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THE ROCK AND THE HARD PLACE USE OF
FORCE BY ARNG IN CIVIL DISTURBANCE
OPERATIONS

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20
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THE ROCK AND THE HARD PLACE
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ABSTRACT

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THE ROCK AND THE HARD PLACE

USE OF FORCE BY ARNG IN CIVIL DISTURBANCE OPERATIONS

The history of the use of the National Guard in the control of civil disturbances and enforcement of the law is as long as the history of the Guard itself.¹ The history of attempts to impose liability for excesses and to limit the force used by the militia is nearly as long.²

The incidence of civil disorders serious enough to require National Guard intervention increased greatly from World War II to 1969.³ The intensity of the disturbances and the magnitude of National Guard involvement evoked greater public debate over its role than throughout its previous proud history.⁴ Probably the greatest catalyst for action to restrict the use of force was the Detroit riot of 1967. Those analyzing the situation charged both the police and National Guard with indiscriminate firing.⁵

Despite misgivings as to the training and capability of the National Guard for law enforcement missions voiced after the 1967 riots, its continued use was predicted. The conditions for civil disturbance still existed and the National Guard was the only organization available to the states "with sufficient man power and appropriate organization and equipment to assist local police departments in riot control operations."⁶ Controversy over regulatory requirements for federal assistance and the relative performance of the National Guard and the later arriving active army forces led to an informal consensus of the governors and adjutants

general not to again request federal troops.⁷

As the debate, litigation, training and policy changes described below progressed, the numbers of civil disturbances requiring intervention of the National Guard dropped. The campus riots of 1970 added to other types of civil disturbances in the same year sharply reversed the trend.⁸

The unfortunate incident at Kent State in 1970 gave new impetus to the efforts to limit the use of force in control of civil disturbances.⁹ Although the question of culpability has not yet been finally determined, none could applaud the actions of any of the participants.¹⁰ Few failed to take sides.¹¹ The Guard had suffered its "My Lai".¹²

At least some fatalities at the hands of the National Guard in the summer riots of 1967 were documented.¹³ Limiting itself to the period from January 1, 1968 through April 30, 1970, the National Guard Association of the United States was able to say that the only civilian death that could be charged to the National Guard was an armed robber.¹⁴ Unfortunately the death of four students at Kent State on May 4, 1970 marred the subsequent record.

Although a number of sources kept score as to civilian and regular law enforcement officers deaths and substantial information is available as to injuries,¹⁵ no one has attempted to compile statistics as to National Guardsmen killed or injured in civil disturbance operations.¹⁶ Interviews and answers to a survey questionnaire discussed in detail below disclosed 2 deaths and 23 serious injuries of National

Guardsmen during law enforcement operations since 1950.¹⁷
In addition, many minor injuries were sustained and much
abuse suffered by guardsmen in every major disturbance,
specifically including Kent State.¹⁸

In view of this history, the well articulated calls for
legal restraint and adequate control of use of force by
the National Guard in civil disturbances is understandable.
The Riot Commission severely criticized the training of the
National Guard, noted that its equipment was not approp-
riate for law enforcement duties and held that its perform-
ance posed a serious challenge to the nation.¹⁹ Any reader
with an interest in this field will recall the barrage of
editorials and articles during that time.²⁰ Many were as
critical as the very liberal American Civil Liberties
Union which charged:

"All in all, the lives, limbs and free-
doms of innocent citizens were put in
immediate danger on each of the 324
occasions when the Guard was called
out between January 1968 and May
1970."²¹

The Kent State incident isolated the Guard in what had been
equal condemnation of all law enforcement agencies.²²

Calls for use of force were not as well articulated and
published.²³ Probably the only written calls for use of
more force as a deterrent appeared in the after-action re-
ports mentioned in the essay identified in the previous
footnote. At least one Adjutant General is thoroughly con-
vinced that firm public statements that all necessary force

would be used saved his State from the riots and demonstrations which occurred in neighboring states. It may be possible to think or even say that the reduction in the number of campus riots was caused by the death of the Kent State students but who would have the temerity to advance that as an argument for use of more force.²⁴

One of the best balanced statements appeared not in the several official reports but a private publication and referred primarily to the police:

"They must emphasize selective response, with great care to use what the law prescribes: Only the minimum force necessary - but all the force that is necessary - to suppress lawlessness speedily and firmly. And civil authorities have a duty to see that the police are trained and psychologically prepared to do it - and to back them with the full moral support when the time comes.²⁵

The public outcry assured changes in law and policy.

Despite the long history of use of the National Guard to suppress civil disorders, the law applicable was not well defined. Court decisions are fast filling the void.²⁶

A 1972 decision of the United States Court of Appeals for the Sixth Circuit, while upholding the validity of statutes giving immunity to law enforcement officers for use of force necessary and proper to suppress riot, held that the federal courts had the authority to direct the states in the training and plans for use of the National

Guard in civil disturbance operations.²⁷ Fortunately the decision was appealed. The Supreme Court of the United States reversed that part of the Circuit Court of Appeals decision allowing court supervision of the training and utilization of the Guard. The specter of a federal District Judge formulating guidelines for training and plans for use of the National Guard in law enforcement duties had been removed.²⁸

The attack by civil suits for damages against state authorities has been more successful. On April 17, 1974, the United States Supreme Court held that state executive officers are not absolutely immune from such suits but that

"A qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of the office and all of the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based".²⁹

The 1971 act granting a right to sue in federal courts for damages for violation of civil rights upon which the Krause and Scheur claims are based has found a new and greatly expanded role as a legal threat to Guardsmen accused of use of excessive force, at least where gross or culpable negligence or willfulness can be charged.³⁰

The most chilling legal threat arose from the indictment of eight National Guardsmen by a federal grand jury for their part in the Kent State incident.³¹ The indictments charge that they did under color of law willfully deprive the dead

students of their civil rights, an offense punishable by imprisonment for any term of years or for life. The case will undoubtedly be the vehicle for eventual determination by the United States Supreme Court of the immunities from criminal prosecution available to the National Guard acting in a law enforcement role and the nature of proof required to show a willful violation of rights, issues not now clearly defined by law.³² The initial failure of the Attorney General of Ohio to furnish defense counsel to the Guardsmen in the federal court proceedings added to the anguish. After the National Guard Association of the United States had raised a defense fund, the Attorney General of Ohio, at the direction of the Governor, elected to exercise his discretion to furnish defense counsel.³³

No attempt is made here to summarize the law since the policies discussed below impose greater restraints.³⁴

Following the 1967 riot, the Department of the Army quickly recognized and acted to correct the deficiencies in training of the National Guard for civil disturbance operations.³⁵ Civil disturbance training prior to the 1967 riots consisted primarily of mob dispersal and crowd control techniques with emphasis on riot control formations and use of riot control agents.³⁶ An expanded 32 hour training program was designed to correct the deficiencies noted in the 1967 riots.³⁷ One hour was assigned to policies and legal considerations. The states started development of riot control plans under directives of the

Department of Army. The development of plans and training continued and by 1970 it seemed the goal had been met.³⁸

The Kent State incident shocked the Department of the Army and National Guard Bureau into renewed activity. A National Guard Bureau study group, convened for the period of 9-20 November 1970, reviewed the civil disturbance plans of the states, particularly the provisions limiting and authorizing the use of deadly force. The Department of the Army plan with which the state plans were compared attempts to limit the opportunity for misuse of deadly force by assuring control of the means of force.³⁹ Provisions in previous state plans such as

"Rifles will be carried with a round in the chamber in the safe position."

came under agonizing reappraisal as a result of the Kent State incident. Through continued effort of the National Guard Bureau the concept of restraint in the use of force and rules of engagement controlling the means of deadly force contained in Department of Army plans were accepted and incorporated in the plans of all of the states.⁴⁰

Training requirements were periodically revised and upgraded from 1967 through 1973. Guard enlisted personnel receive 16 hours of civil disturbance training during or following basic combat training. Units with a civil disturbance mission must conduct an 8 hour annual program of Junior Leadership Training and must conduct annual refresher training. The lesson plans suggested for the Leadership

Training Program emphasize minimum force and liabilities for use of excessive force.⁴¹

The means of preparing and controlling the National Guard for civil disturbance duties have been fully developed. The restraints on the use of force are more clearly defined in these plans and training documents than in any statute or court decision. A typical plan provides:

Deadly Force: Any force that in most cases would cause death or serious injury (e.g., rifle fire, shotguns at close range, bayonet stabs and the like).

- (1) Is not authorized for use in preventing activities which do not present a risk of death or serious injury to innocent persons (e.g., curfew violations, looting).
- (2) Is authorized when all of the following factors are present:
 - (a) Lesser force is ineffective or unavailable.
 - (b) Risk of death or serious injury to innocent persons is not increased by use.
 - (c) Required to prevent one of the following:
 1. Death or bodily harm to troops (self defense).
 2. A crime which poses risk of death or serious injury to any person(s) (e.g., sniping, arson to an occupied building, etc.).
 3. Destruction of public utilities or similar property vital to public health and safety.
The escape of persons committing offenses in 1, 2 or 3 above.

There is little doubt these regulatory restrictions can and will be used in proceedings against any Guardsman accused of violation. They have the effect of limiting the immunity or justification given by statutes in cases involving injuries of bystanders after the Riot Act warning has been given and when necessarily used in the arrest of felons.

The existence of standards does not assure their acceptance nor that they will be understood. It must be made clear that "minimum force" will often be best applied by use of the maximum number of troops available so as to limit likelihood of necessity for use of weapons. Training must impart the concept that force may not be used simply as a response to provocation. It is difficult for many to accept that the rights of a rioter who has done everything possible to provoke a trooper would be violated by roughing him up during apprehension. It is almost as difficult to understand that guardsmen may be required to take cover and refrain from return fire when the assailant is not clearly identified or allow a felon to escape when all of the requirements for use of deadly force are not met. The possibility of the National Guard having to take the first casualty may appear just as real to guardsmen as the risk of ambush which is a constant threat to police officers in some areas.⁴² Training cannot be honestly presented without impressing upon the guardsmen the stress and possible risk which he must accept and the legal threat if he over-reacts.

It is inevitable that a guardsman faced with civil disturbance and law enforcement duties must feel to some degree that he is between the rock of personal danger and the hard place of possible liability. The training must be adequate to insure understanding and acceptance of the concept of minimum force but not at the expense of destroying the individuals will and ability to use force when necessary.

A guardsman must understand and believe that he is entitled to rely upon orders of his superior if they are not obviously unlawful; that suit or criminal charges are unlikely; that he can be held liable in a civil suit only if the greater weight of the evidence proves he used excessive force; that any criminal charge must be proven beyond a reasonable doubt; that his actions will be judged in the light (or confusion) of the circumstances as they reasonably appeared to him at the time and that he will be afforded immunities and legal protection as well as benefits in the event of injury commensurate with the risk.

The training task is to take these concepts and put them across through plain every day language, examples and exercises.

What are the problems we must overcome to succeed in this training mission? How successful have we been? What is required to assure adequate continued emphasis on this training?⁴³

Little difficulty has been encountered in acceptance of the concept of minimum force by the younger officers and men. The basic training centers have done an excellent job with Guard recruits. Older officers and non-commissioned officers, including those who may be in direct charge, have a greater difficulty in accepting the concept. Young and old alike make an instructor's job interesting and challenging with hypothetical questions or supposed actual cases

faced by guardsmen. Public resistance can be a problem.⁴⁴

Although not seen as an immediate threat to the effectiveness of the Guard, difficulty has been encountered in assuring guardsmen of the support and backing of the law. Many feel the "full moral support" called for by Methwin is lacking. Public justification and excuse of violence by protestors is annoying but presents no real problem.⁴⁵ The Kent State indictments led to a great deal of private and some public prediction that this will be the Guard's death knell. Guardsmen have been concerned that they might find themselves in civil or criminal court without provision of an attorney by the state. Not all of the states have adequate statutory authority to provide counsel to defend civil or criminal suits against individual guardsmen. Lack of provision for payment of civil judgments by many states is a problem.⁴⁶ Some guardsmen are concerned about protracted trial and need reassurance that trials lasting many months occur primarily because of defense tactics and are not the norm. Guardsmen are reluctant to accept assurances as to these matters and of the protections outlined at page 10 from non-lawyers. Although the problems presented by the indictments of the Ohio guardsmen are manageable, many feel that conviction would present a serious problem.

The lack of available counsel for training and to provide legal assistance when committed has been a problem in all but the most populous states. One state reported that

it had no staff judge advocate until this year. Most are not technicians or state fulltime employees. All states were able to obtain legal advice in the preparation or at least the review of the rules of engagement, operation plans and training documents. Fourteen states and Puerto Rico were unable to have a staff judge advocate participate in the initial Junior Leadership Training. Only 15 states had sufficient staff judge advocate or lawyer officers serving in other branches to provide all of the Junior Leadership Training in the legal aspects of civil disturbance operations. In the other states this instruction was conducted in part by lawyers. Only 8 states were able to fill all requests for lawyer instructors for training of units having civil disturbance missions while 22 states and Puerto Rico were unable to furnish any lawyer instructors for the unit training. Units have recently been committed without legal assistance to the commander.

The quality of instruction in the legal aspects of civil disturbance operations has depended heavily upon individual instructor techniques. Other training demands and lack of facilities and personnel have limited civil disturbance training and training evaluation. Only 17 states appeared to be continuing a full program of command post exercises, field training exercises and stress training. I perceive some lack of command attention.

Since the increased training in 1971 through the first quarter of 1974, National Guard troops have been involved

in 81 separate civil disturbance operations.⁴⁷ Although suit was threatened in one state as a result of these operations, no claims, suits or charges were reported as having been filed arising from the civil disturbance operations. If it were not for the shock of Kent State following 28 months of errorless operation, one could argue that the training has been proven effective by the record. A nagging doubt that it has been 100% effective arises from an informal report of guardsmen committed in one incident with rounds in the chamber and without the control prescribed by the state plan. Most states are satisfied that the training is effective and the best that can realistically be expected. Only 4 Staff Judge Advocates and 1 Military Support Plans Officer stated that they were not satisfied that the training within their state was accomplishing the dual objective of thorough understanding by individuals of the concept of minimum force while assuring them that they have the protection of law. Sixteen states indicated reservations because of lack of practical experience and training, lack of sufficient legal support or reduced emphasis on this training since 1971. The knowledge of those interviewed and the comprehensiveness of plans in every state makes it likely the training is in fact effective.

The willingness of individual guardsmen to accept the mission despite the physical and legal threats is evidenced by the fact that no serious difficulty in recruiting and

retention has been attributed to the civil disturbance mission or the threat represented by the Kent State suits. Two states reported that difficulty in recruiting blacks may have resulted from the image of the Guard caused by its civil disturbance missions. Two states reported reserve recruiters suggesting to prospects that enlistment in the United States Army Reserve offered the advantage of avoiding the civil disturbance and law enforcement obligations of the Guard. Each indicated this offered no serious threat to Guard recruitment. One state reported two guardsmen declined re-enlistment because of the policies in regard to use of force. Four states reported they felt recruiting had been hurt by the Kent State indictments but that this was only a minor factor. Although the lack of difficulty in recruiting and retention could be the result of lack of awareness of the risks, those involved feel strongly that the Guard has retained its esprit.

Despite philosophical reservations about the limitations imposed on use of force, most agree our men are trained, motivated and ready to meet the challenge.

A number of actions to attain or maintain a satisfactory level of training were suggested or are indicated.

First and foremost, continuing command attention is necessary. The commander must know his officers, non-commissioned officers and men if he is to make assignments that assure control.

More use should be made of command post exercises, field training exercises and stress training. Additional mandatory training is not the answer. A commander aware of his responsibility can allocate adequate time.

The Judge Advocate officers and lawyers serving in other branches should be utilized to the fullest extent. Plans should assure legal assistance in troop briefing, legal foundation for actions, (i.e. valid call, mission orders, riot act warning, etc.) advice to commanders and liason with local prosecutors.

Those states not having adequate authority to provide counsel to defend guardsmen should, as many recently have, immediately seek legislation.⁴⁸ Immunity statutes should be reviewed and the legislature asked for the broadest protection possible within the Supreme Court guidelines. Insurance or protection from civil judgment through waiver of sovereign immunity should be sought in those states where not already provided.

The National Guard Bureau should be asked to coordinate research, preparations of model statutes, development of instructor techniques and efforts to obtain adequate Staff Judge Advocate support.⁴⁹

Lastly, and still the most important, there must be continuing command attention. No one knows when the Guard will next be needed for its primary mission. The record says it will be needed for civil disturbance operations several times every year. Although not as personally rewarding as

disaster duty, the protection provided is equally important to the state. The Guard must be able to function between the rock and the hard place.



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FOOTNOTES

1. National Association of Attorneys General, Committee on the Office of Attorney General, Legal Issues Concerning the Role of the National Guard in Civil Disorders, p. 51, hereafter referred to as Legal Issues).

2. Ibid., p. 67; 54 Military and Civil Defense, sec. 291; American Civil Liberties Union, The National Guard and the Constitution, (hereafter referred to as ACLU).

3. "The Role of the National Guard in An Age of Unrest", The National Guardsman, September 1970, p. 10, (hereafter referred to by publication name). From 1945 through 1964 more than 99,000 guardsmen were involved in control of 88 separate civil disturbances with more than one-third in the final 5 years of that period. In the years 1965-1969, 291,396 guardsmen were involved in 242 control operations with the majority in the final 2 years.

4. U. S. Riot Commission Report, Report of the National Advisory Commission on Civil Disorders, New York Times Edition, p. 97-104, (referred to hereafter as Riot Commission Report)

5. Ibid, p. 97.

6. Ibid, p. 497.

7. This comment and others so noted are, at least in part, from the sources identified at footnote 43. The Wounded Knee occupation in South Dakota involved federal officers only because of lack of state jurisdiction. Recent calls for federal assistance in Boston were justified upon the fact enforcement of a federal District Court order was involved.

8. National Guard Bureau, National Guard in Domestic Emergencies Since World War II.

9. James Michener, Kent State: What Happened and Why, pp 327-343; the entire book contains repeated references to the Guard and background for the incident. See note 22.

10. Ibid; Alan Stang, Kent State-Proof to Save the Guardsman", American Opinion, June 1974; Legal Issues, p. 74; The National Guardsman, September 1970, p. 11. See note 43.

11. A Gallup Poll reported that 58% of those polled believed the students were primarily responsible for the incident and 11% believed the National Guard to be responsible as reported in The National Guardsman.

12. LTC Robert S. McGowan, "The Army National Guard in the 1970's."
13. The National Guardsman; Riot Commission Report pp 66, 68, 98.
14. The National Guardsman, p 10.
15. The Federal Bureau of Investigation publishes an annual summary entitled "Law Enforcement Officers Killed" and annual "Uniform Crime Reports".
16. As reported to the author by representative of the National Guard Association of the United States.
17. Note 43.
18. Ibid.; The National Guardsman, September, 1970, p. 11
19. Riot Commission Report, pp 497, 502.
20. "It's Time to Change the Guard", Time, 20 October 1967, pp 24-25; McWhite, William A, "The National Guard--Awake or Asleep?", Life, October 1967, pp. 85-98.
21. ACLU, p. i.
22. "No More Kent States", Editorial, The Philadelphia Inquirer, 12 Nov 1970, p. 6.
23. Ernest L. Kaiser, Col., National Guard and Federal Troops in Civil Disorder.
24. See note 43.
25. Eugene H. Methwin, The Riot Makers, p. 485
26. Legal Issues, p. 60; National Association of Attorneys General Committee on the Office of Attorney General, Analysis of Questionnaire to Adjutant General, p. 431 (hereafter referred to as Analysis); ACLU, 11; James B. Lee, LTC, Civil Disturbance Operations - Liabilities Facing a Commander; 54 Am Jur 2d Military and Civil Defense, section 291; 40 Am Jur 2d, Homicide sections 134 et seq.; 6 Am Jur 2d, Assault and Battery, section 148.
27. Morgan v Rhodes, 426 Federal Reporter 2d 608.
28. Ibid.; 93 Supreme Court Reporter (S.Ct) 2440; Analysis, p. 42.
29. Scheur v Rhodes, Krause v Rhodes, 94 S. Ct 1683; American Trial Lawyers Association, Newsletter, August 1974, p. 243.

30. Ibid. p. 240; 42 United States Code Annotated (USCA) §1983 and annotations; ACLU 86.

31. Bob Brumfield, "An Epitaph for the Guard," Cincinnati Inquirer as appearing in The Guardsman, South Dakota National Guard Association, July 1974; this editorial was widely distributed. The riot act had blocked state indictment.

32. 18 USCA, section 242 and annotations; see note 43.

33. Analysis p. 14; See note 43.

34. See footnotes 26 through 30 and 32.

35. Riot Commission Report, p. 500.

36. U. S. Department of the Army. Army Subject Schedule 19-6, 9 February 1965.

37. U. S. Department of the Army, 19-6(T), "Civil Disturbance and Riot Control"; August 1967; "A New Riot Control Memo is Given to Guard", New York Times, 6 August 1967, p. 51.

38. US Department of the Army, Army Subject Schedule 19-6 21 February 1968; The National Guardsman, September 1970, p. 10.

39. See note 43; Legal Issues, p. 81; Analysis, pp. 31, 37; US Department of the Army Civil Disturbance Plan, Garden Plot (U); Department of the Army Field Manual 19-15, March 1972.

40. See note 43; No authority existed for requiring the states to adopt a uniform plan, see Maryland v US, 85 S. Ct. 1293 for an explanation of the relationship between US and National Guard; 33 Am Jur 2d Military and Civil Defense, section 30.

41. U. S. Department of the Army, Army Regulations 350-7, 8 February 1973 as supplemented by Appendix XV Annex C, FORSCOM Suppl 1 to AR350-1; See note 37; Lesson Plan entitled "Policies and Legal Consideration" of "Leadership Training Program" prepared in February 1971 by the Law Division of The United States Army Military Police School.

42. Federal Bureau of Investigation, Uniform Crime Report, 1972 and 1973 contain the following yearly summaries:

Number	Killed During	Civil Disorder	Ambush
	1963-67	6	7
	1968-72	4	63
	1972	2	14

43. The answers suggested below are based upon personal experiences, non-attribution interviews of 3 representatives

of National Guard Bureau, 2 representatives of the National Guard Association of the United States, a member of the 1970 committee which reviewed the plans of the states, 3 Adjutants General, 2 Administrative Assistants to Adjutants General and 1 Division Commander representing states from each geographic area, 7 Military Support Plans Officers representing all geographic areas and 19 Staff Judge Advocates, again representing all geographic areas for a total of 37 interviews and also upon 26 written replies to a questionnaire. At least one contact was made in each of the 50 states and Puerto Rico.

44. In one state, the resistance to a plan requiring unarmed troops to enter a disturbance area resulted in considerable public controversy. An out of context quotation resulting in headlines indicating the National Guard would be required to take the first casualty required extraordinary effort on the part of the Adjutant General to explain and defend his civil disturbance plans.

45. The author recently listened to a sermon by a minister, who was present throughout the Wounded Knee occupation in South Dakota, in which some variation of the word "violence" was used 12 times in less than 10 minutes as being the only alternative to apathy available to an oppressed people. The seeming inability of the law to punish those inciting civil disturbance is frustrating.

46. Analysis, p. 14.

47. National Guard Bureau, "National Guard in Domestic Emergencies Since World War II," 31 March 1974 reports National Guard troops were used in 43 law enforcement operations in 1971, 18 in 1973 and 7 in the first quarter of 1974.

48. National Association of Attorneys General, Committee on the office of Attorney General, Attorney Generals Legal Services to Military Forces.

49. A report will soon be issued by the Adjutant General of Nevada releasing results of a survey of the states as to adequacy of existing Judge Advocate support.

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3. American Jurisprudence. Second Edition. Volume 54. Military and Civil Defense, Sections 30, 291. Volume 40. Homicide. Sections 134 et seq. Volume 6. Assault and Battery. Section 148. San Francisco: The Lawyers Co-operative Publishing Company, 1971.
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(These reports contain excellent compilations of data, statutes and case law.)
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