REE:LU:CMB:sgc

MAR 1 3 1972

Files
Mr. Erickson
Mr. Ulman
Miss Lawton
Mr. Buxton
Mrs. Gauf

E. Grey Lewis
Deputy Assistant Attorney General
Civil Division

Ralph E. Erickson
Assistant Attorney General
Office of Legal Counsel

Qual 3-13-72

Use of Federal forces to perform the functions of the Pacific Coast Longshoremen

You have requested our views as to whether, in the event the Pay Board does not permit the full wage increase negotiated by the Pacific Coast longshoremen, and the longshoremen again strike and refuse to return to work, the President may use Federal troops to perform the functions of the longshoremen.

We are of the opinion that there is no tenable legal basis for such an action by the President.

We note at the outset a dichotomy of situations regarding executive intervention in labor disputes resulting in a strike or lockout, in the absence of specific congressional authorization. One situation is where the bargaining units are labor and private industry; the other is where the dispute involves employees of the Federal government.

In the purely private sector the precedents for Federal government intervention in such labor disputes are largely against the government. The Steel Seizure Case (Youngstown Sheet & Tube Co. v. Sawyer), 343 U.S. 579 (1952), is the principal case dealing with the authority of the President to intervene in labor disputes in the absence of specific congressional authorization. The context of the intervention in that case was the actual seizure and operation of the steel mills by the Federal government. Justice Black for the Court said that seizure by the Executive as a technique to solve labor disputes was not only in that instance unauthorized by any congressional enactment, but Congress had,

during the enactment of the Taft-Hartley Act in 1947, specifically rejected an amendment that would have given the Executive such power in cases of emergency. 343 U.S. at 586. As to the existence of an inherent or implied constitutional authority in the President to seize the steel mills, Justice Black concluded that such an authority did not exist. 1/

Since the emergency created by the 1952 steel disputes is similar (and perhaps greater) than a possible longshoremen's walkout, we think the Steel Seizure Case is applicable in the latter situation. It should be noted that the Taft-Hartley Act (29 U.S.C. 141 et seq.), with its rejection of presidential seizure authorization, remains the controlling law with respect to settlement of labor disputes affecting interstate commerce. 2/

We note, of course, that the performance by Federal troops of the functions of the longshoremen would not technically be a "seizure" of the maritime shipping industry. There would, we presume, be some seizure of various loading equipment in order to effectively load and unload the cargoes. We are not aware of any cases which indicate that there is an inherent authority of the Executive to intervene in labor disputes if its action amounts to less than a "seizure"; we doubt, therefore, the significance of such a possible distinction.

We are aware of a group of precedents which seem to indicate an inherent authority of the Executive to use troops where necessary to allow the President to insure that the laws are faithfully executed. Const., art. II, sec. 3. These cases have usually dealt with particular situations involving domestic

---

1/ Particular reliance was placed by the Government on those provisions in article II which vest the executive power in the President, direct that he "take care that the laws be faithfully executed," and provide that he is the Commander in Chief of the armed forces of the United States.

2/ The absence of specific statutory authority to intervene in the longshoremen's situation is discussed more fully infra.

violence (see In re Debs, 158 U.S. 564 (1895)), or the threat of violence (e.g., the use of a U.S. Marshal to protect Justice Field; see In re Neagle, 135 U.S. 1 (1890)). We think, however, that the dicta indicating such a broad inherent power is largely circumscribed not only by the facts of those cases (i.e., violence involved), but by more recent cases such as The Steel Seizure case. In addition, statutes such as 10 U.S.C. § 334, allowing use of Federal troops only in cases of domestic violence, have been in existence since 1792. See 1 Stat. 264.

Presidential intervention by the use of the National Guard was used to continue the delivery of the mail during the postal strike of March 1970. A court test of this action was to our knowledge never instituted. At that time, this Office justified the action of the President on two grounds: 1) the duty of the President under article II, section 3, to "take care that the Laws be faithfully executed"; and 2) the ability of the President under 10 U.S.C., sections 3500 and 8500 to use the National Guard where he is "unable with the regular forces to execute the laws of the United States," in conjunction with the mandate of various statutes requiring the expeditious handling and delivery of the mail (39 U.S.C. §§ 707, 5102, 6001, 6101).

It was thus arguable in that situation that Congress had stated a policy that the mails not be obstructed, and that the use of the Guard to implement that policy was justified. Regardless of the merits of these arguments, we think it is particularly significant that the mail strike was preventing the performance of a peculiarly federal function, i.e., the handling and delivery of the United States Mail. We think this was an additional factor on which to justify the use of the Guard in the mail strike, particularly in light of the constitutional duty of the President to insure the execution of the laws of the United States. Such considerations of particular federal functions are not involved in the longshoremen's dispute. We think it would be extremely difficult to argue that through use of the troops in the longshoremen's strike that the President would be attempting to insure the execution of the laws of the United States, either as contemplated by 10 U.S.C. § 3500 or by the Constitution. 3/

3/ Conceivably there could be involved, at least to some extent, transportation of the mails and of defense materials.

We are unable to find any additional statutes that might provide a basis for presidential action. Most statutes directing presidential action in certain "emergencies" either date from traditional statutes allowing the use of troops to suppress domestic violence (see, e.g., 10 U.S.C. § 332), or involve the exercise of special executive powers in time of war (e.g., 10 U.S.C. § 4742, providing for control of transportation systems during time of war).

You additionally requested our views as to the possible significance of the hypothetical refusal of the longshoremen to return to work in violation of an injunction obtained by the government pursuant to section 205 of the Economic Stabilization Act. The general contempt and civil penalty powers of the court under the Act would be the sole basis for sanctions against such a refusal. Certainly, the constitutional powers of the President to employ Federal troops or to execute the laws do not ordinarily expand in relation to the degree of the emergency or the refusal of a particular party to obey orders of the court. E.g., Steel Seizure case, supra, 343 U.S. at 613-14 (Frankfurter, J., concurring), 629 (Douglas, J., concurring). Therefore, we conclude that such a refusal to obey the injunction would not provide a basis for additional presidential action.