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cc: FILES
7 Copeland
Lawton

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

**Re: Authority to use troops to protect
federal functions, including the
safeguarding of foreign embassies
in the United States**

This is in response to your letter of April 28, 1970 requesting a reexamination of the view expressed in our memorandum of November 14, 1969 that the Posse Comitatus Act (18 U.S.C. 1385) appears to prohibit the use of the Army or Air Force to protect foreign embassies in the United States.

As you noted in your letter, that memorandum was hastily written under the press of circumstances and appears inconsistent with views expressed by this Office in October 1967. Moreover, a later study by this Office in March 1970, a copy of which is attached, reached the general conclusion that there is inherent authority for the President to use troops when necessary to perform federal functions and that the Posse Comitatus Act is not applicable to such use of troops. On reexamination, we conclude that the President has inherent authority to use troops when necessary to perform federal functions; that the protection of foreign embassies is a federal function; and that the Posse Comitatus Act is not applicable to the use of troops in this context.

10 I. The Inherent Authority

As noted in our October 1967 Memorandum and in the attached study, Presidents have long maintained that the obligation to "take care that the laws be faithfully

executed" (Const. Art. II, sec. 3), together with the natural right of the sovereign to protect itself, gives rise to inherent authority to use troops when this becomes necessary to protect the federal government, its functions and its property. This inherent authority has been maintained independent of any statutes expressly providing for use of troops in specific circumstances.

The Supreme Court has recognized this inherent authority as a natural and necessary attribute of sovereignty. The most forceful language to this effect is found in In re Neagle, 135 U.S. 1, 65 (1890), and In re Debs, 158 U.S. 564, 581-582 (1895), and is quoted in the October 1967 Memorandum and in the attached study. It is noteworthy that both were decided after the 1878 enactment of the Posse Comitatus Act.

10 II. Safeguarding Embassies --
7 Federal Function

In our October 1967 Memorandum the inherent authority to use troops was discussed in the context of protecting federal property and federal operations. However, it is our view that this authority extends to the protection of foreign embassies in the United States as well.

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). International practice in the conduct of foreign affairs includes the exchange of ambassadors and other diplomatic representatives and host countries have an obligation to protect such representatives. Congress has affirmed this obligation both with respect to the person of diplomatic representatives (18 U.S.C. 112) and with respect to their property and functions (D.C. Code §§ 22-1115, 1116). As your letter notes, efforts are now underway to expand regular protection for foreign embassies through the use of federal, rather than D.C. police officers.

Given the clear federal responsibility to protect foreign embassies it seems clear that such protection is a federal function. If troops may be used when necessary to carry out and protect federal functions -- and we have concluded that they may -- then troops may be used to protect foreign embassies.

The reference to use of troops "when necessary" should be emphasized. As noted below, the inherent authority to use troops should not be exercised to perform routine and normal police functions such as protection against burglary. The authority should be exercised only in the extraordinary circumstances where normal measures are insufficient to carry out the federal function of protecting foreign embassies in this country.

10 III. Posse Comitatus Act

There remains the question whether the authority discussed above is in any way limited by the requirements of the Posse Comitatus Act.

As discussed in our October 1967 Memorandum and the attached study, the Posse Comitatus Act was enacted in response to a specific situation -- the use of troops, upon call of United States Marshals, to perform regular police duties. It was premature use of troops on command of minor officials to perform law enforcement functions that the Act was intended to prohibit. There is fairly clear indication in the debates (7 Cong. Rec. 3618, 3727, 3846-49, 4240) that the provision was not intended to limit the President's authority to use troops in circumstances where this was necessary to carry out or protect the performance of federal functions.

In light of the history of the Act and its purpose as indicated by the congressional debates, it is our view that the Posse Comitatus Act is not applicable to

situations in which the President deems it necessary to call upon troops to carry out a federal function and this would include the use of troops to protect foreign embassies in the United States when circumstances indicate that more than routine police services are necessary.

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