cc: Miss Lawton
Mrs. Gauf
Files

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The Deputy Attorney General

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Law Relating to Civil Disturbances.

Attached is what I believe you will find to be a useful memorandum, prepared by Mary Lawton, summarizing the law and the practice relating to the use of the military in civil disturbance situations.

~~MCL:GG~~

cc: Files
Miss Lawton
Mrs. Gauf

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

Re: Law relating to civil disturbances

Some weeks ago you requested that I prepare a memorandum summarizing the law with respect to use of federal troops to quell civil disturbances. An outline of the law as it relates to the States, the territories and the District of Columbia follows. Except where necessary to illustrate a point of law, we have not cited historical examples; those prior to 1941 may be found in abundance in Rich, The Presidents and Civil Disorders (Brookings).

I. Disorders Within a State

A. Domestic Violence. Article IV, Section 4 of the Constitution imposes on the federal government the obligation to protect a State "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." This is the basis for intervention by federal troops or marshals in civil disorders occurring within the States.

Implementing the constitutional provision, chapter 15 of Title 10, U.S. Code, authorizes the President to send troops into a State in cases of domestic violence. Section 331 provides for troops on request of the State; sections 332 and 333 provide for troops, without State request, in order to execute federal law, prevent obstruction of the execution of federal law, carry out federal court orders or protect civil rights. Customarily, the proclamations which precede the sending of troops (as required by 10 U.S.C. 334) rely on the authority of all three sections. Since any large scale civil disorder is bound to interfere with the execution of federal law in the area and the civil rights of individuals, e.g. inability to deliver the mail, restriction of individuals right to travel, there is a factual basis for invoking sections 332 and 333 even when a State has requested troops pursuant to section 331.

Section 331, in referring to disorders, uses the term "insurrection." We have always interpreted the term as being synonymous with the phrase "domestic violence" used in the Constitution. Accordingly, it is not necessary that there be political overtones or actual attempts to overthrow government in order to invoke the section; a riot can form the basis for sending troops pursuant to section 331.

The sending of troops is not automatically triggered by the request of a State pursuant to section 331; the President must use his own judgment as to whether the situation warrants the use of the armed forces. 8 Op. A.G. 8 (1856). Three prerequisites have invariably been insisted upon before troops have been sent: 1) the actual existence of domestic violence, 2) a statement that the violence is beyond the control of the State authorities, using all available resources including the State police and National Guard, and 3) the proper request from the Legislature or the Governor.

No request for the assistance of troops has been made by a State legislature. This may be attributable to an historical accident whereby no violence of the requisite degree has occurred while legislatures have been in session; it may also be, at least in part, attributable to the greater reluctance of the so-called "popular branch of government" to invoke such emergency powers. In the recent truckers' strike, however, there was some discussion of requesting federal troops at a time when the legislatures were in session. The question was raised as to the proper form of a legislative request. This Office expressed the view that any such request should be in the form of a legislative act, i.e., an act or joint resolution requiring the Governor's signature or an override of his veto. We reasoned by analogy to Smiley v. Holm, 285 U.S. 355 (1932), that where a constitutional or statutory provision refers to an action to be taken by a legislature without specifying the form of the legislative act, a traditional legislative act, i.e., passage by both Houses and signature of the Executive, is contemplated. Smiley so interpreted a provision requiring legislative reapportionment, rejecting the argument that this was a purely legislative matter that did not require submission to the Governor.

Our conclusion that the legislative request for troops must be submitted to the Governor has the advantage of requiring either the concurrence of the executive and legislative branches as to the need for troops or, at least, an overwhelming vote of the legislative branch. It protects the federal government, to some degree, from being caught in a squabble between the Governor and the legislature as to whether federal troops are necessary.

The provisions of 10 U.S.C. 331 refer to the use of regular troops and of the "militia of other states." The question has been raised whether the militia of the requesting State may also be federalized. As a practical matter, the National Guard of the requesting State has generally been federalized in order to provide a unified command in the civil disturbance situation. Argument over the technical limitations of the language of section 331 has been avoided by the invocation of all of chapter 15 of title 10, as mentioned above. Since section 332 refers to the "militia of any State" and section 333 to "the militia," the incorporation of these provisions dealing with the obstruction of federal law and the protection of civil rights, provides authority to federalize the Guard of the requesting State independent of section 331.

B. Power of the military when called into service. There are no general statutes conferring powers of arrest or other specific authority upon troops called into federal service in a civil disorder situation. The law with respect to their implied powers is scant. The general rule seems to be that actions reasonable under the circumstances will be found to be authorized so long as the military does not usurp the civilian power to arrest and prosecute. In any case, DOD Directives now require all individuals taken into custody to be turned over to the civil authorities as soon as practicable. To the best of our knowledge, the authority of the military to take into temporary custody for this purpose has not been challenged.

In the Colorado mining disputes at the turn of the century, the Supreme Court found that a declaration of "qualified martial law" by the Governor authorized troops

who had been sent in to detain individuals for substantial periods of time without actual criminal charges having been brought. Moyer v. Peabody, 212 U.S. 78 (1909). The case has not been reversed, and has been cited fairly recently, but we have some doubt that prolonged detention by the military at a time when the civilian courts are open and able to function would survive constitutional attack today.

C. Interdepartmental Action Plan. Since April 1969 the procedures to be followed when troops are called into a civil disorder have been governed by an Interdepartmental Action Plan, executed by the Departments of Defense and Justice and approved by the President. Under the plan, it is the Attorney General who has the responsibility for collecting intelligence concerning actual or potential disturbances and for recommending to the President whether troops should be called. The Secretary of Defense has limited authority to pre-position troops in a potential disturbance area but the troops cannot be deployed without a presidential proclamation and Executive Order. When troops are deployed, the Department of Defense assumes command but the Attorney General determines questions of law relating to arrest powers and the like, and maintains liaison with civilian law enforcement authorities. Appended to the plan are model proclamations and orders. It should be noted that the model Executive Order refers to authority to call Reserves as well as National Guard to active duty. In any future use of the order the references to Reserves should be deleted since the statutory authority to call them in these circumstances has now expired.

D. Use of troops in strike situations. On several occasions when crippling strikes have affected areas of the country, suggestions have been made that troops be called on either to replace the strikers or to preserve order. It is our view that striking workers in private industry cannot be replaced by troops, absent a specific statute authorizing it. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Troops also cannot be used to enforce the law in situations of violence arising out of such strikes unless chapter 15 of Title 10 is invoked.

Where what is involved is the protection of Federal property (e.g., cordoning off a Federal building) or assuming the performance of Federal functions (e.g., sorting or delivering the mails), In re Debs, 158 U.S. 564 (1895), suggests the existence of inherent presidential authority to use troops, not dependent on statute. When, however, the intervention goes beyond this protective purpose and is directed to the enforcement of Federal law or the protection of civil rights of individuals (valid statutory grounds for the use of troops under 10 U.S.C. 332, 333) the statutory procedure of proclamation and order must be observed. Thus, in the Pullman strike in which troops were used not only to protect the mails but also to take action to enforce a federal injunction, a proclamation was issued by the President. In re Debs, supra.

II. Disorders in the District of Columbia.

When a disorder occurs in the District of Columbia, there are unique provisions of law which come into play. This Office has consistently taken the position that the District is a State within the meaning of chapter 15 of Title 10, even though not so defined, and that the Mayor may request troops in the same manner as a Governor under 10 U.S.C. 331. This was the case in the April 1968 riots. At the same time, all D.C. law is federal law and the President can send troops on his own initiative under 10 U.S.C. 332, 333.

The President is also Commander-in-Chief of the D. C. National Guard, D. C. Code 39-603, and may call the Guard into service in the District when a disturbance occurs or is "threatened." When the Guard serves under such a call, it is acting in its militia capacity, much as though a Governor had called it into service. It does not receive the pay and benefits it would if federalized. Under D. C.Code 39-602, the Commanding General of the D.C. Guard may also order it into service for such parades, escort or other duties, as he may deem proper. The Guard has been ordered into service under this provision in cases of large demonstrations. Pursuant to D.C. Code 4-133 the Mayor may also appoint Guardsmen as special police of the District in case of riot, in which capacity they have all the arrest and search powers of

regular police. We have taken the position, however, that the special police statute cannot be used when the D. C. Guard is federalized; it is only available when the Guard occupies its militia status.

There are, of course, parks and other lands in the District which are subject to federal control. In areas which they police, the Park Police possess the powers conferred by the D. C. Traffic Act. D. C. Code 40-615. These include the power to close certain areas, in an emergency, to both vehicular and pedestrian traffic. D.C. Code 40-601 to 617. Actions under this statute were contemplated during the May Day demonstrations.

As a matter of practice, permits for major demonstrations in the District of Columbia have been coordinated among federal authorities -- Park Police, Federal Protective Service, Executive Protection Service and Capitol Police. There is no statute requiring such coordination or centering responsibility in any one agency but arrangements have been worked out under the exigencies of each potentially troublesome situation as it arises. The lead with respect to these efforts has been variously exercised by the Metropolitan Police, GSA, Interior and Justice.

The existence of federal property and functions in the District also gives rise to certain federal powers which are discussed in Parts V and VI, below.

III. Disorders Within the Territories.

Like the District of Columbia, there are certain territories having special provisions of law relating to federal responsibility in civil disturbances. Guam and the Virgin Islands are by definition included within the provisions of chapter 15 of Title 10. 10 U.S.C. 335, 336. In addition, there is specific authority for the Governors of Guam and the Virgin Islands to call upon military in their respective areas to assist in times of civil disturbance. 48 U.S.C. 1422, 1591. The President may call upon the land and naval forces to protect the rights of discoverers of guano islands, 48 U.S.C. 1418, although we have no knowledge that this authority has ever been used.

Aside from the use of troops, there is, of course, a federal responsibility to enforce the federal laws in the territories. This authority may be broader in the territories than within the States. For example, under the Virgin Islands Code the U. S. Marshal may deputize Virgin Islands police personnel to assist him in enforcing the law; and he enforces not only federal law but also all writs and process of the District Court which has local as well as federal felony jurisdiction.

IV. Enforcement of Federal Laws.

A. The Posse Comitatus Act. The use of the Army or Air Force to "execute" the laws is forbidden except where authorized by the Constitution or Act of Congress. 18 U.S.C. 1385. This statute, known as the Posse Comitatus Act, dates from 1878. It was a rider on the Army Appropriation Act of that year and was a reaction to the use of troops to watch the polls and prevent election violations during the Hayes-Tilden election and in a series of labor disturbances in 1877. The legislative history of the Act indicates that it was aimed primarily at restricting the deployment of troops upon the direction of U. S. Marshals or other lesser officials, not at the call of troops by the President in riot situations. It is also clearly aimed at the use of troops to perform law enforcement functions similar to those performed by the U. S. Marshals or the FBI. Even though the Act refers to "execution" of the laws, we have consistently interpreted it as applying only to law enforcement, not to the carrying out of an affirmative duty of the government such as delivering the mail.

The applicability of the Posse Comitatus Act to the Army and Air Force only is probably an accident of history. Since the vehicle at hand for this amendment was the Army Appropriation Act, it originally applied only to the Army. The Air Force, as a subsequent split-off from the Army, has been included by the codifier of Title 18. It should be emphasized that the Judge Advocates General of the Navy and Marine Corps have taken the position that their respective services are bound by the spirit of the Act, if not its letter. To our knowledge, the Navy and Marine Corps have never been used to avoid the strictures of the Posse Comitatus Act.

The Act imposes a felony penalty for its violation but we know of no prosecutions. There have, however, been adverse consequences for noncompliance. In Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961), a tort suit was brought against the United States for injuries resulting when the blade of an Air Force helicopter being used to assist a local sheriff in tracking an escapee broke off and hit plaintiff's car. The suit was dismissed on the ground that the local commander and the pilot were in violation of the Posse Comitatus Act and therefore beyond the scope of their employment. The individuals involved would thus be personally liable.

By its own terms the Posse Comitatus Act does not apply when the Constitution or federal statute authorizes the use of troops to enforce the law.

B. Laws Conferring Authority to Use Troops for Enforcement. The use of troops pursuant to inherent constitutional authority is discussed in parts V and VI, below. All that need be said here is that the reference to the Constitution, added to the Posse Comitatus Act as a floor amendment, was a conscious acknowledgement that there is inherent authority in the President to use troops in certain circumstances.

The primary authority to use troops to enforce federal law is 10 U.S.C. 332, 333. These provisions overlap to some extent but both are aimed at violence or insurrection obstructing or interfering with the enforcement of federal laws within a State. 10 U.S.C. 332 is aimed generally at resistance to the carrying out of federal laws, such as resistance to the collection of taxes in the Whiskey Rebellion in Washington's Administration. 10 U.S.C. 333 is concerned with the forcible interference with the civil rights of individuals and with violence aimed at preventing the enforcement of court orders such as the resistance to the desegregation order in Little Rock in 1957. Normally the two sections are invoked together. A proclamation and order are required under section 332 and 333 but no request from the State is necessary in order to send troops to the trouble spot. Indeed, in most instances in which sections 332 and 333 provide the sole basis for sending troops, the Governor has objected to the federal action.

It should be emphasized that the use of troops in these federal enforcement situations has been a last resort. If the U. S. Marshals or other enforcement personnel have been adequate to do the job, troops have not been used. When James Meredith entered the University of Mississippi, for example, an attempt was made to secure compliance with the court order by use of Marshals; only when this proved inadequate were troops called in. On the other hand, in some situations -- where the inadequacy of nonmilitary forces is apparent from the outset -- it may not be advisable to go through the formality of attempting nonmilitary enforcement first. In Little Rock, for example, where the National Guard of the State was being used to prevent enforcement of the court order, troops were used in the first instance, without preliminary resort to Marshals. In such a situation, the use of troops has the advantage of providing a basis for federalizing the Guard and thus insulating it from the Governor's control.

While the call of troops is generally vested in the President, there is a little known provision, 42 U.S.C. 1989, dating from 1866, which authorizes Commissioners (now U. S. Magistrates) to call upon the land and naval forces to execute their orders respecting civil rights violations. To the best of our knowledge, this has not been used, at least in the Twentieth Century. As presently written, S. 1 would repeal this provision.

Other provisions of law may permit the use of military personnel in situations which involve law enforcement. For example, 49 U.S.C. 1657 provides for the detailing of military personnel to the Department of Transportation to assist it in carrying out its duties. By memorandum dated September 30, 1970 to the Department of Defense, this Office took the position that personnel so detailed could be deputized as Marshals and utilized in the Sky-Marshal program. We took the view that since the detailing statute made the military personnel DOT personnel for all intents and purposes, they would not be military within the meaning of the Posse Comitatus Act. There may be other such statutes; we have not canvassed the code.

V. Execution of the Laws.

As noted above, the Posse Comitatus Act prohibits the use of troops to "execute" the laws but the legislative history makes clear that the word is used in the enforcement sense. In re Neagle, 135 U.S. 1 (1890), suggests that the President has inherent constitutional authority to use any forces at his command to carry out the laws or to protect others carrying them out.

We have taken the position that there is inherent constitutional authority in the President to use troops to protect a foreign embassy from demonstrators in order to carry out the treaty obligations of the United States. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). At the same time, it is doubtful that troops could be used on regular guard duty at embassies in this country or could be used to protect against crimes, such as burglary. We have expressed the view that invocation of chapter 15, Title 10 procedures would be necessary if troops were to be used to "liberate" an embassy seized by terrorists since this would involve criminal law enforcement in addition to the carrying out of our treaty obligations. The Department of Defense concurs in this position.

We have also taken the position that troops could be used to sort and carry mail during the postal strike as an exercise of the inherent authority to carry out the laws.

VI. Protection of Federal Property and Functions.

The authority to use troops in a protective capacity to secure federal property or safeguard the performance of federal functions is likewise an inherent authority of the President. The language of Neagle supports this view in the broadest possible terms.

Although routine protective responsibilities are assigned to the Federal Protective Service, the Executive Protection Service and U. S. Marshals, it is our view that troops may be used to cordon off the White House to protect against demonstrators or safeguard bridges used by federal workers to

enter the city to prevent disruption by demonstrators. Again, however, the role played by the military should be limited to protection, not affirmative law enforcement.

In addition to the use of military personnel, questions have arisen from time to time concerning the use of military equipment. Obviously, such equipment may be used when troops are called into service pursuant to chapter 15 of Title 10. Moreover, barring appropriations or other restrictions, military equipment can be loaned to federal law enforcement personnel. It is our view, however, that military vehicles manned by military personnel should not be used for law enforcement absent the invocation of chapter 15 of Title 10; we cautioned against the use of military vehicles and personnel to assist the Marshals by manning road blocks at Wounded Knee.

A recent statute, P.L. 90-331, 82 Stat. 170, 18 U.S.C. 3056 note, authorizes the Director of the Secret Service to call upon any agency of the government to assist the Service in carrying out its protective responsibilities. These duties involve the protection of the President and his family, the Vice President, a President-elect, former Presidents, visiting heads of State or other distinguished foreign visitors, and major candidates for President and Vice President. The statute is phrased in mandatory terms, i.e., the agency head shall assist when called upon. (The Secret Service authority can, however, be revoked by the President.) It is clear from the legislative history that this provision was meant to allow the Secret Service to call upon not only the FBI, Federal Protective Service and other civilian agencies, but the military departments as well. Such a call for troops by the Secret Service would be outside the restrictions of the Posse Comitatus Act on two grounds -- because of its exclusively protective character and because it is authorized by statute specifically.

VII. Conclusion.

The above represents a bare outline of the legal authority relating to federal use of the military in civil disturbances -- we have detailed memoranda on most of the points mentioned. We have not attempted to describe, except

in passing, the roles of various components of this Department or of other agencies. It should also be noted that the handling of civil disturbances may raise questions under other, more general, laws -- such as the scope of federal criminal jurisdiction in relation to Wounded Knee, the scope of 18 U.S.C. 33 in relation to the truckers' strike, the remedies for unlicensed use of a citizen band radio, etc. The variation of legal issues here is as diverse as civil disturbances themselves.

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