

SEP 30 1970

**MEMORANDUM FOR BENJAMIN FOWMAN
ASSISTANT GENERAL COUNSEL (INTERNATIONAL AFFAIRS)
DEPARTMENT OF DEFENSE**

**Re: Legality of deputizing military
personnel assigned to the Depart-
ment of Transportation**

In light of the President's program of assigning personnel of various Departments to the Department of Transportation to act as security guards on civil aircraft and the practice of deputizing such personnel, conferring on them the power of U.S. Marshals, the question has arisen whether deputization of the military personnel assigned to DOT is prohibited by the Posse Comitatus Act (18 U.S.C. 1385),

The Posse Comitatus Act provides:

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

This statute was enacted in 1878 and was expressly aimed at a purported instruction of the Attorney General to U.S. Marshals to the effect that, on their own initiative, they might call upon troops to enforce the law. (7 Cong. Rec. 4181, 4241 to 4247). The objection was to the use of troops in a police role under the command of civil authorities, especially authorities of minor rank.

It is the view of this Office that the deputization of military personnel assigned to the Department of Transportation pursuant to 49 U.S.C. 1657 is not a use "of any part of the Army or the Air Force" within the meaning of the Posse Comitatus Act, and that the Posse Comitatus Act does not prevent the deputization of military personnel so assigned.

Section 9 of the Department of Transportation Act, 80 Stat. 944 (49 U.S.C. 1657) expressly authorizes the detailing of members of the Army, Navy, Air Force or Marine Corps to the Department of Transportation to participate in carrying out its functions. Such detail does not affect the status, office, rank, grade, emoluments, perquisites, rights, privileges or benefits of members of the Armed Forces assigned to DOT. However, members assigned are not to be charged against statutory limits on grades or strengths of the Armed Forces, nor are they subject to direct or indirect command of their military department or any officer thereof. In short, while they lose no rights or benefits by virtue of the detail, they are, for all other purposes, DOT employees for the duration of the detail.

Unlike section 302(c) of the Federal Aviation Act, 72 Stat. 745 (49 U.S.C. 1343(a)), the Department of Transportation Act suggests no limit on the types of duties to be performed by military personnel who are detailed. Nor does the legislative history suggest any such limits (H. Rept. 1701, 89th Cong., 2d sess. (1966)). Apparently, military personnel detailed to DOT are subject exclusively to the Secretary's orders as to any duties he wishes them to perform.

Contrary to the general intent of the Posse Comitatus Act, section 9 of the Department of Transportation Act contemplates civilian command of certain members of the Armed Forces, performing essentially civilian duties. Under

these circumstances, it seems clear that individual members of the Armed Forces assigned to and subject to the exclusive orders of the Secretary of Transportation are not "any part of the Army or the Air Force" within the meaning of 18 U.S.C. 1385. They are, for virtually all purposes, temporary employees of the Department of Transportation. Accordingly, the Posse Comitatus Act would not bar their deputization along with, and in the same manner as, other employees assigned to the Department of Transportation.

To avoid the necessity of interpreting these provisions in the future, especially in light of the proposed codification of title 49 (H.R. 14028, 91st Cong., 2d sess.) which suggests limits on the use of military personnel assigned to DOT (proposed section 502), it may be desirable to add express reference to law enforcement powers of detailed military personnel in the pending legislation to confer such powers directly on DOT (H.R. 19225, 91st Cong., 2d sess.).

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