

WHR:MCL:jcs

cc: FILES
7 Mrs. Copeland
Miss Lawton

4 NOV 1 1969

4 MEMORANDUM FOR THE
4 HONORABLE ROBERT E. JORDAN, III
1 GENERAL COUNSEL, DEPARTMENT OF THE ARMY

*Picked up
by Quincy
11/14*

4 Re: Authority to use federal troops to assist in
the protection of foreign embassies in the
District of Columbia.

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 protect foreign embassies in the District of Columbia, specifically the Embassy of South Vietnam.

This memorandum is confined to the question whether active federal troops may be used for this purpose. As indicated in our Memorandum of October 16, 1967 concerning the use of D.C. National Guardsmen to police demonstrations in the District of Columbia, National Guardsmen in militia status may be appointed special policemen to assist the Metropolitan Police Department. Since the police have a clear obligation to protect foreign embassies (see D.C. Code §§ 22-1115, 1116), Guardsmen being utilized as special

policemen may assist them in carrying out that responsibility.

It is our view that elements of the Navy (including the Marine Corps and the Coast Guard when assigned to naval duty) may be utilized to protect foreign embassies in the District. However, a fair reading of the Posse Comitatus Act (18 U.S.C. 1385) would preclude the use of elements of the Army or Air Force for this purpose.

General authority to protect embassies

The conduct of foreign affairs is a uniquely federal responsibility under the Constitution and the Federal Government has all the powers necessary to discharge that responsibility. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Accepted international practice in the conduct of foreign affairs includes the exchange of ambassadors and other diplomatic representatives and host countries assume a general obligation to protect such representatives. In the United States this is recognized by statute both with respect to the persons of foreign diplomatic representatives (18 U.S.C. 112) and

with respect to the property and functions of diplomatic representatives (D.C. Code §§ 22-1115, 1116).

Given the responsibility to protect diplomatic personnel, functions and property, the question arises whether components of the armed forces may properly be used to carry out this responsibility.

Our general views with respect to the use of federal troops to protect federal property and functions are detailed in our memorandum on that subject, dated October 16, 1967, the substance of which need not be repeated here. It is appropriate to add, however, that the federal responsibility for the proper conduct of foreign affairs, in our view, is within the ambit of the federal functions which may properly be protected. This was recognized, in powerful dicta, by In re Neagle, 135 U.S. 1, 64 (1899), which observed that the President's duty "to take care that the laws be faithfully executed" extends not merely to enforcement of acts of Congress but to the enforcement of "the rights, duties and obligations growing out of the Constitution itself, our international

relations, and all of the protection implied by the nature of the Government under the Constitution". (Emphasis added.)

Absent an express impediment, it is our view that federal troops could properly be used to protect diplomatic personnel, functions and property.

13 Application of Posse Comitatus Act

The Posse Comitatus Act was enacted as an express limitation on the use of the Army (and later the Air Force) to execute the civilian laws "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress".

It could be argued that the constitutional responsibility for the conduct of foreign affairs would constitute an exception to the general prohibition, but since the Constitution does not "expressly authorize" the use of troops to carry out this function, it is doubtful that such an argument could be successfully maintained. A fair reading of the Posse Comitatus Act would appear to prohibit the use of the Army or Air

Force to protect diplomatic personnel, functions or property except when authorized by statute.

On the other hand, the prohibition in the Posse Comitatus Act, by its clear terms, applies only to the use of the Army or Air Force. It raises no impediment to the use of components of the Navy. Given the general authority to use federal troops to protect diplomatic personnel, functions and property, as discussed above, and the apparent absence of any prohibition on the use of components of the Navy in the exercise of this general authority,^{*/} it is our view that components of the Navy could, if necessary, be used to protect a foreign embassy in the course of a demonstration directed at it.

7 Sincerely,

4
/ William H. Rehnquist
/ Assistant Attorney General
/ Office of Legal Counsel

44/ THH ENL
*/ This discussion has focused primarily on the Posse Comitatus Act. In the time available, research has disclosed no similar provision applicable to the Navy although comprehensive research has not been possible.