

28 APR 1970

Honorable William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D. C. 20530

The most recent statement concerning this subject was issued by your office on October 14, 1967 in connection with demonstrations at the Pentagon. That opinion stated that troops could be used to protect the Pentagon and other Federal functions at the Pentagon based on the inherent authority of the Government in these situations.

Dear Bill:

Your November opinion addressed, and concludes in a manner which leaves no impediment to the use of troops, whether the Posse Comitatus Act (18 U.S.C. 1385) precludes the use of Army or Air Force personnel "to protect diplomatic personnel, functions, or property." (Incl 1) As you may recall, this question arose prior to a proposed march on the Vietnamese Embassy during the anti-war demonstrations in the District of Columbia on 13-15 November 1969. After reviewing your opinion, The Judge Advocate General of the Army and I have become concerned that the opinion limits in a way not required by the Posse Comitatus Act the authority to use Army and Air Force personnel to protect Federal property or prevent interference with Federal functions.

Your prior memorandum indicated that, while the protection of foreign ambassadors and embassies was clearly a Federal function recognized by the Constitution and Acts of Congress, Army and Air Force personnel could not be used to protect embassies or diplomatic personnel since the Posse Comitatus Act provided that Army and Air Force personnel could not be used to execute the civilian laws "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." [Emphasis added] Your opinion noted that the use of troops was not expressly authorized in the Constitution or in any statute dealing with the protection of diplomatic personnel or property.

Both the Army and the Department of Justice have, in the past, taken the view that the Federal Government has the inherent authority to protect Government property and prevent interference with Federal functions. It has been clearly recognized that civilian law enforcement agencies must first be used in these situations. However, it has also been recognized that, when the situation is beyond the capability of

OGC, OSA

✓ ASG, OSA

Mr Jordan

Mr Sacks

OSA 370.6 4-28-70 FM 1-11-69

civilian agencies to handle, the Government has the inherent authority to use military forces and the Posse Comitatus Act does not bar such use. In 1870, he wrote that "the Government is a good deal crippled in its means of enforcing the laws by the proviso attached to

The most comprehensive statement concerning this subject was included in the opinion issued by your office on October 16, 1967 in connection with anti-war demonstrations at the Pentagon. That opinion concluded that Federal troops could be used to protect the Pentagon and prevent interference with Federal functions at the Pentagon based on the inherent authority of the Government in these situations.

theory that Federal marshals could order the Army into action Your November opinion addresses, and concludes in a manner which imposes no impediment to the use of troops, whether the protection of embassies is the kind of governmental function which is within the scope of the rather explicit dicta of In re Neagle, 135 U.S. 1, 64 (1889). However, you had difficulty in finding an exception to the requirement of the Posse Comitatus Act that there be an express exception in either the Constitution or a statute.

stances and should be construed accordingly.

I believe that our legal reasoning parts company at this point. I view the question involved not as one of finding an exception to the Posse Comitatus Act, but initially as one of determining whether the Act, fairly interpreted, applies to the conduct in question. My conclusion is that the Act does not reach the kind of conduct which was proposed in protecting the embassies, and hence that it is unnecessary to search for an express exception to the provisions of the Act. supposed malefactors out of the immediate vicinity in which the protective. This reading of the Act is consistent with the October 1967 opinion of your office cited above. Specifically, that opinion noted, I would suggest a further implied limitation on the authority to use troops under the The Posse Comitatus Act grew out of the debate quasi-martial law 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.

It appears to me that it would be a fair construction of the Posse Comitatus Act, read against history, to exclude from its application essentially passive and defensive efforts by the Government to protect its property, functions, and operations. Distinctions could be made between such protective activities, and affirmative measures such as the investigation of possible criminal matters, and the pursuit of supposed malefactors out of the immediate vicinity in which the protective functions undertaken by the armed forces are executed. To avoid an excessively relaxed attitude towards the use of troops, I would suggest a further implied limitation on the authority to use troops under the Neagle doctrine: That the authority rest on the quasi-martial law principle of necessity; that is, that its existence be predicated upon a finding that, in the particular case, the functions of Government cannot adequately be protected by civil authorities, whether Federal or State. As I read the 1967 opinion of your office, page 6, a similar limitation is implied in that opinion.

I appreciate the fact that your November opinion had to be furnished us on extremely short notice, and I apologize for seeking to re-litigate the issue which we raised at that time. I do suggest that it is in our mutual interests to re-examine this question at a time when

there are no pending crises, so that we can be prepared for future situations which may arise.

I should add that the Army is not eager to find itself in the role of defending embassies, or for that matter any other role involving disturbances on the domestic scene. Hopefully, the plans to augment the White House police organization to provide a specific force for embassy protection will minimize the possibility that armed forces of any Service will be required in the future. It is, however, difficult to project future demands, and we feel that the interpretation of the Posse Comitatus Act advocated above, in addition to being consistent with the history of that Act, provides desirable flexibility to the President, the Attorney General, and the Secretary of Defense in dealing with situations which may arise. I am particularly concerned that the reasoning of the November opinion undercuts the October 1967 opinion, which governs an important part of our set of assumptions concerning the permissible use of Army personnel. While I would like to see the November opinion revised, it is especially important to have assurance that it is limited to the particular facts with which it deals, and does not effect a retreat from the general views contained in the October 1967 opinion.

The attached appendix to the Department of the Army Civil Disturbance Plan is submitted in compliance with paragraph IV of reference cited above.

Please let me know if we can be of assistance to you in addressing this matter.

As the use of military resources during civil disturbance situations, the Secretary of the Army publishes directions and procedures through the medium of the DA Civil Disturbance Plan.

The common procedures and requirements contained in this plan apply equally to all DOD components. Accordingly, the attached implementing document which has been concurred in by the military departments and appropriate DOD agencies, is furnished in behalf of all DOD components. However, individual components may publish further instructions peculiar to their respective responsibilities deemed appropriate.

Sincerely,

(Signed) Robert E. Jordan, III
Robert E. Jordan, III
General Counsel

Inclosure

As Stated

plus D/Justice
memo of 16 Oct 67

RECEIVED OF THE VONA
C 112

NOV 58 4 10 PM '67

4