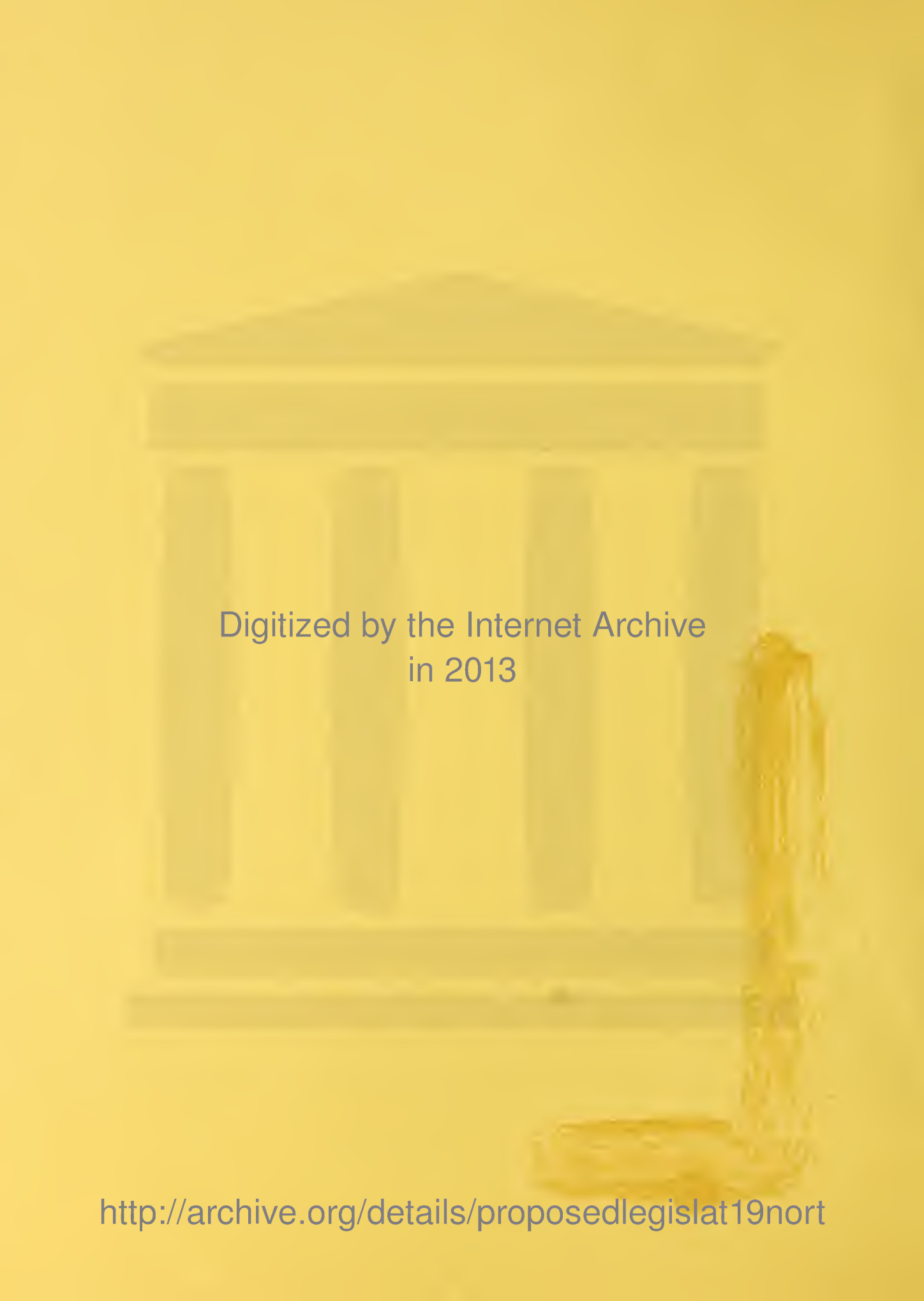
PROPOSED LEGISLATION RELATING TO RIOTS AND CIVIL DISORDERS

REPORT AND COMMENTARY OF THE NORTH CAROLINA
GOVERNOR'S COMMITTEE ON LAW AND ORDER

Governor Robert W. Scott, Chairman
Charles E. Clement, Executive Director

RALEIGH
February 15, 1969



STATE OF NORTH CAROLINA
GOVERNOR'S COMMITTEE ON LAW AND ORDER
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RALEIGH, N. C. 27601

GOVERNOR ROBERT W. SCOTT, CHAIRMAN
CHARLES E. CLEMENT, EXECUTIVE DIRECTOR

February 18, 1969

The Honorable Robert W. Scott
Governor of North Carolina
Raleigh, North Carolina

Dear Governor Scott:

On behalf of the Governor's Committee on Law and Order, I am pleased to transmit to you, for submission to the 1969 General Assembly, this report on Riot and Civil Disorders legislation.

This study was made and the enclosed report has been prepared at the request of Your Excellency and former Governor Moore.

Very truly yours,

Charles E. Clement

Charles E. Clement
Executive Director

Enclosure

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The civil disorders of April 1968 exposed the lack of an adequate legal framework in North Carolina for dealing with riots and other disturbances. In an effort to fill the need, Governor Dan K. Moore requested the Governor's Committee on Law and Order to consider appropriate legislation. To assist the Committee, he appointed an Advisory Committee composed of citizens of North Carolina whose experience made them especially sensitive to legal needs for dealing with massive or widespread civil disorders.

The Advisory Committee was appointed following the April disorders and met at least monthly. Its efforts were devoted largely to defining legislative needs and reviewing specific responses to those needs proposed by its drafting subcommittee, which met at least bi-weekly during the life of the Advisory Committee.

Research and technical assistance to the Advisory Committee and the Drafting Subcommittee were provided by L. Poindexter Watts and Douglas R. Gill of the Institute of Government.

These materials include the report and commentary of the Advisory Committee upon its legislative proposals and the drafts of the proposed bills themselves. The Governor's Committee on Law and Order has approved and adopted the legislative recommendations and the report and commentary.

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* Position now vacant with resignation of Major William B. Julian of the Durham Police Department to join the staff of the Governor's Committee on Law and Order.

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* Members of Governor's Committee on Law and Order

RIOTS AND CIVIL DISORDERS

REPORT AND COMMENTARY ON PROPOSED LEGISLATION

ORGANIZATION OF PROPOSED BILL

The Advisory Committee to the Governor's Committee on Law and Order studied the existing laws for dealing with various aspects of riots and civil disorders. Out of this study came statutory drafts falling in the following six categories:

(1) Enactment of new statutes and amendment of statutes defining and punishing criminal offenses.

(2) Enactment of provision relating to evidence of participation in riot or disorder.

(3) Enactment of new statutes and amendment of statutes relating to inspections, searches, and seizures.

(4) Enactment of new statutes setting forth the power of municipalities to deal with states of emergency.

(5) Enactment of new statutes setting forth the power of counties to deal with states of emergency.

(6) Enactment of new statutes setting forth the power of the Governor to deal with states of emergency.

After working up statutory drafts, the Advisory Committee then began putting them in a proposed bill. As a matter of strict logic, each of these six categories of legislation could have been inserted in a different chapter of the General Statutes. The Advisory Committee determined, however, that it would be much more useful to put the proposed new statutes that deal strictly with riots and civil disorders in a single

statutory article. The arbitrary choice was made to place that article in Chapter 14, which is the chapter on criminal law.

The eight major sections of the proposed bill are briefly described below. Then, a more complete description is given of the substantive provisions of the bill and the reasoning of the committee in drafting them.

Section 1

This section comprises approximately three-fourths of the bill. It enacts a new Article 36A, to be entitled Civil Disorders, for placement in Chapter 14 of the General Statutes of North Carolina. It contains provisions from all six of the categories listed above.

Section 2

This is an amendment to G. S. 153-9, the section of the statutes dealing with the powers of boards of county commissioner, to state that the commissioners and their chairmen have the authority to deal with states of emergency as set out in the Civil Disorders article. This provision is essentially a cross-reference, and will assist persons looking in the portion of the statutes relating to county powers to locate the additional authority granted as to states of emergency in the Civil Disorders article.

Section 3

This is an amendement to G S. 160-200, the section of the statutes dealing with the powers granted municipalities. It is the same sort of cross-reference statute for municipalities as the one in Section 2 is for counties.

Section 4

This section amends the statutory article dealing with local alcoholic beverage control stores to make express the power of the Governor to close A. B. C. stores in states of emergency.

Section 5

This section amends the statutory article dealing with the regulation of wine and malt beverages to make express the power of the Governor to halt the sale, manufacture, or bottling of wine, beer, ale, etc., in states of emergency.

Section 6

This section rewrites Article 13 of Chapter 14 of the General Statutes to include incendiary devices as well as high explosives under the coverage of the provisions outlawing the malicious bombing of persons or property.

Section 7

This section adds a new section in Article 8 of Chapter 14 of the General Statutes, which relates to assaults, to cover the specific offense of discharging a firearm into occupied or unoccupied property. As this proposed offense would apply generally rather than merely during civil disorders, it was not put in the Civil Disorders article.

Section 8

In studying the law applicable to searches with and without a warrant in states of emergency, the Advisory Committee noted many ambiguities in the general search warrant statutes. In addition, the Committee found that search warrants may not presently be obtained to look for weapons that have been used in misdemeanor riots and disorders. Thus, the Advisory Committee has recommended a complete revision of Article 4 of Chapter 15

of the General Statutes, relating to search warrants. This goes slightly beyond the Advisory Committee's main assignment, which was to study the laws relating to riots and civil disorders, but the Committee felt that yet another piecemeal amendment to the search warrant law, confined merely to weapons or other evidence of riot or civil disorder, would be intolerable. In addition, the Committee found that effective law enforcement during riots as well as at all other times is hampered by unnecessary ambiguities in the procedural law governing search warrants.

DEFINITIONS FOR ARTICLE ON CIVIL DISORDERS

The definitions gathered in the first section of proposed Article 36A are the ones that apply to more than one section of the article. When a definition relates solely to a single section, it is given in the section itself. The definitions will be discussed in this commentary, however, as they become applicable to the understanding of particular provisions of the article.

RIOT

The common-law offense of riot is:

> a tumultuous disturbance of the peace by three persons or more assembled together of their own authority, with intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution, in terrific and violent manner, whether the object in question be lawful or otherwise. Indictment for riot always must charge the defendants with unlawful assembly, mutual intent to assist one another, and execution of the intent by overt acts, before they can be convicted.

State v. Cole, 249 N.C. 733, 744, 107 S.E.2d 732, 741 (1959). The crime of unlawful assembly, which is a component element of riot, contains the following elements: (1) the participation of three or more persons; (2) a common intent to attain a purpose which will interfere with the rights of others by committing disorderly acts; (3) a purpose to commit acts in such manner as would cause firm persons to apprehend a breach of peace. As there are no statutes governing the crimes of unlawful assembly or riot, or such related crimes as rout or inciting to riot, the punishment for each of these common-law misdemeanors is under G. S. 14-3(a): fine, imprisonment for a term not exceeding two years, or both, in the discretion of the court.

The Advisory Committee studied the enforcement of the law in riot situations as it presently stands, and came to the following conclusions:

(1) The common-law elements of riot are exceedingly complex and it would be desirable to simplify them in a cofifying statute if at all possible.

(2) The lack of a statute setting out in concrete form the elements of riot causes great difficulty for many magistrates and clerks of court in the process of issuing warrants for the offense of riot.

(3) The common-law misdemeanor of riot is much too broad. It covers anything from an unruly brawl following an athletic contest to open rebellion. The Advisory Committee thought that riot should be broken into degrees with differences in punishment depending upon the seriousness of the particular conduct.

Statutes of Other Jurisdictions

The Advisory Committee looked at the Model Penal Code provision relating to riot and other civil disorders and at statutes proposed and enacted in other jurisdictions. The Advisory Committee noted that a number of states were in the process of revising their laws on riots and civil disorders. One model followed by several states was the proposal in the Model Penal Code. The Committee liked the concept of the Code which makes riot an aggravated form of the lesser crime of disorderly conduct when committed by a specified number of persons participating with each other, but finally decided that the aggravating elements of the Code were a little too abstract and all-inclusive for proper application in the trial courts of North Carolina. As will be noted, however, the Committee did substantially adopt the Code's disorderly conduct statute, but did not tie it in specifically as a lesser included offense although they both build upon a common definition of "public disturbance." The Model Penal Code states:

> A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:
>
> (a) with purpose to commit or facilitate the commission of a felony or misdemeanor;
>
> (b) with purpose to prevent or coerce official action; or

> (c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

In evaluating this Code provision, it should be kept in mind that a "misdemeanor" under the Code is a fairly serious offense and that the Code also sets out punishment for two lesser types of offenses called "petty misdemeanors" and "violations"--the latter a noncriminal offense punishable by fine only.

Another sort of statute considered was the one recently adopted as part of New York's revision of its criminal law:

> A person is guilty of riot when, with four or more other persons, he wrongfully engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm. [Class E felony]

The members of the Committee, however, thought this statute far too broad-gauged to define a felony offense.

The Committee noted that Illinois in its 1961 revision of the criminal code had used the term "mob action" instead of "riot" to describe its basic civil-disorder felony offense. The apparent purpose was to help guard against the process of court interpretation putting back in all the elements of common-law riot that had been deliberately left out of the statute. Although several members of the Committee were in sympathy with this approach, the majority decided that there was a general public understanding of the word "riot" which was valuable to build upon, and that the proposed new statutory offense should define an offense basically in keeping with the public's notion of what constitutes a riot.

The provision which was more closely followed by the Committee than any other was in a proposed riot bill for the District of Columbia (which was not adopted by the Congress). The bill had the approval of the Attorney

General of the United States and was very similar in some respects to the definition of "riot" inserted in 18 U.S.C. § 2102(a) by the Civil Rights Act of 1968. The District of Columbia proposal was as follows:

> (a) A riot in the District of Columbia is a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.
>
> (b) Whoever willfully engages in a riot in the District of Columbia shall [be punished] by imprisonment for not more than one year or a fine of not more than one year or a fine of not more than $1,000, or both.
>
> (c) Whoever willfully incites or urges other persons to engage in a riot shall be punished by imprisonment for not more than one year or a fine of not more than $1,000, or both.
>
> (d) If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than ten years or a fine of not more than $10,000, or both.

Elements of Proposed Statute

Public disturbance

This phrase is defined in the definitions section of the proposed new article, and is based in part on the special definition of "public" set out in the Model Penal Code:

> "Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

This definition gave the Committee a great deal of trouble. The Committee was not alone in this, as the above definition differs from that in the Code's tentative draft, and several of the states adopting some part of the Code's approach to disorderly conduct or disorderly conduct and riot made further modifications. Some members of the Committee thought it

would be helpful to enumerate some of the more common places as to which question might arise, such as schools and prisons, but the majority of the Committee felt it would probably be more limiting to enumerate examples of "public" places than not to do so.

Assemblage

Although the statute omits the common-law element of "intent mutually to assist one another against all who shall oppose them," the use of the word "assemblage" nevertheless preserves a basic concept of riot. There must be some minimum acting-together on the part of those participating, even if by concerted action rather than any kind of spoken agreement.

Three or more persons

Since the true gist of the offense of riot is the danger in numbers caused by mob disorder, several members of the Committee were inclined to follow the trend set by several other jurisdictions in raising the number of persons necessary to constitute a riot to five or six or more persons, especially in view of the decision to make certain forms of riot a felony. Those who favored raising the number believed that indictments for conspiracy rather than riot would be appropriate in the case of serious planned disruptions carried out by a small group. The majority of the Committee, though, argued in favor of the common-law number, on the ground that it might be difficult to prove the participation of a larger number than three persons. The law has always been, of course, that a single person could be prosecuted for riot if the evidence is clear that the proper number of other persons were also participating, whether the names of the other persons were known or not, but the majority of the Committee believed that proof beyond a reasonable doubt as to the number of persons involved

could be a problem in some courts if the testifying witnesses could not detail actual acts of participation in the riot by the requisite number of named persons.

Tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct

Tumult and violence or the imminent threat of it are basic to the common-law concept of riot, and the Committee felt that this aspect of the offense should be retained. The earliest English common law may have required actual violence as an element of riot, with the prosecution to be for unlawful assembly or rout if there was anything less. The general tendency in the United States in more recent times, however, has been to expand the definition of riot. The Supreme Court of North Carolina quoted from a legal treatise with approval in the Cole case:

> "It must be shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, making threatening speeches, turbulent gestures, or the like, or being in disguise * * *. In any case, it is well settled that it is not necessary that personal violence be committed * * *." Wharton's Criminal Law and Procedure (1957 Ed.), Vol. 2, section 864, page 731; S. v. Lustig, 13 N.J. Super. 149, 80 A.2d 309. . . .

State v. Cole, 249 N.C. 733, 741, 107 S.E.2d 732, 729 (1959). The case of State v. Caulder, 251 N.C. 444, 111 S.E.2d 583 (1959), is one in which there was clear proof of only a minimal amount of actual violence. During a bitter labor dispute a crowd of strikers gathered to harass a group of nonstrikers as their automobiles were leaving a mill gate after the end of a work shift. The testimony of the witnesses, as recapitulated by the Court in its opinion, indicated that extremely violent threats were made and that many of the strikers had rocks and other missiles in their

hands to throw at the cars. One witness testified that he saw one of the group of strikers throw a rock and heard it hit something--presumably a car, but this was not completely clear from the facts given. The Court recited no other facts of overt violence, though there were many threats of extreme violence and the situation was very tense. The Court had no difficulty in sustaining the convictions for riot in the case.

Although the proposed statutory definition of riot may not appreciably extend the scope of the crime of riot beyond the scope indicated in the Court's opinions, as a practical matter there will undoubtedly be an expanded use of the riot prosecution in imminent-threat situations. Many persons have tended to look at the common-law crimes of unlawful assembly, rout, and riot as mutually exclusive rather than overlapping. The statutory spelling-out of the imminent-threat alternative element will clarify matters. One of the things that the law enforcement members of the Advisory Committee most insisted upon is that the proposed statutory scheme allow arrests to defuse highly dangerous situations before the actual outbreak of violence. The imminent-threat language in the riot definition plus the recommended statutory provisions relating to inciting to riot, disorderly conduct, and failure to disperse when commanded should greatly assist in meeting this need.

The Committee decided because of First Amendment difficulties not to recommend the enactment of any statutory crime of unlawful assembly or rout. Its definition of riot will include severely threatening conduct that under the common law might have been characterized as unlawful assembly or rout. The Committee believes that there is very little in the way of constitutionally punishable unlawful assembly or rout not embraced in its

interrelated offenses of riot, inciting to riot, disorderly conduct, and failure to disperse when commanded. The Committee pondered whether to recommend repeal of the common-law offenses in question upon enactment of its statutory scheme. The Committee finally decided that it would be better not to recommend repeal. If it turns out that there are any important omissions in its proposal, perhaps common-law indictments could still be utilized to reach the unlawful conduct not covered by the Committee's proposed statutes. In reality, of course, once there are statutes on the subject of riot, inciting to riot, disorderly conduct, and failure to disperse when commanded, prosecutions under the common law for civil-disorder offenses will be extremely rare.

Results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property

The alternative elements set out above are intended to specify what type of tumult and violence or imminent threat of it is covered by the riot offense. The threatened tumult and violence may not be abstract or socially-tolerated, as may be the case at some supercharged sporting events, but true anti-social behavior. The clear-and-present-danger alternative is intended to harmonize with the element of imminently threatened tumult and violence in order to allow prosecutions for riot at the earliest permissible moment under constitutional standards.

Punishments for Riot

The basic punishment for wilfully engaging in a riot is a misdemeanor punishable as provided in G. S. 14-3(a). This statute sets a punishment of fine, imprisonment not to exceed two years, or both, in the discretion of the court.

A person may be convicted of a felony for wilfully engaging in riot if (1) in the course and as a result of the riot there is property damage in excess of $5,000 or serious bodily injury or (2) such participant in the riot has in his possession any dangerous weapon or substance.

Property damage in excess of $5,000

Several members of the Advisory Committee when first shown the riot draft protested that the $5,000 amount was too high. They said a person could be indicted for felony larceny if the amount of the goods taken was in excess of $200, and they suggested a figure somewhere around $1,000 or even lower. The answer, which eventually satisfied the members of the Committee, is that the money figure is used to test the seriousness of the riot, and is in no way the measure of the seriousness of an individual's behavior. If a riot is severe enough to exceed the $5,000 property-damage limit, all participants in it will be subject to prosecution for a felony even if they did not personally cause any damage and even if no one was badly injured. Because of the possibility that fringe-participants in a large riot may be subjected to felony prosecution on this basis, the Committee recommended that the punishment for felony riot be kept to a maximum of five years of imprisonment rather than utilize the more standard up-to-ten-years formula.

The $5,000 figure came from the proposal made for the District of Columbia, although it should be noted that the federal bill used the test only for persons inciting to riot and not mere participants. The reasoning behind the $5,000 amount is that if there is any burning of buildings in a riot the $5,000 figure would rather quickly be exceeded.

The use of the money figure, though, would allow imposition of higher punishment in the case of a very severe and prolonged or widespread riot even if there were no successful incendiary attempts.

Serious bodily injury

If a riot is violent enough to result in serious bodily injury to any person, then all participants in the riot may be prosecuted for a felony punishable by imprisonment up to five years--rather than for a misdemeanor punishable up to two years.

The phrase "serious bodily injury" is a modification of the phrase "serious bodily harm" utilized in the District of Columbia bill. It is intended that the North Carolina courts will construe "serious bodily injury" to mean substantially the same thing as the element of "serious injury not resulting in death" now found in G. S. 14-32, the felonious assault statute. The Advisory Committee knows that the element of "serious injury" requires proof of more severe injury than is required by the aggravating element of "serious damage" in the misdemeanor assault statute, G. S. 14-33(b). Since the Judicial Council is proposing a revision of G. S. 14-32 which would delete the gratuituous "not resulting in death" from the statute, the Advisory Committee decided against using the full present phraseology of G. S. 14-32.

Participant in the riot has in his possession any dangerous weapon or substance

Even if the riot itself is only a misdemeanor-level riot, any participant in it who is armed with a dangerous weapon or substance may be punished as a felon. The Committee debated whether to go further with the approach of the Model Penal Code and make any participant guilty of a felony if

he knows that any other participant is armed, but the Committee finally decided that this would complicate the crime too much. This approach would make some participants in the same riot guilty of a felony and some guilty of a misdemeanor depending on the state of their knowledge, and would blur in the minds of the officers the distinction that might be important to them in reasonably determining whether they are dealing with a misdemeanor or a felony offense. The Committee thought that deterring the use of deadly weapons and substances was important enough, however, to allow an exception as to the person actually in possession. And in any event, a person's possession of a deadly weapon or substance is a much more objectively determinable element than the state of a person's knowledge as to whether others are armed.

The definition of "dangerous weapon or substance" is a very important one that will be utilized in several key statutory recommendations of the Advisory Committee. The definition is a three-part one. It includes not only the items that are deadly weapons per se but also includes anything capable of being used to inflict serious bodily injury or destruction of property when the circumstances indicate some probability of its being so used. This probably does not go greatly beyond the definition of "deadly weapon" developed by the courts, except that it would apply before the use of the instrument or substance in a deadly fashion. In addition, the definition covers parts or ingredients of dangerous weapons or substances when the circumstances indicate some probability that such part or ingredient will be so used. This definition will clearly cover cans or bottles of gasoline when the circumstances indicate some probability of the use of the gasoline in an unlawful incendiary manner. It would also cover the

situation in which the parts of some dangerous instrument or weapon are spread about among several persons for later assembly and unlawful use.

INCITING TO RIOT

The Supreme Court of North Carolina has indicated in State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959), that the common-law offense of inciting to riot can only be prosecuted if a riot actually occurs as a result of the defendant's urging or inciting. The Committee's proposed statute would make inciting another to engage in riot a misdemeanor if as a result of the inciting or urging a riot either occurs or a clear and present danger of a riot is created.

One member of the Committee suggested that the bare inciting of another to engage in riot be made a punishable offense. The majority of the Committee, however, had sufficient constitutional doubts as to this proposal to lead it to adopt the more qualified clear-and-present-danger language. A similar proposal that was given somewhat more consideration by the Committee was one to make it a misdemeanor to incite a riot--and then define "to incite a riot" in the language used in the Civil Rights Act of 1968, 18 U.S.C. § 2102(b):

> (b) As used in this chapter, the term "to incite a riot" . . . includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

The members of the Committee supporting this proposal indicated that here the defendant would have to bring himself within the free-speech exception, whereas the draft favored by the majority of the Committee requires the State to prove beyond a reasonable doubt the element of clear and present danger of a riot if one does not occur following the inciting. As a number of the Committee members had at least some question concerning the constitutionality

of the approach in the Civil Rights Act of 1968, notwithstanding its enactment by the Congress of the United States, the majority of the Committee continued to support the phraseology originally discussed above.

The misdemeanor of inciting to riot under the Committee's proposal is punishable under G. S. 14-3(a), which means fine, imprisonment for not more than two years, or both, in the discretion of the court.

The Committee also recommends a felony-level offense of inciting to riot. The felony provision follows the recommended elements of the District of Columbia bill and makes inciting or urging another to engage in a riot a felony if the inciting or urging is a contributing cause of a riot in which there is serious bodily injury or property damage in excess of $5,000. The punishment for this felony is as provided in G. S. 14-2, which means fine, imprisonment for a term not exceeding ten years, or both, in the discretion of the court. The Committee thought that the deliberate inciting or stirring up a major riot was an even more serious offense than the bare participation in it. Moreover, in the case of a rioter caught engaging in particularly destructive or dangerous acts in the course of a riot, he could be prosecuted for these extra offenses along with the offense of rioting.

DISORDERLY CONDUCT

Although most municipalities have disorderly-conduct ordinances, there is no general provision relating to this offense in our statutes or under our common law. There are a number of common-law public nuisances that would apply to various aspects of disorderly conduct, and in ninety-one counties G. S. 14-197 makes it unlawful to use indecent and profane language in a loud and boisterous manner on any public road or highway in the hearing of two or more persons.

The Committee's recommended disorderly-conduct offense is based for the most part on a provision of the Model Penal Code and is somewhat more sweeping than the usual municipal ordinance covering disorderly conduct. The Code provision is as follows:

> (1) Offense Defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (a) engages in fighting or threatening, or in violent or tumultuous behavior; or
>
> (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
>
> (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
>
> "Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.
>
> (2) Grading. An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

As North Carolina does not have a noncriminal "violation" offense, the Committee decided that it would be sufficient to have only one degree of

the crime of disorderly conduct and let the judge determine whether to impose fine or imprisonment, according to the seriousness of the conduct. As some forms of disorderly conduct can be very disrupting, the Committee opted for a punishment of fine not to exceed $500 or imprisonment for not more than six months. It was felt that a six-months term of imprisonment was a fairly severe maximum, and that to authorize a higher maximum penalty would prejudice the use of the disorderly-conduct offense in mass-arrest situations. The federal decisions have been indicating that jury-trial and right-to-appointed-counsel guarantees may be made mandatory in misdemeanor cases with possible punishment that could exceed the limits stated above. In recent days the Supreme Court of North Carolina has confirmed the relevance of the Advisory Committee's thinking by requiring counsel to be furnished indigents in all misdemeanor cases in which the punishment may exceed a fine of $500, imprisonment for more than six months, or both. State v. Morris, (N.C., Jan. 21, 1969).

Although there have been some changes of wording, the North Carolina offense of disorderly conduct is quite similar to that set out in the Model Penal Code. One slight shift of emphasis has been achieved by use of the phrase "public disturbance." The Code requires the State to prove "purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . ." The "public disturbance" definition is more objective in its approach and requires the State merely to prove that the act or condition was in fact annoying, disturbing, or alarming and exceeded the bounds of social toleration normal for the time and place in question. The "public" aspect of the definition of "public disturbance" has already been discussed in connection with the definition of riot.

Although the disorderly-conduct statute will as a practical matter make it rare to encounter indictments for common-law public nuisances (such as going about armed to the terror of the populace), the Committee decided that its statutes should not attempt to repeal any of the common-law offenses that might arguably be surplanted by the new statute. This sort of tidying-up may well be desirable as part of a carefully studied re-codification of the criminal law, but the feeling was there may be some areas not as well covered under the new approaches and that it would not hurt to have the common-law indictments available in reserve.

FAILURE TO DISPERSE WHEN COMMANDED

The failure-to-disperse offense is based in part on a provision in the Model Penal Code's riot section:

> (2) Failure of Disorderly Persons to Disperse Upon Official Order. Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor.

Because of the difficulty of proving beyond a reasonable doubt the wilful state of mind involved in a refusal or that there was a knowing failure to obey the order to disperse in any individual case, the Advisory Committee has again shifted to a more objective emphasis. The statute requires that the command to disperse be given in a manner reasonably calculated to be communicated to the assemblage. Then, it makes "failure to comply as quickly as practicable with a lawful command to disperse" a misdemeanor punishable by a fine not to exceed $500 or imprisonment for not more than six months. For this offense, defined in this manner, to be constitutional the State will undoubtedly have to prove at the very least that a particular defendant reasonably should have known of the command to disperse, taking into account all the circumstances in question, but this approach to the proofs puts far less of an onus on the State than the wording in the Code provision.

It should be noted that the Committee's proposal uses the term "law enforcement officer" rather than "peace officer" as in the Code. The reason for this is that the Committee has settled upon a uniform definition of "law enforcement officer" to be utilized throughout the article on civil

disorders. The term is broadly defined and includes a larger number of officers than those usually thought of in connection with the term "peace officers." The definition of "law enforcement officer" specifically includes soldiers, militiamen, National Guardsmen, federal marshals, etc., when they are called upon to enforce the laws of North Carolina or preserve the peace.

Failure to Disperse as Prima Facie Evidence

One very important aspect of the failure-to-disperse provision is that subsection (c) of proposed new G. S. 14-288.4 makes remaining at the scene of a riot or of disorderly conduct by an assemblage of three or more persons prima facie evidence of wilfully engaging in the riot or disorderly conduct if a lawful command to disperse has been given and a reasonable time for dispersal has elapsed. This means that officers who wish to break matters up and clear the streets in a near-riot situation can arrest very shortly after the command to disperse for the misdemeanor to disperse. Those who elude capture or later arrive to join in a riot that breaks out can be charged when caught with the more severe penalty if the command to disperse is repeated at reasonably frequent intervals. In the confusion surrounding a riot, one of the greatest difficulties is getting clear-cut proof that a person who has been arrested at the scene is a participant rather than a "mere bystander." The failure-to-disperse offense and prima-facie-evidence provision should simplify the tasks of law enforcement officers in these trying situations.

LOOTING; TRESPASS DURING EMERGENCY

The related offenses of trespass during emergency and looting were developed by the Committee after it had studied somewhat different approaches to the problem taken in statutes enacted in Illinois and Ohio. The Committee decided to combine the two approaches.

The Ohio trespass statute is as follows:

> No person shall enter without legal justification upon the premises of another during a public emergency arising out of riot, insurrection, invasion, storm, flood, or other disaster, or when such premises are damaged by reason of vandalism, riot, insurrection, invasion, fire, explosion, collapse, storm, flood, or other calamity.
>
> Whoever violates this section is guilty of trespass upon damaged premises, and shall be fined not more than five hundred dollars or imprisoned not more than six months, or both.

The Illinois looting statute is as follows:

> A person commits looting when he knowingly without authority of law or the owner enters any home or dwelling, or upon any premises of another, or enters any commercial, mercantile, business or industrial building, plant or establishment, in which normal security of property is not present by virtue of a hurricane, fire or vis major of any kind or by virtue of a riot, mob, or other human agency and obtains or exerts control over property of the owner.
>
> A person convicted of looting shall be imprisoned in a penal institution other than the penitentiary for not less than 6 months and not more than one year or in the penitentiary for not less than 1 year and not more than three years.

The first thing to notice concerning the Committee's proposal is that the offenses do <u>not</u> utilize the carefully wrought definition of "state of emergency" that was put in the section on definitions. The Committee thought that the state-of-emergency definition would tend to cover entire jurisdictions or areas in states of emergency, and the looting and trespass-during-emergency statutes are confined to premises which are in fact suffering a loss of effective usual security of property by reason of the various disasters or calamities listed.

Trespass during emergency prohibits mere entry on the vulnerable premises without legal justification, and is a misdemeanor punishable, under G. S. 14-3(a), by fine, imprisonment for not more than two years, or both, in the discretion of the court.

The felony of looting is committed by any person who commits the crime of trespass during emergency and without legal justification obtains or exercises control over, damages, ransacks, or destroys the property of another. The Committee proposes that the felony of looting be made punishable by a fine not to exceed $10,000, imprisonment for not more than five years, or both such fine and imprisonment.

It will be noted that the crime of looting quite deliberately avoids the traditional elements of larceny in defining the offense. Also, the statute uses the word "property of another" and is not limited merely to "personal property" as in the case of larceny. The Committee is aware of the proposals of the Judicial Council which will delete some of the snarls from the breaking-and-entering offenses. These proposals of the Judicial Council are supported by the Advisory Committee to the Governor's Committee on Law and Order, and it is thought that the recommendations of the Judicial Council may very well be utilized for the more effective prosecution of many persons committing breaking-and-entering offenses (or breaking-or-entering offenses) during a riot. Nevertheless, it should be kept in mind that the looting offense applies to premises generally and not just to buildings into which persons have broken or entered.

The Committee noted that there were still other forms of theft or injury to property which could occur under cover of a riot, such as of vehicles and equipment out on the street. It finally decided not to attempt

any statute dealing with larceny or theft during the course of a riot or other public emergency. It concluded that misdemeanor larceny is already punishable by up to two years of imprisonment, and that if the property is worth more than $200, the penalty jumps to a permissible maximum of ten years of imprisonment. As for other types of activity with respect to property out on the streets, the Committee found that a recent statutory amendment to the offense of wilful and wanton injury to real property, under G. S. 14-127, has raised the maximum punishment in all cases up to a two-year term of imprisonment. The same penalty had already been applicable across the board for wilful and wanton injury to personal property of another under G. S. 14-160.

One other item that worried many members of the Committee was the theft of firearms and other dangerous weapons and substances, not only during states of emergency but at all times. The Committee finally decided that the question whether larceny of dangerous weapons and the like should be made a felony in all cases and at all times should more appropriately be handled by the Judicial Council. The response of the Judicial Council was to add to its proposed revision of G. S. 14-72 another exception in order to make larceny of "nitroglycerine, dynamite, or other high explosive" a felony regardless of the value of the explosive stolen. The Council explained its position as follows:

> A member of the Council recommended that larceny of any "firearm or high explosive device or substance" be made a felony. As this wording in subsection (b)(3) [of G. S. 14-72 in its proposed revision] would also make the receiving of stolen firearms and high explosive devices and substances automatically a felony, it would hopefully act as a deterrent to the criminal traffic in dangerous weapons and devices. Although many members of the Council were sympathetic to the idea presented, a majority thought that the category "firearms" was too broad and might work hardships in rural areas in which the petty theft of shotguns and hunting rifles occurs

> fairly commonly. The recommendation as to firearms was withdrawn for further study, and the Council decided as an interim measure to submit the recommendation only as to high explosives. Rather than adopt the proposed phrase "high explosive device or substance," which does not have a technical statutory or case law definition, the Council proposed to utilize a modification of the phrase currently found in G. S. 14-49: "nitroglycerine, dynamite, gunpowder or other high explosive . . . ." The Council's draft adopts this phrase with the exception of the word "gunpowder."

One of the proposals of the Advisory Committee discussed below is an amendment of the language in G. S. 14-49 and the inclusion of incendiary devices along with high explosives, and the addition of a definitions section to cover the explosives and incendiary devices in question. If the proposals made by the Advisory Committee and the Judicial Council both receive favorable consideration in the General Assembly, it may well be advisable to amend the Judicial Council's proposed language somewhat to harmonize with G. S. 14-49 as rewritten.

TRANSPORTING DANGEROUS WEAPONS OR SUBSTANCES DURING EMERGENCY; POSSESSING OFF PREMISES

This section utilizes the specialized definition of "dangerous weapon or substance" that has already been discussed above. It makes it a misdemeanor for any person to transport or possess off his own premises any dangerous weapon or substance in any area (1) in which a declared state of emergency exists or (2) within the immediate vicinity of which a riot is occurring. The section states that it does not apply to persons exempted from the provisions of G. S. 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

G. S. 14-269 is the concealed-weapon statute and it exempts:

> Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties.

It is important to be aware that the weapons-transport statute is very broad in its coverage of types of weapons and substances, but will apply only for a most limited time and only in a limited area. To make sure that persons are not caught unawares in transporting otherwise lawful weapons or substances through areas in which the persons did not know that a state of emergency existed, the statute restricted its scope to areas in which either a riot is then occurring or in which there is a declared state of emergency. The section on definitions has a detailed definition of a declared state of emergency to cover almost all possible contingencies. It even provides for the situation in which the declaration

of emergency is made by federal troops or officials lawfully sent in to help preserve the peace in North Carolina.

Although the Advisory Committee is recommending in other sections relating to the power of the Governor and local authorities to deal with emergencies that proper officials be authorized by proclamation to restrict the sale and transportation of gasoline and other potentially dangerous weapons and substances, it is believed that a statute on the subject that would automatically outlaw transportation or possession off premises of all dangerous items in the most affected areas is highly desirable. Moreover, the punishment for violation of the proposed statute could be a good bit stiffer than the penalties proposed for violations of the various emergency proclamations. Violations of the statute are made punishable under G. S. 14-3(a), which means fine, imprisonment for not more than two years, or both, in the discretion of the court.

WEAPONS OF MASS DEATH AND DESTRUCTION

Whereas the provision discussed immediately above places restrictions on all dangerous items during times and in areas in which there are critical emergencies, the provision here under discussion would restrict certain highly dangerous weapons at all times and all places. To draft a statute that would reach all the highly dangerous weapons that needed restriction and yet allow exceptions for legitimate uses has resulted in a somewhat complex provision. One member of the Committee groaned and suggested that the proposal be narrowed to include only "Molotov cocktails," but the majority of the Committee thought there was a definite need for a statute such as the one proposed which would give law enforcement officers some chance to prevent or break up the stockpiling of machine guns, cannons, bazookas, grenades, bombs, and the like by persons with no legitimate use for them.

The key element of the section is the definition of "weapon of mass death and destruction." As this definition is utilized only in this particular section, its definition is included within the section itself. Basically, the definition is a copy of the definition of "destructive device" originally set out in the Crime Control and Safe Streets Act of 1968 and now codified in 18 U.S.C. § 921(a)(4). It was necessary, however, to add a subdivision to the basic federal definition to cover machine guns, sawed-off shotguns, and other weapons designed for rapid fire or inflicting widely-dispersed injury or damage, as weapons of this type are treated elsewhere in the federal law and are not included in the definition of "destructive device."

The section provides that it is unlawful, except as otherwise provided, for any person to manufacture, assemble, possess, store, transport,

sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any "weapon of mass death and destruction" as defined in the section. Another subsection then lists the persons exempted from the provisions. The draftsman for the Committee took pains to think through the various situations in which persons would have a legitimate need for dealing in some manner with devices that would fall under the definition of "weapon of mass death and destruction." The four categories of exempted persons are: (1) persons exempted under G. S. 14-269 from the concealed-weapon law (which list of persons has already been quoted above); (2) licensed importers, manufacturers, dealers, and collectors of weapons and ammunition; (3) persons under contract with certain State and federal governmental agencies, with respect to activities governed by their contracts; and (4) inventors, designers, ordnance consultants and researchers, chemists, physicists, and other persons lawfully engaged in dealing in some manner with weapons or devices in the prohibited category.

The punishment for any violation of the law relating to weapons of mass death and destruction is as provided in G. S. 14-3(a), which means fine, imprisonment for not more than two years, or both, in the discretion of the court.

ASSAULT UPON EMERGENCY PERSONNEL

The Committee discussed at length the problem of assaults upon policemen, firemen, and other persons required to be on the streets during emergencies. It determined that a special offense of assault upon emergency personnel may help to deter such assaults. Its recommended statute would make it a two-year misdemeanor, under G. S. 14-3(a), to commit an assault upon emergency personnel either (1) during a declared state of emergency or (2) within the immediate vicinity of which a riot is occurring or is imminent.

The definition of "declared state of emergency" has already been discussed. "Emergency personnel" are defined in the statute as including "law enforcement officers, firemen, ambulance attendants, utility workers, doctors, nurses, and other persons lawfully engaged in providing essential services during the emergency."

If the assault upon emergency personnel is committed with or through the use of any dangerous weapon or substance, the assault is punished as a felony.

The Committee further discussed assaults on policemen and firemen--at all times rather than just during civil disorders--and decided that the assault laws of North Carolina need tightening generally. The Advisory Committee thus most definitely supports the recommendations of the Judicial Council as to the revision of the assault laws. There have been indications that some violent extremist groups may, when no civil disorder is occurring, make some fictitious report to policemen or firemen to bring them to a certain place--and then attack them from ambush when they arrive. If an assailant hits one of the policemen or firemen, he would be punishable

by imprisonment up to twenty years under the secret assault statute, G. S. 14-31. But as the assault law is presently written, the assailant would be guilty of only a misdemeanor assault if there is no battery inflicted (although a felony indictment for attempted murder may theoretically be possible in light of G. S. 14-3(b)). The Judicial Council, by recommending that assault with a deadly weapon with intent to kill be made a five-year felony, would fill this existing gap in the assault laws.

The Advisory Committee also approves the Judicial Council's recommendation that G. S. 14-33 be amended to make an aggravated misdemeanor assault out of assault upon a public officer while discharging or attempting to discharge a duty of his office. This would cover, as it was intended to, more than just law enforcement officers, but it would not cover firemen. The Committee believes that this is not a serious omission, for firemen and other emergency workers are covered by the Committee's recommended section during emergencies, and at other times they are not usually singled out by anti-social groups. The general strengthening of the assault laws recommended by the Judicial Council would in any event probably help deter assaults at these other times.

The Committee did believe, however, that a special case could be made as to assaults upon law enforcement officers, and it is recommending separately (and not as a part of the civil-disorders bill) that any assault upon a law enforcement officer either with a deadly weapon or inflicting serious injury be made a felony. This recommended assault statute would apply at all times, and not just during riots or other civil disorders.

FRISK OF RIOTERS AND CURFEW VIOLATORS

Several members of the Advisory Committee requested that the Committee draft North Carolina legislation in implementation of a law enforcement officer's right to stop and frisk as announced in Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968). The Committee discussed the matter and finally decided that this was a year-round problem which went somewhat beyond the particular area it was invited to study. Although the Committee has jumped the traces with two or three other provisions as to which it felt strongly, it decided against taking any stand for the present as to stop-and-frisk legislation in general.

In the absence of any State cases imposing more restrictive constitutional standards, it appears that Terry and Sibron confer stop-and-frisk rights upon law enforcement officers in North Carolina right now; there is no need for legislation. The Supreme Court of the United States sidestepped the truly difficult threshold stop-and-frisk issue. This concerns the right of the officer to stop a suspicious person in a nonarrest situation and force him to account for himself. The Court premised its stop-and-frisk holding on the enforcement officer's self-protective rights while lawfully carrying out his duties in situations involving contact with a possibly dangerous person. It may be that North Carolina legislation could assist officers by defining more clearly the right of the officer, and the degree of compulsion he is entitled to use, in stopping persons under various circumstances and making them account for themselves and their activities. It is obvious that this is an extremely delicate constitutional area, however, and it is not at all clear that the states can take any really effectual steps until there has been a further clarification of the constitutional issues by the Supreme Court of the United States.

The Committee does propose, though, two stop-and-frisk provisions that are strictly limited to civil-disorder situations.

Frisk of Rioters

Proposed G. S. 14-288.9(a) provides that any law enforcement officer may frisk any person in order to discover any dangerous weapon or substance when he in good faith believes that the person is or may become unlawfully involved in an existing riot. This can only be done, however, "when the person is close enough to such riot that he could become immediately involved in the riot." The subsection further authorizes the officer to inspect the contents of any personal belongings that the person frisked has in his possession.

In providing expressly for inspection of contents of personal belongings, the proposed statute goes beyond the concept of "frisk" approved by the Supreme Court's cases. Moreover, it is not limited to situations in which the officer believes himself to be in danger; the test is whether the person is or may become unlawfully involved in the riot. But the times in which this extraordinary frisk power may be exercised are so severely restricted that a very reasonable constitutional argument can be made on behalf of the proposal. The Fourth Amendment to the Constitution of the United States prohibits "unreasonable" searches and seizures. The major class of "reasonable search" is that under a warrant, but the Court has long recognized certain "reasonable" searches that may be made without warrant. The major categories of search without warrant have traditionally included search incident to an arrest and search of moving vehicles upon probable cause. Recently, however, the Court has expanded the reasonable-search area somewhat with its decisions in Terry and Sibron and in Warden, Maryland Penitentiary v. Hayden, 387

U.S. 294 (1967), and Cooper v. California, 386 U.S. 58 (1967). Cf. McCray v. Illinois, 386 U.S. 300 (1967). It is not completely clear, of course, whether the cases above cited have opened the door sufficiently to justify the type of frisk recommended in the Advisory Committee's proposal, but the Committee feels the need for such a provision is so great that the courts would strain to uphold it if it is not abused in the way it is applied by law enforcement officers.

Frisk of Curfew Violators

Proposed G. S. 14-288.9(b) authorizes law enforcement officers to frisk the person and inspect the personal belongings of curfew violators. The term "law enforcement officer" in this subsection, as in the previous one, has the broad special definition set out in proposed G. S. 14-288.1.

Some persons may think it unnecessary to include this subsection in the recommended bill, as the officer will have the power to arrest any curfew violator and could then search the person and the immediate surrounding area incident to the arrest. There are two answers to be given here:

(1) The officer making an arrest could always make the type of search necessary for evidence of the crime or for self-protection, but the scope of this frisk provision is somewhat broader, and relates to dangerous weapons and substances that might be unlawfully used in furthering the civil disorder. For example, if the officer arrests, he would be safe from the person's use of anything in the trunk of the car, and nothing in the trunk would be evidence of the curfew violation. Nevertheless, there may be very legitimate reasons for checking the trunks of the

automobiles of all curfew violators abroad in a certain area or at a certain time for cans of gasoline and other dangerous weapons and substances.

(2) This frisk provision for curfew violators is independent of whether the officer makes an arrest. Manpower shortages during civil disorders may require that the officers give citations to curfew violators whom they stop and find are not transporting any dangerous weapon or substance or violating any other law beside the curfew provision. In many respects the statute parallels Carroll v. United States, 267 U.S. 132 (1925), in authorizing a search prior to arrest, but it substitutes for the specific probable cause required by Carroll a more generalized probable cause inherent in the emergency situation. The Court has authorized the use of generalized probable cause in obtaining safety-ordinance inspection warrants, see Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967). Whether the Court will authorize the use of generalized probable cause in a warrantless emergency search is still an open question. Again, the Advisory Committee believes the power under discussion is important and vital enough to community needs during civil disorders for it to recommend pushing to the limits of current constitutional doctrine.

WARRANTS TO INSPECT VEHICLES DURING EMERGENCIES

In addition to the power granted to stop and frisk and inspect the belongings of rioters and curfew violators, the Committee thought there should be some way of inspecting vehicles approaching a riot area in order to prevent potential rioters or counter-rioters from bringing dangerous weapons and substances into the vicinity of a riot or into a municipality experiencing a state of emergency. As the enforcement officers trying to keep control in the emergency may wish to inspect these vehicles day or night and perhaps outside the municipal limits at key approach points, the Committee decided that it would be essential to utilize a strictly-controlled warrant system. It felt that the possible variations in situations that might arise were so great that a statute could not spell them all out precisely enough to allow constitutional inspection without a warrant.

Provisions of Proposed Inspection-Warrant Statute

Proposed G. S. 14-288.10 authorizes inspection of vehicles to discover any dangerous weapon or substance (as broadly defined) likely to be used by one who is or may become unlawfully involved in a riot. The inspection warrants for this purpose may be used to inspect (1) all vehicles entering or approaching a municipality in which a state of emergency exists or (2) all vehicles which might reasonably be regarded as being within or approaching the immediate vicinity of an existing riot.

The Committee debated at some length whether to put any territorial limits upon these warrants--for example, by restricting them to use in an area not more than one, two, or three miles beyond the limits of the

municipality experiencing the emergency. The Committee found that the existence of key interchanges of by-pass highways and the like kept it from settling upon a reasonable territorial limit. Therefore, it wrote a provision into the statute that the issuing judge must "specify with reasonable precision the area within which it may be exercised." Because of the important discretionary powers lodged in the issuing official, the Committee deliberately limited the power to issue these inspection warrants to any judge or justice of the General Court of Justice. This will prevent justices of the peace, magistrates, and clerks of court from issuing them.

Another limitation upon the issuance of this warrant to inspect all vehicles approaching a certain point, or within a given riot area, is as follows: the judge may issue the warrant only when he has determined that the one seeking the warrant has been specifically authorized to do so by the head of the law enforcement agency of which the affiant is a member. As an aid in keeping these warrants as limited in scope as possible, the statute also requires the issuing judge to state whether the warrant is an approach-type warrant or an in-the-riot-area-type warrant. These two types of inspection warrants may not be combined, though if a situation were bad enough, of course, two or more different warrants might be issued.

The proposed statute puts a strict time limit upon these inspection warrants. They become invalid twenty-four hours after issuance, and each one must bear a notation to that effect.

Execution of the Inspection Warrant

The Committee wrestled with and finally decided to leave open for implementation by the courts in accordance with the procedural rules of the common law the problem of execution of the warrant. The traditional rule

is that the officer executing a warrant must either have a copy of the warrant with him at the time of execution or near at hand in the possession of one of the group of officers assisting in the execution of the warrant. When a warrant specifies a certain territory and authorizes inspection of all vehicles either in or approaching that territory, the warrant might be simultaneously executed in several different places. There is no reason why copying machines cannot duplicate sufficient copies of the warrant so that all officers attempting to execute its provisions have a copy to indicate to the persons whose vehicles are being inspected under what authority the officers are acting.

Constitutional Issues

The major question in the Committee's mind concerning the inspection-warrant provision was its constitutionality. Actually, there is less doubt concerning the validity of the provision under the Constitution of the United States than under the Constitution of North Carolina. This warrant can be reasonably regarded as a proper extension of the rationale utilized by the Supreme Court of the United States in Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), as that case recognized the use of a warrant to inspect the home of one who is unwilling to submit to an inspection. The dissent, as may be expected, protested Camara's watering-down of the concept of probable cause to allow the use of a more generalized probable cause. It is possible, of course, to distinguish Camara as dealing with inspections relating to regulatory offenses--that is, offenses mala prohibita. It is an extension of the Camara ruling to allow inspection for illegally-transported dangerous

weapons and substances, as this kind of regulation falls more squarely within the traditional concerns of the criminal law, even though unlawful possession or transportation of weapons may not actually be characterized as an offense malum in se. It is obvious that the limits under the Constitution of the United States are not clear, and the Committee again felt the matter important enough to make a recommendation that pushes toward the outer limits of constitutionality.

The North Carolina constitutional issue arises under Section 15 of Article I of the Constitution of North Carolina. It states:

> General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

The Supreme Court of North Carolina in dicta has indicated that this constitutional section means substantially the same thing as the Fourth Amendment to the Constitution of the United States. If the Court holds to this line of reasoning and follows the Camara analogy, there may be no difficulty. Yet if you take the provisions of Article I, Section 15 literally, there is a problem as to these inspection warrants that may not be easily brushed aside. The most reasonable ground for justifying the proposed inspection-warrant statute as meeting the test of the Constitution of North Carolina is as follows: in the context of search or inspection warrants (as opposed to arrest warrants, which are also covered by the section), a general warrant is a warrant which is open-ended both as to the object of the search or inspection and the identity of the persons to be searched or inspected. Here, you will have evidence of likely acts of transportation of dangerous weapons and substances, and therefore warrants limited to these objects are not general warrants under the above theory.

Seizure of Dangerous Weapons and Substances

The Committee seriously considered proposing a statute which would allow the impounding of all dangerous weapons and substances unearthed by officers executing inspection warrants or making frisks in times of emergency--without regard to whether the dangerous weapon or substance was being carried unlawfully concealed or was unlawfully possessed or transported. The procedural aspects of an impounding statute and the provision for return of weapons possessed without violation of a specific law after the end of the emergency turned out to be rather complicated.

As a result, the Committee voted to propose the special statute previously discussed outlawing transportation and possession off one's premises of dangerous weapons and substances during emergencies. Thus, weapons recovered in the danger areas will be unlawfully possessed or transported, and will be immediately subject to seizure as evidence of crime under the general provisions of the common law.

The Committee realizes that its solution leaves a few gaps. If the check point for vehicles approaching a municipality is beyond the limits of the area in which the state of emergency has been declared, the possession or transportation of the dangerous weapon or substance (if not a concealed weapon) may not violate any specific legal provision. In this event, the officers could not seize the dangerous weapon or substance; they could, however, advise the person transporting the weapon or substance to turn back, as the transportation and possession would become unlawful once the area in which the state of emergency has been declared is reached. The Committee believed that this tactic would take care of most situations, and in the few instances that someone may persist in approaching a municipality with anything of a dangerous nature, the person's vehicle could

be kept under surveillance and intercepted if it entered into the territory under the declared state of emergency.

IMPOSING PROHIBITIONS AND RESTRICTIONS DURING EMERGENCIES

Municipal Emergency Ordinances

Under G. S. 160-52, municipal boards of commissioners are given the:

> power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, as they may deem necessary . . . .

In addition, under G. S. 160-200(6), all cities are given the power to:

> supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.

Under G. S. 160-200(7), all cities are given the power to:

> pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.

Under G. S. 160-200(10), all cities are given the power to:

> make and enforce local police, sanitary, and other regulations.

Under G. S. 160-200(17), all cities are given the power to:

> regulate, control, restrict, and prohibit the use and explosion of dynamite, firecrackers, or other explosives or fireworks of any and every kind, whether included in the above enumeration or not, and the sale of same, and all noises, amusements, or other practices or performances tending to annoy or frighten persons or teams, and the collection of persons on the streets or sidewalks or other public places in the city, whether for purposes of amusement, business, curiosity, or otherwise.

All of the above provisions taken together arguably give municipalities the power to enact municipal ordinances of almost every conceivable type necessary to assist in controlling civil disorders. Most municipalities in North Carolina have, in fact, already enacted ordinances for coping with civil-disorder emergencies, along lines suggested by model

ordinances recommended by the North Carolina League of Municipalities and the Institute of Government. The Committee nevertheless thought, out of an excess of caution if nothing else, that it would be desirable to provide specifically for municipal power to take all the various types of action the Committee visualized as being necessary to keep control in emergencies. The Committee was particularly anxious to remove all doubt as to the authority of municipalities to delegate to their mayors the right to act quickly and impose necessary emergency prohibitions and restrictions by proclamation.

Because so many municipalities have already adopted emergency ordinances of the type authorized in proposed G. S. 14-288.11(b), the section clearly states that the authorization in question is supplementary to other powers of municipalities to enact emergency ordinances and that all pre-existing emergency ordinances of municipalities may continue in full force and effect under the new authorization without re-enactment.

Types of emergency ordinances authorized

The Committee deliberated several approaches to the matter of imposition of prohibitions and restrictions in emergencies. Some members of the Committee wondered whether local municipal and county authorities would be able to work up legally airtight ordinances and proclamations to deal with emergencies. The proposal was made to consider as alternatives: (1) a full statutory scheme of prohibitions and regulations for emergencies that would go into effect upon proclamation of a state of emergency by the appropriate local official or (2) a detailed model ordinance to be set out in the statute which could be incorporated by reference. Proponents of this approach pointed out that having the applicable ordinances with their specific provisions as to scope of permissible implementing proclamations

in the General Statutes would simplify law enforcement during emergencies by officers called from outside the jurisdiction.

The majority of the Committee, however, believed that it was desirable to give localities flexibility to enact their own ordinances, as types of foreseeable emergencies may differ in various portions of North Carolina, or in various size communities, and that the types of ordinances and proclamations needed may therefore vary from place to place. Also, it was pointed out, the local authorities have copies of the models worked up by the North Carolina League of Municipalities and the Institute of Government, and there was reason to believe that in essential portions these models had already been followed by municipalities, and would be followed by counties upon their being given ordinance-making power.

The Committee in settling upon a broad authorization to local governing bodies utilized the experiences of municipalities in the recent past in dealing with civil disorders as to the general types of prohibitions and restrictions authorized to be imposed. It is important to keep in mind that the list of ordinance categories developed is incorporated by reference in the sections dealing with county emergency ordinances and proclamations of the Governor when local control is insufficient.

The proposed statute states that emergency ordinances may permit prohibitions and restrictions:

(1) Of movements of people in public places.

(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate.

(3) Upon the possession, transportation, sale, purchase, and consumption of intoxicating liquors (which means malt beverages and wine as well as spirituous liquors).

(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, including gasoline.

(5) Upon all other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

County Emergency Ordinances

County ordinance-making power in general

Counties traditionally have not had the power to make police-power ordinances the violation of which is punishable as a criminal offense. Some fairly recent statutes have authorized counties to make penally-sanctioned ordinances with respect to subjects such as zoning and garbage collection, but it is rare even for these to apply to all counties. See, e.g., G. S. 153-10.1; G. S. 153-266.18 and -266.22; and G. S. 153-272. In 1963, however, the General Assembly enacted G. S. 153-9(55), applicable in fifty-two counties, authorizing boards of county commissioners to make police and sanitary regulations in county areas outside the jurisdiction of municipalities, and also to make such ordinances applicable within municipalities if municipal governing bodies agree to it. This section, which is now applicable to fifty-seven counties, has been held unconstitutional to the extent that it authorizes counties by ordinance to regulate trade. The reason was that deletion of so many counties from the effect of the act made it in truth a local act, and Section 29 of Article II of the Constitution of North Carolina prohibits local legislation on this subject. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965); High Point Surplus Company v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965). Apparently the ordinance-making power would have been valid even as to regulation of trade if G. S. 153-9(55) had applied to all counties.

The Committee during its deliberations was aware that the Local Government Study Commission was in the process of recommending legislation to grant counties the power to make ordinances enforceable in the criminal courts. Indeed, Ernest H. Ball, General Counsel of the North Carolina League of Municipalities, and John T. Morrisey, Sr., Executive Director of the North Carolina Association of County Commissioners, served on the two subcommittees of the Study Commission and also served on the Advisory Committee's Drafting Committee. At the time the Committee did its major work on the subject of county emergency ordinances, however, the proposals of the Local Government Study Commission had not been definitely determined. Therefore, the Committee's proposed bill does not take the proposals of the Local Government Study Commission into specific account. It will be desirable, of course, for any legislative committee studying the Advisory Committee's proposal as to county emergency ordinances to harmonize the emergency-ordinance proposal with whatever legislative action may have been taken on the Study Commission's recommendation. The Study Commission's recommended bill, slightly modified from the statutory draft contained in its report, has already been introduced in the 1969 Session of the General Assembly as Senate Bill 30 and identical House Bill 57.

Committee's proposal as to county emergency ordinances

In most respects the Committee's proposal as to county emergency ordinances is a carbon copy of its proposal relating to municipal emergency ordinances. It authorizes the governing body of any county to enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency. Proposed G. S. 14-288.12(b) does not set out

the subjects on which the counties may make ordinances, but incorporates by reference the statement of general types of prohibitions and restrictions which may be imposed in emergencies as given in the section relating to municipal emergency ordinances. The subsection further authorizes the ordinances to delegate to the chairman of the board of county commissioners the authority to determine and proclaim the existence of a state of emergency, and to propose those authorized prohibitions and restrictions appropriate at a particular time. This last provision is identical with the delegation provision as to mayors in the municipal emergency ordinance section.

As counties have not in any general way enacted emergency ordinances in the past, there was no apparent need for any provision stating that the authority is supplementary or that existing ordinances may continue in effect without re-enactment. Instead, the county section contains a provision that no county emergency ordinance will apply in a municipality unless the municipality by resolution consents to its application. The Committee's draft here takes an approach similar to that in the Study Commission's bill as introduced. It also borrows a leaf from SB 30 and identical HB 57 by restricting its basic definition of municipality in proposed G. S. 14-288.1 to <u>active</u> municipalities. There are a large number of defunct municipalities which have not been legally dissolved. As a defunct municipality would not be able by resolution to consent to a county ordinance, the argument could be made that the county ordinance would not apply in any territory embraced by the charters of any such purported municipality.

The final subsection stipulates that violation of any county emergency ordinance is punishable by a fine not to exceed fifty dollars or imprisonment

for not more than thirty days. This is the same punishment as is set for violation of municipal ordinances under G. S. 14-4. If G. S. 14-4 is amended in accordance with the Local Government Study Commission's bill to include violations of county ordinances generally, this subsection of the Committee's proposed bill could be eliminated.

Extension of Municipal Emergency Restrictions to County

One troublesome problem that engaged the attention of the Committee was the possibility of local emergencies that would spread across municipal and county boundaries. The Drafting Subcommittee developed and then rejected a draft statute which would have given municipalities and counties a fairly wide range of options to enact joint emergency ordinances or proclamations, or both, in their discretion. The Committee finally decided that if a state of emergency crossed several local jurisdictional lines so as to hamper local control of the emergency, this would nearly always be a serious enough emergency to authorize the intervention and coordination of the Governor. The one prominent exception seemed to be the situation in which an emergency arising in an urban setting began to affect areas outside the limits of the municipality in which the trouble arose. In this instance there might be a need for emergency measures in the county, even though the situation would not be serious enough to call upon the Governor for assistance. If the county had enacted emergency ordinances, it would of course be able to take steps in coordination with the city. But, as counties are not accustomed to enacting police-power ordinances, it is not certain that all counties will enact emergency ordinances of a type necessary to meet all conceivable types of problems that may arise. (The Advisory Committee thought that if a county has built-up

areas outside municipal boundaries in which civil-disorder emergencies would be likely to arise, such a county would almost surely have already enacted appropriate county emergency ordinances. Then, if an emergency affected only the county area outside a municipality, the county would be able to deal with it through its own ordinances.)

Proposed G. S. 14-288.13 will empower the chairman of the board of county commissioners of any county to extend by proclamation the effect of municipal emergency prohibitions and restrictions--on the request of the mayor of the municipality. The authorization was deliberately not confined to municipalities within the county, as there are several municipalities in North Carolina of fairly considerable size which have suburban areas lying across county lines.

Upon the mayor's request, the chairman of the board of county commissioners will have the discretion to extend any one or more of the prohibitions and restrictions in force in the municipality to any area within his county "in which he determines it to be necessary to assist in controlling the state of emergency within the municipality." These extended prohibitions and restrictions cannot affect any other municipality in the county, however, unless that municipality by resolution consents to it.

The statutory proposal sets out the ways in which the extended prohibitions and restrictions in the county are to be terminated, and the statute is somewhat more specific here than in the previous sections because the delegation of authority is to one man rather than a governing board. The statute also expressly states:

> The powers authorized under this section may be exercised whether or not the county has enacted [emergency] ordinances . . . . Exercise of this authority shall not preclude the imposition of prohibitions and restrictions under any [emergency] ordinances enacted by the county . . . .

A violation of any provision of any prohibition or restriction extended by the chairman's proclamation is made a misdemeanor punishable by a fine not to exceed fifty dollars or imprisonment for not more than thirty days.

Powers of the Governor in Emergencies

Lack of clear-cut authority under existing law

Section 1 of Article III of the Constitution of North Carolina states that "the supreme executive power of the State" is vested in the Governor. This unquestionably means that if an emergency becomes great enough the Governor will have, inherently, all the authority he needs in order to meet the emergency. The problem that the Committee foresees, however, is not that of some total emergency but of numerous scattered "routine" emergencies in which it cannot be said that the State itself is threatened but in which the capacities of localities are overborne. That is, there is a need for laws clearly specifying the authority of the Governor to take direction and control in law-enforcement emergencies in situations not serious enough for martial law to be declared.

Members of the Committee discussed with a number of responsible State and local officials the types of problems that were faced during the April 1968 disorders following the death of Martin Luther King. The Committee discovered that in a number of instances officials had taken steps that were clearly necessary and appropriate in the circumstances, but without specific legal authority to back them up. The reason for this lack of clear-cut authority stems from the fact that day-to-day law enforcement has traditionally been a local rather than a State concern in North Carolina. With changing conditions in the Twentieth Century, North Carolina has responded

in piecemeal fashion, establishing the State Highway Patrol in 1929, authorizing a State Bureau of Investigation in 1937, taking an increased role in local law enforcement training in the 1960's through programs of the Department of Community Colleges, and giving a permanent statutory base in 1967 to the Governor's Committee on Law and Order. It must be apparent, however, that none of these actions taken by the State clearly define the role of the State in assisting in local law-enforcement emergencies.

On the basis of discussions with members of Governor Moore's staff and with other State and local officials who were affected by the disorders of April 1968, the Committee determined the types of powers it would be desirable to grant the Governor for use in serious or widespread emergencies. The Committee found its thinking on the subject substantially corroborated by the recommendations of the States Urban Action Center, Inc. in Action for Our Cities--Part I: Public Order and Control of Crime (Preliminary Report, 1968).

The Governor's civil-defense powers

The Governor is given a broad range of powers in civil-defense emergencies under the North Carolina Civil Defense Act of 1951, which is contained in Chapter 166 of the General Statutes of North Carolina. The definition of "civil defense" in G. S. 166-2(1) is as follows:

> "Civil defense" shall mean the preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to prevent, minimize and repair injury and damage resulting from disasters caused by enemy attack, sabotage or other hostile action or by fire, flood, earthquake, windstorm or explosion when so requested by the governing body of any county, city or town in the State. These functions include, without limitation, fire fighting services, police services, medical and health services, rescue, engineering, air raid warning services, communications, radiological, chemical and other special

> weapons of defense, evacuation of persons from stricken areas, emergency welfare services (civilian war aid), emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection, together with all other activities necessary or incidental to the preparation for and carrying out of the foregoing functions

The Committee seriously considered approaching the problem of giving the Governor the power to direct and control law-enforcement emergencies by making appropriate amendments to Chapter 166 of the General Statutes. Among the amendments considered were: (1) adding riots and civil disorders specifically to the above definition; (2) deleting the requirement that the governing body of a locality must request the assistance and allow the chief elected official to do so when there was a need for swift action; (3) giving the Governor in certain defined situations the power to take command of emergencies whether requested by any local official or not; (4) making violation of regulations of the Governor promulgated under the authority of G. S. 166-5(b)(1) a criminal offense; and (5) specifically adding the Governor's authority to make appropriate regulations as to the categories of prohibitions and restrictions developed in connection with local emergency ordinances.

The Committee finally decided that the types of law-enforcement emergencies that might be expected to arise in the wake of civil disorders were essentially different in nature and quality from the types of emergencies that the civil-defense machinery was designed to handle. Therefore, it is recommending statutes on the powers of the Governor in civil disorders to be placed in the proposed new article on civil disorders rather than in Chapter 166 of the General Statutes. The Committee is aware that law-enforcement emergencies could become so extreme or widespread that the more

general emergency authority of the Civil Defense Act of 1951 may be needed, and the Committee thus supports clarifying amendments to Chapter 166 which it understands the civil-defense authorities of the State plan to recommend in order to make certain that the civil-defense powers can be utilized in serious riots and other civil disorders.

Proposal recommended by Committee

Proposed G. S. 14-288.14 turns upon an important condition precedent. The Governor must find that local control is insufficient before he can step in and direct and control in a local law-enforcement emergency. The statute defines the various ways in which local control may be determined to be insufficient.

Once the Governor finds that a state of emergency exists in any part of North Carolina and further finds that local control is insufficient, he may exercise two important powers. (1) He may by proclamation impose any one or more or all of the prohibitions and restrictions of the type authorized for imposition under municipal and county emergency ordinances. (2) The Governor may give all participating State and local agencies and officers such directions as may be necessary to assure coordination among them.

The proposal numbered (2) above, it should be noted, applies only to the officials and agencies that have voluntarily come or have been lawfully called or sent to the area undergoing the state of emergency. It does not go quite so far as the model suggested by the States Urban Action Center, Inc., which would apparently authorize the Governor to call all local police and fire departments from any part of the State into special service. Since the Governor can do this under the civil-defense statutes (which presumably will be amended to cover riot situations), the Committee thought that the

more limited power would be sufficient in the "routine" types of law-enforcement emergencies visualized by the Advisory Committee. In connection with the matter of calling upon neighboring jurisdictions for emergency services, it should be remembered that in 1965 the General Assembly enacted G. S. 69-40 (mutual aid between fire departments) and in 1967 it enacted G. S. 160-20.2 (mutual law-enforcement assistance). It may well be that both these statutes need re-examination in the light of later events to make sure they are flexible enough to cover the types of emergencies which are now foreseeable. The Advisory Committee had hoped to do this, but the deadline it faced required it to take up other matters of greater priority first, and as a result the Committee was never able to make any re-examination of these statutes.

Three other facets of the statutory proposal as to the powers of the Governor in emergencies deserve mention:

(1) If the Governor takes direction and control of the public agencies and officials who are combatting an emergency, the Governor may designate the officer or agency who is to take command. This person or agency may very well be a local official or agency if the Governor determines that this is the most appropriate course of action in a particular situation.

(2) Any law enforcement officer participating in controlling the state of emergency is given the same power and authority as a sheriff throughout the territory to which he is assigned. This means, for example, that a city policeman would have full authority out in the county (or even in the next county under some conditions) if he is assigned there after the Governor has assumed authority.

(3) The Governor is given power through his proclamation to amend or rescind prohibitions and restrictions that may have been imposed by local authorities. There will often be a need for uniform prohibitions and restrictions over an area crossed by several local jurisdictionsal lines, and the emergency proclamations already in effect could be conflicting or at variance with each other. Local prohibitions and restrictions are not automatically superseded when the Governor steps in, however, and the course he would take may differ with the circumstances. In many instances it is entirely likely that the Governor would find the prohibitions and restrictions already in effect quite consistent with each other and effective to control the situation. In this event, he would probably leave the local proclamations undisturbed.

The Committee deliberated as to the punishment that would be appropriate for violating a provision of any proclamation of the Governor imposing prohibitions and restrictions. Several members suggested the same level of punishment as for violations of proclamations by local authorities: at the fifty-dollar/thirty-day level. The majority of the Committee believed, though, that violation of a Governor's proclamation was a somewhat more serious matter. First, the Governor will usually not take charge of a local emergency unless it is fairly serious; in this instance it would be vital to secure as much compliance as possible. The possibility of stiffer penalties may be helpful in securing this fuller compliance. Second, the proclamation of the Governor would probably get even more public attention than one issued by local authorities, and there would be even less excuse for anyone's violating it. Therefore, the Committee recommends that punishment for violating any prohibition or restriction in any emergency procla-

mation of the Governor be set at fine not to exceed $500 or imprisonment for not more than six months.

Technical Provisions Relating to All Prohibitions and Restrictions

Proposed G. S. 14-288.15 applies to all proclamations under discussion here and states that they are to take effect immediately upon "publication" in the area affected unless the proclamation itself sets a later time. "Publication" is defined to include:

> reports of the substance of the prohibitions and restrictions in the mass communications media serving the affected area or other effective methods of disseminating the necessary information quickly. As soon as practicable, however, appropriate distribution of the full text of any proclamation shall be made.

For constitutional reasons it is necessary to require an after-the-fact distribution of the full text of any proclamation imposing prohibitions and restrictions. The defendant in any criminal case charged with violating any prohibition or restriction has a right of access to the exact language of the requirement which he is accused of disregarding so that he may prepare any defense which he may have. Some may wonder whether it is constitutional to require compliance by the public on the basis of less than the full text's being publicly distributed. So long as the prohibitions and restrictions being imposed are reasonably simple and straightforward, it seems that the State should be able to require compliance on the basis of general notice of the terms that must be obeyed. It would be part of the State's case later to prove, however, that sufficient publicity was given to a particular provision and that the defendant reasonably should have become aware of its terms. If a defendant were charged with violating an obscure provision of a proclamation or one given little publicity, then he would surely have grounds for acquittal.

The statutory section also provides for extension of proclamations both as to time and area, amendment of proclamations, and their recission. Unless a proclamation is sooner terminated, it expires automatically five days after its last imposition.

AMENDMENT OF MALICIOUS BOMBING STATUTES

Existing G. S. 14-49, 14-49.1, and 14-50 punish injuring, attempting to injure, and conspiring to injure persons or property maliciously with high explosives. The Committee determined that it would be desirable to add incendiary devices and substances to these sections. Accordingly, it is proposing a complete revision of the article embracing these statutes.

The revision makes a few technical changes to harmonize the language of the three companion sections. It then adds a definitions section for the new term "explosive or incendiary device or material" utilized in the three substantive sections. The new definition is similar in many respects to the definition of "dangerous weapon or substance" in that it covers not only things that are explosive or incendiary per se but also any instrument or substance capable of being used for destructive explosive or incendiary purposes--when the circumstances indicate some probability of such use. In addition, the definition further parallels the definition of "dangerous weapon or substance" by including any part or ingredient of such a device "when the circumstances indicate some probability that such part or ingredient will be so used." There is less reason for a part-or-ingredient category in a definition designed to prohibit actual bombings than there is in a definition keyed to a ban on possession or transportation. Nevertheless, in some instances of conspiracies in which different members of the conspiracy are responsible for rounding up different parts or ingredients from which an incendiary or explosive device or material may be assembled or compounded, it may be helpful to have the more inclusive definition.

It should be noted that the malicious-bombing statutes apply at all times, and not just during riots and other civil disorders.

The Committee's proposed revision of the statutes in question left the punishments specified for these bombing offenses unchanged.

DISCHARGING FIREARM INTO OCCUPIED OR UNOCCUPIED PROPERTY

There have been several recent instances in which persons have discharged firearms into occupied buildings or vehicles in a wanton manner. In the absence of a clear intent to hit someone or evidence that the shot came close to hitting a person within, there may be difficulty in proving an assault charge. If there is proof of damage to the property by the bullet, the 1967 revision of the statute relating to wilful and wanton injury to real property may become material. G. S. 14-127 was amended to delete the provision that the punishment is limited to the fifty-dollar/thirty-day level if the damage to the property does not exceed ten dollars; the offense is now in every case a general misdemeanor. Also, the element "maliciously" was deleted and the easier-to-prove elements "wilfully and wantonly" substituted. (This 1967 revision, incidentally, had the effect of making the injury-to-real-property offense substantially similar to G. S. 14-160, which has long made it a general misdemeanor for anyone wilfully and wantonly to injure the personal property of another.)

The Committee believed that punishment for a serious life-endangering act should not turn upon the happenstance of whether the elements of assault were met or whether there was proof of some injury or damage to the property. It therefore proposed a new section to be added to the statutory article on assaults covering discharging a firearm into occupied or unoccupied property.

The proposed statute, G. S. 14-34.1, makes it a felony if any person:

> wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied . . . .

The word "occupied" was used in the same sense that it has when used in the

burglary statute, G. S. 14-51. It is not necessary, however, that there be any proof that the defendant tried to hit anyone, that he shot toward anyone, or even that he knew anyone was inside the property in question.

The proposed statute also describes a lesser-included offense:

> If the property is unoccupied, the defendant is guilty of a misdemeanor punishable as provided in § 14-3(a).

This sentence is similar in its structure to the last sentence of G. S. 14-54 in its present form, and there is little question that it properly defines a crime. It is important to notice, however, that by referring to "the property" (emphasis added) the misdemeanor is limited to cases in which the firearm is discharged into property reasonably capable of being occupied at the time. For instance, it is not intended that the misdemeanor offense defined above cover the act of a person shooting into an automobile that has been discarded at a public dump and as to which there is no reasonable expectation that it is occupied.

The punishment for the felony offense is set at a fine not to exceed $10,000, imprisonment for not more than five years, or both. The punishment for the misdemeanor offense is fine, imprisonment not to exceed two years, or both.

REVISION OF SEARCH-WARRANT ARTICLE

The Committee, in considering the need for authorization for searches demanded by riot conditions, found that search warrants may not presently be obtained to look for weapons used in misdemeanor riots or disorders or possessed in violation of a riot-related ordinance. The Committee felt that adding yet another piecemeal amendment to the search warrant law in order to include these weapons would be intolerable. The present law, it felt, had already become encrusted in ambiguities resulting from a history of minor amendments.

Objects of Search

The major substantive change included in the recodification is that search warrants may be issued for "any contraband, evidence, or instrumentality of a crime . . . ." Previously, three sections of Article 4, G. S. 15-25, 15-25.1, and 15-25.2, have authorized warrants for search for evidence and instrumentalities of a felony as well as of most common misdemeanors, including those involving stolen goods, gambling equipment, and barbituate and stimulant drugs. The major effect of the change is to include evidence and instrumentalities of misdemeanors that seemed to be arbitrarily excluded, including weapons which were evidence of only misdemeanors.

No Exclusion of Evidence if Deviation Only Technical

Proposed G. S. 15-25(b) also contains a new provision:

> No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required.

As the Constitution of the United States requires exclusion of evidence obtained by an unconstitutional search and seiqure, this statute is

designed to keep the evidence from being thrown out if the error in a warrant is merely technical and does not omit or relax anything constitutionally demanded. One example might be a situation in which the issuing official left out the time that the warrant was issued. The proposed statute follows the existing law on this point and specifies that time of issuance be written into the warrant. As there is apparently not a constitutional requirement that the time be put in the warrant, however, failure to do so would not invalidate the warrant.

Modifications Which Effect Little Substantive Change

Among the ambiguities included in the present Article 4 are these:

(1) the identity of officials who can issue warrants for the various objects of search;

(2) the standard for issuance of a search warrant ("reasonable cause to suspect" or "reason to suspect" or "reason to believe");

(3) the territory in which search warrants may be executed; and

(3) the validity of a warrant issued on "information and belief."

The recodification attempted to resolve all of these ambiguities without affecting the original intent of the provisions of Article 4.

Who may issue

In the proposed statute the issuing officials for all regular search warrants are stated to be "[a]ny justice, judge, clerk, or assistant or deputy clerk of any court of record, any justice of the peace, or any magistrate of the General Court of Justice . . . ."

The only search warrants that would not be subject to the article and this list of issuing officials would be the separately-treated inspection warrants. G. S. 15-27.2 governs administrative search and inspection

warrants and sets out a list of issuing officials similar to the above except that it does not contain any reference to justices or justices of the peace. The Advisory Committee is proposing the creation of a new type of inspection warrant for vehicles in emergency situations. As will be recalled, this warrant was deliberately restricted to issuance by "any judge or justice of the General Court of Justice."

Territorial validity

The proposed G. S. 15-25(b) is designed to harmonize with the provisions in Chapter 7A of the General Statutes; it states:

> Any search warrant issued by any Justice of the Supreme Court, Judge of the Court of Appeals, or Judge of the Superior Court may be executed anywhere within the State. Any search warrant issued by any other official of the General Court of Justice may be executed as provided in Chapter 7A of the General Statutes. Any search warrant issued by any other judicial official or officer of any other court may be executed only within the territorial jurisdiction of such official or court.

In addition to the territorial validity of the warrant itself, proposed G. S. 15-25(c) touches on the authority of the executing officer, and states:

> The warrant may be executed by any law enforcement officer acting within his territorial jurisdiction whose subject matter jurisdiction encompasses the crime with which the object of the search is involved.

Need for factual affidavit stating probable cause

G. S. 15-25.1 and 15-25.2 both contain the following sentence:

> No warrant shall be issued in any case upon an affidavit stating nothing more than "information and belief."

This somewhat puzzling phrase has been interpreted by some defense counsel to indicate that search warrants for barbiturate and stimulant drugs or for evidence of a felony (the objects of search covered by G. S. 15-25.1 and 15-25.2) may not be obtained upon hearsay information, although it

seems more likely that this provision is intended to prevent a mere ritual incantation of the words "information and belief" from being substituted for a statement of the basis for probable cause. See State v. Elder, 217 N.C. 111, 6 S.E.2d 840 (1940).

This requirement was added to G. S. 15-25.1 in 1961 and included in G. S. 25.2 in 1965, although the substance of the rule was required in all search warrants in 1964 by Aguilar v. Texas, 378 U.S. 108. The re-codification of Article 4 clarifies the requirement and extends its application to all search warrants. Proposed G. S. 15-26(b) thus states:

> An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.

Officers have often raised the question whether the law demands that the factual affidavit required by Aguilar be actually attached to the warrant when it is executed. The proposed statute answers that question directly, but in apparently the same manner as was more ambiguously indicated by G. S. 15-25.2: "The warrant shall state the grounds or probable cause for its issuance . . . ."

PROVISIONS CONSIDERED BUT NOT INCLUDED

Throughout this commentary reference has been made to specific provisions which the Committee considered but then decided against including in its proposed legislative draft. In some instances, the Committee thought the item went beyond the focus of its assignment; in others, the matter was too complex for the Committee to tackle within its deadline imposed by the convening of the 1969 Session of the General Assembly; in some instances, the Committee decided against recommending a provision because a majority of the Committee believed it unwise.

There will be no attempt here to recapitulate the various items previously identified in this commentary as having been deliberately omitted from the legislative proposal. This section will treat a few miscellaneous items not covered, or not sufficiently covered, in the prior portions of the commentary.

Wiretapping and Electronic Eavesdropping

Title III of the Crime Control and Safe Streets Act of 1968 federalized the subject of wiretapping and electronic eavesdropping. If any state or local law enforcement agencies desire to engage in wiretapping or electronic eavesdropping, their state must first enact a procedural statute governing wiretap-eavesdrop warrants, and this statute must be keyed in every detail with the federal requirements. If the state does not enact an implementing statute, wiretapping and electronic eavesdropping by state and local officers (and by anyone else but federal enforcement officers acting under the provisions of the 1968 law) is a serious federal crime.

Several members of the Advisory Committee were interested in drafting a suggested implementing warrant statute that would meet the federal

procedural demands. This request had little to do with riots and civil disorders, but the members making the request apparently hoped the legislation might be sponsored by the full Governor's Committee on Law and Order separately from the civil-disorder proposals. Other members of the Advisory Committee had doubts as to the need for such legislation in North Carolina at the present time.

Wiretapping and eavesdropping are serious invasions of individual privacy, and their use is principally justified on the grounds of national security or the need to combat organized crime. The principal draftsman of Title III of the federal act commented to one of the Committee members that it was doubtful that organized crime's foothold in North Carolina was yet so extensive as to justify the invasion of privacy that would result from legalizing wiretapping and electronic eavesdropping here.

After consultation with members of the Office of the Attorney General and some further discussion on the subject, the Advisory Committee decided to abandon its research efforts directed toward drafting the implementing legislation to Title III.

Riots and Disorders at Prisons and Schools

While the Advisory Committee was in the midst of its deliberations, it became unmistakably apparent that serious attention must be paid to the dangers of disorders and disruptions caused by prisoners in custodial institutions and students in schools. At first blush it may seem strange to lump the two problems together, but both schools and custodial institutions will be dealing primarily with persons already subject to administrative discipline.

One response to the problem is to note that many of the civil-disorder provisions being recommended by the Committee will have application in disorder situations involving prisons and schools. In particular, the definition of "public disturbance" that is used in defining both riot and disorderly conduct derives largely from the Model Penal Code definition of "public" developed for its disorderly-conduct provision and covers "a place to which the public or a substantial group has access." The actual Code definition went further and specifically stated that prisons and schools, among other things, were included. The decision of the Committee to delete the specification of examples from the definition was, as previously indicated, not for the purpose of excluding prisons and schools and the other listed places from the definition but rather out of fear that the courts might tend to restrict the definition only to the types of places enumerated. It should be said, however, that the Committee's decision as to this definition was made at a fairly early stage of its deliberations, and the decision was not later re-examined as various types of school disorders continued to occur throughout the fall and winter.

But even if it were made clear beyond question that the riot and disorderly-conduct statutes applied to school and prison disorders, a number of further problems remain.

Although most prison disorders and many school disorders may be accompanied by violence or terror or the imminent threat of it, which is the true gist of riot, many highly serious disruptions in both schools and custodial institutions could take quite different aspects. Given a militant and organized group bent on disrupting normal processes, one

can imagine coordinated subversive or rebellious activity that would fail to meet the particular elements of riot, disorderly conduct, or any of the several other more usual public-order offenses. It may be, of course, that if the disruptive activity is by persons under the institution's administrative authority and their conduct does not verge on terrorism that the institution's normal disciplinary procedures rather than the criminal law should be utilized. Nevertheless, the potential problems need to be analyzed carefully to see if there are legislative approaches that could help prevent or curtail disorders in schools and prisons. In schools, for example, there might well be a need for a study of the administrative procedures relating to explusion, suspension, and lesser disciplinary punishments, and appropriate statutes may differ depending on whether the school is at the primary, secondary, or higher level. In addition, the analysis of potential school disorders must take into account the actions of persons who are not students.

Among the types of activity that will need to be anticipated both as to custodial institutions and schools are:

(1) Taking persons or valuable property hostage.

(2) Occupying buildings, rooms, conveyances, or equipment.

(3) Destroying property.

(4) Sit-down strikes.

(5) Mass refusal to conform to reasonable administrative requirements.

In addition, at schools and many jails there would be additional problems of mass picketing or demonstrations at nearby public places of a sort calculated to disrupt proceedings in the institution. With the possibility of teacher strikes increasing, demonstrations and picketing by teachers' groups and persons supporting and opposing them might be anticipated.

It is obvious from the complexity of the problems outlined above that the Advisory Committee was not able to tackle them, given its primary assignment, in the limited time available for meetings since its formation. The members of the Drafting Subcommittee plus one or two other interested members of the Advisory Committee have offered to continue to meet together to formulate possible legislative and policy proposals that the full Governor's Committee on Law and Order may wish to sponsor. If authorized to do so, this smaller group would get to work immediately in order to come up with meaningful suggestions before too great a portion of the 1969 Session of the General Assembly has elapsed.

Use of Force; Protecting Officers Who Acted in Good Faith

Members of the Committee briefly discussed the possibility of codifying, and thereby clarifying, the laws relating to permissible use of force by law enforcement officers in differing situations. The Committee had to give up this idea as hopeless in the time available to it before the 1969 legislative session.

The Committee did, however, make recommendations that will simplify the problems of enforcement officers as to use of force in civil-disorder situations. The device of the command to disperse in riot and disorderly-conduct cases will separate the participants from the bystanders--and reduce the possibility of mistakes of fact. Breaking riot into degrees and distinguishing it from disorderly conduct will help officers determine exactly how serious the conduct is deemed to be from the legal standpoint, and will assist the officers and reviewing courts in deciding what level of force is appropriate to meet the type of disorder involved. The specific

statutes on frisk and the use of the inspection warrant in emergency situations should substantially increase the officers' legitimate means of effective actions in coping with the emergency--and thus reduce the pressure upon officers to cope with the emergency through unlawful channels of activity.

The question of immunity

Several members of the Committee examined the idea of granting an immunity to officers for the consequences of their good-faith actions taken to suppress riots and disorders and decided, on balance, against recommending any such legislation. As there was no general press for such a provision by the other members of the Committee, the matter was never broached in a general discussion by the Committee.

The major defect seen in such a statute is that its protection will likely prove illusory and give enforcement officers a false sense of security. No matter how immunity provisions are worded, it seems likely that the courts will refuse to interpret them to immunize actions that are beyond question unconstitutional--despite good faith. To the extent that immunity from the consequences of property damage unlawfully inflicted is sought to be conferred upon officers, the statute would probably run afoul of the rule prohibiting the taking of private property without compensation. (Rights of criminal prosecution and tort action have traditionally been much more amenable to legislative regulation and restriction.) Most importantly of all, it seems unlikely that a state immunity provision would be effective as a defense in a civil-rights action in federal court, and this promises to be the major forum of the future for actions against officers for alleged illegal oppressive activities. And if the actions of the officers are reasonably within the bounds of the law, they do not need an immunity statute.

Committee members examined several existing immunity statutes including those recently enacted in Virginia and Ohio and that included in G. S. 166-9.1, in the Civil Defense Act of 1951. It seemed doubtful that any of these provisions would extend the protection of officers far enough to justify the danger of mistaken reliance upon them that could well occur.

Resisting unlawful arrest

Members of the Committee considered legislative overruling of the absolute common-law right to resist an unlawful arrest since modern methods of communication and transportation available to a person wrongfully taken into custody make it far better that the person submit to an arrest by a law enforcement officer even if he knows or believes it to be unlawful than to have legally-sanctioned battles between the officer and the person. In the press to put the proposed legislation in final form, however, this item's priority for claiming attention was not sufficiently high for it to gain inclusion in the proposed legislative package.

Emergency Search of Premises With and Without Warrant

On the basis of riot problems in other states, the Committee developed in some detail and then finally rejected two emergency-search provisions.

One would have authorized law enforcement officers to enter premises without warrant to look for snipers and to find their caches of weapons--provided this emergency power was exercised in the immediate area in which deadly secret assaults upon officers were being made and was exercised at the time of or in the immediate aftermath of such assaults. The majority of the Committee, however, rejected the provision on the grounds that the proposal contained many constitutional problems and that its purposes were

already partially served by existing statutes such as G. S. 15-43 and 15-44.

The Committee also worked up a draft provision allowing the issuance of a warrant to search for known supplies of dangerous weapons and substances reasonably believed to be in a certain neighborhood. It was hoped that the specific information as to the existence of the dangerous weapons and substances would keep such a warrant from being held invalid as a general warrant. The Committee, however, had great difficulty in defining the limited area in which such a blanket warrant might be executed, and finally determined not to recommend the proposal.

Additional Matters Relating to Weapons Not Explored in Depth

In its initial sessions, the Committee marked out a number of areas of possible consideration dealing with weapons control which it later determined did not lie within its scope or which were too complex for adequate treatment by the Committee in the time remaining after disposition of its priority items. Several of the more important matters falling into this category will be set out here.

The Committee is, of course, making several proposals as to dangerous weapons and substances in times of emergency. It is also making proposals as to weapons of mass death and destruction and the addition of incendiary devices and substances to the malicious-bombing statutes. It did not have an opportunity, however, to examine the weapons-control statutes of North Carolina generally. Many ambiguities and defects in the existing statutes are to be noted, however.

The pistol-permit law is administered in approximately sixty counties by the sheriff; the other counties were exempted from the statute transferring

this duty to the sheriff, and thus the clerk of superior court has the responsibility in those counties. This law has been subject to piecemeal amendment, and badly needs re-examination and clarification.

An isolated weapons-control statute that needs examination to see if it properly sets what should be the current policy of the State is G. S. 14-401.6. This is the section prohibiting possession, use, storage, sale, or transportation of tear gas except by the persons listed as being exempted from the provisions of the section.

The law dealing with the confiscation of concealed weapons is in a state of extreme confusion. The statute transferring the administration of the pistol-permit law to sheriffs also applied to the power of disposition of concealed weapons--with approximately forty counties exempted. G. S. 14-269, however, was later revised and the weapon-disposition provisions were put in G. S. 14-269.1. It is not clear whether the word "sheriff" in this new act is to be construed as "clerk of the superior court" in the approximately forty counties in which the clerk administers the pistol-permit law. In addition, there are several local acts on this subject which are confusing to anyone studying the laws governing weapons in North Carolina.

One weapons-control measure that the Committee noted but did not fully explore was the proposal that a statute make a minimum term of imprisonment mandatory in every case in which a defendant is convicted of committing a crime in which he used or possessed a firearm at the time of its commission. This proposal has been recommended elsewhere as applying to <u>all</u> crimes, and not just those in which the use or possession of a deadly weapon is an element of the crime.

A suggestion made in the Committee sessions to make a violation of the pistol-permit law a continuing offense so long as a person retained possession of an illegally-obtained weapon fell by the wayside without being specifically rejected. Such a law would allow prosecution for the crime of having obtained a hand weapon unlawfully if and when the fact of its possession came to light. Although the courts may reach this interpretation of the statutes in their present form, the chances are that the two-year statute of limitations will be construed to apply to the offense of obtaining without permit a pistol or other type of concealable hand weapon covered by the permit law.

APPENDIX A

INTRODUCED BY:

Referred to:

A BILL TO BE ENTITLED AN ACT TO REVISE AND CLARIFY THE LAW RELATING TO RIOTS AND CIVIL DISORDERS.

The General Assembly of North Carolina do enact:

Section 1. Chapter 14 of the General Statutes of North Carolina is amended to add a new article as follows:

"Article 36A.

"Civil Disorders.

"§ 14-288.1. Definitions.--Unless the context clearly requires otherwise, the definitions in this section apply throughout this article:

"Dangerous Weapon or Substance: Any deadly weapon, ammunition, explosive, incendiary device, or any instrument or substance designed for a use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate some probability that such instrument or substance will be so used; or any part or ingredient in any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used.

"Declared State of Emergency: A state of emergency found and proclaimed by the Governor under the authority of § 14-288.14, by any mayor or other municipal official or officials under the authority of § 14-288.11, by any chairman

of the board of commissioners of any county or other county official or officials under the authority of § 14-288.12, by any chairman of the board of county commissioners acting under the authority of § 14-288.13, by any chief executive official or acting chief executive official of any county or municipality acting under the authority of any other applicable statute or provision of the common law to preserve the public peace in a state of emergency, or by any executive official or military commanding officer of the United States or the State of North Carolina who becomes primarily responsible under applicable law for the preservation of the public peace within any part of North Carolina.

"Disorderly Conduct: As defined in § 14-288.3(a).

"Law Enforcement Officer: Any officer of the State of North Carolina or any of its political subdivisions authorized to make arrests; any member of the armed forces of the United States, the North Carolina National Guard, or the State Defense Militia called to duty in a state of emergency in North Carolina and made responsible for enforcing the laws of North Carolina or preserving the public peace; or any officer of the United States authorized to make arrests without warrant and assigned to duties that include preserving the public peace in North Carolina.

"Municipality: Any active incorporated city or town, but not including any sanitary district or other municipal corporation that is not a city or town. An 'active' municipality is one which has conducted the most recent election required by its charter or the general law, whichever is applicable.

"Public Disturbance: Any annoying, disturbing, or alarm-

ing act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which affects or is likely to affect persons in a place to which the public or a substantial group has access.

"Riot: As defined in § 14-288.2(a).

"State of Emergency: The condition that exists whenever, during times of great public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent.

"§ 14-288.2. Riot; inciting to riot; punishments.--(a) A riot is a public disturbance involving an assemblage of three or more persons which by tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

"(b) Any person who wilfully engages in a riot is guilty of a misdemeanor punishable as provided in § 14-3(a).

"(c) Any person who wilfully engages in a riot is guilty of a felony punishable by a fine not to exceed $10,000 or imprisonment for not more than five years, or both such fine and imprisonment, if:

(1) In the course and as a result of the riot there is property damage in excess of $5,000 or serious bodily injury; or

(2) Such participant in the riot has in his

possession any dangerous weapon or substance.

"(d) Any person who wilfully incites or urges another to engage in a riot, so that as a result of such inciting or urging a riot occurs or a clear and present danger of a riot is created, is guilty of a misdemeanor punishable as provided in § 14-3(a).

"(e) Any person who wilfully incites or urges another to engage in a riot, and such inciting or urging is a contributing cause of a riot in which there is serious bodily injury or property damage in excess of $5,000, is guilty of a felony punishable as provided in § 14-2.

"§ 14-288.3. Disorderly conduct.--(a) Disorderly conduct is a public disturbance caused by any person who:

(1) Engages in fighting or in violent, threatening, or tumultuous behavior; or

(2) Makes any offensively coarse utterance, gesture, or display or uses abusive language, in such manner as to alarm or disturb any person present or as to provoke a breach of the peace; or

(3) Creates a hazardous or physically offensive condition by an act which serves no legitimate purpose.

"(b) Any person who wilfully engages in disorderly conduct is guilty of a misdemeanor punishable by a fine not to exceed $500 or imprisonment for not more than six months.

"§ 14-288.4. Failure to disperse when commanded misdemeanor; prima facie evidence.--(a) Any law enforcement officer or public official responsible for keeping the peace may issue a command to disperse in accordance with this section if he reasonably believes that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring. The command to disperse shall be given in a manner reasonably calculated to be communicated to the assemblage.

"(b) Any person who fails to comply as quickly as practicable with a lawful command to disperse is guilty of a misdemeanor punishable by a fine not to exceed $500 or imprisonment for not more than six months.

"(c) If any person remains at the scene of any riot, or disorderly conduct by an assemblage of three or more persons, following a command to disperse and after a reasonable time for dispersal has elapsed, it is prima facie evidence that the person so remaining is wilfully engaging in the riot or disorderly conduct, as the case may be.

"§ 14-288.5. Looting; trespass during emergency.--(a) Any person who enters upon the premises of another without legal justification when the usual security of property is not effective due to the occurrence or aftermath of riot, insurrection, invasion, storm, fire, explosion, flood, collapse, or other disaster or calamity is guilty of the misdemeanor of trespass during emergency and is punishable as provided in § 14-3(a).

"(b) Any person who commits the crime of trespass during emergency and, without legal justification, obtains or exerts control over, damages, ransacks, or destroys the property of another is guilty of the felony of looting and is punishable by a fine not to exceed $10,000 or imprisonment for not more than five years, or both such fine and imprisonment.

"§ 14-288.6. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.--(a) Except as otherwise provided in this section, it is unlawful for any person to transport or possess off his own premises any dangerous weapon or substance in any area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring.

"(b) This section does not apply to persons exempted from the provisions of § 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

"(c) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in § 14-3(a).

"§ 14-288.7. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.--(a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any

weapon of mass death and destruction.

"(b) This section does not apply to:

(1) Persons exempted from the provisions of § 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(2) Importers, manufacturers, dealers, and collectors of firearms, ammunition, or destructive devices validly licensed under the laws of the United States or the State of North Carolina, while lawfully engaged in activities authorized under their licenses.

(3) Persons under contract with the United States, the State of North Carolina, or any agency of either government, with respect to any activities lawfully engaged in under their contracts.

(4) Inventors, designers, ordnance consultants and researchers, chemists, physicists, and other persons lawfully engaged in pursuits designed to enlarge knowledge or to facilitate the creation, development, or manufacture of weapons of mass death and destruction intended for use in a manner consistent with the laws of the United States and the State of North Carolina.

"(c) The term 'weapon of mass death and destruction' includes:

(1) Any explosive, incendiary, or poison gas:

a. Bomb; or

b. Grenade; or

c. Rocket having a propellant charge of more than four ounces; or

d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or

e. Mine; or

f. Device similar to any of the devices described above; or

(2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or

(3) Any machine gun, sawed-off shotgun, or other weapon designed for rapid fire or inflicting widely-dispersed injury or damage (other than a weapon of a type particularly suitable for sporting purposes); or

(4) Any combination of parts either designed or

intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled.

The term 'weapon of mass death and destruction' does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

"(d) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in § 14-3(a).

"§ 14-288.8. Assault on emergency personnel; punishments.--(a) An assault upon emergency personnel is an assault upon any person coming within the definition of 'emergency personnel' which is committed in an area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a

riot is occurring or is imminent.

"(b) The term 'emergency personnel' includes law enforcement officers, firemen, ambulance attendants, utility workers, doctors, nurses, and other persons lawfully engaged in providing essential services during the emergency.

"(c) Any person who commits an assault upon emergency personnel is guilty of a misdemeanor punishable as provided in § 14-3(a). Any person who commits an assault upon emergency personnel with or through the use of any dangerous weapon or substance is guilty of a felony punishable by a fine not to exceed $10,000 or imprisonment for not more than five years, or both such fine and imprisonment.

"§ 14-288.9. Frisk of persons during violent disorders; frisk of curfew violators.--(a) Any law enforcement officer may frisk any person in order to discover any dangerous weapon or substance when he in good faith believes that the person is or may become unlawfully involved in an existing riot and when the person is close enough to such riot that he could become immediately involved in the riot. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession.

"(b) Any law enforcement officer may frisk any person he finds violating the provisions of a curfew proclaimed under the authority of §§ 14-288.11, 14-288.12, 14-288.13, or 14-288.14 in order to discover whether the person possesses any dangerous weapon or substance. The officer may also at that time inspect for the same purpose the contents of any

personal belongings that the person has in his possession.

"§ 14-288.10. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies.--(a) Notwithstanding the provisions of Article 4 of Chapter 15, any law enforcement officer may, under the conditions specified in this section, obtain a warrant authorizing inspection of vehicles under the conditions and for the purpose specified in subsection (b).

"(b) The inspection shall be for the purpose of discovering any dangerous weapon or substance likely to be used by one who is or may become unlawfully involved in a riot. The warrant may be sought to inspect:

(1) All vehicles entering or approaching a municipality in which a state of emergency exists; or

(2) All vehicles which might reasonably be regarded as being within or approaching the immediate vicinity of an existing riot.

"(c) The warrant may be issued by any judge or justice of the General Court of Justice.

"(d) The issuing official shall issue the warrant only when he has determined that the one seeking the warrant has been specifically authorized to do so by the head of the law enforcement agency of which the affiant is a member, and:

(1) If the warrant is being sought for the inspection of vehicles entering or approaching a municipality, that a state of emergency exists within the municipality; or

(2) If the warrant being sought is for the inspection of vehicles within or approaching the immediate vicinity of a riot, that a riot is occurring within that area.

Facts indicating the basis of these determinations must be stated in an affidavit and signed by the affiant under oath or affirmation.

"(e) The warrant must be signed by the issuing official and must bear the hour and date of its issuance.

"(f) The warrant must indicate whether it is for the inspection of vehicles entering or approaching a municipality or whether it is for the inspection of vehicles within or approaching the immediate vicinity of a riot. In either case, it must also specify with reasonable precision the area within which it may be exercised.

"(g) The warrant shall become invalid twenty-four hours following its issuance and must bear a notation to that effect.

"(h) Warrants authorized under this section shall not be regarded as search warrants for the purposes of application of Article 4 of Chapter 15.

"(i) Nothing in this section is intended to prevent warrantless frisks, searches, and inspections to the extent that they may be constitutional and consistent with common law and governing statutes.

"§ 14-288.11. Powers of municipalities to enact ordinances to deal with states of emergency.--(a) The governing body of any municipality may enact ordinances designed to permit the imposition of prohibitions and restrictions during

a state of emergency.

"(b) The ordinances authorized by this section may permit prohibitions and restrictions:

(1) Of movements of people in public places;

(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate;

(3) Upon the possession, transportation, sale, purchase, and consumption of intoxicating liquors;

(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline; and

(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

The ordinances may delegate to the mayor of the municipality the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

"(c) This section is intended to supplement and confirm the powers conferred by §§ 160-52, 160-200(7), and all other general and local laws authorizing municipalities to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

"(d) Any ordinance of a type authorized by this section promulgated prior to the effective date of this section shall, if otherwise valid, continue in full force and effect without re-enactment.

"§ 14-288.12. Powers of counties to enact ordinances to deal with states of emergency.--(a) The governing body of any county may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

"(b) The ordinances authorized by this section may permit the same prohibitions and restrictions to be imposed as enumerated in § 14-288.11(b). The ordinances may delegate to the chairman of the board of county commissioners the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

"(c) No ordinance enacted by a county under the authority of this section shall apply within the corporate limits of any municipality, unless the municipality by resolution consents to its application.

"(d) Any person who violates any provision of an ordinance enacted under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars or imprisonment for not more than thirty days.

"§ 14-288.13. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality.--(a) The chairman of the board of commissioners of any county who has been requested to do so by a mayor may

by proclamation extend the effect of any one or more of the prohibitions and restrictions imposed in that mayor's municipality pursuant to the authority granted in §§ 14-288.11. The chairman may extend such prohibitions and restrictions to any area within his county in which he determines it to be necessary to assist in controlling the state of emergency within the municipality. No prohibition or restriction extended by proclamation by the chairman under the authority of this section shall apply within the limits of any other municipality unless that other municipality by resolution consents to its application.

"(b) Whenever any chairman of the board of county commissioners extends the effect of municipal prohibitions and restrictions under the authority of this section to any area of the county, it shall be deemed that a state of emergency has been validly found and declared with respect to such area of the county.

"(c) Any chairman of a board of county commissioners extending prohibitions and restrictions under the authority of this section must take reasonable steps to give notice of its terms to those likely to be affected. The chairman of the board of commissioners shall proclaim the termination of any prohibitions and restrictions extended under the authority of this section upon:

(1) His determination that they are no longer necessary; or

(2) The determination of the board of county commissioners that they are no longer necessary;

or

(3) The termination of the prohibitions and restrictions within the municipality.

"(d) The powers authorized under this section may be exercised whether or not the county has enacted ordinances under the authority of §§ 14-288.12. Exercise of this authority shall not preclude the imposition of prohibitions and restrictions under any ordinances enacted by the county under the authority of §§ 14-288.12.

"(e) Any person who violates any provision of any prohibition or restriction extended by proclamation under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars or imprisonment for not more than thirty days.

"§§ 14-288.14. Authority of Governor to exercise control in emergencies.--(a) When the Governor determines that a state of emergency exists in any part of North Carolina, he may exercise the powers conferred by this section if he further finds that local control of the emergency is insufficient to assure adequate protection for lives and property.

"(b) Local control shall be deemed insufficient only if:

(1) Needed control cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances as authorized by §§§ 14-288.11, 14-288.12,

or 14-288.13; or

(2) Local authorities have not taken implementing steps under such ordinances, if enacted, needed for effectual control of the emergency that has arisen; or

(3) The area in which the state of emergency exists has spread across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; or

(4) The scale of the emergency is so great that it exceeds the capability of local authorities to cope with it.

"(c) The Governor when acting under the authority of this section may:

(1) Impose prohibitions and restrictions in all areas affected by the state of emergency.

(2) Give to all participating State and local agencies and officiers such directions as may be necessary to assure coordination among them. These directions may include the designation of the officer or agency responsible for directing and controlling the participation of all public agencies

and officers in the emergency. The Governor may make this designation in any manner which, in his discretion, seems most likely to be effective. Any law enforcement officer participating in the control of a state of emergency in which the Governor is exercising control under this section shall have the same power and authority as a sheriff throughout the territory to which he is assigned.

"(d) The Governor in his discretion, as appropriate to deal with the emergency then occurring or likely to occur, may impose any one or more or all of the types of prohibitions and restrictions enumerated in §§ 14-288.11(b), and may amend or rescind any prohibitions and restrictions imposed by local authorities.

"(e) Any person who violates any provision of a proclamation of the Governor issued under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed $500 or imprisonment for not more than six months.

"§ 14-288.15. Effective time, publication, amendment, and recision of proclamations.--(a) This section applies to proclamations issued under the authority of §§ 14-288.11, 14-288.12, 14-288.13, and 14-288.14.

"(b) All prohibitions and restrictions imposed by proclamation shall take effect immediately upon publication of the proclamation in the area affected unless the procla-

mation sets a later time. For the purpose of requiring compliance, publication may consist of reports of the substance of the prohibitions and restrictions in the mass communications media serving the affected area or other effective methods of disseminating the necessary information quickly. As soon as practicable, however, appropriate distribution of the full text of any proclamation shall be made.

"(c) Prohibitions and restrictions may be extended as to time or area, amended, or rescinded by proclamation. Prohibitions and restrictions imposed by proclamation under the authority of §§ 14-288.11, 14-288.12, and 14-288.13 shall expire five days after their last imposition unless sooner terminated under § 14-288.13(c)(3), by proclamation, or by the governing body of the county or municipality in question. Prohibitions and restrictions imposed by proclamation of the Governor shall expire five days after their last imposition unless sooner terminated by proclamation of the Governor."

Sec. 2. G. S. 153-9 is amended to add a new subdivision at the end of that section as follows:

"(60) The board of commissioners of any county may enact ordinances dealing with states of emergency as authorized by § 14-288.12, and the chairman of the board of commissioners of any county may issue proclamations imposing prohibitions and restrictions in emergencies under the authority of § 14-288.13 and, to the extent

authorized in ordinances dealing with states of emergency, under the authority of § 14-288.12."

Sec. 3. G. S. 160-200 is amended to add a new subdivision at the end of that section as follows:

"(45) The governing body of any municipality is authorized to enact ordinances dealing with states of emergency as authorized by § 14-288.11."

Sec. 4. Chapter 18 of the General Statutes of North Carolina is amended to add a new section as follows:

"§ 18-38.1. Authority of the Governor to direct closing of A. B. C. stores.--When the Governor finds that a state of emergency, as defined in § 14-288.1, exists anywhere within the State, he may order the closing of county and municipal liquor stores in all or any portion of the State for the period of the emergency. His order shall be directed to the Director of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit any other authority, express or implied, to order the closing of these stores."

Sec. 5. Chapter 18 of the General Statutes of North Carolina is amended to add a new section as follows:

"§§ 18-129.1. Authority of the Governor to limit sale of wine and malt beverages.--When the Governor finds that a state of emergency, as defined in § 14-288.1, exists anywhere within the State, he may order the cessation of all sale or transfer, manufacture, or bottling of malt beverages

or wine in all or any portion of the State for the period of the emergency. His order shall be directed to the Director of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit any other authority, express or implied, to order cessation of these activities."

Sec. 6. Article 13 of Chapter 14 of the General Statutes of North Carolina is rewritten to read as follows:

"Article 13.

"Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

"§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.--(a) Any person who wilfully and maliciously injures or attempts to injure another by the use of any explosive or incendiary device or material is guilty of a felony.

"(b) Any person who wilfully and maliciously damages or attempts to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony.

"(c) Any person who violates any provision of this section is punishable by imprisonment in the State's prison for not less than five nor more than thirty years.

"§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.--Any person who wilfully and maliciously damages or attempts to damage any real or personal property of any kind or nature,

being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable by imprisonment in the State's prison for not less than ten years nor more than imprisonment for life.

"§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.--(a) Any person who conspires with another wilfully and maliciously to injure another by the use of any explosive or incendiary device or material is guilty of a felony.

"(b) Any person who conspires with another wilfully and maliciously to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony.

"(c) Any person who violates any provision of this section is punishable by imprisonment in the State's prison for not more than fifteen years.

"§ 14-50.1. Explosive or incendiary device or material defined.--As used in this article, 'explosive or incendiary device or material' means nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, other destructive incendiary device, or any other destructive incendiary or explosive device, compound, or formulation; any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate some probability that such instrument or substance will be so used; or any explosive or incendiary part or ingredient in

any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used."

Sec. 7. Article 8 of Chapter 14 of the General Statutes of North Carolina is amended to add a new section as follows:

"§ 14-34.1. Discharging firearm into occupied or unoccupied property.--Any person who wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable by a fine not to exceed $10,000, imprisonment for not more than five years, or both such fine and imprisonment. If the property is unoccupied, the defendant is guilty of a misdemeanor punishable as provided in §§ 14-3(a)."

Sec. 8. Article 4 of Chapter 15 of the General Statutes of North Carolina is rewritten to read as follows:

"Article 4.

"Search Warrants.

"§ 15-25. Search warrants for contraband, evidence, and instrumentalities of crime.--(a) Any justice, judge, clerk, or assistant or deputy clerk of any court of record, any justice of the peace, or any magistrate of the General Court of Justice may issue a warrant to search for any contraband, evidence, or instrumentality of crime upon finding probable cause for the search.

"(b) Any search warrant issued by any Justice of the

Supreme Court, Judge of the Court of Appeals, or Judge of the Superior Court may be executed anywhere within the State. Any search warrant issued by any other official of the General Court of Justice may be executed as provided in Chapter 7A of the General Statutes. Any search warrant issued by any other judicial official or officer of any other court may be executed only within the territorial jurisdiction of such official or court.

"(c) The warrant may be executed by any law enforcement officer acting within his territorial jurisdiction whose subject matter jurisdiction encompasses the crime with which the object of the search is involved.

"(d) The search warrant shall be returnable as other criminal process is required to be.

"§ 15-26. Contents of search warrant.--(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.

"(b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.

"(c) The warrant must be signed by the issuing official and bear the date and hour of its issuance above his signature.

"§ 15-27. Exclusionary rule.--(a) No evidence obtained or facts discovered by means of an illegal search shall be

competent as evidence in any trial.

"(b) No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required.

"§ 15-27.1. Application of article to all search warrants; exception as to inspection warrants.--The requirements of this article apply to search warrants issued for any purpose, including those issued pursuant to §§ 18-13, except that the contents of and procedure relating to inspection warrants authorized under Article 4A of this chapter and § 14-288.10 are to be governed by the provisions set out in the sections relating to them."

Sec. 9. All laws and clauses of laws in conflict with this act are hereby repealed.

Sec. 10. This act shall take effect upon its ratification.

APPENDIX B

INTRODUCED BY:

Referred to:

A BILL TO BE ENTITLED AN ACT TO MAKE IT A FELONY TO ASSAULT A LAW ENFORCEMENT OFFICER WITH A DEADLY WEAPON OR INFLICTING SERIOUS INJURY.

The General Assembly of North Carolina do enact:

Section 1. Article 8 of Chapter 14 of the General Statutes is amended to add a new section as follows:

"§ 14-32.1. Assault on law enforcement officer with deadly weapon or inflicting serious injury.--(a) Any person who assaults a law enforcement officer as defined in § 14-288.1, while such officer is discharging or attempting to discharge a duty of his office, with a deadly weapon is guilty of a felony.

"(b) Any person who assaults a law enforcement officer as defined in § 14-288.1, while such officer is discharging or attempting to discharge a duty of his office, and inflicts serious injury is guilty of a felony.

"(c) Any person who violates any provision of this section is punishable by a fine not to exceed $10,000 or imprisonment for not more than five years, or both such fine and imprisonment."

Sec. 2. All laws and clauses of laws in conflict with this act are hereby repealed.

Sec. 3. This act shall take effect upon its ratification.