Oct 4, 1967

[redacted]

cc: Files
Selig
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MEMORANDUM

Re: Use of Federal Troops to Protect Government Property and Functions at the Pentagon Against Anti-War Demonstrators

Questions have arisen concerning the legal basis for the use of Federal troops to protect property and functions of the Federal Government from interference by anti-war demonstrators, who plan to appear at the Pentagon on October 21, 1967. It is estimated that approximately 100,000 demonstrators may be involved. Under these circumstances, the responsible civilian law-enforcement agencies 1/ may not be able to supply a sufficient number of guards to police the Pentagon area. Thus the question arises whether Federal troops may be used for that purpose.

There are two possible grounds for such a use of Federal troops. The first is 10 U.S.C. 332, which regulates the employment of the Armed Forces by the President to enforce Federal authority. The second, a nonstatutory ground, is the inherent right of the Government to use military force, if necessary, to suppress unlawful force which threatens Federal property or functions. These grounds are discussed below in sections 1 and 2 of this memorandum. Section 3 discusses the Posse Comitatus Act and concludes that it does not prohibit the use of Federal troops for the purposes contemplated, on either the statutory or the nonstatutory ground. In conclusion, section 4 briefly discusses considerations pertaining to the choice of grounds for using Federal troops, and the command arrangements which should govern their use in either case.

1/ The policing of the Pentagon and its adjacent grounds and parking lots is a function of the General Services Administration. Police power over access roads to the Pentagon that are under the jurisdiction of the United States is a function of the United States Park Police. The demonstration may also affect areas within the jurisdiction of the police of Arlington County and the Commonwealth of Virginia.

1. The Statutory Ground. 10 U.S.C. 332 provides as follows:

> "Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

The President could provide for the protection of the Pentagon by acting under this section. He need not wait for unlawful obstructions to occur before taking reasonable steps under this section to protect against their likely occurrence. However, he may not be willing to issue a proclamation, as 10 U.S.C. 334 would in that event require. [2]

2. The Nonstatutory Ground. The use of Federal troops to protect Federal property is specifically regulated by subparagraph 11.a of Army Regulations (AR) 500-50, 19 July 1961, which provides as follows:

> "The right of the United States to protect its property by intervention with Federal troops in an emergency is an accepted principle of our Government. The exercise of this right is an executive function and extends to all Government property of whatever nature and wherever located, including premises in the possession of the

[2] "Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."

Federal Government. Intervention is warranted where the need for protection of Federal property exists and the local authorities cannot or will not give adequate protection."

The asserted right of the United States to protect its own property presumably implies (if it does not actually include) the right to prevent interference with the use of such property in the performance of Federal governmental functions. Moreover, in a memorandum dated January 25, 1946 (SPJGA 1946/1478), the Judge Advocate General expressed the opinion that the War Department "may, through its troops, use such force as is reasonably necessary to overcome interference with the execution of its Governmental functions." (In full context, the conclusion of this opinion is not limited to protecting functions of the War Department itself, as the phrase "its functions" might suggest.) Neither this opinion nor subparagraph 11.a of AR 500-50 assumes that a Presidential proclamation would be necessary.

For reasons stated below, it is believed that subparagraph 11.a of AR 500-50 and the passage quoted above from SPJGA 1946/1478 are valid statements of law and would furnish an alternative basis to 10 U.S.C. 332 for using Federal troops to protect property and functions of the United States from threatened interference at the Pentagon.

According to JAGA Memorandum 1963/4239 (June 5, 1963), the right asserted in subparagraph 11.a is "the sovereign right of any nation to protect itself, its agencies, and its property against molestation and to use for that purpose such of the means at its disposal as circumstances require." The memorandum goes on to list an unbroken line of JAG opinions affirming the right of the Federal

Government to protect its property by intervention with Federal troops in an emergency. /3/

As limited by the conditions set forth in subparagraph 11.a, this "sovereign right" is a particular expression of the martial law principle that when unlawful force threatens the order of the State and the appropriate civil authorities are unable to preserve order, the sovereign may use military force to whatever degree is necessary for that purpose. Luther v. Borden, 7 How. 1, 45-46 (1849). Although this principle does not depend upon any express provision of the Constitution or Act of Congress, its validity has long been recognized by the courts and other legal authorities. E.g., Luther v. Borden, supra; In re Debs, 158 U.S. 564, 582 (1895); /4/ F.B. Wiener, A Practical Manual of Martial Law 16-27 (1940). The principle is at least available to justify the defensive use of troops to protect property and internal functions of the Government against forcible interference. Such a restricted use of troops is not likely to be seriously challenged. The Supreme Court has in fact

/3/ Thus it was concluded that Federal troops could be used to guard Government railroad equipment (JAG 370.61, 5 Nov. 1924); to guard a United States Mint (id. 370.61, 27 Dec. 1933); to guard an official residence (id. 093.7, 21 May 1940); to guard the grave of President Roosevelt (SPJGA 1945/10728, 19 October 1945); to cross a picket line to obtain food products necessary for the maintenance of the Army (SPJGA 1946/1478, supra); and to provide security to the wreckage of a civil aircraft (JAGA 1962/4010, 26 May 1962). Moreover, although Federal troops were not actually used in connection with the 1963 civil rights march on Washington, they were prepositioned for use in nearby staging areas.

/4/ "The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. . . . If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws." (Dictum).

indicated, in powerful dicta, that the right of the President to protect Federal property with troops, even in the absence of any authorizing statute, is not open to doubt. In re Neagle, 135 U.S. 1, 65 (1890).[5]

3. The Posse Comitatus Act. The remaining question is whether the Posse Comitatus Act, 18 U.S.C. 1385, prohibits the use of Federal troops for the purposes contemplated. In substantially the same form as when it was originally enacted in 1878 (20 Stat. 152), 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 Act evidently raises no obstacle to the use of troops under 10 U.S.C. 332 and 334, since this would be a use "expressly authorized by . . . Act of Congress." The more difficult question is whether the Posse Comitatus Act would prohibit basing the use of Federal troops on the sole ground of the sovereign's inherent right to protect its own functions by force, as discussed in section 2 above -- a ground that is not sanctioned by any statute or by any express provision of the Constitution. It is believed that

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[5] ". . . if the President . . . is advised that the mails of the United States . . . are liable to be robbed and the mail carriers assaulted . . . who can doubt the authority of the President . . . to make an order for the protection of the mail and of the persons and lives of its carriers, by . . . providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States. . . ?

"The United States is the owner of millions of acres of valuable public land . . . . Has the President no authority to place guards upon the public territory to protect its timber?"

the Posse Comitatus Act does not prohibit the proposed use of Federal troops on this ground, in the event that the civil authorities are unable to provide adequate protection. This conclusion is based primarily upon the historical background and legislative history of the Act.

In 1854, Attorney General Caleb Cushing rendered an opinion to the effect that the power conferred on United States marshals by the Judiciary Act of 1789 "to command all necessary assistance in the execution of their duties" was equivalent to the power of a sheriff at common law to enlist a posse comitatus to assist him in executing writs, quelling riots, and other law enforcement activities. 6 Op. A.G. 466, 471. At common law, the posse comitatus consisted of all able-bodied males of a county over 15 years of age. Cushing emphasized that this would include "the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any way affect their legal character." Id. at 473.

Preparing for the Presidential and Congressional elections of 1876, Attorney General Alphonso Taft instructed the United States marshals to secure the rights of voters at the polls, to prevent breaches of the peace, and to that end "to summon to your assistance, in preventing and quelling disorder," a posse comitatus. He then referred to the Cushing opinion, specifically quoting the statement set forth above with respect to the use of military forces as part of the posse. 6/ At that time, no statute expressly authorized the use of Federal troops for such purposes.

In the disputed Tilden-Hayes election of 1876, Hayes obtained the necessary electoral votes only because the disputed votes of South Carolina, Louisiana, and Florida were all awarded to him. In each State the elections were accompanied by the use of Federal troops to preserve the

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6/ S. Ex. Doc. No. 30, 44th Cong., 2d Sess., pp. 7-8.

peace. In each State both the Federal and local elections were contested and the troops supported the Radical Republicans.

The Posse Comitatus Act grew out of the debate subsequently initiated by Democrats in Congress who protested against the use of the Army in the 1876 elections and who criticized Taft's instructions to the United States marshals and the theory set forth in the Cushing opinion. With minor modifications, the provision that was enacted was a rider introduced by Congressman Knott of Kentucky. When asked what class of cases the rider was designed to meet, Knott explained that it was "designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws." 7 Cong. Rec. 3849.

President Hayes, who signed the bill, took a similarly limited view of the scope of the Act. In his Diary for July 30, 1878, he wrote that "the Government is a good deal crippled in its means of enforcing the laws by the proviso attached to the Army Appropriation Bill which prohibits the use of the Army as a posse comitatus to aid United States officers in the execution of process."

It is therefore reasonable to conclude that the Posse Comitatus Act was aimed solely against the Cushing-Taft theory that Federal marshals could order the Army into action to assist them in executing the laws of the United States. The Act was not intended to prevent the President or the military departments from using Federal troops, where necessary, to protect property and internal functions of the Government against unlawful interference. The omission from the Act of any reference to the naval or marine forces further indicates that the Act was a response to particular historical circumstances and should be construed accordingly.

Judicial authority supports the above conclusions. Thus the Act has been held to prohibit the use of the Army to

collect Federal taxes or to apprehend an escapee from a nonmilitary prison. 16 Op. A.G. 162 (1878); Wynn v. United States, 200 F. Supp. 457 (E.D. N.Y. 1961). On the other hand, the Supreme Court has implied that the Act does not diminish the authority of the President to use Federal troops to secure Federal property or the safe performance of Federal functions. See In re Neagle, supra, 135 U.S. at 65.

4. Choice of Grounds; Lines of Command. As indicated above, there are alternative statutory and nonstatutory grounds for using Federal troops, if necessary, to protect property and functions of the Government against unruly demonstrators. So long as troops are needed only for such limited purposes, there is a choice between these two grounds which may be determined by considerations of policy. Sections 332 and 334 of title 10 have the advantage of being explicit provisions of law, unlike the above-described implied powers of the sovereign which are not limited by the Constitution or statutes. However, proceeding under section 332 requires issuance of a proclamation under 334. There are obvious difficulties in framing such a proclamation in the context of a situation in which violence has not broken out -- indeed, where the use of troops is intended to forestall violence by their very presence at the scene. Perhaps for this reason, no overt action under sections 332 and 334 was taken in either the 1963 civil rights march or the 1965 peace demonstration in Washington. On the other hand, action under these sections was taken prior to the Selma-Montgomery march in 1965, in the expectation that the presence of troops would prevent violence from breaking out.

Moreover, in the event that Federal troops are to be used not merely in a defensive operation to protect Government property and functions at the Pentagon or elsewhere in Washington, but for affirmative purposes of suppressing rioting or other general law enforcement activity in the city, the troops should be called into action under section 332 with the accompanying proclamation required by section 334. Reliance upon this

express statutory ground would forestall any questions that might otherwise be raised concerning the possible applicability of the Posse Comitatus Act to the use of Federal troops for more than purely defensive purposes.

If Federal troops are used, on either ground of authority, they should remain entirely under military command, subject to the ultimate direction of the President. This would be in keeping with the Congressional policy, as expressed in the Posse Comitatus Act, against placing the Army under the command of civilian law enforcement officials.