

MEMORANDUM

Re: Authority to use troops to execute  
the laws of the United States.

There appears to be both legislative and inherent authority for the President to use troops in order to "take care that the laws be faithfully executed." (Const. Art. II, sec. 3). It must be noted that, historically, this authority has been utilized in the context of enforcing laws against violent obstruction. Nevertheless, the authority is not by its own terms limited to enforcement but encompasses the "execution," i.e., the completion, effectuation, performance, of the laws.

I. Inherent Authority

Although there has been specific legislation authorizing the use of troops in cases of domestic violence since 1792 (1 Stat. 264) -- the time of the Whiskey Rebellion -- various Presidents have maintained that they have inherent authority to use troops to execute the laws absent such statutes. Corwin, The President: Office and Powers pp. 130-138 (4th ed. 1957).

This authority has been recognized by the Supreme Court in terms which suggest that it is unquestioned. In re Neagle, 135 U.S. 1 (1890), involved the use of a U.S. Marshal, not troops, to provide a body guard for a Supreme Court Justice. Yet in discussing the inherent authority of the President to "take care that the laws be faithfully executed" by using a Marshal in this fashion, the Court described use of troops or marshals in identical terms:

"So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure,

are liable to be robbed and the mail carriers assaulted and murdered in any particular region of the country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States with a posse comitatus properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it is intended to go?" 135 U.S. at 65.

While the quoted language is dicta, the absolute certainty of the Court in this respect is noteworthy.

The issue of Presidential authority to use troops to execute the laws was more directly presented in In re Debs, 158 U.S. 564 (1895). There the President sent troops into a railway strike situation over the objection of the Governor. President Cleveland's proclamation recites, in part:

"And whereas, for the purpose of enforcing the faithful execution of the laws of the United States and protecting its property and removing obstruction to the United States mails in the State and city aforesaid, the President has employed part of the military forces of the United States."

The protection of the mails and of interstate commerce and the enforcement of a federal court injunction designed to assure such protection were considered sufficient justification for use of the troops.

The Supreme Court rejected Debs argument that the application of penal laws against obstructing the mails was the only course of enforcement available to the federal government.

"Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it." 158 U.S. at 581.

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"The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all of its militia, are at the service of the Nation to compel obedience to its laws." 158 U.S. 582.

Again, as in Neagle, the Court treats this authority as unquestioned.

## II. Legislative Authority

As noted above, Congress has expressly provided for the use of troops to enforce the laws since 1792, although such statutes are usually phrased in terms of insurrection or domestic violence. There appear to be no published reports or significant debates on these early statutes, 1 Stat. 264; 1 Stat. 424; 2 Stat. 443; 12 Stat. 282. It is interesting to note that the two earliest statutes, in 1792 and 1795, referred only to the use of the militia and it was not until the statute of 1807 (2 Stat. 443) that Congress specified that regular troops might be used in the same circumstances as the militia.

The basic authority to use troops and militia to counteract domestic violence (10 U.S.C. 332, 334) dates from these early statutes. There is virtually no legislative history throwing light on these provisions. Corwin does note, however, that President Fillmore objected to the requirement of a formal proclamation as a limitation on his inherent constitutional authority. Corwin op cit p. 132.

These early statutes were, by their terms, limited to the use of troops in situations of domestic violence and these are the situations in which the troops were used up to the close of the Civil War. During reconstruction, however, troops were used with increasing frequency in policing functions, apparently without benefit of proclamation and without limiting their use to a last resort situation. On January 22, 1877 a House Resolution requested of the President copies of all orders relating to the use of troops in Virginia, South Carolina, Louisiana and Florida from April 1 through December 9 of 1876 -- the period of the Hayes-Tilden campaign and election. The summer of 1877 saw a series of violent labor strikes throughout the country resulting in repeated use of troops.

In 1878 when the Committee reported the Army Appropriation bill in the first Democratic-controlled House since the Civil War it provided drastic cuts in the size of the regular army. (7 Cong. Rec. 3579-3586). The rationale of the cuts was the historic opposition to standing armies but much of the debate focused on the use of the troops to police the polls and close down State legislatures during the Hayes-Tilden election and on "excessive" use of troops during strikes.

What has become essentially the Posse Comitatus Act (18 U.S.C. 1385) was offered in the House as an amendment to the Army Appropriation Act. (7 Cong. Rec. 3845).

The debates repeatedly emphasize the use of troops as a "national police force." (7 Cong. Rec. 3718, 3727, 3849). They make clear, however, that use of the troops upon presidential order would be permitted in situations of domestic violence (7 Cong. Rec. 3618, 3846-7, 3849) and that this is expressly authorized by statute (the predecessors of 10 U.S.C. 331 to 334). What was to be prohibited was 1. premature use of troops and 2. use of troops upon request of individual marshals or other minor officials. The amendment passed the House 130 to 117. (7 Cong. Rec. 3877).

The Senate Appropriations Committee recommended that this provision be stricken from the bill. (7 Cong. Rec. 4181). In the debate which followed careful distinction was made between proper use of the troops by the President, which was not objected to, and a purported instruction by the Attorney General to the marshals indicating they might call on troops on their own initiative, which was objected to. An amendment was offered and adopted to the effect that the President could use troops under his constitutional authority, as well as when authorized by statute as provided in the House version. (7 Cong. Rec. 4240). This language, it should be noted, was retained in the bill as enacted.

It is clear from the Senate debates that the primary intent of the provision was to prevent civil authorities from taking command of the troops to enforce laws against opposition, not to prevent their use under military command in serious situations. (7 Cong. Rec. 4241, 4244, 4247). The provision is not directed to the performance of functions commanded by law but rather to law enforcement in the narrower sense.

The Senate retained the provision with the amendment referring to the President's constitutional authority (7 Cong. Rec. 4303) and the Senate version prevailed in conference (7 Cong. Rec. 4648). The Appropriation Act, with the language which is now 18 U.S.C. 1385, was approved on June 18, 1878.

The provisions which are now 10 U.S.C. 3500, 8500 were enacted in 1903 as a part of a basic reorganization of the militia or National Guard requested by President Roosevelt. Beyond occasional references to past uses of the Guard in labor disturbances, the legislative history contributes little to an understanding of the uses to which troops might properly be put. H. Rept. 1094, 57th Cong., 1st sess.; S. Rept. 2129, 57th Cong., 2d sess.

The Armed Forces Reserve Act of 1952 was also a structural reorganization. The House report contains a detailed history of the militia from 1776 to Korea and the accompanying bill contains a provision relating to the President's power to call up the reserves. The provision, which became 10 U.S.C. 673, was included in order to limit the period of service and to prevent inequities such as the unnecessary recall of Korean combat veterans. "The President's power to utilize the Regular forces, and to send the Army, Navy and Air Force wherever he chooses is not affected by this bill." H. Rept. 1066, 82nd Cong., 1st sess. p. 17.

The provision for calling the Reserve in an emergency was omitted in the Senate, S. Rept. 1795, 82nd Cong., 2nd sess., but emerged from the Conference, H. Rept. 2445, 82nd Cong., 2d sess. The legislative history throws no light on the uses to which the Reserves might be put or the type of emergency contemplated, beyond the detailed history of the use of the militia in insurrections, strikes, the 1916 Mexican border incident, and a 1917 waive of sabotage.

### III. Summary

Presidents have maintained and the Supreme Court has recognized an inherent authority to use troops in taking care that the laws be faithfully executed. Congress too

appears to recognize such authority. What limitations Congress has placed on the use of troops involve how they are to be called (10 U.S.C. 334, 3500, 8500), who may call them (18 U.S.C. 1385) and how long they may be required to serve (10 U.S.C. 673). The statutory limitations deal almost exclusively with the use of troops for war or police purposes and are silent with respect to the use of troops to perform legal obligations. Given the inherent authority, and absent any congressional limitation, it seems clear that the President may call troops to perform or execute the law when necessary.