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Office of the  
Deputy Assistant Attorney General

Washington, D.C. 20530

MAY 10 1988

Bruce Rashkow, Esq.  
Assistant Legal Advisor for  
United Nations Affairs  
Office of the Legal Adviser  
Department of State  
2201 C Street, N.W.  
Washington, D.C. 20520

Dear Bruce:

Enclosed please find our opinion on the assignment of Marine personnel to the United States Mission to the United Nations ("USUN"). In it we conclude that nothing in either 10 U.S.C. 5983 or the Posse Comitatus Act bars such an assignment. Thus, as we read 10 U.S.C. 5983, the Secretary of State is authorized to request of the Secretary of the Navy that Marine guards be assigned to the USUN. That determination is by law committed to the discretion of the Secretary of the Navy.

I am simultaneously sending a copy of this opinion to Harvey J. Wilcox, Acting General Counsel of the Navy. If you have any questions, please do not hesitate to contact me or Dan Troy in this office at, respectively, 633-2051 or 633-3711.

Sincerely,

Michael A. Carvin  
Deputy Assistant Attorney General  
Office of Legal Counsel

cc: Harvey J. Wilcox, Esq.  
Acting General Counsel  
Department of the Navy

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## MEMORANDUM TO THE STATE DEPARTMENT LEGAL ADVISOR

Assignment of Marine Personnel to the U.S. Mission to the United Nations

This Office has been informed that the Department of State is contemplating the "use of U.S. Marines to guard the U.S. Mission to the United Nations in New York." Letter of November 20, 1987 from Abraham D. Sofaer, The Legal Advisor, Department of State, to Michael Carvin, Deputy Assistant Attorney General, Office of Legal Counsel. The State Department is concerned, however, that 10 U.S.C. 5983, which authorizes the Secretary of State to request the use of Department of Navy personnel to guard any "embassy, legation, or consulate," might not apply to the United States Mission to the United Nations in New York (the "USUN"). There is also concern that using Marine guards at the USUN might violate the Posse Comitatus Act, 18 U.S.C. 1385, which prohibits the use of the Army or the Air Force as a posse comitatus or to execute the laws.

The Department of the Navy, having jurisdiction over Marine guards, believes in fact that the phrase "embassy, legation, or consulate" in 10 U.S.C. 5983 does not include the USUN. In any event, the Navy maintains that the assignment of Marines to guard the USUN is prohibited by its policy of not assisting "Federal, State or local civilian authorities in law enforcement activities, except as permitted by law and regulation." Letter of February 12, 1988 from Harvey J. Wilcox, Acting General Counsel, Department of the Navy, to Michael Carvin, Deputy Assistant Attorney General, Office of Legal Counsel ("Navy Response"). We believe that 10 U.S.C. 5983 does in fact authorize the Secretary of State to request that the Secretary of the Navy assign Marine guards to the USUN, and that such an assignment is permissible under the Navy's own regulations and existing law.

I. 10 U.S.C. 5983

The broad powers vested by the Constitution in the President as Commander in chief of the Armed Forces (U.S. Const., Article II, sec. 2, clause 1) and chief federal law-enforcement officer (U.S. Const., Article II, sec. 3, clause 4) would unquestionably empower him, in the absence of contrary legislation on the subject, to assign members of the armed forces to guard buildings

owned and operated by the United States and subject to potential threats. See generally In re Neagle, 135 U.S. 1 (1890). Here, however, Congress has exercised its constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const., Article I, sec. 8, clause 14, and has spoken to the issue of using Navy personnel to guard embassies, consulates, or legations. Thus, the question arises whether 10 U.S.C. 5983 makes assigning Marine guards to the USUN "incompatible with the expressed or implied will of Congress," thus diminishing the executive's power to "its lowest ebb," or whether such an assignment is within the "zone of twilight" where the President and Congress have concurrent authority. See Youngstown Co. v. Sawyer, 343 U.S. 579, 637-39 (1952) (Jackson, J., concurring). If Congress has not barred this assignment, either expressly or implicitly, then any such decision is a matter in the discretion of the President.

Although Congress has not debated and addressed the specific issue of the assignment of Marine guards to the United Nations in New York, it has enacted legislation on the subject of Naval personnel at embassies, legations, and consulates of the United States. Thus, if 10 U.S.C. 5983 were to authorize only the assignment of Marine guards to embassies, legations, and consulates outside the United States, it could be inferred that Congress considered, and declined, to authorize such a domestic assignment. However, we do not read the statute as embodying a congressional determination that only assignments abroad are authorized. Rather, we think the better reading of 10 U.S.C. 5983 -- more consistent with the plain meaning of the statute -- authorizes the Secretary of State to request Marine guards for assignment to any "embassy, legation, or consulate" of the United States.

Section 5983 of Title 10 provides, in full:

Upon the request of the Secretary of State, the Secretary of the Navy may assign enlisted members of the naval service to act as custodians under the supervision of the principal officer at any embassy, legation, or consulate.

The section is entitled "State Department: assignment of enlisted members as custodians of buildings in foreign

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<sup>1</sup> Even where Congress has acted to the contrary, there are actions the President may take to execute his exclusive responsibilities under the Constitution. See, e.g., Myers v. United States, 272 U.S. 52 (1926). Congress may not use a power delegated to it to eviscerate a power textually committed to the President. In light of our conclusion that no act of Congress bars the assignment, we need not discuss whether this assignment is within the scope of a power exclusively committed to the President by the Constitution.

countries." The Navy contends that the title of 10 U.S.C. 5983, when read together with its language, "clearly suggests that Congress intended the authority to apply only to assignment to United States embassies, legations, consulates, and, probably, 'United States missions' in foreign countries." Navy Response at 1. The Navy also contends that "[t]he legislative history of the section further supports such an interpretation." Id. We find neither of these arguments persuasive for a number of reasons. First, the USUN falls within the technical definition of the term "embassy," inasmuch as it has an ambassador in residence there. Second, it can be surmised from the definitions of those terms that Congress sought to include within the scope of the statute all establishments housing diplomatic agents of any kind. Finally, in 1946, Congress deliberately deleted the qualifying phrase "located in foreign countries" that followed "embassy, legation, or consulate of the United States," thus altering the plain meaning of the statute to cover embassies, legations, or consulates of the United States, wherever located. H. Rep. No. 2508, 79th Cong., 2d Sess. 74 (1946).

We begin with the words of the statute. An examination of the meaning of the words in issue, as defined in contemporary dictionaries, indicates that the USUN falls under the technical definition of "embassy." According to Webster's New International Dictionary (1917), an "embassy" is the "residence or office of an ambassador." The Oxford English Dictionary of 1897 defines an "embassy" as "the body of persons sent on a mission, or as a deputation, to a sovereign, etc.; the ambassador and his retinue, with their surroundings; also, the official residence of the ambassador." (Emphasis added.) As the office of an ambassador, the USUN is an "embassy" under these definitions.<sup>2</sup>

<sup>2</sup> To be sure, the USUN is called a "mission" rather than an embassy. We do not believe, however, that this implies that the USUN or other diplomatic outposts now referred to as "missions" fall outside the scope of 10 U.S.C. 5983. This is primarily because the term "mission," now often used as shorthand to describe permanent diplomatic missions, did not have the same meaning in the early part of this century. The preferred definition was the general one, that is "a sending, or being sent or delegated, by authority to perform some service or function or to transact certain business; commission." Webster's New International Dictionary (1917). In the diplomatic context, "mission" was defined as "persons sent; envoys; specif.: a. A body of persons appointed to go somewhere to perform any service, esp. to a foreign country to carry on negotiations, establish relations, etc.; a special embassy." It is the second definition, however, that is more interesting for our purposes: "[a] permanent diplomatic body or establishment; a permanent foreign embassy or legation. U.S. Rare" (emphasis in original). From this, and a survey of contemporary discussions of diplomatic missions, compare 4 J. Moore, A Digest of International Law,

Moreover, section 5983 covers diplomatic offices whose personnel are of the first rank (embassy), second rank (legation), and even those who are not accredited to the sovereign or minister of a foreign government (consulate).<sup>3</sup> This

<sup>2</sup> (Cont.) sections 623-37 (1906) and 4 G. Hackworth, Digest of International Law, sections 370-81 (1942) with 7 M. Whiteman, Digest of International Law 1-504 (1970), it is apparent that the word "mission" was not generally thought to comprehend the concept of a permanent diplomatic mission. That understanding of the term came into wider use after the formulation of "embassy, legation, or consulate" had been introduced in 1906, in related statutes. See, e.g., 22 U.S.C. 4221, derived from act of August 18, 1856, ch. 127. §24, 11 Stat. 61 (giving authority to take sworn depositions to secretaries of any "embassy, legation, or consulate" instead of secretaries of any "legation, consulate or commercial agency"). Moreover, even the rare usage of "mission" does not seemingly refer to a particular type of permanent diplomatic body distinct from embassies, legations, or consulates. Rather, the rare use of "mission" was simply a general term which describes these specific types of diplomatic outposts. Thus, there was no need for Congress to supplement the words "embassy, legation or consulate" in section 5983 with the term "mission" in order to reach all permanent diplomatic bodies then in existence. Consequently, the absence of that term in section 5983 does not create the negative inference that Congress intended to exclude "missions" from the coverage of the act.

<sup>3</sup> A "legation" is defined by Webster's as a "place of business or official residence of a diplomatic minister at a foreign court or seat of government." Webster's New International Dictionary (1917). Both Webster's and the Oxford English Dictionary make clear that the difference between a legation and an embassy is that "legation" is used "when the minister has not the titular rank of 'ambassador.'" Oxford English Dictionary (1897). A consulate is "the jurisdiction or resident of a 'consul.'" A "consul" is an "official appointed by, or with the authority of, a government to reside in some foreign country to care for the commercial interests of the citizens of the appointing government . . . . He is ordinarily not accredited to the sovereign or minister of the foreign government." Webster's New International Dictionary (1917).

That the definition of "legation" and "consul" includes a reference to a "foreign court" or a "foreign country" does not mean that section 5983 fails to reach the USUN because it is located in New York. First, as an office of an ambassador, as noted above, the USUN is more likely to fall within the ambit of the word "embassy" than either "legation" or "consul." Second, we think that by using all three words together, Congress was trying to cover permanent diplomatic establishments with diplomats of all grades, and not because it sought to limit the assignment of Marine guards only to diplomatic establishments in

broad statutory scope indicates a desire on the part of Congress to cover all offices of the United States with any kind of diplomatic personnel.<sup>4</sup>

Finally, the deletion from the statute of the phrase "located in foreign countries", provides another guide to the intent of Congress. In 1940, Congress continued in effect authority previously given to the Secretary of State to request that Navy or Marine personnel serve as "custodians" at "embassies, legations,<sup>5</sup> or consulates of the United States located in foreign countries." In 1946, Congress eliminated the phrase "in foreign countries," changing the legislation to read

The Secretary of the Navy is authorized, upon request of the Secretary of State, to assign enlisted men of the Navy and the Marine Corps to serve as custodians under the supervision of the principal officer at an embassy, legation, or consulate.

H.R. Rep. No. 2508, 79th Cong., 2d Sess. 74 (1946).

The House Report claims that the proposed legislation perpetuated the provision in the Department of State Appropriation Act of 1947, which provided as follows:

<sup>3</sup> (Cont.) foreign places. This conclusion is supported by Congress' decision, discussed below, to remove the limitation "in foreign countries" from an earlier version of the act.

<sup>4</sup> One of the memos submitted by the State Department argues that "established practice has treated [the] Geneva [UN] as falling within the scope of Section 5983," even if Geneva is not technically an "embassy" or a "legation." And, since the Geneva U.N. is functionally indistinguishable from the USUN, the argument goes, the statute must cover the USUN as well. Memorandum of April 2, 1981 from James Gray to Ambassador Kirkpatrick re: Possible Request for Assignment of Marine Personnel at USUN, at 3-4. This analogy to the Geneva mission fails to come to grips with the Navy's assertion that 10 U.S.C. 5983 reaches only foreign missions.

<sup>5</sup> That 1940 statute, 34 U.S.C. 448b, provided in full:

The Secretary of the Navy is authorized, upon request by the Secretary of State, to assign enlisted men of the Navy and the Marine Corps to serve as custodians, under the immediate supervision of the Secretary of State or the chief of mission, whichever the Secretary of State shall direct, at embassies, legations, or consulates of the United States located in foreign countries."

(Department of State Appropriations Act, 1941, ch. 189, title I, 54 Stat. 185 (1940)).

[T]he Secretaries of War and Navy are authorized, upon request by the Secretary of State, to assign enlisted men of the Army, Navy, and Marine Corps to serve as custodians, under the immediate supervision of the Secretary of State or the chief of mission, whichever the Secretary of State shall direct, at embassies, legations, or consulates of the United States located in foreign countries . . . . "

H.R. 6056, quoted in H.R. Rep. No. 2508, 79th Cong., 2d Sess. 74 (1946) (report on the Foreign Service Act of 1946, H.R. 6967).<sup>6</sup> Specifically, the House Report states that "[t]he present legislation perpetuates this provision except that no mention is made of enlisted men of the Army, the War Department having indicated its reluctance to permit the assignment of such personnel." Id.

Reading the phrase "perpetuates this provision" as the Navy does -- to mean that the act perpetuates this section in all respects -- is inconsistent with the comment in the House Report. The section enacted into law differed from then-existing legislation and the Department of State Appropriation Act of 1947 in at least two ways. It eliminated the reference to Army personnel and in both cases struck the words "in foreign countries." We think the phrase "perpetuates this provision" need not -- indeed, cannot -- be read to mean that the act perpetuates the provision in question in all respects. Rather, we think it means simply that a section authorizing the assignment of Navy and Marine personnel for duty as custodians in State Department buildings will continue in effect as law.

In essence, Congress eliminated the phrase "in foreign countries" without discussion. There are many reasons why it may have made this change. Since the United Nations was being formed at this time in the United States, one could argue that Congress was aware that there would be diplomatic establishments of the United States in the United States. One can similarly argue that Congress would not have struck the phrase without a purpose, and that the better reading of Congress' intent is to say that it expressly intended to cover diplomatic establishments in the United States. We need not rely on such unspoken implications, however, because, as noted, we believe that the USUN falls within the technical definition of, and the more general intent of Congress as manifested by,

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<sup>6</sup> The House Report accompanying H.R. 6967, the "Foreign Service Act of 1946," was sent to the Committee of the Whole House on July 12, 1946, one week after H.R. 6056, the "Department of State Appropriation Act, 1947" had passed the full Congress. That appropriation act had passed on July 5, 1946.

"embassy, legation, or consulate."<sup>7</sup>

## II. The Posse Comitatus Act

The other possible impediment posed by Congress and cited by the Navy to assigning Marine guards to the USUN is the Posse Comitatus Act, 18 U.S.C. 1385 (the "Act"). Navy Response at 2. This statute was enacted in 1878 to address concerns of Democrats in Congress who objected to the use of the Army in the 1876 elections and who criticized Attorney General Alphonso Taft's instructions to United States marshals to secure the peace in part by commissioning posses comitatus. The Act now provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

The Navy -- and the Marine Corps as a constituent part thereof -- are thus plainly excluded from the coverage of the Act. The terms of the Act mention only the Army and the Air Force. When enacted in 1878, the Act applied only to the Army.<sup>8</sup> In 1956, the Act was formally extended to cover the Air Force, although it had been applicable to the Air Force since 1948 by virtue of general legislation enacted at the time the Air Force became autonomous. That general legislation made all relevant laws relating to the Army applicable to the Air Force. See discussion in Furman, Restrictions Upon Use of the Army Imposed By the Posse Comitatus Act, 7 Mil. L. Rev. 85, 95-96 (1960).

<sup>7</sup> That the title of 10 U.S.C. section 5983 still refers to "buildings in foreign countries" does not change our analysis. Titles "are interpreted according to the following well-established rules: (1) The title cannot control the plain words of the statute. (2) In case of ambiguity the court may consider the title to resolve uncertainty in the purview of the act or for the correction of obvious errors [footnotes omitted]." 2A Sutherland Statutory Construction, section 47.03 (4th ed. 1984). That Congress neglected to change the title of the act in 1946 cannot trump the plain words of the act; nor should it prevent us from giving effect to what we think is the best reading of Congress' intent.

<sup>8</sup> Act of Aug. 10, 1956 to revise, codify, and enact into law, title 10 of the United States Code, sec. 18, 70A Stat. 626.

<sup>9</sup> Where Congress has sought to limit the use of all of the armed forces to aid civilian law enforcement officials in enforcing the law, it has done so expressly. For example, 10 U.S.C. 375 requires the Secretary of Defense to issue necessary regulations to "insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any



All courts considering the issue make plain that the Act is not applicable to the Navy or Marines. See United States v. Roberts, 779 F.2d 565 (9th Cir.), cert. denied, 107 S.Ct. 142 (1986); United States v. Del Prado-Montero, 740 F.2d 113 (1st Cir.), cert. denied, 469 U.S. 1021 (1984); United States v. Walden, 490 F.2d 372, 373 (4th Cir. 1974), cert. denied, 416 U.S. 983 (1974); United States v. Yunis, (No. 87-0377), Pretrial Mem. Order No. 3 (D.D.C. 1988); United States v. Gerenä, 649 F. Supp. 1179 (D.Conn. 1986).<sup>10</sup>

The Navy concedes that the Act does not apply to the Navy and Marine Corps, but argues that "the provisions of the Act have been adopted as a matter of policy." Navy Response at 2. See also United States v. Walden, 490 F.2d at 373. It is true that Department of Defense regulations, which must be assumed to have the force of law, provide that "DoD guidance on the Posse Comitatus Act . . . is applicable to the Navy and Marine Corps as a matter of DoD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis." 32 C.F.R. § 213.10(c) (1987).<sup>11</sup> However, no law -- constitutional

<sup>9</sup> (Cont.) personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation in an interdiction by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."

<sup>10</sup> The Act has also been held not to cover the Coast Guard. United States v. Chapparo-Almeida, 679 F.2d 423 (5th Cir. 1982), cert. denied, 459 U.S. 1156 (1983).

<sup>11</sup> The court in Walden relied, at least in part, on this regulation for its determination that the Act applies to the Navy as a matter of policy. However, the court also seemed to suggest that the Act would cover the Navy even absent this regulation. Any such implication is clearly erroneous because it extends coverage to an entity not encompassed by the statute's plain terms. Specifically, the Walden opinion suggested that exclusion of the Navy was more in the nature of a drafting oversight than a deliberate legislative choice, even as it reluctantly conceded that execution of the laws by Navy or Marine Corps personnel did not violate "the letter of the Act . . . ." 490 F.2d at 373. The court pointed to the fact that the Act was enacted into law in 1878 as a rider to an Army appropriations bill, and indicated that the 1956 amendment including the Air Force within the coverage of the Act was a mere technical correction to the statute. 490 F.2d at 375 n. 5. The court cited Note, Honored in the Breech [sic]: Presidential Authority to Execute the Laws with Military Force, 83 Yale L.J. 130, 143 n. 96 (1973), id. at 374, which makes a similar argument. However, the court does not mention the fact that the original version of the bill introduced in 1878 covered the Army and the Navy. See, Furman, supra, 7

or statutory -- makes the Posse Comitatus Act applicable to the Navy or the Marines.<sup>12</sup> See United States v. Roberts, 779 F.2d 565 (9th Cir.) cert. denied, 107 S.Ct. 142 (1986); United States v. Del Prado-Montero, 740 F.2d 113 (1st Cir.), cert. denied, 469 U.S. 1021 (1984); Walden, 490 F.2d at 373; United States v. Yunis, (No. 87-0377), Pretrial Mem. Order No. 3 (D.D.C. 1988); United States v. Gerena, 649 F. Supp. 1179 (D.Conn. 1986). Accordingly, any decision on whether to assign Marine guards is committed to the discretion of the executive branch. Indeed, the DoD regulation itself obviously allows the Secretary of the Navy, if he so chooses, to grant the request of the Secretary of State that Marine guards be assigned to the USUN. Thus, the DoD regulation need not be modified to permit the Navy to exercise the discretion left to it under the Act.

Finally, the Department of the Navy points out that the Marine Security Guard program is covered by a Memorandum of Agreement signed August 1, 1967 between the Department of State and the Department of Defense ("MOA"). Navy Response at 1. That agreement was more recently embodied in a Memorandum of Understanding of December 15, 1986 between the Department of State and the Marine Corps. Those memoranda do not mention the USUN, and the parties do not seem to have previously discussed whether any Marine guards would be stationed in the United States. For example, the MOA is replete with references to "overseas." See, e.g., Section IV.B.1(a) ("All Marine Corps personnel assigned to the program overseas"); section IV.B.2(c) and (d) ("Prior to departure for a post overseas, the Marine Corps will arrange for all necessary physical examinations . . . ." and "The Marine Corps will ensure the certification of at least an

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<sup>11</sup> (Cont.) Mil. L. Rev. at 95-96. It may be the case, as the Yale note suggests, that the reference to the Navy was dropped because the bill was a rider to an Army appropriations bill. Even if that were so, however, it reflects a legislative choice that should be given effect. After all, Congress could have proceeded through a free-standing bill or by means of a rider to the Navy's appropriations bill if it wanted to limit the Navy and believed that it could not or should not do so in an Army appropriations bill. In all events, the statute, for whatever reason, does not mention the Navy and courts are not at liberty to revise legislation by supplying statutory language they think more appropriate.

<sup>12</sup> Chief Justice Burger's comments in Laird v. Tatum, 408 U.S. 1, 15-16 (1972) cited by the Walden court, are not to the contrary. There the Chief Justice emphasized that "there is nothing in our Nation's history . . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied." By definition, of course, if no law prohibits the activity, it cannot be unlawful.

interim Top Secret clearance for each Marine before assignment overseas.") (emphasis added). Nothing in either of the memoranda, however, expressly precludes any United States assignments for Marine guards. Details related specifically to their assignment at the USUN may have to be worked out between the two Departments, but nothing in the agreements, or in law, prevents the two parties from amending their current agreement.

Conclusion

In sum, neither 10 U.S.C. 5983 nor the Posse Comitatus Act prohibit the assignment of Marine guards to the USUN. In fact, the better reading of 10 U.S.C. 5983 authorizes the Secretary of State to request that Marine guards be assigned to the USUN. Navy regulations do not prohibit the Secretary of the Navy from acceding to that request; he may, according to the statute and Navy regulations, grant or deny the request.

*Michael A. Carvin*

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