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IMMUNITY AND ARREST POWERS OF MILITARY PERSONNEL

House Bill 5501 (Substitute H-1)
First Analysis (1-29-02)

Sponsor: Rep. Randy Richardville
Committee: Veterans Affairs

THE APPARENT PROBLEM:

In the wake of the terrorist attacks on September 11, 2001, the governor has called the National Guard into active state service. Among the guard's responsibilities are protecting airports; border crossings in Detroit, Port Huron, and Sault Ste. Marie; Bioport Corporation in Lansing (the sole producer of the anthrax vaccine); and guard installations in Lansing and throughout the state. The emergence of these new, though once traditional, homeland security duties for guard members has led state leaders to propose amendments to the Michigan Military Act to ensure that state law provides adequate powers and protections for the successful performance of those duties.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Military Act to expand the arrest powers of military members called into duty to respond to acts or threats of terrorism. In addition, the bill would expand civil and criminal immunity to certain military personnel called into service to respond to acts or threats of terrorism. Furthermore, the bill would expand the duties of the adjutant general, who serves as the director of the Department of Military and Veterans Affairs (DMVA).

Active Service. The bill would add members of the organized militia (National Guard) in "active service" to several provisions in the act. The act defines "active service" to mean "service, including active state service and special duty required by law, regulation, or pursuant to order of the governor". Active service also includes continuing service of an active member of the National Guard and the defense force in fulfilling his or her commission, appointment, or enlistment.

Vital Resources. The bill would define "vital resource" to mean a public or private building, facility, property, or location that the governor

considers necessary to protect the public health, safety, and welfare of the citizens of the state.

Judgement of a Commanding Officer. Under current law, if any portion of the organized militia is called into active state service or the service of the United States, a commanding officer is required to use his or her judgement in apprehending or disbursing a sniper, rioter, a mob, or an unlawful assembly. The bill would add to this provision situations in which the organized militia were called into active service, and in response to an act or threat of terrorism or to safeguard military or other vital resources of the state or the U.S. The bill would also add that a commanding officer would use his or her judgement in apprehending or disbursing a person reasonably believed to have committed a misdemeanor or felony on a state military base, an armory base, an air base, or a vital resource of the state or the U.S.

Immunity from Civil or Criminal Liability. Under current law, a member of the organized militia in active state service or in service of the U.S. is not liable civilly or criminally for an act committed by him or her in the performance of his or her duty. The bill would specify, in addition, that the immunity would apply to a member of the organized militia in "active service".

In addition, current law states that a member of the organized militia in active state service or in service of the U.S. has the "immunity of a peace officer" if he or she is acting in aid of civil authorities and in the line of duty, or if assisting in the prohibition of the importation, sale, delivery, possession, or use of a controlled substance while in the line of duty. The bill would add that a member of the organized militia called for active service would have the immunity of a peace officer, and would specify that the immunity would also apply when a member has been ordered by the governor to respond to acts or threats of terrorism or to safeguard military or other vital

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resources of the state or U.S. while in the line of duty.

Duties of the Adjutant General. The bill would require the adjutant general to develop and implement plans for the defense of state military personnel, lands, installations, and other vital resources. In addition, the adjutant general could limit access to and from property used for military purposes, if it is necessary for the protection of military personnel, installations, or property, or the state's vital resources, or the public health, safety, and welfare of the citizens of the state, if the governor declares military property or any part of military property to be a vital resource of the state.

MCL 32.505 et al.

BACKGROUND INFORMATION:

The bill would add that National Guard members acting in response to acts or threats of terrorism would have the "immunity of a peace officer". In general, the governmental immunity act (Public Act 170 of 1964) states that, among others, each officer or employee of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer or employee while acting on behalf of a governmental agency if all of the following apply:

- The officer or employee is acting, or reasonably believes that he or she is acting, within the scope of his or her authority.
- The governmental agency is engaged in the exercise or discharge of a governmental function.
- The officer's or employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. Gross negligence is defined to mean conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

In *Westbrook v. Dilley* (1997), the Michigan Court of Appeals held that "police officers are given a wide degree of discretion to determine how to respond to dangerous situations" and to best determine the course of action necessary to stop a crime or other unlawful conduct, and to apprehend criminals or other wrongdoers. According to the court, this holding allows the officer to use as much force as reasonably necessary to lead to a lawful arrest when the suspect resists arrest. In addition, if a police officer reasonably believes that he or she is in great

danger, he or she may use whatever reasonable force is necessary in self-defense. Thus, "when confronted with a life threatening situation, an officer may use deadly force in defense of his own life, in defense of others, or when pursuing a fleeing felon".

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no direct fiscal impact on the state or local governments. (1-24-02)

ARGUMENTS:

For:

This bill is critical for the protection of the state. National Guard troops have been deployed throughout the state in an effort to boost security in such vital areas as the border crossings and major airports. The bill would give these guard members, in the line of duty, arrest powers when responding to threats or acts of terrorism, or when reasonable grounds exist to believe that a person has committed a misdemeanor or felony on a state military base, armory base, air base, or vital resource. Current law restricts the guard's arrest powers to cases that involve a sniper, rioter, mob, or an unlawful assembly. The new homeland security duties asked of guard members are not explicitly covered under current state law. This bill provides guard members with the authority to fulfill their duties when protecting the state.

For:

As the duties of guard members are expanded to meet the growing security needs of the state, the potential of any civil or criminal liability is also expanded. The act states that a member of the organized militia has the "immunity of a peace officer" if he or she, while in the line of duty, is aiding civil authorities or assisting in the enforcement of the state's controlled substance laws. However, the current homeland security duties of the guard members do not fall into the category of assisting civil authorities or enforcing the state's controlled substance laws. While other state laws may offer immunity from liability for the actions of guard members in the performance of their duties, the bill would explicitly state that they would have the immunity of a peace officer if they are ordered by the governor to respond to acts or threats of terrorism or to safeguard military or other vital resources, while in the line of duty. This provides guard members with the assurance that their actions in performance of their duty are protected under state law.

For:

The bill adds to the duties of the adjutant general the duty to develop and implement plans for the defense of state military personnel, lands, installations, and vital resources. In addition, the adjutant general could limit access to and from property used for military purposes if the need arises. These new duties would give the adjutant general the explicit authority to implement an emergency response plan. The added authority would better enable the adjutant general and the National Guard to prepare for the defense of the state, and respond quickly should the need arise.

POSITIONS:

The Department of the Attorney General supports the bill. (1-24-02)

The Department of Military and Veterans Affairs supports the bill. (1-24-02)

Analyst: M. Wolf

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.