July 17, 1953

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The Illegal Entry of Aliens into California Power of the President to use Troops in aid of Immigration Authorities.

From the memorandum of the Commissioner of Immigration & naturalization dated July 10, 1953, it appears that each day one or more thousand aliens are crossing illegally from Mexico into the United States at the southern California boundary. The boundary line between Mexico and California is about 250 miles long. No more than approximately 200 Immigration Service border patrol officers appear to be available to guard the area.

The issue presented is whether troops can be used to assist in preventing what is an obvious breakdown in the enforcement of the Immigration and Nationally Act.

The President's Power to Use Troops in Enforcing Federal Law.

The Constitution provides in Article I, section 3, that the President "shall take care that the laws be faithfully executed"; and in Article II, section 2 that he "shall be Commander-in-Chief of the Army Navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

The Congress early in our history provided for the use of the militia of the states and of the national forces by the President where he deemed it necessary for the enforcement of the laws. Act of May, 1792, 1 Stat. 264; Act of Feb. 28, 1795, 1 Stat. 424; Act of Mar. 8, 1807, 2 Stat. 443.

Out of the early statutes came the currently effective legislation, enacted as section 1 and 2 of the Act of July 29, 1861, 12 Stat. 281-282, which becomes R.S. 5298 and R.S. 5300, 50 U.S.C. 202 and 204, respectively. R.S. 5298 (50 U.S.C. 202) provides:

> "Whether, by reason of unlawful obstruction, combinations, or assemblages or persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the Judgement of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United 'states within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State to Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

R.S. 5300 (50 U.S.C.) provides:

"Whenever, in the judgement of the President, it becomes necessary to use the military forces under this chapter, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time."

Beginning with President Washington and the "Whiskey Insurrection", successive Presidents have invoked these statutes to handle disorders directed against the government. Rich, The Presidents and Civil Disorder (1941); Corwin, The President: Office and Powers (1948) pp.

160-171; S. Doc. 263, 67th Cong., 2d Sess. "Federal Aid in Domestic Disturbances, 1787-1922" (1923). There are other provisions of the Constitution, such as Art. 4, section 4, and other statutes such as R.

S. 5297, 50 U.S.C. 201; R.S. 5299, 50 U.S.C. 203; R.S. 1989, 8 U.S.C. 55, which authorize the President's use of troops to aid the states and to maintain the rights of persons in the United States, some of which have been invoked in disturbances involving the state governments or social and industrial conditions (see Rich, Corwin and S. Doc. 263, 67th Cong., supra). But these provisions of law and incidents are collateral, and not directly related, to the use of military forces in the enforcement of federal law.

Under the provisions of R.S. 5298 (50 U.S.C. 202), it was held by various Attorneys General, that it was competent for the President to direct the military forces to give to the marshal for the Indian Territory such aid as was necessary to enable him to maintain the peace and enforce the laws of the United States, 19 Op. A.G. 293 (1889); that the President might employ military forces to aid in the execution of the laws for the suppression of combinations of outlaws and criminals in the territory of Arizona without the need for further legislation, 17 Op. A.G. 333 (1882); id. 242 (1881); and that the President might employ military forces in Arkansas in aid of the collector of internal revenue who was meeting organized resistance, 16 Op. A.G. 162 (1878).

R.S. 5300 (50 U.S.C. 204) requires a proclamation by the President as a preliminary step to using the military forces under R.S. 5298 (50 U.S.C. 202). However, measured by some of the cited cases passed upon by the Attorneys General, it does not seem that the literal words of the proclamation required by R.S. 5300, commanding "the insurgents to disperse and retire peaceably to their respective abodes, within a limited time", confines R.S. 5298 to cases of insurrection only. (Of course, if the instant situation were to be regarded as an "invasion" of the United States, there would be no problem with, or need for, a proclamation; but it would be difficult legally and politically to characterize this situation as an invasion.)

The so-called Posse-Comitatus Act, first enacted in 1878, 10 U.S.C.

15, is a limitation upon the use of troops in law enforcement. It provides that:

"It shall not be lawful to employ any part of the Army of the United States, as a posse-comitatus, or otherwise, for the purpose of executing the laws, except in

such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; ..."

This act is a limitation on U. S. marshals and other federal law enforcement officers, but is not a limitation on the President who, among other things, enjoys express authorization to use troops under R. S. 5298, 17 Op. A.G. 242; id. 333; 19 Op. A.G. 570, 16 Op. A.G. 162.

While R.S. 5298 concerns use of both national and state forces, other provisions of law dealing specifically with the National Guard (state militia) are also pertinent to the kind of case we are considering. In 32 U.S.C. 81a it is provided:

"Whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable, with the regular forces at his command to unable, with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose through the governor of the respective State or Territory, or through the commanding general of the Militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper."

However, the above quoted conditions to be met in calling upon the state militia (National Guard) tend to limit the use of the statute, particularly the showing that the President "is unable with the regular forces at his command to execute the laws of the Union." (Underscoring supplied). We understand that the Office of the Judge Advocate General of the Army feels that this provision probably makes the authority under 32 U.S.C. 81a unusable in the current situation.

The Army regulations on the subject of employment of troops in the aid of civil authorities are contained in AR 500-50. They follow the provisions of the Constitution and statutes already discussed or noted. They are, of course, broad in scope to cover situations other than enforcement of federal law.

Application of the President's Power in the Current Immigration Law Breakdown.

What has been said so far has been principally a demonstration of the power of the President under R.S. 5298 to use the armed forces and the militia in aid of federal law enforcement. Without speculating on any cognate powers he might have or exercise pursuant to the direct grants of authority in him under the Constitution (see Lieber, Use of the Army in Aid of the Civil Power (1898)), the legal question to be resolved is this: Does the over-running of the California border constitute, or result from, an unlawful obstruction, combination, or assemblage of persons, or rebellion against the authority of the Government of the United States, which in

the judgment of the President makes it impracticable to enforce the law by the ordinary course of judicial proceedings.

To cope with bands of outlaws making raids into Mexico from Arizona for plunder, and to suppress other like criminal activities, Acting Attorney General Phillips in 1881, and Attorney General Brewster in 1883, held that the President would be justified in using military forces under R.W. 5298 to a assist the United States marshals. 17 Op.

A.G. 242, id. 332. Likewise, as was noted, there was deemed to be justification for military aid to he marshal of the Indian territory, 19 Op. A.G. 293; and to the federal tax collector in Arkansas, 16 Op.

A.G. 162.

On the other hand, in 1923, when Attorney General Daugherty was asked by President Harding whether he had authority to use the naval forces of the United States in the enforcement of the National Prohibition Act, the Attorney General took the view that R.S. 5298 could not be used as authority on the ground that it was a statute intended for emergencies, when he courts and the civil departments of the government were no longer able to enforce the civil or criminal law. He said that while there had been numerous violations of the National Prohibition Act, both on land and within territorial waters, there had been no unlawful obstructions of the functions of the courts, or of the Coast Guard, the Division of Customs, the Prohibition Unit, or the marshals and their deputies of the Department of Justice. All of the departments, he said, were functioning and making a steady advance against lawless elements. There were stubborn exceptions in congested localities where public opinion was unfriendly, but he regarded these as "isolated cases" which did not constitute a "national emergency". He held that there were no unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the United States in the enforcement of the prohibition statutes such as rendered it impracticable to continue to enforce these laws by the ordinary course of "executive and judicial" proceedings. 33 Op. A.G. 562 (1923).

On its face, this opinion appears to be authority against the use of military forces under R.S. 5298 in support of the Immigration and Nationality Act. However, it is probably reconcilable with the many earlier opinions on the ground that the Attorney General found as a factual matter that there was no breakdown of the law enforcement machinery under the prohibition statutes.

Assuming, without conceding the correctness of Attorney General Daugherty's position, that a "national" emergency must be established, though other Attorneys General apparently did not so view it, it would seem that the decision on the existence of an emergency, national or local, and the taking of action under R.S. 5298, rests with the President. The decision would appear to involve a political question, entrusted to him by the Constitution and the act of Congress, and his decision would bind the courts. Prize Cases, 67 U.S. 635, 670 (1862);

Martin v. Mott, 12 Wheat 19, 29, 30 (1827); 9 Op. A.G. 516, 521-522 (1860). Sterling v. Constantin, 287 U.S. 378 (1932) at 399 is in accord, but the decision indicates, in judging the

emergency military order to a state governor, the possibility of judicial inquiry into like presidential action. However, the factual similarity is not present here. Moreover, the finality attributed to a decision of the President under R.S. 5298 would in this case be strengthened by the fact that the persons directly affected would probably have no standing to complain or sue.

It is quite probable that this situation, in which it appears that thousands of persons are assembled at or near our southern borders awaiting or planning opportunities for clandestine crossings in violation of law, would come within the terms of R.S. 5298. The situation would appear to constitute on assemblage or combination of persons in such numbers that the President might reasonably find it has become impracticable to enforce the immigration law by the ordinary civil procedures.

There are certain considerations, however, both for and against the exercise of discretion in this case. Substitution of military force for ordinary law enforcement is inevitably disliked by our people. In addition, a friendly foreign country is involved and the placing of a sizable armed force at its boundaries might easily be misconstrued. In that connection, I would think it important that the State Department be consulted before any decision favoring the use of troops is made; and should there be a disposition on the part of the President to order the use of troops in this situation, the action might well be prefaced by careful explanatory discussions with representatives of the Mexican Government.

On the other hand, there is clearly a large hole in the otherwise elaborate system of immigration restrictions, designed for selective immigration and the screening of security risks. The use of troops to supplement the completely inadequate border patrol might sharply point up the grave lack of personnel and other facilities, and might stir Congress to action where other means have failed.

In the past few years Congress has not been disposed to act. In 1951, following the detailed study by the President's Commission on Migratory Labor, the lack of an adequate border patrol and the need for additional appropriations to hire additional personnel was included in a special message by the President. Thereafter, the President approved the act relating to recruitment of agricultural workers from Mexico, P. L. 78, 82nd Congress, upon an understanding with congressional leaders, embodied in another special message (H. Doc. 192, 82nd Cong., July 13, 1951), that supplementary appropriations would receive prompt consideration at that session. Nothing happened. In fact, it is our understanding that the appropriations and total authorized force of the border patrol is less today than it was in 1951.

The authorized border patrol force is a little over 1000 officers. Of that, approximately 700 are available for the whole Mexican border, which totals about 3000 miles. The traditional problem, involving migration through the lower Rio Grande Valley, has been tremendously increased by migration for employment into the Imperial Valley of California. In addition to more personnel, money appropriated for the building of fences in strategic places, and the lighting of particular areas at night, would go a long way in solving the problem of guarding the border.

The problem confronting the President is whether the temporary use of troops will lead to a better solution of the long range problem.

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