

Department of Justice
Washington, D.C. 20530

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Files

10 JAN 1980

MEMORANDUM FOR THOMPSON S. CROCKETT
Director
Emergency Programs Center

Re: Use of Federal Military Force in Domestic
Terrorism Incidents

This responds to your request of October 2, 1979 that we review a nine-point guidance paper dealing with the use of federal military force in connection with domestic terrorism. This paper was sent on September 19, 1979 by Acting Deputy Attorney General Ruff to Acting Assistant Secretary of Defense Walter Slocombe, and outlines the policy and procedures by which the Departments of Justice and Defense propose to coordinate their preparations for and responses to domestic terrorism incidents. Most of the points covered in the guidance paper deal with the relationship between military and civilian authorities before the use of military force has actually been authorized, so that they must be viewed in light of the restrictions imposed by the Posse Comitatus Act, 18 U.S.C. § 1385. 1/ While we express no views on the policy or tactical ramifications of the guidance paper, we find no basis in that Act, or otherwise in the law, on which to take exception to it.

The President's authority to use federal troops to suppress domestic violence derives from 10 U.S.C. §§ 331-336. Section 332 covers situations in which it is "impracticable" to enforce federal laws by ordinary civil authority; and § 333 deals with situations of serious domestic violence which cannot be controlled by

1/ 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.

civilian law enforcement resources. Section 334 requires the issuance of a presidential proclamation to disperse, and an appropriate Executive order, prior to military intervention. The President's power under these statutes is not impaired by the Posse Comitatus Act. 41 Op. A.G. 313, 327 (1957). See also Note, "Honored in the Breach: Presidential Authority to Enforce the Laws with Military Force," 83 Yale L. J. 130, 139 (1973) ("If disorder significantly threatens the enforcement of federal laws or the fulfillment of federal duties, no statutory restrictions stand in the way of swift military action on the part of the President.") Prior to their invocation, however, the Posse Comitatus Act prohibits civilian law enforcement authorities from employing military force in the performance of their own duties. 2/

Point 1 concerns the point at which military observers may be sent to the scene of a terrorist incident. The Posse Comitatus Act prohibits only the use of military force "to execute the laws, " and it has never been interpreted to bar military personnel from observing civilian law enforcement activities.

2/ We see no necessary difficulty posed under the Posse Comitatus Act, or any other federal law, where the military, independently of civilian law enforcement authorities, and under Presidential direction, takes steps to prepare for the possibility that its forces will have to be called upon to assist in civilian law enforcement. On the only occasion when the Supreme Court addressed this issue, it dismissed in a brief per curiam opinion a suit brought by the State of Alabama against the United States, noting that

In essence, the papers show no more than that the President has made ready to exercise the authority conferred on him by 10 U.S.C. § 333 by alerting and stationing military personnel in the Birmingham area. Such purely preparatory measures and their alleged adverse effects upon the plaintiffs afford no basis for granting any relief.

Alabama v. United States, 373 U.S. 545 (1963). See also Laird v. Tatum, 408 U.S. 1, 3-5 (1972), impliedly sanctioning certain intelligence measures taken by the Army to prepare for future civil disorders in which federal troops might be called upon to assist local authorities.

In the Wounded Knee cases, 3/ no court found fault with the mere presence of a military observer, although there was some difference of opinion as to whether additional activities engaged in by the observer there--as well as logistical support provided by the Army to the FBI--violated the Posse Comitatus Act. Compare United States v. Jaramillo, 380 F. Supp. 1375, 1380 (D. Neb. 1974) (any influence by Army personnel on civilian law enforcement officers would violate the Act), with United States v. Red Feather, 392 F. Supp. 916, 924-25 (D.S.D. 1975) (Act prohibits only military taking "an active role in direct law enforcement"). The specific limitations which are proposed to be placed upon the military observers in the DOJ discussion of Point 1 reinforce our conclusion that their presence at the scene of an incident is not prohibited by the Posse Comitatus Act.

We would add that in none of the Wounded Knee cases did the courts suggest that the lawfulness of having military observers present might depend on the likelihood that military force would at some point be used. The imminence of resort to military force does not seem to us to be a necessary predicate to having military observers present.

We also believe that the Posse Comitatus Act poses no problem for the procedures dealing with liaison between civilian and military authorities for purposes of obtaining operational intelligence in the context of a terrorist incident discussed in Point 2. As noted above, the Act prohibits use of military by civilian authorities to execute the laws, but does not bar contact between military and civilian authorities if the sole purpose of that contact is to enable the military to gain familiarity with a particular situation.

We reach the same conclusion with respect to Point 3, which discusses the provision of operational/background intelligence by civilian authorities to the military. Subject to any existing statutory restraints on interagency dissemination of particular kinds of intelligence provided,

3/ United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1976); United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975); United States v. Means, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975).

e.g., 5 U.S.C. 552a (the Privacy Act),^{4/} we see nothing objectionable about the procedures proposed by the Justice Department. We believe it would be desirable for the FBI to identify any statutory restraints that may exist regarding information that it might need to share with the Department of Defense in these situations to ensure that all steps have been taken to make such information legally transferable. Along these lines, we are separately addressing the question of what limitations there may be on the transfer of information to the military gathered by electronic eavesdropping conducted pursuant to Title III of The Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20. ^{5/}

Point 4 concerns the point at which military reconnaissance may be authorized. The Justice Department proposal contemplates early authorization of initial military reconnaissance by the observers discussed in Point 1. So long as the purpose of this reconnaissance and the conditions of its conduct are as described, we have no difficulty with the Justice Department's formulation.

Point 5 deals with the prepositioning of military forces prior to presidential invocation of 10 U.S.C. 332 or 333. Here again, we see nothing exceptionable in the Justice Department's proposals under the Posse Comitatus Act, since in no case would such "prepositioned" troops be involved in actual law enforcement. The question of

^{4/} The Privacy Act requires generally that information subject to its provisions may not be transferred from one agency to another absent the publication of a "routine use." There are exceptions to the "routine use" requirement, including the exchange of information among federal law enforcement agencies, but we have been advised by the Office of Information Law and Policy that in these circumstances the FBI should, if it has not already done so, promulgate a "routine use" of such information to cover dissemination of such information to the Department of Defense.

^{5/} In contrast, the provision of information by the military to civilian authorities might well pose a substantial problem under the Posse Comitatus Act, since in thus assisting civilian law enforcement the military might be said to be "executing the laws."

exactly when such preposition should occur seems to us more one of policy rather than one of law, and within the discretion of the Executive agencies concerned. See note 2, supra.

Points 6 through 9 seem to us to raise no legal questions, but rather involve matters of policy upon which we express no views.

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