CIVIL DISTURBANCE OPERATIONS: LIABILITIES FACING A COMMANDER

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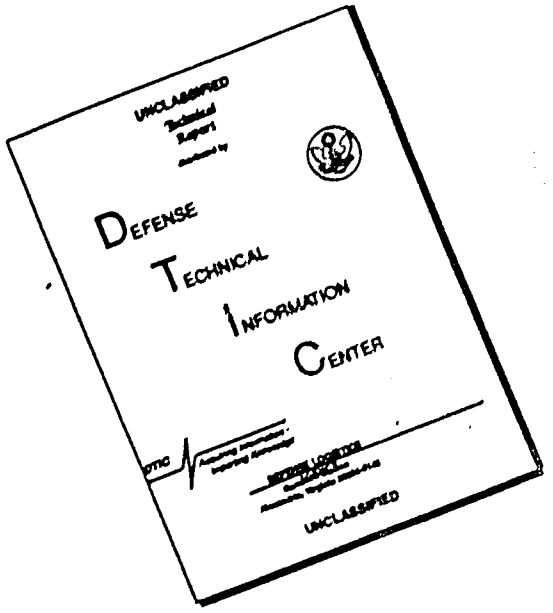

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STUDENT ESSAY

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ABSTRACT

AUTHOR: James B. Lee, Lt Col, FA
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Commanders of federal troops and National Guard units in civil disturbance operations may be subject to civil and criminal liabilities for their decisions and actions. Court opinions, law treatises, and statutes (federal and state) were reviewed to determine what legal actions could be commenced against Commanders who lead troops seeking to control civil disturbances and what defenses are available to such lawsuits. Federal officers will seldom be employed in the control of civil disturbances. Both Federal and Guard officers will be bound by the general rule that their actions must be reasonable and necessary in order to avoid civil and criminal liability. Federal officers are not protected by an immunity statute, but federal courts have given immunity in some instances. Many states have immunity laws to protect Guard officers against civil and criminal liability; these are limited and do not provide complete protection. New York State passed an effective indemnity law in 1968; such a statute should be adopted in other states because the state saves harmless the officer from attorneys' fees and costs arising out of any claim or prosecution for any offense, by reason of alleged negligence or offense of such officer.

CIVIL DISTURBANCE OPERATIONS - LIABILITIES FACING A COMMANDER

Responsibility for enforcing laws and maintaining order in the United States rests primarily with the several states. Whenever a civil disorder occurs, the first level of enforcement rests with the police forces within the states. When civil authorities cannot cope with a civil disturbance, state-controlled forces are normally employed prior to the use of federal troops. The use of federal troops is a drastic last resort when state forces cannot contain the disturbance. State forces include the National Guard which is part of the organized militia of the states. When not federalized, the National Guard is under the complete control of the governor. He has the authority to employ the guard in its state status to suppress civil disturbances within his state.[1]

Since World War II, the National Guard has been summoned to aid in controlling disorders a total of 72 times in 28 states. Thirteen took place during

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[1]George P. Kelly, Colonel, "Civil Disturbance Capabilities of the National Guard in State Roles," Thesis (Carlisle Barracks, 9 March 1970), pp. 6-7.

the summer of 1967.[2] The commitment of federal troops to aid state and local forces in controlling a disorder is an extraordinary act. Only twice in the last 45 years have governors requested federal troops to quell civil disorders.[3]

States have had, and will continue to have, much more frequent occasion for the control of civil disturbances than the federal government, because the preservation of domestic order in the United States is primarily a state function.[4]

Commanders of federal troops and National Guard units in civil disturbance operations may be subject to civil and criminal liabilities for their decisions and actions. This essay shall review pertinent court decisions, law treatises, and statutory provisions to determine what legal actions can be instituted against Commanders who lead troops seeking to control civil disturbances. From this study, conclusions shall be

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[2]Report of the National Advisory Commission on Civil Disorders, (1 March 1968), p. 497.

[3]Ibid., p. 506.

[4]Samuel H. Sterling, "Civil and Criminal Liability of National Guardsman Called Out for Duty", Temple Law Quarterly, 1933, p. 69.

made as to what liabilities a Commander faces and what he can do to provide himself with defenses against such lawsuits.

Awareness of their civil rights by dissidents and criminal elements in our society, and the ever-increasing protection afforded them by the courts, have combined to make operations against civil disorders more difficult in recent years. The keeping or re-establishing of peace and order requires evermore sophisticated responses to insure not only efficiency, but also full legality of the actions taken.[5]

CIVIL AND CRIMINAL ACTIONS

It is necessary to distinguish a civil action (tort) from a crime. The distinction between them lies in the interests affected and the remedy afforded by the law. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests

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[5]Ernest L. Kaiser, Colonel, "National Guard and Federal Troops in Civil Disorders". Essay (Carlisle Barracks, 20 December 1970), p. 1.

of the public as a whole by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from imitating him. A criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed, and his only part in it is that of an accuser and a witness for the state. The civil action for a tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer. If he is successful, he receives a judgment for a sum of money, which he may enforce by collecting it from the defendant. The same act may be both a crime against the state and a tort against an individual.[6]

FEDERAL OFFICERS

It has long been recognized that an officer of the United States is not subject to the criminal sanctions of a state for acts done within the scope of his duties. Some decisions appear to base this immunity

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[6]William L. Prosser, Law of Torts (1964), p. 7.

on lack of jurisdiction in state courts.

> "...[W]here an officer from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet, where there is no criminal intent on his part, he does not become liable to answer to a criminal process of a different government." [7]

Other decisions appear to recognize performance of a federal duty as a substantive defense to state prosecution without actually denying the existance of jurisdiction in the state court. This relative immunity from state prosecution is somewhat misleading, however, since the reasonableness of the officer's conduct will be closely scrutinized in determining whether his actions were done in good faith within the scope of his duties and without criminal intent.[8]

For example, in Brown v. Cain,[9] Coast Guardsman Brown, guarding a shipyard, was struck by a brick during

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[7] In Re Lewis, 83 F 159, 160 (N.D. Wash. 1897).

[8] U.S. Department of the Army Pamphlet 27-100-26, Military Law Review (October 1964), pp. 84-87.

[9] 56 F.Supp. 56 (E.D. Pa. 1944).

a riot. He shot at the legs of a man running away, thinking that it was the guilty person and seeking to arrest him. The man tripped and fell just as Brown fired, and as a result, the bullet inflicted a fatal wound. Brown was indicted by the state for murder and applied to the federal cour. for a Writ of Habeas Corpus. Although the court eventually granted the Writ, saying Brown was "amenable to the law of the United States and to no other",[10] the reasonableness of Brow..'s conduct was thoroughly examined.

With regard to criminal responsibility to the United States, the officer has no immunity from prosecution. An officer of the United States is subject to the Uniform Code of Military Justice when he is involved in suppressing a civil disturbance and is performing his assigned duties.[11]

While inferior officers bound to obey orders are protected in so doing, except where such orders show on their face their own illegality or want of authority, a superior officer is himself answerable

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[10] Ibid., p.60.

[11] 10 United States Code, §801-940; O'Callahan v. Parker, 395 U.S. 258, 23 L.Ed.2d 291, 89 S.Ct. 1683; and Manual for Courts-Martial, United States, 1969 (Revised Edition).

for all acts within the fair scope of the orders given by him, and his only available defense is that the orders given by him were lawful. The general rule is that United States officers in command of military forces are not personally liable for injuries resulting from their official acts in the prosecution of lawful military operations. This rule is subject, however, to the limitation that personal liability may be incurred where the officer acts wantonly, or in the absence of any reasonable necessity.[12] In recent years, however, there has been a considerable erosion of this limitation.

The leading case in support of the proposition that federal employees are immune from liability for torts committed in performing their duties is Gregoire v. Biddle.[13] In that case, Judge Hand used broad language in holding that the Attorney General and another Department of Justice official were not subject to civil suit by a man who claimed to have been falsely imprisoned by them. Because the broad and persuasive

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[12] 54 American Jurisprudence 2d, Military, and Civil Defense, §292, p. 118.

[13] 177 F.2d 579 (2nd Cir., 1949), cert. denied, 339 U.S. 949 (1950).

language of Judge Hand was quoted with approval by the Supreme Court, other federal courts are accepting it as the law.

> "The Supreme Court's acceptance of Gregoire v. Biddle impels us to the conclusion that the law has changed, and that it is now considered wise to leave some government agents entirely free from suit when they are acting within an area intrusted to their discretion." [14]

Because this legal concept is still in a stage of development, it is impossible to say how far it will extend or what impact it will have on providing immunity to federal officers in a civil disturbance situation. At present, it does not appear to guarantee immunity from civil suit to the officer who uses unprivileged or excessive force.

NATIONAL GUARD OFFICERS

A look at the status of National Guard officers in civil disturbance operations is in order.

All courts start from the premise that it is necessity which alone justifies gubernatorial military action. Those measures which courts find reasonably necessary and substantially related to the

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[14] Bershad v. Wood, 290 F.2d 714, 719 (9th Cir., 1961).

attainment of that object are upheld, either upon these grounds, or upon the theory that the court cannot interfere with the controlling authority of the Executive as the military chief. Where courts can discover no necessity to justify the military measures undertaken, such action is enjoined either for the reason that it is beyond the constitutional power of the Governor or violates due process of law, or, where the Court has adopted the war-time military government approach, upon the ground that there is no actual "martial law".[15]

The cases resolve themselves into two broad categories: (1) Those involving military infractions of property interests, and (2) those concerned with invasions of interests of personality.

It was held in Herlihy v. Donohue[16] that militia officers called to suppress an insurrection in the County of Silver Bow, Montana, were personally liable for destroying without hearing or adjudication the stock (whiskey) of a saloonkeeper for neglecting

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[15] "Use of Military Forces in Domestic Disturbances". Yale Law Journal (1936), pp. 884-885.

[16] 52 Montana 601, 161 P 164 (1916).

to obey an order to keep his saloon closed within specified hours, where there was nothing to show the necessity for such destruction, such as a threat of the rioters to break into the building to secure the liquor, so that its destruction was necessary to prevent the excesses which follow the free access of disorderly persons to it.

Abatement of disorder often requires military action more drastic than encroachments upon rights of private property. Invasions of interests of personality resolve themselves into two categories: The first comprising the direct application of force to an individual; the second concerned with his summary arrest and detention by the military authorities. Actions falling within the first class are presented to the courts, after the passing of the exigency, in civil actions for assault and battery or in criminal prosecutions for murder. Ela v. Smith,[17] was a tort action against the Mayor of Boston and two officers of the Massachusetts volunteer militia for an assault on the plaintiff. Apprehending a riot over the return to the South of a fugitive slave, the Mayor called out the

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[17] 71 Mass. 121 (1855).

troops to clear the streets while the fugitive was being marched to the wharf for deportation. The plaintiff, attempting to pass through a guarded street, was pushed back and knocked down by the soldiers. The court, adhering to the doctrine that the troops were called out to aid the civil authority as "armed police" only, announced that no liability could be incurred for acts reasonable and necessary for the clearing and guarding of the streets. However, if the force used towards the plaintiff was excessive and unreasonable, recovery could be had. Thereupon, the case was sent back for trial. Upon the same theory, the Michigan court, in Bishop v. Vandercook,[18] held that the use of a log to ditch autos which refused to stop for military search, constituted a wanton disregard for human life, and sustained an award of substantial damages against the military officer who had directed that such a measure be taken.

A prosecution for murder, State v. Coit,[19] involved an Ohio National Guard Colonel who ordered the militia to fire on a mob which threatened to break

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[18] 228 Mich. 299, 200 N.W. 279 (1924).

[19] 8 Ohio Dec. 62 (Com. Pl. 1897).

in the door of a courthouse in an attempt to lynch a Negro charged with rape. The court, announcing that the military was subordinate to the civil authority, instructed the jury that it was the duty of the Colonel to use only such force as was necessary and proper to protect the prisoner and the public property. He could not legally take human life in accomplishing those ends unless he had first ascertained, by such a prudent and reasonable exercise of his faculties as the circumstances permitted, that such action was necessary and proper.

In a similar case, Lorich v. State,[20] a person filed a claim against the State of New York for injuries resulting when she was shot in the back by National Guardsmen. The Court of Claims said:

> "Whatever may be said of the situation which faced the guardsmen and police at other times during the day, it is clear to us that the shooting of the claimant was perpetrated contrary to due care and prudence under all the circumstances existing at that time. No reasonably prudent and careful officer, unresisted, unmenaced, and unthreatened, would have ordered his men to fire into the backs of a fleeing crowd of citizens, whatever their previous offensive demeanor or provocation might have been.
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[20] 113 Misc. (N.Y.) 409 (1920), 184 N.Y.Supp. 818.

> "We would have no hesitation in dismissing this claim, however, if it appeared that the shooting was done by the guardsmen in self-defense, or when they were seriously resisted, menaced, or threatened. We desire not to be misunderstood." [21]

More common as a means of abating disorder than the direct application of force is the arrest without warrant and temporary detention by the military authorities of those suspected of inciting or participating in the violence. The confinement of such participants may be essential for the successful suppression of the disturbance. The question of the legality of such arrests is raised, during the period of military activity, by Writs of Habeas Corpus. In Re Moyer[22] and Re McDonald[23] the returns to the writs were similar. Each stated that the prisoner was a leader of the insurrection - a strike - that his arrest was necessary for its successful suppression, and that he would be released from military arrest as soon as that safely could be done. Upon such a showing, the internments were sustained as reasonable measures within the

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[21] Ibid., p. 821.

[22] 35 Colo. 159, 85 P 190 (1905).

[23] 49 Mont. 454, 143 P 947 (1914).

discretion of the Executive and the military authorities under him, and as having direct relation to the suppression of the disturbance which the militia had been summoned to subdue. Where military arrests have been sustained, courts have been careful to indicate that they are merely precautionary measures for the prevention of the exercise of a power hostile to the efforts of the Executive to restore order.[24] They cannot continue beyond the period of the emergency. Upon its termination, the prisoner must either be set at liberty or turned over to the civil authorities for trial according to law

National Guard officers may be subject to an action under Section 1983 of the Civil Rights Act.[25] That Section provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Since the United States Supreme Court decided

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[24] Moyer v. Peabody, 212 U.S. 78,84,85 (1909).

[25] 42 U.S.C. §1983 (1959).

Monroe v. Pape[26] in 1961, a growing area of tort law under Section 1983 has developed governing the conduct of police officers. However, Section 1983 could also apply to National Guard officers, but it is clear that federal law enforcement agents or officers are not within its scope.

In Monroe, defendants, thirteen Chicago police officers, entered plaintiff's residence at night without a warrant, searched the premises, and brought him to the station where he was questioned for ten hours, and released without charge. The circumstances were extreme. Complaint alleged plaintiff and his family were routed from bed and forced to stand naked while policemen ransacked their home. Plaintiff sued under Section 1983 alleging violation of his Fourth and Fourteenth Amendment rights by the unlawful search and arrest without probable cause. Seventh Circuit Court of Appeals dismissed the Complaint for failure to state a claim on which relief could be granted. Finding was reversed by United States Supreme Court holding that such conduct was actionable under Section 1983 despite the unlawfulness of the conduct under state law and the availability

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[26] 365 U.S. 167 (1961).

of an effective state remedy. The Act clearly provides a remedy for the deprivation of any rights, privileges or immunities secured by the Constitution and Laws.[27] Monroe stands for the proposition that the statute is to be given a broad reading. Thus, as courts determine that conduct violates constitutional rights this conduct will, likewise, be actionable against police officers as well as all others who act under color of law. The list of rights that have been held to be within the statutes is a lengthy one; nearly every right that has been brought within the due process clause of the Fourteenth Amendment has also been the subject of a suit for damages or equitable relief under the Civil Rights Statutes.[28] Any action by a National Guard officer during civil disturbance operations that results in the deprivation of any rights or privileges secured by the Constitution and laws could subject the officer to an action at law or other proper proceeding for redress.

STATUTORY IMMUNITY OR INDEMNIFICATION

Federal statutes were passed after the Civil

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[27]Cheney C. Joseph, Jr., "Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Act," Louisiana Law Review, 1969-70, p. 102.

[28]John G. Niles, "Civil Actions for Damages Under the Federal Civil Rights Statutes", Texas Law Review, 1966-1967, p. 1021.

War which gave relief from liability for all acts done pursuant to superior military authority during the War. These statutes have no application to the torts of members of the Army today. There are no immunity laws at the federal level at the present time.[29]

Some state statutes provide that members of the militia (National Guard) ordered into active service of the state shall not be liable civilly or criminally for any act or acts done by them in the performance of their duty.[30]

Doubt arises as to the meaning of the phrase "in the performance of their duty". At least three interpretations are possible. One is that the legislature intended merely to restate the common law. Another is that regardless of the validity of an order, a subordinate officer who obeys it is protected from any liability. A third is that all members of the militia are protected under all circumstances while in active service and not on leave, including those who give illegal orders. If the last view is correct, then while it probably is valid with respect to criminal liability, it may be unconstitutional insofar

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[29] "Liability for Torts of Military Personnel", Harvard Law Review, 1942, pp. 655-656.

[30] Section 39-1-11, Utah Code Annotated, 1953, as amended; Article 11, §235, New York Code.

as it attempts to exempt members of the militia from civil liability to a person who has been damaged in his person or property by patently unjustifiable action or by negligence.[31] In a Louisiana case, it was said that the Legislature could not constitutionally exempt superior officers from civil responsibility or deny to the citizen adequate remedy for injury done him, on the ground that such exemption is a denial of due process of law.[32]

The New York State Legislature in 1968 adopted a very effective provision.[33] The State shall save harmless and protect a member of the organized militia when ordered into active service of the state pursuant to the provisions of the state code from attorneys' fees, and costs arising out of any claim, demand, suit, judgment or prosecution for any offense, by reason of the alleged negligence or offense of such member, provided that at the time the alleged damages were

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[31]Edmund Ruffin Beckwith, et al.,"Lawful Action of State Military Forces"(1944), pp. 70-71.

[32]O'Shee v. Stafford, 122 La. 444, 475 So. 764 (1908).

[33]Article 11, §235-a, New York Code.

sustained or the alleged offense was committed said member of the organized militia was acting within the discharge of his duties and within the scope of his employment and that such alleged negligence or offense did not result from the willful act or gross negligence of such member.

CONCLUSIONS

1. Since federal troops have only been requested to help quell civil disorders twice in the last 45 years, it is not likely that officers of the United States Army will have to be overly concerned with liabilities which might result from said officers' participation in a civil disturbance operation. In fact, one military writer[34] has noted that the reduced requirement for active Army forces in the civil disturbance role is due to the National Guard being better trained and equipped to handle civil disturbance situations more readily.

The federal officer is not subject to the criminal laws of a state for acts done within the scope of his duties during a civil disturbance operation. He is subject to the Code of Military Justice and has no

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[34]Kelly, p. 13.

immunity from prosecution by the United States if he violates the Code during a civil disturbance operation.

Generally, federal officers in command of military forces are not personally liable for injuries resulting from their official acts in the pursuit of lawful military operations, subject, however, to the limitation that personal liability may be incurred where the officer acts wantonly or in the absence of any reasonable necessity. Gregoire v. Biddle may erode this limitation and provide immunity against civil actions.

As a practical matter, a person who has been injured or wronged will not file a civil action against a federal officer if he can file a suit against the United States under the Federal Tort Claims Act[35] since collection of the judgment from the United States is certain but a federal officer may be unable to pay a substantial judgment. There are many limitations and exclusions to the Federal Tort Claims Act so this Act may be of little assistance to the federal officer.

Finally, a federal statute provides that if a civil or criminal prosecution in a court of a state against a member of the Armed Forces of the United States on account of an act done under color of his

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[35] 28 United States Code §2674.

office or status or under the law of war, may at any time before trial or final hearing thereof, be removed for trial into the federal court for the state where it is pending.[36] Thus, a federal officer would be able to have his trial before a federal judge if he desired; this may be little consolation if he is adjudged liable or guilty.

2. National Guard officers should be more concerned with civil disturbance operations since Guard units have been committed more often than federal troops and will likely be utilized more in the future.

In order to overcome or prevent unlawful violence, it is legally permissible for a Guard officer to have his troops use only such degree of force as appears to be reasonably necessary, but the application of this general rule will depend upon the specific situation.[37]

Should a guard officer be brought before a civilian court on the charge that he used excessive force, the court will take into consideration the facts

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[36] 28 United States Code §1442a.

[37] Beckwith, et al., p. 100.

as the officer had reason to believe them to be at the time he acted. Judges and juries know that the precise amount of force necessary to overcome actual or threatened violence cannot be estimated with mathematical exactness, and they will make allowance for the quick decisions required by the exigencies of military action.[38]

Recommendations appearing in After Action Reports of the Detroit riots and other disturbances that advocate extreme measures neither need, nor should be followed. Such measures include requests for permission to shoot looters on sight, to counter sniper fire with a preponderance of automatic fire, extinguishing or shooting out street lights and other illumination, and firing warning shots into the air. Such suggestions are contrary to today's interpretation of the law as it relates to civil and criminal liability of a Guard officer in a civil disturbance.[39]

A guard officer must remember that the courts favor the theory that a military officer, when called in aid of civil authorities during a riot, has no power

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[38] Ibid.

[39] Kaiser, p. 15.

to act independently of the civil authority and the Guard troops must use reasonable and necessary force only to carry out the mission.

3. Immunity statutes may provide some protection to Guard officers, but there is serious question about the extent of coverage. Some courts say that such laws refer strictly to military offenses, or offenses which are both statutory and military, and will not relieve an officer from civil liability for an unauthorized and illegal act.

It is recommended that a uniform indemnification act, similar to New York's, be prepared and adopted by all states so that a Guard officer could be assured that the state would save him harmless from attorneys' fees and costs arising out of claims made as a result of a civil disturbance operation.

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Lieutenant Colonel, FA

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