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MEMORANDUM FOR THE

HONORABLE ROBERT E. JORDAN, III

GENERAL COUNSEL, DEPARTMENT OF THE ARMY

Re: Statutory authority to use federal troops to assist in the protection of the President

This is in response to your request for the views of this Office with respect to the use of components of the armed forces to assist in protecting the President, through the stationing of troops in the vicinity of the White House, during the demonstrations planned for November 13, 14 and 15.

It is our view that Public Law 90-331, 82 Stat. 170, authorizes such use of the armed forces if requested by the Director of the Secret Service. This memorandum is confined to a discussion of the scope of that statute and is not addressed to the authority to use federal troops for the protection of federal functions and property generally -- a subject previously discussed in our memorandum of October 16, 1967. If the Director of the Secret Service should make a request it would be advisable to have it refer specifically to P.L. 90-331.

13 Protection of the President

The primary responsibility for the protection of the person of the President is vested in the Secret Service by 18 U.S.C. 3056 which reads in pertinent part:

10 "Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice-President or other officer next in the order of succession to the office of President, and the Vice-President elect; * * * and perform such other functions and duties as are authorized by law."/*/

In 1968 Congress increased the responsibilities of the Secret Service by authorizing it to protect persons determined to be major presidential and vice-presidential candidates, P.L. 90-331, 82 Stat. 170. In so doing, Congress provided additional funds and express authority to utilize other federal agencies:

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/*/ Additional responsibility may be vested in the White House Police who are to perform such duties as the Secretary of the Treasury may prescribe in connection with the protection of the Executive Mansion and Grounds, any building in which White House offices are located, and the President and members of his immediate family. (3 U.S.C. 202)

"Sec. 2. Hereafter, when requested by the Director of the United States Secret Service, Federal Departments and agencies, unless such authority is revoked by the President, shall assist the Secret Service in the performance of its protective duties under section 3056 of title 18 of the United States Code and the first section of this joint resolution."

It is clear from the legislative history of this provision that it contemplates the furnishing of personnel, as well as equipment and services, and that it is intended to encompass all federal agencies, including the military, and is not limited merely to traditional law enforcement agencies.

Legislative History of P.L. 90-331

In late May 1968, while the Senate Appropriations Committee was considering the Treasury and Post Office appropriations for fiscal 1969, the President approached Senate leaders on the need to authorize the Secret Service to protect major presidential candidates and for funds for this purpose. On May 27 the Committee met in executive session to hear Treasury officials on this subject. When the appropriation bill (H.R. 16489) was reported in the Senate on June 5, 1968 (see S. Rept. 1165, 90th Cong.,

2nd Sess.), the Committee recommended the additional funds plus a substantive provision authorizing the Secret Service to use other federal departments and agencies to carry out its protective function.

In reference to the bill, both Senator Dirksen and Senator Monroney noted an Illinois case which indicated the difficulty of Secret Service use of other federal personnel without express statutory authority. (Cong. Rec., June 6, 1968, pp. S. 6821, 6840). On a presidential visit to Chicago the local Secret Service office had requested the aid of personnel of the Alcohol and Tobacco Tax Unit, Internal Revenue Service, in maintaining surveillance of a gun dealer known to them who lived about 300 yards from the Inn in which the President was staying, had a large collection of military rifles, and kept a cannon in the garage. The IRS agents stayed at his home and attempted to prevent his entering the house unless they accompanied him. He thereafter brought civil suit against the two agents. The District Court dismissed and the Court of Appeals affirmed holding that the agents were within the scope of their authority -- based on the Secret Service

request and an internal Treasury order permitting the Secret Service to call on other Treasury personnel -- and were therefore immune from civil suit. Scherer v. Brennan, 379 F.2d 609 (C.A. 7, 1967), cert. denied, 389 U.S. 1021. The case, of course, left open the question whether the Secret Service could call on personnel outside Treasury.

The provision for use of other agencies was added to the bill specifically to avoid any such question in the future. Mentioning the Illinois case, Senator Dirksen expressed belief in the "inherent authority" to use other agencies but commented:

> "I want our Presidents to have every protection this Government can provide them. I do not want to risk another national tragedy because we have failed to put all the personnel and resources needed behind the task of protecting them. I want each department to be in constant liason with the Secret Service. And I want the Director of the Secret Service to be able to call upon our personnel and facilities -- without having to think twice about it -- to see that the assistance is available at all times." (p. S. 6821).

Senator Monroney also referred to the case and indicated the provision was designed to insure that the authority

to provide such assistance to the Secret Service would be accompanied by the immunity which attaches to a federal employee acting within the scope of his official duties. (S. 6840-41).

In the Senate debate on the bill, specific mention was made of the cooperation not only of federal law enforcement agencies but also of the military. Senator Monroney commented:

> "In many instances, with mob scenes, there is no way in which that safety can be assured, but danger can be materially lessened by the presence on duty of these men and, if necessary, the presence on duty of military detachments; because this lessens to a great degree -- it will not prevent, but will lessen -- the exposure to abnormal dangers that this week has shown that the men who campaign for high office may be subject to." (p. S. 6839)

The Senator repeated this specific reference to the military later (S. 6840-41).

In explaining that the language authorizing presidential revocation of the authority to call on other agencies was adopted at his suggestion, Senator Javits noted that otherwise the Director of Secret Service would have potentially great powers over the military. He pointed out:

"It will be noted at page 7, lines 1 through 6, that the Director of the Secret Service has the authority, and the word used is 'shall', to require other Federal departments and agencies, which would naturally include the national defense forces of the United States, to 'assist the Secret Service in the performance of its protective duties'." (p. S. 6840).

The appropriation bill with this amendment passed the Senate that day but the House, disagreeing on other matters, called for a conference. As an alternative, Congressman Mahon offered a joint resolution (H.J. Res. 1292) embodying the Senate language relating to the Secret Service. With virtually no debate, the resolution passed the House. (Cong. Rec., June 6, 1968, p. H. 4627). When the joint resolution was referred to the Senate, Senator Monroney explained this situation, commented that the legislative history of the appropriation bill language should be considered the legislative history of the resolution, and recommended its adoption. It passed without debate that same day (p. S. 6893).

Relationship to the Posse Comitatus Act

It is clear from the legislative history of P.L. 90-331 that Congress contemplated the use of military forces to aid

the Secret Service on request. It is also clear that some members, at least, thought there was already authority to provide such assistance to the Secret Service.

Absent the express language of P.L. 90-331, it would be necessary to consider whether the Posse Comitatus Act (18 U.S.C. 1385), which prohibits the use of the Army or Air Force for the execution of the laws "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress", would bar the use of military troops to aid the Secret Service. Given the broad authorization by Congress in P.L. 90-331, it is clear that the Posse Comitatus Act does not apply.

13 Use of Troops as a Cordon

While it is clear that the Secret Service may call for the assistance of military forces in carrying out its protective functions under 18 U.S.C. 3056, it is axiomatic that the Secret Service could not request troops to carry out functions which are beyond the scope of its own responsibilities. Accordingly, it is pertinent to review the authority to cordon the area in the vicinity of the White House as an exercise of Secret Service powers.

It is the responsibility of the Director of the Secret Service to provide the necessary protection to the President, and the statutes are silent as to how this protection is to be accomplished. There is also a singular lack of judicial construction of the Director's authority in carrying out his protective functions.

In Quaker Action Group v. Hickel, No. 22983, C.A.D.C. June 24, 1969, the court suggested that the discretion in carrying out the protective functions is not unlimited:

> "While courts must listen with the utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President, we must also assure ourselves that those conclusions rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." (Slip op. p. 10).

It indicated that a general limitation on the number of pickets at the White House raised sufficiently serious questions as to require a hearing on the merits.

On the other hand, the courts have recognized the paramount interest in the protection of the President:

10 "The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Watts v. United States, 394 U.S. 705, 707 (1969). *

The fact that this sometimes requires measures beyond the usual or normal public safety measures has also been recognized.

In Scherer v. Brennan, supra, the court found within the scope of the Secret Service duties the barring of a man from his own home and his constant surveillance even though he had apparently voiced no direct threat to the President. In arguing that this invasion of privacy was illegal, the appellant cited Camara v. San Francisco, 387 U.S. 523 (1967), and See v. Seattle, 387 U.S. 541 (1967). The court rejected his argument with the observation, "Here the need to protect the President of the United States from possible physical harm would

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* The Watts case was an appeal from a conviction for threatening the President. Finding the threat too vague in language and too remote in circumstances to justify conviction, the Court reversed the conviction.

justify measures that might not be considered appropriate in routine health inspections." 379 F.2d at 612.

The most that can be gleaned from these decisions is that the Secret Service may not have unlimited powers in protecting the President but its powers are broader than routine public safety measures. The test to be applied, it seems, is whether, given the overwhelming interest in protecting the President and his performance of his duties, the measures taken are reasonable under the circumstances.

It has been announced that the planned demonstrations are intended to involve large numbers of persons and to focus in major part upon the White House. There has been past experience with violent and disruptive behavior by one of the major organizing groups of the demonstration, both in this city and elsewhere. There was an attempt, as recently as a month ago, during a similar demonstration to force entry to the White House grounds. Given this background, it would appear reasonable for the Director of the Secret Service to conclude that the

positioning of troops in a cordon in the vicinity of the White House during the demonstration is necessary to the carrying out of his protective functions.

One other factor might be noted. The President has signified his intention to be at Cape Kennedy on November 14. If this present plan materializes, he would be absent from the White House during part of the planned demonstrations. Nevertheless, this factor would not alone justify a conclusion that positioning of troops in the vicinity of the White House is unwarranted.

The protective function extends to the President's family as well as himself and to the Vice-President. The Supreme Court indicated in Watts v. United States, supra, that it extends to the performance of the President's duties as well as his person. The protection of the Vice-President, should he be in his executive office, or to members of the President's family in the White House would justify necessary protective measures. Moreover, the protection of the President with respect to performance of his duties requires that he be assured

safe and immediate access to his primary office in the White House at all times. Assuring such access, even in his temporary absence, would appear to be a necessary concomitant of the protective functions of the Secret Service.

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