

# False Hope or Get Out of Jail Free? An Analysis of State Laws Exempting National Guard Members from Arrest

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## I. Introduction

On the way to weekend drill, can a National Guard member drive like a maniac, throw an empty liquor bottle out of the car window, and perhaps start a fight without getting arrested by civilian police officers? In some states, the answer might be yes. Most states codify rules and regulations with respect to their National Guard and militia forces.<sup>1</sup> At least eighteen of those states, to varying degrees, afford their National Guard members “exemption from arrest” while traveling to and from military duty.<sup>2</sup>

Although the language varies from state to state, these statutes generally share the common language that

[N]o person belonging to the [National Guard], [State Defense Forces] or the naval militia shall be arrested on any process issued by or from any civil officer or court, except in cases of felony or breach of the peace, while going to, remaining at or returning from any place at which he may be required to attend for military duty; nor in any case whatsoever while actually engaged in the performance of his military duties, except with the consent of his commanding officer.<sup>3</sup>

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<sup>1</sup> See, e.g. VA. CODE ANN., § 44 (2014); N.H. REV. STAT. ANN., § VIII (2014); CAL. MIL. & VET. CODE § 390 (2015).

<sup>2</sup> See COLO. REV. STAT. § 28-3-406 (2014) (Colorado); DEL. CODE ANN. tit. 2 § 175 (2014) (Delaware); HAW. REV. STAT. § 121-25 (2014) (Hawaii); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014) (Maine); VA. CODE ANN. § 44-97 (2014) (Virginia); OKLA. STAT. tit. 44, § 248 (2014) (Oklahoma); 51 PA. CODE § 4104 (2014) (Pennsylvania); S.D. CODIFIED LAWS § 33-6-2 (2014) (South Dakota); UTAH CODE ANN. § 39-1-54 (LexisNexis 2014) (Utah); VT. STAT. ANN. tit. 20 § 884 (2014) (Vermont); MISS. CODE ANN. § 33-1-7 (2014) (Mississippi); TEX. GOV'T CODE ANN. § 437.223 (2014) (Texas); CAL. MIL. & VET. CODE § 390 (2015) (California); GA. CODE ANN. § 17-4-2 (2014) (Georgia); MONT. CODE ANN. § 46-6-102 (2013) (Montana); N.H. REV. STAT. ANN. § 110-B:71 (2014) (New Hampshire); 30 R.I. GEN. LAWS § 30-7-2 (2014) (Rhode Island); S.C. CODE ANN. § 25-3-120 (2013) (South Carolina).

<sup>3</sup> See, e.g. VA. CODE ANN. § 44-97 (2014) (“No person belonging to the Virginia National Guard, Virginia State Defense Force or the naval militia shall be arrested on any process issued by or from any civil officer or court, except in cases of felony or breach of the peace, while going to, remaining at or returning from any place at which he may be required to attend for military duty; nor in any case whatsoever while actually engaged in the performance of his military duties, except with the consent of his commanding officer”); VT. STAT. ANN. tit. 20 § 884 (2014) (“Officers, noncommissioned officers, musicians and privates enrolled in this state, while under orders for service under the government of the United States or

So what exactly does this mean? For example, can Soldiers and Airmen get out of a speeding ticket or even a reckless driving charge if the offense occurred while driving to and from home and his or her duty station? The plain language appears to suggest that National Guard members can indeed avoid arrest for many misdemeanor offenses as well as various traffic offenses if they commit such violations while on the way to or from drill.<sup>4</sup>

Anecdotally, National Guard judge advocates occasionally reference the respective state provisions when a Soldier faces civil arrest or traffic citation. However, national precedent is generally limited on the overall interpretation of these “exemption from arrest” laws.<sup>5</sup> Moreover, local courts rarely issue written precedent; consequently, the law remains open for interpretation in many states.<sup>6</sup> While the few published interpretations directly on point generally recognize the value and intent of “exemption from arrest” laws, in practice the laws are viewed within a particularly narrow lens.<sup>7</sup> This article

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under authority of this state, except for treason, felony and breach of the peace, shall be privileged from arrest and imprisonment by civil authority, from the date of the issuing of such orders to the time of their discharge from service.”); MISS. CODE ANN § 33-1-7 (2014) (“No person belonging to the military forces of this state shall be arrested by any civil authority under any civil or criminal process while going to, remaining at or returning from any place at which he may be required to attend military duty except for treason or felony. Service of any such prohibited process shall be void.”); GA. CODE ANN. § 17-4-2 (2014) (“The members of the organized militia or military forces shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at drills, parades, meetings, encampments, and the election of officers and going to, during, and returning from the performance of any active duty as such members.”); N.H. REV. STAT. ANN § 110-B:71 (2014) (“Members of the national guard shall, except for treason, felony or breach of the peace, be privileged from arrest and imprisonment while under orders in the active service of the state from the date of the issuing of such orders to the time when such service shall cease, or while going to, remaining at or returning from, any place at which the individual may be required to attend any military duty.”).

<sup>4</sup> VT. STAT. ANN. tit. 20 § 884 (2014); MISS. CODE ANN § 33-1-7 (2014); N.H. REV. STAT. ANN § 110-B:71 (2014). The state codes also contain language exempting members of the National Guard from service of civil process such as civil lawsuits while traveling to, from, or during military duty.

<sup>5</sup> See, e.g., Commonwealth v. Barnhart, 2007 PA Super 293 (Pa. Super. Ct. 2007) (noting “the absence of precedent has been confirmed by our research of the matter” and that the statute has not been cited with any frequency, “[i]n fact, there are no binding decisions from the Pennsylvania Supreme or Superior Courts addressing military exemption from arrest . . .”).

<sup>6</sup> *Id.*

<sup>7</sup> See generally Commonwealth v. Talierco, 1966 Pa. Dist. & Cnty. Dec. LEXIS 22 (Pa. C.P. 1966) (reversing the trial court decision on the basis that the defendant in traffic offense had not been taken into custody and immediately taken before the justice of the peace); Sanders v. Columbus, 140 Ga. App. 441 (Ga. Ct. App. 1976) (recognizing that the National Guard captain’s arrest on a speeding charge was illegal pursuant to the exemption from arrest statute, but the court upheld the conviction because “in Georgia,

surveys the exemption from arrest laws codified throughout the United States. The article then examines the history and legislative purpose of these laws as well as their application with respect to members of the military.

## II. History of “Exemption from Arrest” Laws

State laws exempting militia members from arrest by civilian authorities have been on the books since at least the early nineteenth century.<sup>8</sup> The purpose of the statutes historically has been to prevent civil interference with the military on active duty in the performance of duty.<sup>9</sup> Legislators reasoned that the duties imposed on military members by the order of the governor required attendance and effort at any place of the governor’s choosing; therefore, custody under civil process would manifestly interfere with the duties in which the military member was engaged.<sup>10</sup>

One of the earliest recorded cases of a military member using the exemption as a defense occurred in Rhode Island in 1859.<sup>11</sup> In that case, a surgeon in the Pawtucket Light Guard was served with a civil writ while traveling out-of-state on orders from his commanding officer.<sup>12</sup> The surgeon argued that under the statute, he was exempt from arrest at the time of service of the writ because he was a

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a conviction could not be avoided simply because of the illegality of the arrest”); *State v. Murray*, 106 N.H. 71 (N.H. 1964) (distinguishing between the issuance of a summons in a traffic offense and an arrest).

<sup>8</sup> See, e.g., *Manchester v. Manchester*, 6 R.I. 127 (R.I. 1859) (involving a Rhode Island exemption from arrest statute); *White v. Lowther*, 3 Ga. 397 (Ga. 1847) (holding a First Lieutenant liable for civil process because the officer was in the military service of the federal government and not the state).

<sup>9</sup> See *Sanders*, 140 Ga. App. 473 (noting that the legislative purpose of this immunity statute is to prevent civil interference with the military on active duty in the performance of duty); *Andrews v. Gardiner*, 185 A.D. 477, 479 (N.Y. App. Div. 1918) (stating that the purpose of the statute is to prevent interference with military duties); Cf. *White*, 3 Ga. 397, \*9, citing *Greening v. Sheffield*, 1 Ala. R. 276 (“The service of a process, even for the recovery of an ordinary debt, is a circumstance calculated to excite unpleasant feelings in the bosom of a man of correct principles, and the more so, if it should occur at a moment when he is performing a public duty in the pesence (sic) of his fellow-citizens. Suppose a Sheriff... stepping up to an officer as he was about to give the word of command to his regiment or brigade, and putting a writ into his hand. Would not this be humiliating to his pride? Or even in a more stoical view of the subject, is it not an impediment and hindrance in the discharge of his duty, which he ought not to be subjected to? Or, in the case of a private, at the moment he is about to shoulder his musket in obedience to the command of his officer, to be compelled to receive a writ from a Sheriff, would it not both wound his feelings and embarrass him in the discharge of his duty? It is the duty of a wise Legislature, in subjecting the citizens of the country to the regulations of the law, to have a due regard to those honourable feelings which should be inculcated in the bosom of freemen; and this was the object of our Legislature.”).

<sup>10</sup> See *Andrews*, 185 A.D. at 479.

<sup>11</sup> See *Manchester*, 6 R.I. at 127.

<sup>12</sup> *Id.* at 128.

commissioned officer duly engaged and was going to a place which he had been ordered to attend for the performance of military duty.<sup>13</sup> Ultimately, the court rejected the surgeon’s argument on limited factual grounds holding that “the moment that he passed out of the state and into the jurisdiction of another state, he passed beyond the jurisdiction of his commanding officer, and could not properly be said to be acting there under his orders. If not so acting, he was not within the protection of the act.”<sup>14</sup>

A conflict between military and civilian authorities over the interpretation of a similar law in Illinois came to a head in 1915.<sup>15</sup> There, five uniformed National Guard members of Company E, 5th Infantry initially reported to an armory for the purpose of state encampment before leaving the armory for a night on the town.<sup>16</sup> The men became intoxicated and disorderly, and two of the men were arrested by the police and briefly locked up.<sup>17</sup> Almost immediately, the military convicted the men through summary court-martial proceedings.<sup>18</sup> Civilian authorities then issued arrest warrants for the purpose of prosecuting the men in the local court.<sup>19</sup> The National Guard unit cited the “exemption from arrest” law as a basis to quash the civilian arrest warrant.<sup>20</sup> Upon reaching an impasse, both parties requested a legal opinion from the Illinois attorney general.<sup>21</sup> In this case, Illinois Attorney General P.J. Lucey wrote that the “exemption from arrest” law contradicted the Illinois Constitution, which states that “[t]he Military shall be in strict subordination to the civil power.”<sup>22</sup> As such, Lucey stated that “under the Constitution and laws of this State, a member of the State Militia, even when engaged in active service, is not exempt from arrest by the civil authorities for treason, felony or breach of the peace.”<sup>23</sup> The “exemption

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<sup>13</sup> *Id.* at 128-29.

<sup>14</sup> *Id.* at 129.

<sup>15</sup> *When Members of Nat’l Guard Subject to Arrest by Civil Authorities*, 1915 Op. Atty Gen. Ill. 229.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.* at 4-5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.* at 10. States also provide similar exemptions from arrest for other limited groups, to include: the President and the Governor; Lieutenant Governor during attendance at sessions of the General Assembly and while going to and from such sessions; judge, grand juror, or witness required to attend any court or place; ministers of the gospel while engaged in performing religious services in a place where a congregation is assembled; voters going to, attending at, or returning from an election; and supervising physicians. See, e.g., VA. CODE ANN. § 8.01-327.2 (2014); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014); MONT. CODE ANN. § 46-6-102 (2013).

from arrest” law has since been repealed from the Illinois code. New York is another state that historically codified an “exemption from arrest” statute—it became law in 1883—but has since removed the statute from the books.

### III. Modern Exemptions from Arrest

Although a majority of states and territories do not codify such exemptions, at least eighteen states continue to maintain versions of this language.<sup>24</sup> Each of the eighteen state statutes contain language specifically exempting members of the National Guard from arrest or civil process while going to, remaining at, or returning from any place of military duty.<sup>25</sup> Some states, such as Pennsylvania, South Dakota and Vermont, do not differentiate between state forces and active duty servicemembers with respect to the exemption.<sup>26</sup> Moreover, nine states—Maine, Virginia, Utah, Vermont, Texas, Georgia, Montana, South Carolina, and New Hampshire—carve out an exception where National Guard members are exempted from arrest “except [in cases of] treason, felony and breach of the peace.”<sup>27</sup> The

<sup>24</sup> See COLO. REV. STAT. § 28-3-406 (2014) (Colorado); DEL. CODE ANN. tit. 2 § 175 (2014) (Delaware); HAW. REV. STAT. § 121-25 (2014) (Hawaii); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014) (Maine); VA. CODE ANN. § 44-97 (2014) (Virginia); OKLA. STAT. tit. 44, § 248 (2014) (Oklahoma); 51 PA. CODE § 4104 (2014) (Pennsylvania); S.D. CODIFIED LAWS § 33-6-2 (2014) (South Dakota); UTAH CODE ANN. § 39-1-54 (LexisNexis 2014) (Utah); VT. STAT. ANN. tit. 20 § 884 (2014) (Vermont); MISS. CODE ANN. § 33-1-7 (2014) (Mississippi); TEX. GOV’T CODE ANN. § 437.223 (2014) (Texas); CAL. MIL. & VET. CODE § 390 (2015) (California); GA. CODE ANN. § 17-4-2 (2014) (Georgia); MONT. CODE ANN. § 46-6-102 (2013) (Montana); N.H. REV. STAT. ANN. § 110-B:71 (2014) (New Hampshire); 30 R.I. GEN. LAWS § 30-7-2 (2014) (Rhode Island); S.C. CODE ANN. § 25-3-120 (2013) (South Carolina).

<sup>25</sup> See COLO. REV. STAT. § 28-3-406 (2014) (Colorado); DEL. CODE ANN. tit. 2 § 175 (2014) (Delaware); HAW. REV. STAT. § 121-25 (2014) (Hawaii); ME. REV. STAT. ANN. tit. 37-B, § 185 (2014) (Maine); VA. CODE ANN. § 44-97 (2014) (Virginia); OKLA. STAT. tit. 44, § 248 (2014) (Oklahoma); PA. CODE § 4104 (2014) (Pennsylvania); S.D. CODIFIED LAWS § 33-6-2 (2014) (South Dakota); UTAH CODE ANN. § 39-1-54 (LexisNexis 2014) (Utah); VT. STAT. ANN. tit. 20 § 884 (2014) (Vermont); MISS. CODE ANN. § 33-1-7 (2014) (Mississippi); TEX. GOV’T CODE ANN. § 437.223 (2014) (Texas); CAL. MIL. & VET. CODE § 390 (2015) (California); GA. CODE ANN. § 17-4-2 (2014) (Georgia); MONT. CODE ANN. § 46-6-102 (2013) (Montana); N.H. REV. STAT. ANN. § 110-B:71 (2014) (New Hampshire); 30 R.I. GEN. LAWS § 30-7-2 (2014) (Rhode Island); S.C. CODE ANN. § 25-3-120 (2013) (South Carolina).

<sup>26</sup> PA. CODE § 4104 (“No officer or enlisted person shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from, a place where he is ordered to attend for military duty.”); S.D. CODIFIED LAWS § 33-6-2 (“No person belonging to the military forces may be arrested on any civil process while going to, remaining at, or returning from any drill or annual training that the member is required to attend for duty.”); VT. STAT. ANN. tit. 20 § 1274 (2014) (“No officer or enlisted member of such forces shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from a place where he or she is ordered to attend for military duty. Every officer and enlisted member of such forces shall, during service therein, be exempt from service upon any posse comitatus and from jury duty.”).

<sup>27</sup> ME. REV. STAT. ANN. tit. 37-B, § 185 (2014); VA. CODE ANN. § 44-97 (2014) (Virginia does not include “treason”); UTAH CODE ANN. § 39-1-54 (2014); VT. STAT. ANN. tit. 20 § 884 (2014); TEX. GOV’T CODE ANN. §

remaining nine states generally do not list exceptions pertaining to breach of the peace and felony. However, there is little precedent one way or the other with respect to the proposition that a Soldier could negate a felony arrest on the basis that he or she was traveling for military duty.<sup>28</sup>

Of the few available state precedents, it appears that appellate courts tend to favor upholding arrests through very narrow lenses.<sup>29</sup> In one case, an active Pennsylvania National Guard member was arrested for drunk driving and a seatbelt violation.<sup>30</sup> In upholding the conviction, the court noted that “he was out of uniform and off duty, on a purely personal mission, which had absolutely nothing to do with his active duty status as a guardsman, and was in no way carrying out any military order, duty or obligation at the time he was arrested.”<sup>31</sup> Another Pennsylvania appellate court upheld a speeding infraction where a Pennsylvania Air National Guard captain claimed he was enroute to the Olmstead Air Force Base for military duty.<sup>32</sup> The court held that no arrest had taken place because the captain was not taken into custody and was not immediately taken before the justice of the peace and charged with the alleged offense.<sup>33</sup> However, the court added that if the captain had been taken into custody, “then it could be said authoritatively that he had been arrested,” implying that there are indeed scenarios where the exemption from arrest statute could be applicable.<sup>34</sup>

437.223 (2014); GA. CODE ANN. § 17-4-2 (2014); MONT. CODE ANN. § 46-6-102 (2013); N.H. REV. STAT. ANN. § 110-B:71 (2014); S.C. CODE ANN. § 25-3-120 (2013).

<sup>28</sup> See generally *Commonwealth v. Barnhart*, 2007 PA Super 293 (Pa. Super. Ct. 2007).

<sup>29</sup> See *Id.* (reversing the trial court decision on the basis that the defendant in traffic offense had not been taken into custody and immediately taken before the justice of the peace); *Sanders v. Columbus*, 140 Ga. App. 441 (Ga. Ct. App. 1976) (recognizing that the National Guard captain’s arrest on a speeding charge was illegal pursuant to the exemption from arrest statute, but the court upheld the conviction because “in Georgia, a conviction could not be avoided simply because of the illegality of the arrest”); *State v. Murray*, 106 N.H. 71 (N.H. 1964) (distinguishing between the issuance of a summons in a traffic offense and an arrest).

<sup>30</sup> *Commonwealth v. Barnhart*, 2007 PA Super 293, 296 (Pa. Super. Ct. 2007).

<sup>31</sup> *Id.*

<sup>32</sup> *Commonwealth v. Talierco*, 1966 Pa. Dist. & Cnty. Dec. LEXIS 22, 367 (Pa. C.P. 1966).

<sup>33</sup> *Id.* at 369-70; see also *State v. Murray*, 106 N.H. 71, 73 (N.H. 1964). In rejecting the exemption in a speeding case, the court reasoned that “such an interpretation is consonant with the intent of this statute which is to prevent interference with the requirements of the military. We fail to see how the action taken by the officer and the fact that the defendant was required to answer to a charge of speeding at a later date would result in such interference. However we can foresee serious interference with public and private rights if members of the military were allowed to operate motor vehicles without regard to traffic regulations when no emergency or military necessity exists.” *Id.*

<sup>34</sup> *Talierco*, 1966 Pa. Dist. & Cnty. Dec. LEXIS at 369.

In Georgia, a National Guard captain was arrested for speeding while enroute from Fort Stewart to Fort Benning as part of his military duties.<sup>35</sup> The appellate court noted that “[i]f the speeding was not a breach of the peace, defendant’s arrest was illegal.”<sup>36</sup> Although the court acknowledged errors in the trial court’s conclusions of law, the court refused to overturn the conviction because “in Georgia, a conviction could not be avoided simply because of the illegality of the arrest.”<sup>37</sup>

#### IV. Applying an Exemption Defense

The limited case law suggests that National Guard members arrested while on their way to, from, or during military duty can conceivably use the exemptions in instances where the servicemember is actually taken into custody by civilian authorities.<sup>38</sup> This appears to be the case regardless of whether a state considers a traffic stop to be an arrest.<sup>39</sup>

But what about driving under the influence (DUI) arrests? Certainly, if a National Guardsman fails a field sobriety test while traveling under orders for military duty, the civilian police official is likely to take the servicemember into custody. A plain reading of the various state statutes could create a veritable catch-22 for civilian law enforcement.<sup>40</sup> On one hand, they must arrest the suspected drunk driver on what is typically a misdemeanor offense. But if the drunk driver is arrested and taken into civilian custody, the exemption statute could negate the arrest. One solution is to equate driving under the influence with breach of the peace.

In 1970, the South Carolina Highway Patrol sought guidance from the state attorney general on exactly this

issue.<sup>41</sup> An assistant attorney general issued a legal opinion stating,

[A] review of the legal reference works on the matter indicates that it has been universally held by the courts that operating a motor vehicle while under the influence of intoxicating liquor is a breach of the peace within the meaning of statutes or constitutional provisions exempting certain persons from arrest, except for breaches of the peace and other exceptions.<sup>42</sup>

Although DUI arrests are commonly regarded as a breach of the peace, the classification becomes murkier with respect to traffic offenses that do not involve intoxication.<sup>43</sup> In Virginia, breaches of the peace are defined as “[o]ffenses against the public peace [to] include all acts affecting public tranquility, such as assaults and batteries, riots, routs and unlawful assemblies, forcible entry and detainer, etc.”<sup>44</sup> As such, a Virginia National Guard member traveling to military duty is not exempt from arrest if he or she stops to start a fight or commits a robbery.<sup>45</sup>

Determining the breach of the peace for traffic offenses is more subjective. When deciding on whether or not a traffic offense constitutes breach of the peace, courts typically analyze its egregiousness.<sup>46</sup> Such issues tend to

<sup>41</sup> 1970 S.C. AG LEXIS 348.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see also *West Virginia v. Gustke*, 516 S.E. 2d 283, 291-92 (W. Va. 1999).

<sup>44</sup> *Commonwealth v. Thompson*, 69 Va. Cir. 283 (Va. Cir. Ct. 2005); see also *Great Atlantic & Pacific Tea Co. v. Paul*, 256 Md. 643, 261 A.2d 731, 739 (Md. 1970) (breach of the peace defined as “disorderly dangerous conduct disruptive of private peace”); *State v. Peer*, 320 S.C. 546, 466 S.E.2d 375, 379 (S.C. App. 1996) (breach of the peace is defined as a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence); *Hudson v. Commonwealth*, 585 S.E.2d 583, 588 (2003) (a breach of the peace is an offense disturbing the public peace or a violation of public order or public decorum); 12 Am Jur. 2d *Breach of the Peace* etc. § 4 (1964) (“Throughout the various definitions appearing in the cases there runs the proposition that a breach of the peace may be generally defined as such a violation of the public order as amounts to a disturbance of the public tranquility, by act or conduct either directly having this effect, or by inciting or tending to incite such a disturbance of the public tranquility. Under this general definition, therefore, in laying the foundation for a prosecution for the offense of breach of the peace it is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace, is sufficient.”).

<sup>45</sup> *Thompson*, 69 Va. Cir. 283, \*6.

<sup>46</sup> See, e.g., *Hudson*, 585 S.E.2d at 382 (determining “dangerous conduct on a public highway” as breach of the peace where, although defendant was not intoxicated, defendant’s dangerous driving (weaving all over the road and nearly running an off-duty police officer off of the road) was similar to that of an intoxicated driver); *Kunkel v. State*, 46 S.W. 3d 328, 331 (Tex. App. 2001) (the “lower range” of erratic driving would not generally amount to a breach of the peace); *Sealed Juvenile 1*, 255 F.3d 213, 218 (5th Cir. 2001) (off-duty customs official had authority under Texas law to arrest as a private citizen an individual for erratic driving of pickup truck, veering

<sup>35</sup> *Sanders v. Columbus*, 140 Ga. App. 441, 474-75 (Ga. Ct. App. 1976).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Talierco*, 1966 Pa. Dist. & Cnty. Dec. LEXIS at 369-70.

<sup>39</sup> Some states list additional limits to their exemption from arrest statutes beyond treason, felony, and breach of the peace. For example, the Utah Code does not extend the privilege to arrest or citation in cases of “operation of a vehicle in a reckless manner or while under the influence of any drug or alcohol; or offenses which under state law are class A misdemeanors or greater.” UTAH CODE ANN. § 39-1-54; see also TEX. GOV’T CODE ANN. § 437.223 (“This section does not prevent a peace officer from issuing a traffic summons or citation to appear in court at a later date that does not conflict with the member’s duty hours.”); R.I. GEN. LAWS § 10-10-6 (“A militia officer who is outside of the state is not within the protection of this section since he is not under the jurisdiction of his commanding officer.”).

<sup>40</sup> See, e.g., sources cited *supra* notes 3, 26; Cf. UTAH CODE ANN. § 39-1-54.

arise in cases of citizen's arrest where drivers are arrested by law-enforcement officers operating out of their jurisdiction or off-duty.<sup>47</sup> Some cases are seemingly easier to determine than others. Courts are likely to rule that where an individual is driving "erratically, speeding, changing lanes without signaling, crossing over both the left and right shoulders of the road, and cutting off and nearly striking other vehicles . . . [t]he defendant clearly endangered other motorists . . . [and] driving in such a manner constitutes breach of the peace."<sup>48</sup> Still, there does not appear to be any sort of threshold in categorizing an offense as a breach of the

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in and out of a proper lane, variously crossing the center line and moving onto the emergency shoulder of the road, because conduct was a breach of the peace which "includes all violations of public peace and order"; *State v. Arroyos*, 2005 NMCA 86, 137 (N.M. Ap. 2005) (reasonable person would conclude defendant committed a breach of the peace when he drove erratically at 1:30 AM, including braking constantly and crossing the center line into ongoing traffic); *People v. Niedzwiedz*, 268 Ill. App. 3d 119 (Ill.App. Ct. 1994) (breach of the peace when defendant drove car across center line and fog line on several occasions); *Commonwealth v. Addison*, 36 Va. Cir. 411, 414 (Va. Cir. Ct. 1995) (holding that defendant was driving erratically, speeding, changing lanes without signaling, crossing over both the left and right shoulders of the road, and cutting off and nearly striking other vehicles constituted breach of the peace); *but see Commonwealth v. Borek*, 68 Va. Cir. 323, 327 (Va. Cir. Ct. 2005) (holding that minor offenses of speeding about 20 MPH over speed limit and making a rolling stop before turning right on red do not constitute a breach of the peace); *Horn v. City of Seat Pleasant*, 57 F.Supp.2d 219, 226 (D. Md. 1999) (holding that officer did not have authority to arrest outside of his jurisdiction a private citizen for speeding 75 MPH in a 55 MPH zone); *United States v. Atwell*, 470 F.Supp. 2d 554, 566-67 (D. Md. 2007) (holding that defendant's driving (crossing the yellow line), though erratic, was simply too short-lived and too minimally reckless to constitute a breach of the peace).

<sup>47</sup> See *Hudson*, 585 S.E.2d at 382 (determining "dangerous conduct on a public highway" as breach of the peace where, although defendant was not intoxicated, defendant's dangerous driving (weaving all over the road and nearly running an off-duty police officer off of the road) was similar to that of an intoxicated driver); *Kunkel v. State*, 46 S.W. 3d 328, 331 (Tex. App. 2001) (the "lower range" of erratic driving would not generally amount to a breach of the peace); *Sealed Juvenile 1*, 255 F.3d 213, 218 (5th Cir. 2001) (off-duty customs official had authority under Texas law to arrest as a private citizen an individual for erratic driving of pickup truck, weaving in and out of a proper lane, variously crossing the center line and moving onto the emergency shoulder of the road, because conduct was a breach of the peace which "includes all violations of public peace and order"); *State v. Arroyos*, 2005 NMCA 86, 137 (N.M. Ap. 2005) (reasonable person would conclude defendant committed a breach of the peace when he drove erratically at 1:30 AM, including braking constantly and crossing the center line into ongoing traffic); *People v. Niedzwiedz*, 268 Ill. App. 3d 119 (Ill.App. Ct. 1994) (breach of the peace when defendant drove car across center line and fog line on several occasions); *Commonwealth v. Addison*, 36 Va. Cir. 411, 414 (Va. Cir. Ct. 1995) (holding that defendant was driving erratically, speeding, changing lanes without signaling, crossing over both the left and right shoulders of the road, and cutting off and nearly striking other vehicles constituted breach of the peace); *but see Commonwealth v. Borek*, 68 Va. Cir. 323, 327 (Va. Cir. Ct. 2005) (holding that minor offenses of speeding about 20 MPH over speed limit and making a rolling stop before turning right on red do not constitute a breach of the peace); *Horn v. City of Seat Pleasant*, 57 F.Supp.2d 219, 226 (D. Md. 1999) (holding that officer did not have authority to arrest outside of his jurisdiction a private citizen for speeding 75 MPH in a 55 MPH zone); *United States v. Atwell*, 470 F.Supp. 2d 554, 566-67 (D. Md. 2007) (holding that defendant's driving (crossing the yellow line), though erratic, was simply too short-lived and too minimally reckless to constitute a breach of the peace).

<sup>48</sup> *Addison*, 36 Va. Cir. at 414.

peace.<sup>49</sup> For example, although there is danger associated with failing to drive right of center, courts have dismissed arrests by holding that the driving, "though erratic, was simply too short-lived and too minimally reckless to constitute a breach of the peace . . ." <sup>50</sup>

Indeed, most National Guard members traveling to, from, or during military duty are more likely to be pulled over for minor traffic offenses such as speeding or brief moments of erratic operation. Under those facts, "exemption from arrest" laws could present a valid defense.<sup>51</sup> In some states, courts have held that "[a] 'simple traffic violation' does not constitute a breach of the peace."<sup>52</sup> Generally, simple traffic violations include speeding up to 20-miles per hour over the limit and rolling stops before turning right on red.<sup>53</sup> As such, successful reliance on exemption laws for the typical National Guard member likely hinges on the arrest itself.<sup>54</sup>

As noted above, the legislative intent of exemption from arrest laws is to prevent civil interference with the military on active duty in the performance of duty.<sup>55</sup> Although courts have generally proven reluctant to apply such laws broadly, the exemption appears to meet the above-referenced criteria when a National Guard member is taken into custody for a seemingly minor offense.<sup>56</sup> As such, exemption from arrest laws could conceivably inoculate National Guard members from enduring arrest circumstances similar to those that occurred in *Atwater v. City of Lago Vista*.<sup>57</sup> In that case, a seatbelt violation resulted in a woman being handcuffed, placed in a squad car, and taken to the police station where

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<sup>49</sup> See *supra* note 47 and accompanying text.

<sup>50</sup> *Atwell*, 470 F.Supp. 2d at 566-67.

<sup>51</sup> See *supra* note 25 and accompanying text.

<sup>52</sup> See *Commonwealth v. Borek*, 68 Va. Cir. 323, 327 (Va. Cir. Ct. 2005); see also *Horn v. City of Seat Pleasant*, 57 F.Supp.2d 219, 226 (D. Md. 1999); *United States v. Atwell*, 470 F.Supp. 2d 554, 566-67 (D. Md. 2007).

<sup>53</sup> See cases cited *supra* note 52.

<sup>54</sup> See, generally, VA. CODE ANN. § 19.2-81.3 (articulating criteria for arrest without a warrant); UTAH CODE ANN. § 77-7-1 ("An arrest is an actual restraint of the person arrested or submission to custody. The person shall not be subjected to any more restraint than is necessary for his arrest and detention."); *United States v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011) (holding that investigative stops must be limited both in scope and duration); *Knowles v. Iowa*, 525 U.S. 113, 119 (1998) (holding that while a traffic stop is less intrusive than a formal arrest, a private citizen should not be able to intrude upon another citizen's rights in this way).

<sup>55</sup> See *supra* note 9 and accompanying text.

<sup>56</sup> See, generally, Lisa Ruddy, *From Seat Belts to Handcuffs: May Police Arrest for Minor Traffic Violations?*, 10 Am. U.J. Gender Soc. Pol'y & L. 479 (2002) (noting that twenty eight states permit a police officer to place otherwise law-abiding citizens under full custodial arrest (including handcuffs, a ride in the squad car, booking, and mug shots) for minor, fine-only traffic offenses); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>57</sup> *Atwater*, 532 U.S. at 318.

she was booked and taken before a magistrate.<sup>58</sup> The Supreme Court held that police officers are authorized to make custodial arrests if they have probable cause—even if it is a very minor criminal offense in the officer’s presence.<sup>59</sup>

Hypothetically, if the woman under this general set of facts happened to be on her way to military duty as a member of the National Guard, each of the respective exemptions from arrest laws likely would have prevailed because (1) she belonged to the National Guard; (2) she was arrested; (3) the offense was neither a felony nor breach of the peace; and (4) she was going to a place in which she was required by orders to attend military duty.<sup>60</sup> Conversely, if civilian law enforcement pulls over a National Guard member for a minor traffic offense, but does not take the National Guard member into custody, it appears that any exemption defense will be tied to the duration and level of intrusion involved in the stop.<sup>61</sup> As such, a 15-minute stop may not be considered a full-custodial arrest; consequently, the law will not have interfered with military duty. However, a traffic stop that extends beyond a relatively routine citation could cross the threshold into an arrest with respect to the exemption laws.

## V. Conclusion

State laws exempting National Guard members from arrest while traveling to, from, or during military duty are not generally applied in a consistent manner. As such, despite the plain language of many of these statutes, Soldiers and Airmen are not by any means guaranteed of getting out of speeding tickets or other minor traffic offenses merely because they are pulled over while on their way to military duty. The key factor in waging a viable defense against a minor traffic offense or other relatively benign misdemeanor pertains to whether or not the law enforcement officer effectuated an arrest.

Based on the historical legislative intent associated with exemption laws, courts are likely to base their determination of a National Guard member’s arrest on how much the stop interfered with the servicemember’s military duty. Therefore, full custodial arrests for many misdemeanors or minor traffic offenses are generally prohibited under the respective state exemption laws when the other statutory factors are met. Detention for longer than is necessary—for example, causing a National Guard member to miss

movement or otherwise be late for duty—may also trigger the exemption.<sup>63</sup>

Ultimately, the intended purpose of exemption from arrest laws is to prevent civil interference with the military in the performance of duty. In other words, state legislatures seemingly opted to avoid subjecting on-duty National Guard members from being exposed to the inherent delays and loss of freedom associated with arrests for comparably minor offenses such as the scenario described in the *Atwater* case.<sup>64</sup> As such, the laws are likely to be most useful for National Guard members who are taken into custody. With respect to typical traffic stops, the plain language of many exemption laws presents a legitimate legal defense. However, court trepidation in broadly applying exemption from arrest laws does not guarantee a successful defense.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See sources cited *supra* notes 25, 51.

<sup>61</sup> See *supra* notes 47, 49 and accompanying text.

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<sup>63</sup> *But see* State v. Murray, 106 N.H. 71, 73 (N.H. 1964) (Some courts failed to see how the action taken by the officer and the fact that the defendant was required to answer to a charge of speeding at a later date would result in such interference.).

<sup>64</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).