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MILITARY GOVERNMENT IN REVERSE

By Colonel Frederick Bernays Wiener, AUS, Ret.*

Throughout most of its history, the United States has been fortunate in being a military occupier far more often than it has been militarily occupied. Since the time when we made good our independence, American troops occupied enemy territory in and after the Mexican War, in and after the Spanish War, after World War I, and in and after World War II. Only in the Pacific (Attu and Kiska included) in World War II, and in part of Maine during the War of 1812 (*United States v. Rice*, 4 Wheat. 246), did foreign soldiery rule our soil. But during the War for Independence, itself, the six largest American cities were occupied by the British Army, and it is with that little known aspect of our history that this paper deals.

That war, though it was a rebellion in British eyes, was none the less a struggle of such magnitude that the rebel forces were early granted belligerent rights, so that on capture they were treated as prisoners of war rather than as traitors. As Sir Guy Carleton wrote contemporaneously to General Washington, "In a civil war between people of one empire,

there can, during the contest, be no treason at all." Precisely the same doctrine was applied to the Confederacy in the course of the American Civil War eighty years later.

It will be more convenient first to list the six occupied cities, and then to consider the incidents of their occupation.

1. Boston was besieged in April 1775, immediately after Lexington and Concord; martial law was formally declared there in June; and the city was under military rule until, his position rendered indefensible after the guns from Fort Ticonderoga were mounted on Dorchester Heights, Sir William Howe sailed for Halifax in March 1776 with all his troops (and with many Loyalists).

2. New York was his next target; Howe occupied that city in September 1776, following the Battle of Long Island, and it remained under military occupation for more than seven years, until the final evacuation in November 1783.

3. Newport, Rhode Island, was occupied from December 1776 until October 1779. When the war be-

* This paper, by a former President of the JAA, is drawn from his book, **CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689, ESPECIALLY IN NORTH AMERICA** which will be published this summer. That volume includes full documentation for all the matters mentioned herein.

gan, it had been the fifth largest city in the colonies.

4. Philadelphia was the subject of military occupation from September 1777 until June 1778.

5. Savannah was occupied from December 1778 until June 1782. This was the only one of the six where the royal civil government was restored, with royal courts and with a loyalist legislature.

6. Finally, Charleston, South Carolina, was under military rule from May 1780 until December 1782.

Where military government continued, the pattern was essentially similar.

Houses, whether empty or full, were requisitioned as quarters for the troops; empty ones were torn down—"the King needs wood"; and churches were turned into barracks, storehouses, and stables. Of course there was looting, i.e., plundering by the enemy; when carried on by our troops it is souvenir-hunting.

Forced labor was universal. Inhabitants were required to give in returns of specific kinds of scarce property; and proclamations—i.e., legislative activity by military order—were, in tone and content both, quite the same as those promulgated by American military government officers in both World Wars of the twentieth century.

Some of the regulations effected by these proclamations were entirely unexceptionable—restrictions on movement, fixing of

prices at which necessities and provisions could be sold, rigid controls over the sale of liquor. Some proclaimed curfews, some limited the cutting of timber, one (in Philadelphia) admonished against vice and immorality.

The incidence of military government was most harsh in Charleston, for three reasons. First, throughout the Southern states the Revolution was marked by the fiercest kind of fighting between neighbors. Second, neutral obedience became impossible because of General Clinton's unfortunate proclamation that ordered all who refused to take an oath of allegiance to the King to be treated as rebels. Third, Lieut. Col. Nisbet Balfour, who was Commandant during most of the occupation, was a very difficult person. In the language of a contemporary, "This gentleman displayed in the exercise of this new office all the frivolous self-importance, and all the disgusting insolence, which are natural to little minds when puffed up by sudden elevation."

In consequence, paroled prisoners were forbidden to engage in business—a prohibition that extended to every adult free man who refused the oath of allegiance—they could not be employed, and families of exchanged PWs were even forbidden to lease property.

Other practices were not restricted to Charleston, but were universal. Anyone who spoke against the King or the King's

forces was locked up. Many were banished, some outside the lines, some from Philadelphia to New York, many from Charleston to St. Augustine (which was then in British East Florida).

Except in Georgia, as has been indicated, little was left of civil government.

In Boston, General Gage continued to be the civil Governor of the Province of Massachusetts Bay, and as such appointed an Attorney General. But the Province had been reduced to one besieged and hungry city, and the courts had long since been closed.

In New York, there was a civil Governor in name, but he did only what the military permitted him to do. Governor Tryon deferred to General Robertson, the first Commandant; later, after General Robertson returned to New York as the new civil Governor following a trip home, he in turn deferred to General Clinton, the Commander in Chief.

The numerous Loyalists in New York wanted civil government restored in its accustomed structure—a Governor and Council, an Assembly, a Mayor, and a full panoply of courts. They were predictably happy when Governor Robertson returned in 1780 and proclaimed that the restoration of civil government was imminent.

Alas for their hopes; this step was quite impossible as long as the war continued, as long as the ration strength of the British Army and its German auxiliaries

and the wives, children and civil officials of both was 30,000 strong, and as long as royal authority in the entire Province extended only to the three islands—Manhattan Island, Long Island, and Staten Island. Plainly none but a rump Assembly could then have been convened. And under the settled British law that military personnel committing common law offenses were triable only by the civil courts, every sentry shooting a nocturnal prowler would have been haled before a civilian jury, as the Boston Massacre defendants had been; every junior officer carousing in the streets would have faced a magistrate, as the Boston subalterns had been early in 1775; and every soldier unable to pay the fines imposed upon him would have been bound out as a servant, as many had been in Massachusetts before the shooting war commenced.

No Commander in Chief could possibly have operated on any such basis, and in Georgia, where civil government was indeed re-established, General Clinton's prediction, that "it will intoxicate," came true in full measure.

Accordingly, in all of the other occupied cities, the military government provided its own administration. There were Commandants in New York, Charleston, and Newport, whose orders were executed through a Superintendent-General of Police. (In Philadelphia, the Superintendent-General functioned directly under the Com-

mander in Chief.) Some civil matters were dealt with by Courts of Police, which except in Charleston could not entertain claims for pre-war debts. That extension of jurisdiction was disapproved by the Commander in Chief at New York, but apparently without avail.

These Courts of Police tried inhabitants for lesser offenses, but all serious crimes committed by all civilians of every description were tried by courts-martial of the British army. It may be convenient to list the various kinds of civilians thus tried.

First were the members of the civil departments of the Army—the commissaries, the paymasters, and the like. They were not given military status in the British service for many decades still to come.

Next were the Army's civilian employees—drivers, waggoners, and all kinds of artificers, i.e., tradesmen of various descriptions. Here again, their militarization was still far in the future.

Third were the accompanying wives and camp followers. It should be noted here that the British and Hessian and Continental forces were, all of them, accompanied while in the field by women and children, and that in the British service this practice did not cease until after the close of the Crimean War.

Fourth were the sailors, Royal Navy and merchant mariners alike—because naval courts-martial

then did not have jurisdiction over most offenses committed ashore.

Fifth and last were the local inhabitants, who had no organizational connection whatever with the occupation forces, but who were tried by its courts-martial whenever they were accused of misbehaving. The percentage of acquittals in all of these trials ran better than 50 per cent, in part because of the conscientiousness of the members of the courts, but in part also because the convening authority in those days seems not to have had power to dismiss a charge before trial. He might deem it unfounded, but unless it was retracted by the acuser it had to go to trial.

All of these several varieties of civilians in the occupied American cities were tried by courts-martial of the British army during the Revolution. Many were tried for essentially military offenses, such as disobeying proclamations, corresponding with or aiding the enemy, advising desertion, and purchasing military stores. A few were tried for what was then regarded as a serious matter properly within the cognizance of a court-martial: insulting officers. But the bulk of the civilian accused were tried for ordinary common law felonies—murder, manslaughter, robbery, burglary, larceny, arson, embezzlement, assault and counterfeiting.

Punishments reflected the ideas prevalent in the late Eighteenth Century after the abolition of the *peine forte et dure* but while burning at the stake was still the only penalty for petty treason.

The mildest punishment encountered in the records is drumming out of camp or out of the lines. Sentences to the stocks and the pillory are not unusual. Manslaughter was routinely punished with burning in the hand, though there appears in some of the cases the civil law doctrine that manslaughter is not a lesser included offense within murder, so that a finding of guilty of manslaughter only was treated as a full acquittal.

Hangings were the traditional common law penalty for felony, and such sentences imposed by courts-martial were frequently executed in respect of murders, burglaries, and robberies. In aggravated cases of murder, the accused were hanged in chains or even gibbeted—a gibbet being an iron frame in which the murderer's dead body would hang "until his Bones shall drop asunder, as a Terror to all evil minded People." This practice was fairly common in contemporary England; the grisly details will be found in the first volume of Radcinowicz's *History of the Criminal Law of England*.

Corporal punishment in the form of flogging was the traditional non-capital penalty in the British service. (In the Hessian

running the gauntlet took its place.) Civilians convicted by British courts-martial were sentenced to flogging from 50 lashes up to 1000. But the very severe sentences were rarely fully executed; a surgeon was required to be present, and the commanding officer had discretion to stop the proceedings. Nonetheless, the hospitals were always full of persons with bloody backs, and many no doubt suffered permanent disability or even death in consequence. Imprisonment as a military punishment is met with, but it came rather late in the day and did not become routine during this period.

In the conflict that preceded the Revolution—the Seven Years War, called on this side of the Atlantic the French and Indian War—when the British took Canada from France and Florida, Cuba, and the Philippines from Spain, the last two only temporarily—all inhabitants committing criminal offenses were tried by court-martial, and continued to be so tried until a civil government was established. In modern concepts that was a military government jurisdiction.

But that concept had not been formulated at the time, with the result that the Judge Advocate General in London ruled that all such trials in Canada, however expedient, had been illegal. He reasoned that since civilians were not subject to military law under the Mutiny Act in England or

its possessions in time of peace, they could not be tried by court-martial in occupied Canada either.

With the advent of the Revolution, he did not change his mind, though his strictures were considerably muted; all that he then suggested was that, when general courts-martial tried inhabitants and other civilians in the rebellious colonies, it would be well "not to call the attention to any of the Articles of War in the penning of their Sentence."

Actually, by modern standards, the situation in the occupied

American cities was military government, just as it was military government when the Union Army in the Civil War slowly and painfully reoccupied the territory of the rebellious Confederacy. This was so because, in both wars, the rebel forces were always accorded belligerent rights. But, although those concepts were well understood in 1861-1865 and in the Reconstruction era that followed, they had not taken shape while the War of the American Revolution was under way.



TORT LIABILITY AND NATIONAL GUARD PERSONNEL

By William Lawrence Shaw*

INTRODUCTION

A 1965 decision by the United States Supreme Court, namely, *State of Maryland for the use of Levin vs. United States*¹ has pinpointed the issue as to what is the status of a National Guardsman who is also employed as a caretaker or technician for federal property used by the National Guard. In 1958, an air collision occurred between a commercial airliner and an Air National Guard jet trainer piloted by a National Guard member. The sole survivor was the pilot of the ANG plane. The pilot was commissioned in the Maryland ANG, and in this status trained two days monthly. The remainder of his employed time was devoted as a civilian to the maintenance and supervision of ANG planes owned by the United States and assigned to the ANG. Suits were brought under the Federal Tort Claims Act.² The Supreme Court held the pilot was not an employee of the United

States, and, therefore, the federal government was not liable under FTCA. By way of dictum the court volunteered that the pilot was an employee of the State of Maryland. Accordingly, we are faced with the anomalous result that the federal government entirely finances the compensation paid to a technician (such as the pilot in *Levin*), furnishes all aircraft, sets the standards of maintenance and upkeep of the planes, prescribes the regulations for the hiring of technicians, but declines to accept liability in tort for the act of the technician arising in the course of his employment.

Before the *Levin* decision, numerous federal cases in the Circuit and District Courts had held National Guard technicians and others to be federal employees. This situation points to what may be a need for an overhauling of FTCA and related legislation in order to provide relief in tort against the federal

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¹ 381 U.S. 41, 14 L. Ed. (2) 205 (1965) (Air National Guard is hereinafter cited as ANG).

² 28 USC #1346, 1402, 1504, 2110, 2401-02, 2671-80 (1964) (hereinafter cited as FTCA).

government for the acts or omissions of certain Air and Army National Guard personnel, including technicians.

A. Personal Liability of National Guard Personnel

1. *Immunity Statutes.*

Some states by statute have sought to grant a specific immunity to National Guardsmen for acts committed during the course of active state service. A Michigan statute provided that the state military should "be privileged from prosecution by the civil authorities—for any acts—committed while on such service". This seemed to set forth a grant of immunity. However, the Michigan Supreme Court withheld such an interpretation in *Bishop vs. Vandercook*.³ The case arose in an action for damages to the plaintiff's auto which at night struck a log road-block placed across a highway by a detachment of Michigan National Guard in order to halt traffic at a search point. The Monroe County Sheriff had besought aid from the Governor to stop the transport of liquor from wet to dry territory within the state. The area approaching the road-block was illuminated by flashing red lights. The plain-

tiff was a taxi driver who picked up a fare in a saloon, observed the fare hide an object in the tonneau of the vehicle, and then drove with dimmed lights at a speed of 50-60 miles per hour on the road. The plaintiff saw the military guards, but did not stop. A quantity of liquor was found in the wreckage. The Supreme Court affirmed a jury award of \$2,000 to the plaintiff and declared: "There is no such thing as military power, independent of the civil power". The acts of the defendants were characterized as "wilfull and wanton". The case illustrates the difficulty encountered by state troops in the performance of an ordered duty, and discloses what amounts to a judicial avoidance of a statute of immunity.

An early instance of a *federal grant of immunity* arose under the Enrollment Act of 1863, the first federal conscription law in United States history.⁴ A provision purported to relieve from liability, those involved in the commission of any act under the President's authority. The statute set a period of limitations of two years for a proceeding linked to a seizure or trespass arising from the necessities of war.

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

⁴ 12 Stat. 755-56, Act of 3 March 1863; for a discussion of the compulsory military service obligation, consult Shaw, "Selective Service: A Source of Military Manpower", *Military Law Review*, July 1961 (Dept. Army Pam. 27-100-13, pp. 35-68).

In 1866, a more comprehensive statute granted relief from any liability for all acts performed under orders of superior military authority.⁵ The validity of the two-years limitation for the bringing of any action was sustained.⁶

After the termination of the Civil War, various states adopted immunity statutes. A Missouri statute of March 1865 forbade the prosecution of civil actions or criminal proceedings for acts done after 1 January 1861 in pursuance of military orders. The statute was upheld as not being a bill of attainder or impairing the obligation of contracts or divesting anyone of property rights.⁷ In the same jurisdiction, the identical statute was later interpreted to amount to an impairment of a contract where a sheriff misapplied funds in his possession but acting under military orders. However, the court found that the two-years limitations period in the federal statute⁸ precluded the suit.⁹

A West Virginia statute of 1866 prohibiting all actions growing out of the "rebellion" was upheld.¹⁰ A North Carolina statute of 1866, termed an 'Amnesty Act', released all liability of all persons performing military acts for the United States or for the Confederate States. The act was sustained as valid and subject to a liberal construction.¹¹

A Louisiana statute of 1904 expressly *authorized an action against a militia officer* for acts done in his official capacity. A commanding officer was held personally liable to a storekeeper before whose tent on private property, a guard had been stationed in order to prevent all persons from trading with the merchant. In effect, the commandant exceeded military necessity, and indulged a personal activity leading to damages to the storekeeper.¹²

An instance of what was regarded as an early comprehensive statute of immunity to a National Guard member was found in a

⁵ 14 Stat. 46, Sec. 1, Act of 11 May 1866.

⁶ *Mitchell vs. Clark*, 110 U.S. 633 (1884).

⁷ *Drehman vs. Stifel*, 41 Mo. 184 (1867).

⁸ Op. cit. supra, note 4, Act of 3 March 1863.

⁹ *Missouri in behalf of Judge vs. Gatzweiler*, 49 Mo. 17 (1871).

¹⁰ *Hess vs. Johnson*, 3 W. Va. 645 (1869).

¹¹ *Franklin vs. Vannoy*, 66 N. C. 145 (1872).

¹² *O'Shee vs. Stafford*, 22 La. 444, 47 So. 764 (1908).

New York Law of 1898.¹³ The act proved in vital part: "Members of the militia ordered into the active service of the state by any proper authority, shall not be liable civilly or criminally for any acts done by them while on duty".

A statute which granted immunity to National Guard personnel for acts performed on active state duty, if ordered by the Governor, was valid, and the guardsman on active duty was declared immune from liability for any tortious acts.¹⁴ Under an interstate compact of New York and New Jersey, the National Guard of each state was immune from civil liability within or without the state arising out of training maneuvers.

Under New York law, the defendant might require the plaintiff to post a bond for treble costs in a suit based upon acts or omissions of the military in performance of duty. It was held that the costs-deposit applied to (1) calls of the National Guard during emergencies and (2) calls

of the Guard on a duty status not linked to an emergency.¹⁵

Although liability has been avoided or suspended, it will attach after the performance has been completed. A commanding officer of National Guard sent an observer to where Guard units were holding maneuvers. The observer was liable for traffic violations on the *return from maneuvers* although a statute purported to relieve Guard personnel from all liability while engaged in the performance of duty.¹⁶

A statute could remove the liability of a guardsman for injuries to other guardsmen, and exempt militia officers from actions at law, and such a statute was constitutional.¹⁷ A guardsman could bring an action against a person who caused the loss of employment to the plaintiff as a result of the performance by him of military duties.¹⁸

Where a guardsman exceeded or went beyond his clear limits of authority, he became personally liable.¹⁹ Where a company

¹³ Laws N. Y. 1898, ch. 212, p. 514; Amended Laws 1953, ch. 420, effective 2 April 1953. The quoted section is that of 1898.

¹⁴ *State vs. Josephson*, 120 La. 433, 45 So. 381 (1908); *Dorr vs. Gibson*, 145 N Y S (2) 48, 208 Misc. 262 (1955).

¹⁵ *Shea vs. Rotonour*, 135 N Y S (2) 694 (1954).

¹⁶ *Cotton vs. Iowa Mutual Liability Ins. Co.*, 363 Mo. 400, 251 S W (2) 246 (1952); *affd* in 260 S W (2) 43 (1953).

¹⁷ *Merriman vs. Bryant*, 14 Conn. 200 (1841).

¹⁸ *Klaussen vs. Purcell*, 18 Ohio NP (NS) 91 (1915).

¹⁹ *Mallory vs. Merrit*, 17 Conn. 178 (1845); *Darling vs. Bowen*, 18 Vt. 148 (1838); *Nixon vs. Reeves*, 65 Minn. 159, 67 N W 989 (1896).

commander imprisoned for several hours a member of his company but not apparently for a military infraction, this constituted an actionable wrong.²⁰

2. *The Rights of Peace Officers.*

A leading case is *State vs. McPhail*.²¹ The Governor of Mississippi ordered the National Guard to enforce the law near Jackson, in an area known as "The Gold Coast" in Rankin County. Within the locality, numerous places violated the state liquor and gambling laws. An Officer of the National Guard used a search warrant to obtain evidence which led to the abatement of McPhail's premises as a common nuisance. The State Supreme Court upheld the action of the National Guard, and determined that the National Guardsman serving during a disorder had the *rights of a peace officer*, and was more than a mere citizen at the scene of the disorder. The court did not give to the guardsman the status of a peace officer, but, rather, resolved that the guardsman on duty in an area of lawlessness had the *rights* of a peace officer. This is vital in the making of an arrest of an offender.

A peace officer may arrest without a warrant for (1) a felony committed in his presence or (2) a person whom he has probable cause to believe has committed a felony (even if in fact there was no offense committed or the accused did not participate) or (3) for a misdemeanor committed in his presence or (4) a person threatening to commit an offense against the peace in his presence.²²

In *Bishop vs. Vandercook*,²³ the Guard member was restricted to what could be done by a peace officer on the scene, and was allowed no greater latitude. A decisive factor was that the local situation was relatively calm. In *Herlihy vs. Donahue*,²⁴ there was an instance of destruction of liquor stocks to prevent their use by rioters. In 1914, the Governor of Montana declared Silver Bow County to be in a *state of insurrection* and ordered state troops into the locality. A major in charge of troops had set hours for liquor sales from 8 A.M. to 7 P.M. daily. Acting on the assumption that the plaintiff was violating the restrictions, the major directed two junior officers to remove and destroy the

²⁰ *Nixon vs. Reeves*, Ibid.

²¹ 182 Miss. 360, 180 So. 387 (1938).

²² 5 Am. Jur. (2) "Arrest", pp. 715-717.

²³ Op. cit., supra, note 3.

²⁴ 52 Mont. 601, 161 Pac. 604 (1916).

liquors. The State Supreme Court held that there should have been notice to the plaintiff and an opportunity to show that he was not violating the restrictions. However, the court held that only the superior officer was liable, and the two junior officers were absolved as they could not refuse obedience to an order which seemed valid on its face under the circumstances. In this case, the *guardsmen on the scene were allowed a greater authority than that found in peace officers in order that they might control the turbulent situation.*²⁵

3. The Order of a Superior.

In *Herlihy vs. Donohue*,²⁶ the court stressed that the order of a superior may be a defense to the guardsman who obeys the particular order. A major case was *Moyer vs. Peabody*,²⁷ where the United States Supreme Court upheld action by the Governor of Colorado in declaring a county to be in a state of insurrection because of labor unrest and in calling the National Guard. The

plaintiff was taken into custody and held without charges for 75 days. This was a proceeding by Moyer against a former Governor and a former Adjutant General of the State and a captain of a Guard company. In a decision by Mr. Justice Holmes, the court affirmed the action of the Governor and of the troops commanders. The court devoted discussion to a reliance upon orders as a defense to an action brought after the local situation had improved and the Guard had been withdrawn.

In *Hyde vs. Melvin*,²⁸ a militia officer could not rely upon the order of a superior to do that which was forbidden by law. He could not muster his company during an election time where a statute forbade drill formations during an election. The circumstance that a superior issued such an order was no defense. However, where an order was lawful on its face and did not contravene any law, the subordinate could rely by way of defense on the order of a superior.²⁹

²⁵ See *State ex rel. O'Connor vs. District Court*, 219 Ia. 1165, 260 N W 73, 99 ALR 967 (1935); *State ex rel. Roberts vs. Swope*, 38 N. M. 53, 28 Pac. (2) 4 (1933); *Manley vs. State*, 62 Tex. Cr. 392, 137 S. W. 1137 (1911); *Manley vs. State*, 69 Tex. Cr. 502, 154 S. W. 1008 (1913); *Franks vs. Smith*, 142 Ky. 232, 134 S. W. 484, 487 (1911).

²⁶ Op. cit. supra, note 24.

²⁷ 212 U. S. 78, 85 (1909); in the Colo. courts, 35 Colo. 159, 85 Pac. 190 (1904).

²⁸ 11 Johns. (N. Y. 1814) 520.

²⁹ *Herlihy vs. Donohue*, op. cit. supra, note 24.

A leading case is *Despan vs. Olney*.³⁰ A superior officer secretly exceeded his authority in directing a subordinate officer to arrest a citizen during a state of martial law. The junior was protected in obeying the order which seemingly was within the scope of authority of the superior. Any resulting liability must attach to the superior. The defendant, a captain of militia, acting on the order of a major general in command, arrested the plaintiff at Pawtucket, Rhode Island, removed him to Providence, and there held him in confinement for several days. Upon the issue of the liability of the junior officer, the court instructed the jury (which found for the defendant) as follows:

If he receives an order from his superior, which, from its nature, is within the scope of his lawful authority, and nothing appears to show that authority is not lawfully exerted in the particular case, he is bound to obey it; and if it turns out, that his superior had secretly abused or exceeded his power, the superior, who is thus guilty, must answer for it, and not the inferior, who reasonably supposed he was doing only his duty.

The defense of reliance upon the order of a superior was not recognized in *State vs. Manley*.³¹ President William H. Taft in 1909 visited Dallas at the Fair Grounds. At the request of federal secret-service men a company of National Guard was called to do guard duty and to hold back the crowds near the President. Private Manley was posted, and was ordered to "let no one pass" beyond a suspended wire. A stranger sought to force his way past Manley, was struck with a rifle butt, and, after an exchange of remarks, was thrust through with the bayonet and mortally wounded. The defendant was tried for murder and sentenced to forty years imprisonment. He had carried out the letter of his orders, but used *excessive force*. It is suggested by this writer that under the facts, his superior should not have escaped liability.

Where a statute prohibited a militiaman from firing his rifle when not in an actual training status, a militiaman who on order of his company officer, fired his rifle after dismissal of his unit, was not liable to prosecution. Presumably, the superior had sufficient cause to order that the rifle be fired.³² This result may seem contrary to that in *Hyde vs. Melvin*. However, discretion

³⁰ Fed. Case #3,822, 1 Curt. 306, 309 (1852).

³¹ Op. cit., supra, note 25.

³² *State vs. Hungerford*, 4 Day (Conn. 1810) 383.

should be allowed to an officer to direct the firing of a rifle.

B. Liability of the State to Third Parties.

1. Waiver of Governmental Immunity.

The theory of governmental immunity traces back to the doctrine of sovereign immunity at Common Law. In brief, the Crown could refuse to be sued or otherwise be held liable for the acts of officials and agents of the Crown. The leading case illustrating the doctrine of governmental immunity within the federal system in the United States is *Belknap vs. Schild*.³³ The court declared that "the United States, however, like all sovereigns, cannot be interpleaded in a judicial tribunal, except so far as they have consented to be sued".

The doctrine of immunity likewise extends to each of the states. In the absence of an enabling statute, the *state is immune* or free from suit however meritorious an action may be. The essence of this matter for our purposes is to note to what degree a state by statute may

waive or surrender its inherent freedom from suit and consent to be sued.

New York in the field of torts has adopted a statute waiving immunity and consenting to be sued.³⁴ The State of California by statute has waived governmental immunity as to tort actions. The following is the primary waiver in California, identified by the title 'Liability of Public Entities'.³⁵ There is set forth, *inter alia*:

Sec. 815.2(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

The California Constitution, Article XX, Section 6 provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law". The constitutional provision was subject to strict construction.³⁶

³³ 161 U. S. 10, 16 (1896); see notes 59-60, *infra*.

³⁴ New York Court of Claims Act, #8, 8-a; added Laws 1953, ch. 343, #1, amended Laws 1960, ch. 214.

³⁵ Calif. Stats. 1963, ch. 1681; Govt. Code, Div. 3.6, Part 2, Art. 3.

³⁶ *People vs. Birch Securities Co.*, 86 Cal. App. (2) 703, 196 Pac. (2) 143 (1948), cert. denied, 336 U. S. 936 (1949). This was an action to recover franchise tax owing by a foreign corporation.

A general waiver of immunity by the state did not *per se* apply to the *militia* which *must be specifically mentioned*.³⁷ In the absence of such mention in a general immunity statute, the State was not liable to a member of the public accidentally shot by a State Guard (not the National Guard) member in a demonstration as a part of a recruiting drive.

In *Goldstein vs. State*,³⁸ the New York Court of Appeals, applying a strict construction of the state waiver of immunity statute, denied recovery to a National Guardsman's heirs where the guardsman had been killed through the negligence of a fellow guardsman who was driving the truck in which the decedent was an occupant. The court held that the decedent was not covered by workmen's compensation as he was not a "state employee", nor was the state liable to his heirs under the waiver statute. The court blandly stated that the "army" (meaning the National Guard) "constitutes a class separate and apart". Literally, there was no recovery for the death of the National Guardsman whose

conduct was free from fault at the time of the fatal incident when he was on an ordered duty status and engaged in the course of his employment.

The principle in *Goldstein* was that the state itself determined whether it would accept or reject liability, and, if so, in what degree. Under the New York waiver statute, recovery was denied to a member of the public injured through the negligence of the *driver* of a National Guard truck.³⁹ Subsequently, after an amendment of the waiver statute in 1949 to extend liability to operators of Guard vehicles, a member of the public could recover.⁴⁰ However, a pedestrian struck on the head by a falling object which had been attached to a state armory was not included in the waiver of immunity statutes and could not recover,⁴¹ as no vehicle was involved.

In *Cunningham vs. State*,⁴² the issue presented was alleged negligence in the medical care extended to the plaintiff by medical personnel at Camp Drum, New York. The National Guard were in annual, summer training camp,

³⁷ *Demrod vs. State*, 58 N Y S (2) 490, 185 Misc. 1061 (1945).

³⁸ 281 N Y 396, 24 N E (2) 97, 129 A L R 905 (1939).

³⁹ *Farina vs. State*, 94 N Y S (2) 342, 197 Misc. 319 (1950); in accord, *Newiadony vs. State*, 98 N Y S (2) 24, 276 App. Div. 59 (1940).

⁴⁰ *Barish vs. State*, 96 N Y S (2) 342, 197 Misc. 909 (1950).

⁴¹ *Long vs. State*, 145 N Y S (2) 433, 208 Misc. 703 (1955).

⁴² 186 N Y S (2) 146 (1959).

and the plaintiff alleged negligent acts of both the United States First Army personnel and those of the National Guard. The court held that *State was liable for the negligence of personnel of First Army* which was the agent of the State to extend medical care to National Guardsmen such as the plaintiff.

A comprehensive waiver of immunity statute is that of the State of Nevada, adopted in 1965.⁴³ There is waiver by the State, its agencies and political subdivisions. However, no action may be brought against an *employee* of a governmental unit based upon his act or omission.⁴⁴ An award for damages from a tort may not exceed the sum of \$25,000 to any claimant⁴⁵ nor may an award include exemplary or punitive damages or interest prior to judgment.⁴⁶ The state and any political subdivision may *insure* against any liability or insure against the *expense of defending a claim* or insure any of its employees from liability arising from an act or omission in the scope of their employment.⁴⁷

2. Federal Involvement as to National Guardsmen and Technicians.

In *Levin*,⁴⁸ suits were brought under FTCA. This statute places liability upon the United States for death or injury caused by the negligence 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". Under FTCA, "employee of the Government" also "includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation".⁴⁹

In *Levin*, the Supreme Court had received two decisions of the Circuit Courts arriving at conflicting decisions under essen-

⁴³ Nevada Revised Statutes (NRS) 1965, #1413, Sec. 41.010 *et seq.*

⁴⁴ NRS, Sec. 41.032.

⁴⁵ NRS, Sec. 41.035.

⁴⁶ *Ibid.*

⁴⁷ NRS, Sec. 41.038.

⁴⁸ *Op. cit. supra*, note 1.

⁴⁹ FTCA, *op. cit. supra*, note 2, Sec. 2671.

tially the same facts and law. One Circuit Court held that the National Guard individuals were federal employees.⁵⁰ The other Circuit Court regarded the same individuals not to be federal employees.⁵¹

In 1960, Congress failed to adopt a bill which would have extended FTCA coverage to National Guard members and individuals such as caretakers and technicians.⁵² A difficulty was the language of the Act of 15 June 1933⁵³ which created the National Guard of the United States, but had provided that "members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered—and trained in their status as the National Guard of the several States . . .".

The Comptroller General has ruled that National Guard ac-

counting and custodial employees were state employees⁵⁴

The first federal legislation relating to claims arising from National Guard activities was apparently in the Appropriations Act for the Fiscal Year ending 30 June 1938.⁵⁵ Under the head, "National Guard", the act made available the amount \$25,000 "for the settlement of claims (not exceeding \$500) for damages to or loss of private property incident to the operation of camps of instruction . . .". Subsequent Appropriation Acts except during World War II contained similar provisions for claims with a ceiling of \$500. The Appropriation Act for FY 1951⁵⁶ under the title 'Department of Defense, Claims' raised to the sum \$1,000, the ceiling on claims for Air or Army National Guard for damages to or loss of private property at camps of instruction.

The small limit on claims amounts, and the inconsistency

⁵⁰ *United States vs. Maryland for the use of Meyer*, 332 Fed. (2) 1009 (DC Cir. 1963) cert. denied 375 U. S. 954 (1963).

⁵¹ *Maryland for the use of Levin vs. United States*, 329 Fed. (2) 722 (3d Cir. 1964).

⁵² S. 1764, 86th Cong., 2d Sess. 1959.

⁵³ Ch. 87, #5, 48 Stat. 153, Act of 15 June 1933.

⁵⁴ 21 Comp. Gen. 305 (1941) There has not been considered the effect of a Comptroller General decision in 1953 that the Adjutants-General of the States in employing National Guard technicians are in effect the agents of the Secretary of the Army: 32 Com. Gen. 456, 458 (1953).

⁵⁵ Ch. 423, 50 Stat. 461, Act of 1 July 1937.

⁵⁶ Ch. 896, 64 Stat. 731, Act of 30 June 1951.

of paying for property damage, but not for personal injury, led to the adoption in 1960 of what has been termed the *National Guard Claims Act*.⁵⁷ In brief, the statute empowers the Secretary of the Air Force or the Secretary of the Army, as the case may be, to pay claims up to \$5,000, for both personal injury or property damage attributed to Army or Air National Guard personnel. A two-years period of limitations applies to the presentation of a claim in writing. The department secretary may recommend additional payment by Congress if the secretary deems payment above \$5,000 to be meritorious as to the excess amount above \$5,000. Civilian employees may be included in the coverage protection.

The *Levin* case arose in 1958, obviously prior to the date of adoption of NGCA in 1960. The ratio of the decision in *Levin* was whether the pilot was a federal employee. This feature the Supreme Court resolved negatively. The court in *Levin* seemed to have disregarded that the test of an employment relationship (as distinguished from that of lessor-lessee or seller-buyer or that of

independent contractor between the parties) is the *right to control* the means and details of performance in order to bring about a desired result.⁵⁸

Independently of whether or not the United States or any state has waived governmental immunity, the employee of the government may be personally liable for his tortious act committed in the course of his employment.⁵⁹ *Belknap* was a proceeding against both the commandant of the United States Naval Yard at Mare Island and several civilian engineers employed by the Navy and based upon infringement of a patent process of the plaintiff. On a technicality, the Supreme Court of the United States dismissed the action, but without prejudice to the plaintiff, as it appeared that the defendants had infringed his patent rights. The court stated:

“. . . (T)he exemption of the United States from judicial process does not protect their officers, and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private per-

⁵⁷ 74 Stat. 878, Pub. L. 86-749, Act of 13 September 1960; now set forth in Title 32, Sec. 715, USCA; (hereinafter cited as NGCA); the statute has received implementation in AR 25-40, 6 November 1961 and in AFM 112-1, 2 July 1962, ch. 13.

⁵⁸ *Empire Star Mines Co. vs. California Employment Comm.*, 28 Cal. (2) 33, 168 Pac. (2) 686 (1946).

⁵⁹ *Belknap vs. Schild*, *op. cit. supra*, note 33.

son whose rights of property have been wrongfully invaded or injured, even by authority of the United States".⁶⁰

Before *Levin*, the cases were divided as to the status of National Guardsmen as employees of the United States. The Third Circuit had held a guardsman to be a federal employee under FTCA.⁶¹ The Tenth and Fifth Circuits held a guardsman not to be a federal employee.⁶²

In *O'Toole vs. United States*,⁶³ the court was concerned with the tort of a Guard member in the District of Columbia. The court regarded the National Guard of the District to be a federal force. The Judge Advocate General of the Army has held a District Guardsman not to be an employee

of the United States under FTCA.⁶⁴

In *Cobb vs. United States*,⁶⁵ there were involved Regular Army personnel on ROTC instruction duty in a high school under an agreement between the Secretary of War and the local school board. The Army assigned a colonel and several sergeants who were considered locally as a part of the school faculty. The sergeants received additional pay from the school board. The court held that the military personnel were "servants" loaned to the school board, and the federal government was not liable under FTCA for an injury to a cadet by a sergeant. The court stated: "These commissioned and non-commissioned officers were, during the time in question, serving

⁶⁰ *Ibid* at p. 18.

⁶¹ *O'Toole vs. United States*, 206 Fed. (2) 912 (3d Cir. 1953).

⁶² *Pattno vs. United States*, 311 Fed. (2) 604 (10th Cir. 1962), cert. denied, 373 U. S. 911 (1963); *Williams vs. United States*, 189 Fed. (2) 607 (10th Cir. 1951); *McCranie vs. United States*, 199 Fed. (2) 581 (5th Cir. 1952), cert. denied, 345 U. S. 922 (1953); *Dover vs. United States*, 112 Fed. (2) 431 (5th Cir. 1951); *Storer Broadcasting Co. vs. United States*, 251 Fed. (2) 268 (5th Cir. 1958), cert. denied 356 U. S. 951 (1958); *Leary vs. United States*, 186 F. Supp. 953 (D. N. H. 1960); *Gross vs. United States*, 177 F. Supp. 766 (D. E. N. Y. 1959); *Slagle vs. United States*, 243 Fed. (2) 404 (5th Cir. 1957); *Larkin vs. United States*, 118 F. Supp. 435 (D. N. Y. 1952); Dig. Opn. JAG 1912, p. 704; Dig. Opn. JAG 1912—1940, Sec. 359(5); 30 Opn. Atty. Gen. 687 (1941); 26 Opn. Atty. Gen. 303 (1907); 17 Comp. Gen. 333 (1937); 19 Comp. Gen. 326 (1939).

⁶³ Op. cit. supra, note 61.

⁶⁴ CSJ JAGD/D-317712, 16 June 1949, 8 Bul. JAG 148. Note that Winthrop formulated that the District militia were a form of local police beyond the scope of the Constitution (Winthrop, "Military Law & Precedents", p. 55, n. 67 (2d ed., reprint 1920).

⁶⁵ 81 F. Supp. 9, 15 (D. La. 1948).

at the instance and under the control of the state and its subdivision, the Public School Board. From this it results, that, if (Sergeant) Deal was guilty of actual negligence, as to which the evidence points the other way, it was not as an agent of the United States".

In *Levin*, the Supreme Court seemed to have overlooked all the substantial elements of federal control over the National Guard technicians. Almost as a matter of policy, the court declared that technicians could not be federal employees. The court perhaps was unaware of two prior decisions dealing with the question of whether a Navy paymaster's clerk was an officer of the Navy or a civilian employee. The Supreme Court apparently had established a pragmatic test that the factual elements would govern in any instance as to whether the individual was an officer or a civilian. In *United States vs. Hendee*,⁶⁶ the court had held that a Navy paymaster's clerk, under the facts, was an officer in the Navy. In *United States vs. Monat*,⁶⁷ under some-

what different facts, the same court ruled that a paymaster's clerk in the Navy was a civilian employee. The significant feature in *Hendee* and *Monat*, unlike the result in *Levin*, was that the Supreme Court did not make a pronouncement with finality as to what was the status of a Navy paymaster's clerk, but, rather, would regard each situation as it was presented to the court.

By a 1964 statute, units of the National Guard are authorized to employ personnel who meet specified federal standards to serve as caretakers. These persons at federal expense literally take care in every particular of extensive and complex federal property and equipment assigned to National Guard units for use only.⁶⁸

Various state court decisions have held the National Guard technicians *not* to be state employees in the matter of the pertinency of state civil service laws, and not based upon tort claims.⁶⁹ The state courts saw an *absence of state control* in any essentials over the federally paid and directed technicians.

⁶⁶ 124 U. S. 309 (1883).

⁶⁷ 124 U. S. 303 (1883).

⁶⁸ 32 U S C #709 (1964). See 72 Stat. 723, Pub. L. 85-117, Act of 22 August 1958 which regulates the number of caretakers in the Air National Guard to be appointed by the Secretary of the Air Force.

⁶⁹ *Washington State National Guard vs. Washington State Personnel Board*, 61 Wash. (2) 708, 379 Pac. (2) 1002 (1963); *Anselmo vs. Rockefeller*, 241 N Y S (2) 761 (1963), leave to appeal denied, 12 N Y (2) 599 (1963).

Members of the National Guard not in federal service have been held to be state employees under state workmen's compensation statutes because of the factor of the alleged state control.⁷⁰ The state continued liable even though the guardsman was *injured outside of the state* in the course of field training, and even if the state's insurance coverage did not apply beyond the state.⁷¹ The circumstance that the guardsman was injured through his own fault while on "pass" at field training did not avoid the state liability.⁷² A contrary result was arrived at in *Hays vs. Illinois Terminal Transportation Co.*⁷³ where the Illinois Supreme Court declared that a guardsman was not an "employee" of the state. The court noted that the same guardsman could proceed

and recover under the State Military Code, and therefore there was no need for a workmen's compensation recovery.⁷⁴

In the matter of the technicians or caretakers, the Circuit and District Courts have been divided. The caretaker has been held to be a federal employee in numerous cases.⁷⁵ He has been held not to be a federal employee⁷⁶ under FTCA.

In *Watt vs. United States*,⁷⁷ a National Guard Company First Sergeant who was also *unit administrative assistant* caused the death of the decedent who was a passenger in a vehicle which collided with the vehicle driven by the sergeant. This non-commissioned officer was performing work for the company (returning supplies to a warehouse) which he did not customarily perform.

⁷⁰ *Baker vs. State*, 200 N C 232, 156 S E 917 (1931); *Spence vs. State*, 195 Misc. 797, 288 N Y S 1009 (1936); *State vs. Johnson*, 186 Wis. 1, 202 N W 191 (1925).

⁷¹ *Andrews vs. State*, 53 Ariz. 475, 90 Pac. (2) 995 (1939).

⁷² *Globe Indemnity Co. vs. Forrest*, 165 Va. 267, 182 S E 215 (1935).

⁷³ 363 Ill. 397, 2 N E (2) 309 (1936).

⁷⁴ In accord, *Lind vs. Nebraska National Guard*, 144 Neb. 122, 12 N W (2) 652 (1944). *Contra* is *Nebraska National Guard vs. Morgan*, 112 Neb. 432, 199 N W 557 (1924) where workmen's compensation was allowed to a carpenter working in a civilian status to construct an encampment field-kitchen shed.

⁷⁵ *Courtney vs. United States*, 230 Fed. (2) 112 (2d Cir. 1956); *United States vs. Duncan*, 197 Fed. (2) 233 (5th Cir. 1952); *Elmo vs. United States*, 197 Fed. (2) 230 (5th Cir. 1952); *United States vs. Holly*, 172 Fed. (2) 221 (10th Cir. 1951).

⁷⁶ *Pattno vs. United States*, 311 Fed. (2) 604 (10th Cir. 1962).

⁷⁷ 123 F. Supp. 906 (D. Ark. 1954).

The court denied recovery on the ground that in moving the supplies, the sergeant was acting beyond the scope of his employment. By way of dictum, the court declared that the sergeant otherwise would have been an employee of the federal government for purposes of FTCA! While the sergeant "was in the general employ of the United States", he had gone beyond the scope of his employment. In effect, the court put the plaintiff to a test to prove that the *sergeant was adhering to his job specifications*, and that the "top sergeant" was not doing work which another sergeant in the same company might be able to perform!

The court in *Courtney vs. United States*⁷⁸ ruled that a civilian caretaker who was driving a Tank Retriever M-32 was a federal employee. The court declared that the *issue was solely one of federal statutory interpretation* with regard to FTCA. The status of the caretaker under any state law was declared to be immaterial and was not an issue for the court to decide. This is cogent reasoning and points the way to a solution in the plethora of cases concerning technicians and caretakers.

In the totality of the cases which before *Levin* held that technicians were federal employees, the following factors

were stressed in one or more of the decisions: (1) the technician was paid entirely from federal funds (2) federal standards and regulations were adhered to in the hiring of the technicians, and (3) in the repair and maintenance of the federally-owned property, federal standards and regulations were followed.

Returning to the instance of a member of the public injured by a National Guardsman, several courses of action are available to the injured claimant. If the state has not waived governmental immunity, "C", the claimant, may sue "N", the National Guardsman for the sum total of damages. Or C may proceed under NGCA, and submit his claim to the appropriate military department secretary. A \$5,000 ceiling for personal injury or property damage is controlling. However, after payment, if warranted, under the facts, of a \$5,000 claim, the department secretary in his sole discretion may recommend additional payment by Congress subject to the vicissitudes of Congressional action, if any.

If the state has waived governmental immunity (which is the exception and not the rule) C may still elect to proceed against N. Counsel for N may be able to join the state as a necessary party defendant if state law permits such procedural

⁷⁸ Op. cit. supra, note 75.

joinder. Let us assume that C has elected to go forward against the state (if the law of the forum permits), and has prevailed and gained judgment. After payment of such a judgment, the state in turn may recover indemnification from N based upon his tortious act for which the state has been held responsible, under the doctrine *respondet superior*.

Under the same facts, the state may have insured against liability and the insurance may extend to cover N. The *insurer* may appear for either the state or for N. If the insurer has satisfied any judgment which may have been gained by C against the state or N, then the policy coverage may permit the insurer to go against N.

In all of this, the conclusion is inescapable that N, the individual guardsman, is subject to the burden of costly litigation, even if he prevails, and, ultimately, N may be held liable to C or to the state or to an insurer. Even if C, the claimant, may hold N, yet as a practical matter, N, a young guardsman probably has little or no assets to meet a judgment.

C. Liability of the State to National Guard Personnel

Assuming that a State, such as New York, California, or Nevada has waived governmental immunity, the vital question arises, how will a judgment, if gained,

be satisfied against the State? Must a successful litigant await a legislative grant to meet his judgment? An answer might be that the state in waiving immunity should *require each state department or agency to insure* against liability. In particular, a state military department or the Adjutant General's Office might insure. This is in fairness to both the public and to the agency itself which should not belatedly become concerned with the payment of judgments perhaps substantial in amount.

If the state military department insures, it should foresee that the National Guard personnel, Air and Army, will probably train or *move outside of the state*. Does insurance, if written, cover out-of-state activities by the insured personnel? An affirmative answer should not be assumed without specific investigation.

The guardsman who is joined as a party defendant must expend *counsel fees* even if he eventually should win on the merits. In few jurisdictions does the Attorney General appear *ab initio* in the guardsman's behalf. State law should allow for the practical problem of assuring capable, available counsel to a guardsman, or should assure prompt reimbursement of legal fees and court costs which have been expended by the guardsman.

In what is regarded as model legislation, the State of Nevada

has provided that no person "belonging to the military forces" is subject to arrest on civil process while going to, or remaining at, or returning from any place at which he may be required to attend for military duty.⁷⁹ Members of the militia on active service are not liable civilly or criminally for any act done in line of duty.⁸⁰ The *Attorney General* of Nevada is required to defend any suit or proceeding brought against any officer or soldier.⁸¹ If the proceeding is criminal, the Adjutant General shall designate the judge advocate general or a judge advocate to defend such an officer or person.⁸²

In several instances, the judge advocates of National Guard divisions or squadrons have given of their personal time and facilities, on a donated basis, in order to aid the guardsman who is a party-defendant. This is not a satisfactory permanent solution. If the *Attorney General* by law does not assume the defense, a statutory mode of payment of private counsel should be sanctioned. This is particularly true when the young guardsman may be sued in another state with or without substituted service

for a tort arising out of his ordered performance of duty.

Let us consider another practical situation. A state has not waived immunity, and the guardsman is personally sued. A judgment is then gained against him. May he in turn proceed under NGCA, and, if so, what is the effect of the *two-years* limitations period? Perhaps his case has been on judicial appeal, and several years have elapsed, NGCA might be amended to date any limitations period from a time when a judgment or similar decree against the defendant-claimant became final. Would his private insurer, if any, be subrogated to the guardsman's interest, and could an insurer proceed under NGCA if the insurer has accepted and met liability? Why not, as a practical matter? May a plaintiff's insurer be subrogated, and then claim under NGCA? These and other questions will disclose that the present status of FTCA and NGCA is incomplete and unsatisfactory. The situation would seem unfair to the Air and the Army National Guardsmen, particularly where the rank and file are performing a compulsory military obligation imposed under the pro-

⁷⁹ NRS, Sec. 412.725.

⁸⁰ NRS, Sec. 412.740.

⁸¹ *Ibid.*

⁸² *Ibid.*

visions of the Universal Military Service and Training Act.⁸³

Conclusions and Recommendations

Respectfully, this writer suggests that Congress should adopt legislation which would place National Guard members and caretakers-technicians under the coverage of the Federal Tort Claims Act. Such a proposal was considered by Congress in 1959-1960.⁸⁴ The *Levin* case has shown the need for early Congressional action. In 1966, such a measure passed the House, but came too late in the session for Senate action.⁸⁵ Additionally, the rights

of a peace officer should be extended to all Guardsmen on active state service especially during tumults and disasters. A statute should grant immunity from civil and criminal liability for acts or omissions arising from all Guard state service. Insurance coverage should be obtained by the state covering tortious acts by all Guard personnel. The Attorney General or other promptly-available counsel should at public expense act for the Guardsman against a plaintiff or other claimant suing either within or without the home state.

⁸³ 65 Stat. 75 (1951), as amended, 50 U S C App. #451 (1958). This is the successor statute to 62 Stat. 604 (1948), as amended, the first Selective Service Act, after W W II.

⁸⁴ Op. cit. supra, note 52.

⁸⁵ H. R. 17195 by Mr. Hebert of Louisiana, 89th Cong., 2d Sess., 23 Aug. 1966. *Inter alia* the bill was to clarify the status of NG technicians. Sec. Report No. 1910 to accompany H. R. 17195. There are indications that a similar bill may be introduced in the 90th Congress.

REPORT OF THE NOMINATING COMMITTEE — 1967

In accordance with the provisions of section 1, Article IX of the By-laws of the Association, the following members in good standing were appointed to serve as the 1967 Nominating Committee:

Lt. Col. John J. McCarthy, Jr., USAF, Chairman
Capt. Martin Emilius Carlson, USNR-Ret.
Col. Edward L. Stevens, USA
Col. Richard W. Fitch, Jr., USAR
Lt. Col. William S. Fulton, USA
Cdr. Richard A. Buddecke, USNR
Neil B. Kabatchnick, Esq.

The By-laws provide that the Board of Directors shall be composed of twenty members, all subject to annual election. It is provided that there be a minimum representation on the Board of Directors of three members for each of the Armed Services: Army, Navy and Air Force, including not less than one from each service in a grade not higher than Captain in the Army and Air Force, or Lieutenant, Senior Grade, in the Navy. For the purpose of determining service minimum representation, the slate of nominees for the Board of Directors is divided into three sections; and, the two nominees from each section who receive the highest plurality of votes within the section, together with the junior officer representatives of each service, shall be considered elected at the annual election as the minimum representation on the Board of that Armed Service. The remaining eleven positions on the Board will be filled from the nominees receiving the highest number of votes irrespective of their arm of service.

Members of the Board not subject to annual election are The Judge Advocates General of each service during incumbency in that office and the three most recent past presidents. The Judge Advocates General who will be on the 1967-68 Board without necessity of election will be: Major General Robert H. McCaw, USA; Rear Admiral Wilfred Hearn, USN; and Major General Robert W. Manss, USAF. After the 1967 election, the past-president members of the Board will be: Col. Daniel J. Andersen, USAFR-Ret; Cdr. Penrose Lucas Albright, USNR; and Col. John H. Finger, USAR. These six Board members, not being subject to election, are not listed on the following slate of nominees.

The Nominating Committee has met and has filed with the Secretary the following report as provided by Section 2, Article VI of the By-laws:

Slate of Nominees for Offices

- President: Col. Glenn E. Baird, USAR, Ill. (1)
First Vice President: Capt. Hugh H. Howell, Jr. USNR, Ga. (1)
Second Vice President: Col. Maurice F. Biddle, USAF-Ret, Md. (13)
Secretary: Capt. Zeigel W. Neff, USNR, Md. (5)
Treasurer: Col. Clifford A. Sheldon, USAF-Ret., D.C. (1)
ABA Delegate: Col. John Ritchie, III, USAR-Ret., Ill. (2)

*Slate of Nominees for the Twenty Positions
on the Board of Directors*

Army Nominees:

- Col. Gilbert C. Ackroyd, USA, Va. (3)
Col. John F. Aiso, USAR-Ret., Calif. (4)
Col. Pelham St. George Bissell III, USAR-Ret., N.Y. (4)
Col. James A. Bistline, USAR, Va. (8)
Maj. Gen. Ernest M. Brannon, USA-Ret., D.C. (12)
Maj. Gen. Charles L. Decker, USA-Ret., D.C. (9) (12)
Lt. Col. Osmer C. Fitts, USAR-Hon. Ret., Vt. (1)
Lt. Col. William S. Fulton, USA, Va. (3)
Lt. Col. Delbridge L. Gibbs, USAR, Fla. (1)
Col. James A. Gleason, USAR-Ret., Ohio (1)
Maj. Gen. George W. Hickman, USA-Ret., Ill. (9) (12)
Brig. Gen. Kenneth J. Hodson, USA, Md. (3)
Maj. J. Leonard Hornstein, USAR, N.J. (1)
Maj. Marshall G. Kaplan, USAR, N.Y. (1)
Col. David I. Lippert, USAR-Ret., Calif. (1)
Capt. James L. McHugh, USAR, Va. (3)
Col. Lenahan O'Connell, USAR-Ret., Mass. (1)
Lt. Col. William E. O'Donovan, USA, Wash. (3)

- Lt. Col. Wilton B. Persons, Jr. USA, Va. (3)
 Col. Alexander Pirnie, USAR-Ret., N.Y. (6)
 Col. William L. Shaw, CAL-ARNG, Calif. (13)
 Col. Waldemar A. Solf. USA, Va. (3)
 Col. Ralph W. Yarborough, USAR-Ret., Texas (7)

Navy Nominees:

- Cdr. Richard A. Buddecke, USNR, Va. (5)
 Capt. Robert G. Burke, USNR, N.Y. (1)
 Capt. Martin E. Carlson, USNR-Ret., Md. (1)
 Lt. Leo J. Coughlin, Jr. USN, D.C. (3)
 Rear Adm. William C. Mott, USN-Ret., Md. (12) (11)
 Cdr. Thomas A. Stansbury, USNR, Ill. (1)

Air Force Nominees:

- Col. William M. Burch II, USAF, Va. (3)
 Brig. Gen. James S. Cheney, USAF, Va. (3)
 Col. John A. Everhard, USAFR, D.C. (5)
 Lt. Col. Carl J. Felth, USAF-Ret., D.C. (1)
 Col. Edward R. Finch, USAFR, N.Y. (1)
 Maj. Gen. Reginald C. Harman, USAF-Ret., Va. (12)
 Lt. Col. Gerald T. Hayes, USAFR, Wisc. (1)
 Lt. Col. Jack E. Horsley, USAFR, Ill. (1)
 Col. William R. Kenney, USAF, Alaska (3)
 Brig. Gen. Herbert M. Kidner, USAF-Ret., Va. (1)
 Maj. Gen. Albert M. Kuhfeld, USAF-Ret., Ohio (12)
 Brig. Gen. William H. Lumpkin, USAF, Va. (3)
 Col. Frank E. Maloney, USAFR, Fla. (2)
 Capt. Douglas W. Metz, USAFR, Md. (10)
 Maj. Michael F. Noone, Jr. USAF, D.C. (3)
 Lt. Col. Edward D. Re, USAFR, N.Y. (5)
 Lt. Col. Sanford M. Swerdlin, USAFR, Fla. (1)
 Maj. Gen. Moody R. Tidwell, USAF-Ret., D.C. (11)

Under provisions of Section 2, Article VI of the By-laws, members in good standing other than those proposed by the Nominating Com-

mittee shall be eligible for election and will have their names included on the printed ballot to be distributed by mail to the membership on or about 5 July 1967, provided they are nominated on written petition endorsed by twenty-five, or more, members of the Association in good standing; provided, however, that such petition be filed with the Secretary at the offices of the Association on or before 1 July 1967.

Balloting will be by mail upon official printed ballot. Ballots will be counted through noon, 5 August 1967. Only ballots submitted by members in good standing will be counted.

ZEIGEL W. NEFF
Captain, USNR
Secretary

Note: Number in parenthesis following name of the nominee indicates professional engagement of nominee at this time as follows:

(1) private law practice; (2) full time member of law school faculty; (3) active military or naval services as judge advocate or legal specialist; (4) trial judge; (5) lawyer engaged in federal government service; (6) U.S. Congressman; (7) U.S. Senator; (8) general counsel of corporation; (9) executive of national activity of the bar; (10) management efficiency counselor; (11) business executive; (12) formerly The Judge Advocate General of his service; (13) counsel to State agency.

ANNOUNCEMENT OF 1967 ANNUAL MEETING

The Annual Meeting of the Judge Advocates Association will be held in Honolulu at 3:00 P.M. on 7 August 1967 in the Army Reserve Center, Fort De Russy, Waikiki. The Judge Advocates General of the Army, the Navy and the Air Force will report on the state of legal services in their respective services, and the Chief Judge of the United States Court of Military Appeals will report for the Court on the state of military justice at this meeting. Commander Albright, Chairman of the Association's Legislative Committee, will report on the status of current legislation of interest to military lawyers. New officers and directors of the Association will be installed upon the filing of the report of the results of the annual election.

LAW DAY — U. S. A. 1967: AT THE PENTAGON

Major General Robert H. McCaw, The Judge Advocate General of the Army, presided at the 1967 Law Day Observance at the Pentagon on 1 May 1967. This annual event, co-sponsored by the Pentagon Chapter of The Federal Bar Association and the Judge Advocates Association, featured a presentation of the colors by the Joint Services Color Guard and selections by the U. S. Army Field Band and Soldiers Chorus.

The guest speaker on the occasion was The Honorable Harold Leventhal, U. S. Circuit Judge, U. S. Court of Appeals for the District of Columbia Circuit. The full text of Judge Leventhal's address is set forth:

Pillars of American Democracy: Our Armed Forces and Reverence for the Law

Speaking at the Pentagon on Law Day 1967, my heart bounds forward with strides of pride, fortunately restrained by tugs of humility. My themes are vast, but mercifully my time is short, so I can hope to be forgiven if the canvas I have stretched for a wide landscape is painted with impressions of the hills, trees and valleys, rather than density of detail.

Law Day celebrations mark the importance of the Law as a pillar of American democracy. It is striking how vast and wholehearted is our nation-wide celebration, when we realize that this is only our 10th Law Day. Yet this time of year brings forth a bouquet of speeches and ceremonies in schools, churches, courthouse and all manner of as-

semblies. These are new May flowers for our new May Day in America. They feature the price-less ingredients of our life that we know as the Rule of Law, that we are a government of laws and not of men. This is a mighty counter-force to the national holiday of the communist countries. It is a mighty counter-glow to illuminate the skies of the world.

Yes, our national observance celebrates not the unity of the working classes but rather the unity of all our people under law. On May 1 we do not have military parades. Instead the military at the Pentagon like all officials of this land figuratively bow their heads in fealty to the Law.

It is the more memorable this year that our military unite with all the people in their Reverence for the Law when we realize that

only ten days ago, in Athens, the cradle of democracy, the military by a coup d'etat stepped in to displace popular democracy, let us hope only for a short time.

The fertile soil that welcomed the declarations of Law Day in the past decade has builded up throughout our history. In his first inaugural, March 4, 1801, Thomas Jefferson said: "I believe this . . . the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law." In a memorable speech at Springfield January 28, 1838, captioned "Reverence for the Law" Abraham Lincoln issued the call that stretches across the years to all of us gathered today in this courtyard. Let reverence for the laws, said Lincoln, be breathed by every mother to her babe, be taught in schools, be written in primers and almanacs. "Let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice." He concludes with these telling words: "And in short let it become the political religion of the nation."

How stands that political religion today? What of draft card burnings? Refusals to be drafted and serve in the armed forces?

It would be fatuous to deny that we live in a troubled time, and that many misguided youths have confused the right of dissent that is an inherent characteristic of our liberty, with grossly inad-

missible and indeed outrageous activities that would tear into shreds the fabric of Justice that they say clothes their activities.

For let no one suppose that our Rule of Law which is dedicated to the principle that Might does not necessarily make Right, must make us ignore the truth that Might does the service of Right and Law when it establishes the peace that is a precondition of Law and Justice. The Second World War established that truth in words writ large beyond forgetting. Our Armed Forces stand as a pillar of American democracy alongside and not athwart the Rule of Law.

One outgrowth of World War II was the stretch of the Rule of Law to international aspects in the Act of London that governed the Nuremberg trials with the ringing declaration that branded as criminal any armed aggression across a nation's frontiers to destroy the efforts of a people to achieve its own aspirations of justice in terms of its own background, culture and resources.

When I was last in the Pentagon as an officer of the Government I was in uniform and on detail to Justice Jackson's staff at Nuremberg. The lessons I learned there are unforgettable. They teach not only the need for resisting aggression, but also as in the case of Hitler's aggression against Austria the way in which aggression can be mounted with

fraud as well as major force, with rivulets of troopers as well as rivers of troops.

Today, however, there are voices of dissent that seek to point out differences between the condition of Hitler in Europe and the condition of today. There are differences, of course, but the question is, Are they critical?

It is not my place to adjudicate, so to speak, the clash of views, though it is my personal conclusion that on critical determinations dissenters speaking in the best of faith are flinching from facing hard facts, and that the nations of Asia are realistically beset with fears of a China whose aggressions will run to violent subversion, and in the last analysis to armed forces, if America should withdraw.

But I do think it proper for a judge to emphasize that the Rule of Law that is an essential thread of the fabric of American civilization embraces the right of orderly dissent. And this hallmark of our system is not only one of its chief values, but is quite remarkable. For how many peoples in the history of the world have come to fight a war, even a war that consumes only a modest proportion of total resources, under a system that embraces a freedom of discussion and orderly but outspoken dissent?

It is a harrowing and heart-breaking burden we bear that discussion and differences at home may be misunderstood by the

enemy to encourage him towards defiance rather than negotiation. On this aspect of the problem, there is little that can meaningfully be said to set him straight.

But for ourselves, and perhaps to soften the bitterness of our embattled troops, we can at least on occasion take a reflective look. Wisdom begins with the hope that differences can be argued with restraint and responsibility but continues with the realization that in any event the right to differ is not a weakness but is part and parcel of our strength as a free society. In the words of Confucius, better a diamond with a flaw than a pebble without.

Reflection gives us the perspective to appreciate that Dissent and Conflict is not alien to Law, but is part of the stuff of society that Law is meant to deal with. It is a salient function of the Rule of Law that it resolves conflicts within the society in a civilized way. The conflicts are resolved by general rules or standards intended for even-handed application. Ultimately the responsibility for statement and if necessary change in these Rules lies in the representatives of the people, chosen in free and fair elections, meeting in legislatures and on occasion conventions. And in our system, we seek aid in restraint of tyranny by a separation of powers that gives to independent courts the responsibility of assuring that the legislature and executive act in

accordance with the Constitution. The courts also have the responsibility of deciding private controversies by reference to the rules laid down by the legislatures, where ascertainable, and by formulating rules of law in areas not controlled by legislative enactments.

So it may be obvious, but may nevertheless stand repeating: Law does not contemplate an absence of conflict; it is rather a system for resolution of conflict. It rests on the premise that society may even thrive from the stimulus and tension of conflict, provided the controversies are resolved in peaceful and constructive channels. Indeed the tenet of free and open competition that underlies the basic law of economic enterprise is a rule that is expressly devoted to the assurance of conflict, in the belief that the resulting stimulus serves the public interest.

The individual's freedom is a taproot that nourishes our society broadly. Even our armed forces, if I understand correctly, are strengthened by avoiding overemphasis on conformity in the training of fighting men, and taking advantage of individual enterprise to cope with the unexpected.

In free America our freedom of expression is valued most high. The Supreme Court stresses not only a "robust and uninhibited" freedom of the press, but freedoms of expression that come closer to personal confrontation,

including notably the freedom to picket and the freedom to demonstrate.

But freedoms and differences must not be enshrined to the point of chaos and anarchy. While our Law respects basic freedoms, all Law is inevitably a restraint on freedom. But if the white line down the center of the highway restricts our freedom to travel on the left side of the road, it is a reasonable and limited restriction that promotes a higher freedom of travel. The antitrust laws restrict the freedom of monopolists in order to enhance the freedom of businessmen generally. Even our standard time zones, fresh in our thoughts from the forward movement of clocks and watches this past weekend, reflect a restriction on freedom. Prior to 1883 when the railroads instituted standard time zones different cities calculated their own solar times, so that noon in one city would come slightly ahead of noon 100 miles to the west. We have cheerfully surrendered the freedom to be plagued by such a welter of time differences. We accept such reasonable restrictions in the interest of the public good achieved by release of energies from the chaos or fetters produced by unrestricted freedom.

What our Law strives for is not untrammelled freedom, but what Justice Cardozo has called "ordered liberty." And where that order provided by Law is wanting, either because there is

no law or the law is flagrantly disregarded, then Tyranny takes charge. No one would be safe if Laws could be disregarded with impunity by men because they are powerful, or by mobs because they are unruly.

Even the most treasured freedoms have their limitation. Freedom to picket does not mean freedom to use violence. The freedom to demonstrate does not mean to demonstrate in or about a jail. The provision of channels limiting expression of dissent does not erase the recognition in our Law of the value as well as the inevitability of differences and conflict. Even the most peaceful and constructive criticisms are not without their irritation, at least when and if they are adverse. No one really likes to face adverse criticism. Yet it is obvious that the Law, by assuring channels for peaceful expressions of differences, reduces the head of steam that might otherwise blow up the boiler. And reasoning together leads us often to a group wisdom of surpassing value.

The Rules of Law do not merely settle individual conflicts, they reflect the objectives and aspirations of our society. These inevitably change over time. And so it is not surprising that the rules are changed, in some cases by the Legislatures, and in some cases by the courts when they are called upon to declare constitutional principles or to govern

areas left unsettled by the legislature.

Changes are unsettling, and apparently there are many who are particularly disturbed when the changes are announced by courts. Again, reflection will reassure us. In the words of Roscoe Pound—The law is stable, but it does not stand still. We do not always like, but we cannot countermand the changes life brings. Changes in technology require that we learn new skills. That commonplace is well understood in the Armed Forces, which must innovate new weapons and techniques as assumptions and conditions change.

The changes wrought by courts affect only a small area of their consideration. For the most part the issues in the cases before the courts turn not so much on disputes as to the rules, as on the application of the rules to the disputed fact situations.

But change is an essential ingredient of Law. The Rule of Law combines the principle of continuity with the past with the power and indeed the duty to make adaptations and changes where needed to meet the changing needs of society. Together the pattern of continuity and change provides a gyroscope for the system.

From the earliest days of our country our courts have made changes. The English law that each man must fence in his cattle or pay for damage caused was

replaced in our ranching states with a rule that men fence in their crops, or else forego all actions for damage. The classic rule of water law, that all riparian owners had an equal right to use of a stream, was abandoned when our expansion reached to arid states where such a rule meant that nobody would have enough for his needs. Instead of the riparian rights doctrine the courts in the arid states worked out an "appropriation" doctrine giving priority to the user who first puts the stream to beneficial use.

What is never-changing, however, is the key role of the courts in furtherance of the Rule of Law. That is simply this: They are a bulwark against tyranny. In preserving the rights of the friendless, they safeguard the rights of all. With concern for protection of privacy, for freedom of expression, and for due procedure even for the lowly, the courts have vigilantly sought to check and erase traces and symptoms of a police state. Rulings must of course be harmonized with reasonable requirements of those who must cope with delinquency and lawlessness. Yet it is easier to perceive and stress the immediate needs of the state than to discern the long-range needs of the society overall that are served by restraints on the state and its minions. Courts can provide a long range view.

The Rule of Law is enforced not only by the courts but by all officers and officials of the Government, aided by their legal advisers. Basic rules of fairness, of non-discriminatory application of general standards, may and often do arise in any area where Government touches any part of the community. I have discussed this subject in a speech not long ago, that will be reprinted in the next Federal Bar Journal. I refer those who are interested to that article, stopping in passing only to reaffirm my view that what each of you and all of you do with devotion and fairness in your daily work may have more to do with law where it counts, than all the cases that can be brought to courts or boards some years after the fact.

These remarks have touched here and there on a number of points in the landscape. I repeat for emphasis the central thought of Law Day and the Rule of Law—that we are a government of laws and not of man. This suffuses our lives and lends a distinctive and healthy glow to the quality of life in America. That is an appropriate reflection on any Law Day, bidding us be vigilant in understanding and preserving our essential values. It is a doubly appropriate reflection on Law Day 1967,—when our armed forces are embattled overseas.

The importance of the Rule of Law is certainly not muted by

Viet Nam. Indeed the contrary is indicated by the adoption in March of a new constitution for South Vietnam, providing not only for elections of a president and a legislature, but also promising the people such basic but hitherto unknown rights as habeas corpus, freedom of religion and protection from arbitrary police action. This constitution has been appropriately referred to as: A Document as Valuable as Divisions.

As we think of the troubled days ahead, let us not undervalue the importance of our strengths. The torch we hold aloft for ordered liberty and freedom glows all over the world. It is not a happenstance that the Court of Military Appeals has found that many of the protections American jurisprudence accords its civilians can rightfully be provided for the men in our military forces. It is not a happenstance that the rights of the individual held dear in our constitutional system have appeal to all men who come to know of their existence, throughout the continents

of the world, and even I am confident within the communist states.

We are again in times that try men's souls. Let us appreciate that in according a spirit of tolerance to dissent, we are showing not weakness but strength. It is a seeming paradox but it is a truth that what seem to be our weaknesses turn out to be our strengths. We want to be known throughout the world—as a people willing to stand by our principles under stress. As a country not without injustice, but aware of injustices and doing something to remedy them. As a people that venerates the Law that protects the friendless as well as the powerful. As a people who still revere John Adams not only because he was a revolutionary patriot but also because he stood as successful counsel for the defense when the Boston Massacre was followed by the trial of Captain Prescott.

Let us be confident that the Rule of Law is not only a pillar of American democracy, but a beacon for all mankind.



JAA MEMBERS WILL HOLD ANNUAL DINNER IN HONOLULU AT THE CANNON CLUB

The Twenty-first Annual Dinner of the Judge Advocates Association will be held on the evening of 7 August 1967 at the Cannon Club atop Diamond Head, Fort Ruger, Honolulu, with reception and cocktails at 7 P.M. and dinner at 8. Those who know the island state say there is no more beautiful spot in all the world to view a Pacific sunset than from the veranda of the Cannon Club.

The guest speaker at the annual dinner will be The Honorable J. Garner Anthony, an outstanding member of the bar of the State of Hawaii who served as Attorney General of Hawaii during those troublesome early days of World War II. Mr. Anthony will speak upon some interesting and little known sidelights and anecdotes arising out of the Army's unhappy venture into martial law in Hawaii during World War II, all mellowed by the lapse of 25 years since the events but nonetheless well remembered as part of his personal experiences.

The Committee on Arrangements is composed of Colonel Benoni Reynolds, USAF, Colonel Paul J. Leahy, USA, Captain Saul Katz, USN, and V. Thomas Rice, Esq. The Committee has made excellent arrangements for a truly outstanding and memorable meeting of the members of the Association and their ladies in Hawaii and they look forward to welcoming you on August seventh. Reserve the date and make your reservations early. The cost of the dinner will be \$6.00 per person.

COMA TO HAVE ADMISSIONS SESSION IN HONOLULU

The United States Court of Military Appeals will convene a special ceremonial session of the Court to receive motions for admission to its bar on 8 August 1967 at 10 A.M. in the United States Court House in Honolulu. Arrangements for the session of COMA, sponsored by the Judge Advocates Association, have been effected by the Arrangements Committee, Colonel Benoni Reynolds, Colonel Paul J. Leahy, Captain Saul Katz and Mr. V. Thomas Rice, working with Mr. Herman Lum, U. S. Attorney, and Mr. Alfred Proulx, Clerk of COMA.

Members of the Bar interested in attending the ceremonial session and being admitted to the bar of the United States Court of Military Appeals on August 8th should communicate directly with Alfred Proulx, Clerk, U. S. Court of Military Appeals, 5th and E Streets, N. W., Washington, D. C., who will furnish the requisite form application for admission.

