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).
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> "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
>
> "(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.