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MAR 17 1972

MEMORANDUM FOR E. GREY LEWIS
Deputy Assistant Attorney General, Civil Division

Hand-carried to Lewis by Buxton

Re: Legal justification for the use of Federal troops to act as longshoremen in the event of a renewed longshoremen's strike.

Assuming 1) the rejection by the Pay Board of the full wage increase negotiated by the Pacific Coast Longshoremen (which in fact has occurred), 2) a renewed strike or lockout by the longshoremen, 3) followed by the refusal of the longshoremen to obey an injunction obtained by the government pursuant to section 205 of the Economic Stabilization Act, 84 Stat. 796; the question presented is what legal support exists for a direction by the President for Federal troops to act as longshoremen.

1. The legal justification of such an action by the President requires consideration of several major factors. We think the primary one is the Steel Seizure case (Youngstown Sheet & Tube Co. v. Sawyer), 343 U.S. 579 (1952), which struck down as unconstitutional President Truman's attempt to seize the steel mills in the face of an insoluble labor dispute. After various negotiations to resolve that dispute had broken down, a strike was called by the steel workers to begin at 12:01 A.M., April 9, 1952. President Truman directed the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The Secretary did so by the issuance of an order (no physical seizure was made); he notified each company that its president or chief executive officer would be the "operating manager" for the United States, and directed the officers and employees to continue their functions.

In our situation, we are hypothesizing the use of Federal troops to perform the functions of the longshoremen, so we

are dealing with an altogether different factual situation. While it can be claimed that the doctrine of the Steel Seizure case applies not merely to the limited situation of an actual seizure but to any type of Executive intervention (without the existence of a declared war or a prior congressional authorization) in a private domestic dispute, the scope of the case has never been defined.

It could be argued then, that the case applies only in the drastic situation of a seizure with its attendant problems of takings subject to due process requirements of the Fifth Amendment. The use of Federal troops by the President in various situations arguably implies the use of a "power" different than a seizure. The problem in making these factual distinctions in order to distinguish the Steel Seizure case is that basically the same legal considerations (e.g., does Article II give the President such a power, has Congress authorized the presidential action) exist in each case. Therefore, while attempting to stay within the realm of the use of Federal troops, it is necessary to refer to various aspects of the Steel Seizure case.

Another important facet of the Steel Seizure case is both the divergence of views of the majority and concurring justices, and the fact that three justices dissented from the decision. The voluminous brief for the government in the case, discussing a myriad of legal issues possibly raised by the facts, seemed to offer different bases on which each of the "majority" justices could rest their decision. This divergence of opinion by those justices favoring the striking down of the seizure, coupled with the dissent of three justices, definitely aids in making consideration of the case as a viable precedent a fruitful exercise.

2. Article II of the Constitution is replete with language on which an authority of the President to utilize Federal troops could be based. The most persuasive argument would be that the aggregate of presidential powers conferred by that Article creates an inherent authority in the President

to take such action. Specifically the applicable sections of Article II are: 1) section 1, which provides that the executive power shall be vested in the President, 2) section 2, which provides that the President shall be Commander in Chief of the Army and Navy, and 3) section 3, which provides that the President shall "take care" that the laws of the United States be faithfully executed.

Specifically, the argument would be that the President as commander in chief, vested with all executive power,1/ would, in utilizing Federal forces, be insuring that the laws of the United States are executed. That section 3 of Article II is to be given a broad reading was indicated by the Court in both In re Neagle, 135 U.S. 1 (1890), and In re Debs, 158 U.S. 564 (1895). The Debs case involved the use of federal troops in dealing with the Pullman strike of 1894 in order to continue the free flow of the mails, to prevent the obstruction of interstate commerce, and to deal with violent actions by certain demonstrators in Chicago. The Court treated as inherent in the power to insure the "faithful" execution of the laws the ability to use Federal troops in times of emergency, with this sweeping language:

> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security

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1/ The separate argument for the President as commander in chief would be that the President must give affirmative recognition to his duty to insure the safety of American troops in Vietnam. This argument would largely depend on the amount of defense supplies and materials that the dock strike would prevent from reaching Vietnam. It should be noted that a similar argument concerning Korea was rejected by Justice Jackson in his concurring opinion in the Steel Seizure case, 343 U.S. at 641-46. While the majority of the Court in the Steel Seizure case were leery of a peculiar significance of the executive power grant in section 1, an excellent discussion of the significance of that clause, favorable to the Government here, is found in the dissent. See 343 U.S. at 681-83.

> of all rights entrusted by the Constitution to its care. 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." 150 U.S. at 582.

Obviously, a strike by the dockworkers would be an obstruction to interstate commerce, and might possibly to some degree affect the transportation of the mails. An additional facet of the emergency situation can be based on two considerations which would, of course, be largely factual, i.e., 1) the effect of the strike on our national defense posture, particularly as it relates to our supplies for Vietnam, and 2) the economic emergency, as declared by the Congress in the Emergency Stabilization Act, and the various Executive Orders which have implemented it.2/

2/ Generally, these are the two "emergency conditions" (i.e., a defense and an economic emergency) which served as the basis for President Truman's order to seize the steel mills in 1952. Chief Justice Vinson, in dissent, indicated that the granting of various price concessions to the steel industry would have disrupted the price stabilization program which had been enacted by Congress. 343 U.S. at 701. Similar considerations would be relevant in our situation, in light of the economic emergency as declared in the Economic Stabilization Act. See discussion in section 4 infra. It should be noted that the government did not in the Steel Seizure case raise or brief the issue of whether the Korean conflict was in fact a declared war, giving rise to the availability of various war powers of the Congress and the President (to the extent declared war is needed for the exercise of his war powers) under the Constitution, but instead based its claim on a general emergency, the existence of which was not disputed by the steel industry. Indeed, Justice Frankfurter, in his concurring opinion, "commended" the Solicitor General for disclaiming in the case the "powers that flow from declared war." Of course, the acute problem is not in showing the existence of an emergency but in defining a constitutional power on which the President can act.

Another exposition of the broad power of the President under Article II, section 3 to insure the faithful execution of the laws was made by the dissenters (Chief Justice Vinson, joined by Justice Minton and Justice Reed) in the Steel Seizure case:

> "Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the 'Take Care' clause, advocated by John Marshall, was adopted by this Court in In re Neagle, In re Debs and other cases cited supra. See also Ex parte Quirin, 317 U.S. 1, 26 (1942). Although more restrictive views of executive power, advocated in dissenting opinions of Justices Holmes, McReynolds and Brandeis, were emphatically rejected by this Court in Myers v. United States, supra, members of today's majority treat these dissenting views as authoritative." 343 U.S. at 702.

Emphasis would additionally be given to the fact that presidential power to act on a particular occasion may derive from more than one of the grants contained in Article II. Cf. Myers v. United States, 272 U.S. 52 (1927); Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

Significantly, Justice Clark in his concurring opinion in the Steel Seizure case indicates that in his view the Constitution "does grant to the President extensive authority in times of grave and imperative national emergency." 343 U.S. at 662. Citing Little v. Barreme, 2 Cranch 170 (1804). Justice Clark's concurrence in the judgment of the Court is based on the following reasoning:

"I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crises; but in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in Little v. Barreme, Congress had prescribed methods to be followed by the President in meeting the emergency at hand. 343 U.S. at 662.

Added to the dissenting opinion, the opinion of Justice Clark indicates that there were four justices who believed that the President did in fact have the power to act in certain emergencies in the absence of a specific congressional authorization.

3. The use of historical precedents to justify the exercise of presidential power to deal with various "emergencies" might be another means by which the use of Federal troops in this situation could be justified. The problem, of course, with these precedents is that they could be somewhat distinguished as either based on the existence of or the threat of some war emergency, or domestic violence. Various types of historical precedents may be employed: 1) executive "takings" of property for the benefit of the armed services and the use of troops during emergencies (see Brief for the United States [hereinafter U.S. Brief] at 105-112, 120-144; Steel Seizure case, 343 U.S. 579 (1952)); 2) the use of various precedents cited by Justice Clark, 343 U.S. at 661 n.3.

A corresponding argument with the use of this wide range of historical precedents may be based on the Justice Holmes' idea that "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). See also Inland Waterways Corp. v. Young, 309 U.S. 517, 525 (1940); U.S. Brief at 120-21. That a continued practice may in some instances create a presumption of legality has been recognized by the Court:

"Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department--on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself--even when the validity of the practice is the subject of investigation." United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915).

A possible example of such a presidential action was President Franklin Roosevelt's seizure in 1941 of the California plant of the North American Aviation Company. The breakdown of negotiations in the labor dispute there involved led to the President's action; there was no threat of or actual domestic violence prior to that seizure, although the existence of a war emergency at that time may have been clearer than in our situation. 3/

3/ Justice Jackson (who was Roosevelt's Attorney General at the time of that seizure), in the Steel Seizure case, 343 U.S. at 648-49, distinguished the North American case on the basis that the company was under direct and binding contracts to supply defense items to the country (seizure thus authorized by the Selective Service Act since there was a failure of compliance with government contracts), and the fact that the United States in the Steel Seizure case had not alleged the existence of such contracts with the steel industry. He goes on, however, to indicate that the strike at North American was in violation of the union's collective agreement and that the national labor union and the management of company approved the seizure. Additionally, he claims that the strike was "in the nature of an insurrection, a Communist-led political strike against the Government's lend-lease policy. Here we have only a loyal, lawful, but regrettable economic disagreement between management and labor." Justice Jackson's characterization of the insurrectionist nature of North American strike seems at least open to question, implying that the government injected itself into what was a purely private labor dispute. For an account of that strike, see B.M. Rich, The Presidents and Civil Disorder 177-88 (1941).

4. Our prior discussion has been based on the premise that there does not exist any prior congressional authorization for the use of Federal troops by the President. There does exist, however, one statute on which such an action by the President might be based. 10 U.S.C. § 332 provides that "[w]henever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it unpracticable to enforce the laws of the United States," he may use the armed forces "to enforce those laws or to suppress the rebellion." Arguably a longshoremen's strike would constitute an "unlawful obstruction" making it unpracticable to enforce the laws of the United States. We are not aware, however, of any prior use of this statute to deal with the problem of labor disputes resulting in national emergencies.

It could also be argued that there is a congressional mandate implicit in the Economic Stabilization Act that the President be able to take certain actions to deal with the existing economic emergency that is arguably heightened by a longshoremen's strike. Since the necessity for the use of Federal troops would exist only in the event the longshoremen refuse to obey an injunction issued (assuming it is in fact issued) under section 205 of the Act, it could be argued that the deployment of the troops is consistent with a congressional policy authorizing the President to deal with the economic emergency.

5. We note finally that the Taft-Hartley Act, 29 U.S.C. § 141 et. seq., provides for certain remedies in the face of labor disputes affecting certain industries. Justice Frankfurter, in his concurring opinion in the Steel Seizure case, 343 U.S. at 598-604, reasons that the failure of Congress to provide express authorization in the Act for presidential seizure in instances involving the failure of negotiations during "emergency strikes" (see 29 U.S.C. §§ 176-80), and express rejection of an amendment that would have granted such an authority, indicates that Congress forever forestalled a presidential authority to seize in such "emergency strikes."

Since Taft-Hartley is presumably the basis upon which negotiations to resolve the dispute were held during the prior longshoremen's strike in 1971, a rebuttal to Justice Frankfurter's opinion is important in our situation. We think Justice Frankfurter's reasoning is open to challenge; an argument can be made that, contrary to his opinion, Taft-Hartley did not impliedly preclude a presidential intervention in the face of exhaustion of the negotiating procedures under the Act. Specifically, there is language in the debates concerning that Act indicating that what Congress sought to avoid was a provision for seizure as a routine, expectable device. See U.S. Brief at 169-72. Senator Taft explained:

> "We did not feel that we should put into the law, as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided." 93 Cong. Rec. 3835-3836 (1947) (emphasis added).

6. The foregoing represents our best efforts to establish a credible legal basis for such a use of Federal troops. This should in no way be considered to be a change of our initial opinion expressed in our memorandum of March 13, 1972, on this general subject.

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