsman who becomes disabled through an injury or disease which arose by reason of his duty as a guardsman is eligible for the continuing receipt of his duty pay and all actual necessary medical expenses. It is equally clear that these benefits are temporary only and are limited to a ninety (90) day period.

It is apparent that if the disability lasts for more than ninety (90) days, the temporary status will be terminated and the guardsman, upon proof of the disability, placed on the roll of invalid pensioners of the state and receive benefits identical to that provided for in the pension laws of the federal government. However, the Indiana law specifically excludes any of the provisions contained in the National Service Life Insurance law of the federal government.

Therefore, it is my opinion that a disabled guardsman, whose disability resulted from his duty as a guardsman, is entitled to benefits consisting of his normal duty pay and allowances plus actual necessary medical expenses for a period of up to ninety (90) days. If the disability is over ninety (90) days and thereby not temporary, he is entitled to be placed on the roll of invalid pensioners of the state and receive the same pension as federal pension recipients.

In connection with Guardsmen Benefits while they are on State Active Duty, we should consider the application of federal statutes which would be of assistance to them. Some of these federal statutes to be considered are the Soldiers and Sailors Civil Relief Act, and Servicemen's Group Life Insurance. Looking first to the Soldiers and Sailors Civil Relief Act to see who is covered under its provisions we look to 50 U.S.C. § 511.

> "All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. *The term 'military service', as used in this Act [said sections], shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned* as well as training or education under the supervision of the United States preliminary to induction into the military service. . . ." (Emphasis added.)

Thus a member of a National Guard unit on State Active Duty would not be covered by this statute nor will he be eligible for protection under the National Service Life Insurance program of the federal government. In order for the guardsman to be afforded these federal benefits it will be necessary for him to be called into active federal service as stated in 50 U.S.C. § 511.

Although the guardsman is not protected by these federal statutes unless he is on federal active duty. The law which may afford him some protection is Burns § 45-2514.

> "The adjutant general of this state, with the approval of the governor, is hereby authorized to procure a policy of group insurance for and covering members of the military forces of this state, as defined in this article, covering and insuring against any injury received or had by such members from any accident while on drill, and/or active duty as such member." Act 1953, ch. 187, § 814, p. 660; 1955, ch. 75, § 23, p. 145.

Therefore the National Guardsman is given insurance protection while he is on drill or active duty, or both, if a policy of this nature has been procured by the adjutant general with the governor's approval.

IX.

SURVIVOR BENEFITS: STATE ACTIVE DUTY FATAL INJURY OR DEATH

We next turn to the question of what survivor benefits accrue to next of kin or dependents if a guardsman is killed or dies while on State Active Duty.

Acts 1953, ch. 187, § 420 (Burns § 45-2120) provides in part as follows:

> "[T]he widow or children of every officer or soldier killed while in the active service of the state, shall be suitably provided for by the general assembly, as hereinafter provided."

Acts 1953, ch. 187, § 421 (Burns § 45-2121) provides in part as follows:

> "[I]n case of any wound, injury or disease causing death, then the widow, minor children or dependent mother of such member of the National Guard shall receive such pension and reward, from the time of receiving the injuries on account of which such pension or reward is allowed. . . . If any member of the National Guard shall die in the active service of the state, his reasonable funeral expenses, not exceeding five hundred dollars, shall be paid by the state in such manner as the governor may direct."

Section 421 (Burns § 45-2121) governs both disability and death of a guardsman and in either case the section should be read and considered as a whole. For the purposes of this opinion, however, it has been divided so as to coincide with the particular situation posited by your separate questions.

It is clear that the pension available in the event of disability of a guardsman is likewise available to particular dependents in the event of his death. In addition, funeral expenses up to five hundred dollars ($500.00) will be paid by the state.

There are two minor discrepancies between the language of Section 420 (Burns § 45-2120) and Section 421 (Burns

§ 45-2121): (a) Section 420 refers to the "widow or children" while Section 421 refers to the "widow, *minor* children or *dependent mother*." The more specific language employed in Section 421 indicates that the Legislature intended *minor* children and a *dependent mother* in addition to the widow. (b) While Section 421 does not specifically designate to whom the funeral expense amount of five hundred dollars ($500.00) should be paid, it clearly provides that the governor is vested with wide discretion in determining who is equitably entitled to this sum by the language "shall be paid by the state *in such manner as the governor may direct.*"

Therefore, it is my opinion that when a guardsman is killed or dies from a wound, injury or disease while on State Active Duty his dependents (limited to widow, minor children or dependent mother and in that order) are entitled to the same pension as mentioned in the preceding section of this opinion. In addition, the funeral expenses of the guardsman up to five hundred dollars ($500.00) must be paid by the state as the governor directs.

In addition, Acts 1915, ch. 3, § 1, as amended (Burns § 59-1009) provides for a payment by the county of up to one hundred dollars ($100.00) for services rendered and material furnished in the care of the body of a deceased member of or veteran honorably discharged from the armed forces as a tribute of respect due such member or veteran. It also provides that, if the federal government provides a marker for the grave, there will be a further allowance of eight dollars ($8.00) for the setting of the marker. This Act provides that such a claim shall be filed with the commissioner of the county of the residence of such deceased person.

Therefore, if the guardsman was a member of or veteran honorable discharged from the armed forces, his dependents would be eligible for this benefit.

X.

PROCEDURE FOR PROCESSING CLAIMS

There is no specific procedure for processing claims provided in the Indiana Military Code. The word "claim" is referred to in Acts 1953, ch. 187, § 419 (Burns § 45-2119)

wherein it is provided that "where a claim is made under this section [disability or disease] the adjutant general of the state may cause examinations of the claimant to be made from time to time. . . ."

Further, the same section provides that the "adjutant general . . . may appoint a medical examiner or a board of three officers . . . to inquire into the merits of any claim arising under this section. . . ."

This same section also provides that "the amount found due . . . shall be paid by this state, in like manner as other military accounts are paid."

Acts 1953, ch. 187, § 422 (Burns § 45-2122) provides that "proof shall be made under such regulations as the adjutant general of the state may from time to time prescribe that the applicant is entitled to such pension."

The adjutant general is further empowered to appoint pension examiners to inquire into the merits of any claim for pay and care and pension by Acts 1953, ch. 187, § 423 (Burns § 45-2123). This section also allows the adjutant general, with the approval of the governor and consent of the applicant, to commute any pension by payment of a lump sum to be accepted by the applicant in full satisfaction of all claims.

Therefore, in the absence of statutory requirements it is my opinion that, based upon the language of the foregoing statutes, the office of the adjutant general has the requisite authority to promulgate appropriate procedures for initiating and processing such claims. A letter from the guardsman or his dependents directed to the adjutant general and outlining the facts should be sufficient to initiate an investigation by his office.

The opinion above is limited to matters of rules, regulations and the administrative procedure pertaining to claims under the Indiana Military Code. Any legal questions should continue to be referred to the Attorney General of Indiana for determination.

XI.

STATUS OF GUARDSMAN: EN ROUTE TO OR FROM HOME DURING STATE ACTIVE DUTY

One day of State Active Duty normally covers a 24-hour period. What is the status of a guardsman ordered to State Active Duty if he is killed or injured en route from his home to perform such duty, or in the event he is killed or injured after release from his unit during the 24-hour period specified by his State Active Duty orders?

There is no provision in Indiana law which specifically answers this question. The intent of the Legislature is indicated, however, by the language employed in Acts 1953, ch. 187, § 421 (Burns § 45-2121) wherein it is stated:

> "Every member of the National Guard who shall be wounded or disabled . . . shall . . . be placed on the roll of invalid pensioners of the state and shall receive . . . the like pension or reward that *persons under similar circumstances receive from the United States,* and in case of any wound, injury or disease causing death, then the widow, minor children or dependent mother of such member of the National Guard shall receive *such pension and reward. . . .*" (Emphasis added.)

The Indiana Military Code is replete with references to the armed forces of the United States (*e.g.,* Acts 1953, ch. 187, §§ 303, 310 and 417 [Burns §§ 45-2003, 45-2010 and 45-2117]) which leads to the understandable conclusion that the Legislature intended no conflict to exist between comparable federal and state legislation. The phrase "similar circumstances" employed in § 421 (Burns § 45-2121), *supra,* supports this conclusion and further leads to the inference that the federal law must be consulted and implemented in order to fully carry out the provisions of the Indiana law.

Therefore, in the absence of specific state law, the determination of the status of a National Guardsman en route to or from his home during the 24-hour period specified by his State Active Duty orders should be based upon the federal

position relative to whether or not authorized travel is to be included within the scope of the duty.

38 U.S.C. § 101 (21) states that "the term 'active duty' means (A) full time duty in the Armed Forces, other than active duty for training. . . . (E) *authorized travel to or from such duty or service.*" (Emphasis added).

10 U.S.C. § 1475 provides in part as follows:

> "(a) . . . the Secretary concerned shall have a death gratuity paid to or for the survivor . . . immediately upon receiving official notification of the death of—
>
> "(1) a member of an armed force under his jurisdiction who dies while on active duty or *while performing authorized travel to or from active duty*; . . .
>
> "(3) any Reserve . . . who dies from an injury . . . *while traveling directly to or from that active duty for training or inactive duty training*;
>
> "(4) any member of a reserve officers' training corps who dies . . . *while performing authorized travel to or from that annual training duty*; or
>
> "(5) a person who dies *while traveling to or from or while at a place* for final acceptance, or for entry upon active duty . . . in an armed force, who has been ordered or directed to go to that place. . . ." (Emphasis added.)

Based upon the foregoing, it is clear that authorized travel was intended to be included within the scope of the duty or activity itself.

Further, the federal code provides that a determination shall be made as to whether the individual was authorized or required to perform the duty and whether or not the individual was disabled or killed by the injury. The standards to be used in this determination are as follows:

(1) The hour on which he began to travel directly to or from the duty or training;

(2) The hour at which he was scheduled to arrive for, or at which he ceased performing, that duty or training;

(3) The method of travel used;

(4) The itinerary;

(5) The manner in which the travel was performed;

(6) The immediate cause of death.

10 U.S.C. § 1480; 38 U.S.C. § 106(d).

Even though it is apparent that travel to and from the duty is within the scope of the duty itself, the language in Acts 1953, ch. 187, § 421 (Burns § 45-2121) dictates against a position holding that benefits are allowable during the entire 24-hour period merely because State Active Duty periods happen to be scheduled in this manner. The phrase "Every member of the National Guard who shall be wounded or disabled or has been so disabled *in the performance of any actual service* of this state. . . ." cannot be construed to allow benefits due to injury or death occurring within an arbitrary time period *per se*; the guardsman must be in the performance of actual service, which as stated hereinbefore, extends to travel to and from duty. The fact that an injury or death occurred before or beyond the 24-hour period does not operate as a bar to benefits. Utilization of the six (6) standards outlined hereinbefore should suffice to determine whether or not disability arising from any given travel is within the scope of duty and therefore compensable. If the injury or death results prior to departure or after returning home and the guardsman is not performing "any actual service of this state," his disability is not compensable.

Therefore, for the purposes of determining eligibility for benefits due to disability or death of a guardsman on State Active Duty and in answer to your question, it is my opinion that a guardsman occupies an eligible status for benefits if the injury occurs while he is traveling to his duty station, while he is performing actual service, and while he is en route home after performance of duty. This opinion obtains regardless of whether or not the injury occurs within the

24-hour period. It is reasonable to assume that a claim based on an injury within the 24-hour period would be considered in a more favorable light than one incurred without the period. Nevertheless, as pointed out above, the determination of whether or not the guardsman was performing any actual service of the state is of paramount importance.

It must be emphasized that this opinion pertains only to the guardsman on State Active Duty orders, as distinguished from armory and field training and federal service.

CONCLUSION

This opinion has attempted to expose some of the many and varied problems arising from the use of troops to quell public disorders. Needless to say it is not possible to foresee every possible legal question that can arise. It is hoped that it will provide a nucleus for guidance in answering future questions as well as providing guidance on recurring ones.

OFFICIAL OPINION NO. 67

ELECTIONS—Voters Registration—Length of Term of Deputy Registration Officer.

Opinion Requested by Mr. John R. Maze, Member, Board of Voters Registration of Marion County

You have requested my opinion concerning the length of the term of your deputy registration officers appointed pursuant to statute after the primary election in May, 1966. Although your request was made informally and answered in that manner in August of this year, the same question has arisen since in so many different sections of the state that I have decided that it should be answered in an Official Opinion.