FMW:EIS:rsn

APR 2 6 1968

MEMORANDUM

cc: Files
Selig
Copeland

Re: Legal Authority for Using Federalized National Guard and Reserve Components of Armed Forces in Suppressing Civil Disorders at the Request of a State.

Questions have arisen as to whether the President, in responding to a request by a State for military aid to suppress civil disorder, is authorized by 10 U.S.C. 331 1/ (1) to federalize "the militia" (i.e., National Guard) of the requesting State, for use along with whatever other forces the President may send into that State to suppress the disorder; or (2) to use, for the same purpose, components of the Reserve of any of the armed forces. For reasons stated below, it is concluded that section 331 alone would not authorize either of these actions. However, in practical terms, ample authority exists under other provisions for federalizing the Guard of the requesting State; such authority is lacking for calling up units of the Reserves except under a temporary provision expiring June 30, 1968.

1. Federalization of the Guard of the Requesting State. Section 331 provides that the President may call into Federal service such of the militia "of the other States" as he considers necessary. This phrase need not be construed as prohibiting by implication the federalization of the Guard of the requesting State. It is clear, however, that no explicit authorization for such action can be found in section 331.

The legislative history of the original Act of 1792 from which section 331 derives, 1 Stat. 264, sheds no light on

---

1/ 10 U.S.C. 331 provides as follows:

> "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection."

this omission. We are not aware of any instance (and understand that Army historians are not either), prior to last summer's riot in Detroit, in which the Guard of the requesting State was federalized for use in operations authorized primarily by section 331 or its statutory predecessors. 2/

In the Detroit riot, as well as in the riots of April 1968 in Chicago and Baltimore, federalization of Guard units of the respective States of Michigan, Illinois and Maryland was based primarily upon the President's authority, under 10 U.S.C. 332, to call into Federal service the militia "of any State" to remove obstructions to the enforcement of Federal law, and, under 10 U.S.C. 333(2), to use "the militia" to suppress domestic violence and other unlawful activity which obstructs the execution of Federal law. 3/ On each of these occasions, the President's proclamation invoked Chapter 15 of Title 10 in its entirety (sections 331-34) as the basis for Federal intervention, after paraphrasing the key words of sections 332 and 333 by reciting that "domestic violence and disorder are . . . obstructing the execution of the laws of the United States, including the protection of federal property. . . ." 4/

2/ Congressional debate on the provisions of the Act of 1792 is reported in 3 Annals of Cong. 575-79.

On several past occasions, forces of the requesting State, without being called into Federal service, have been placed under the operational command of the military officer in command of the intervening Federal troops. See B.M. Rich, The Presidents and Civil Disorder 112, 191 (Brookings Institution, 1941).

3/ Pursuant to 10 U.S.C. 332 and 333, Guard units of the home State have been federalized in recent years to assist in enforcing Federal court orders protecting the exercise of civil rights in several Southern States, beginning with the Little Rock episode of 1957.

4/ Proclamation No. 3795 (32 Fed. Reg. 10905, July 24, 1967); No. 3841 (33 Fed. Reg. 5497, April 7, 1968); No. 3842 (33 Fed. Reg. 5499, April 7, 1968).

Although not explicitly cited in these proclamations, temporary supplementary authority for federalizing Guard units of the States in which those riots occurred may be found in the so-called Russell Amendment (Title I, 1967 Defense Appropriations Act, 80 Stat. 981), which authorizes the President until June 30, 1968 to order Ready Reserve units (including National Guard units, 10 U.S.C. 269(b)) of the armed forces to active duty for up to 24 months.

As a practical matter, when domestic violence breaks out on a wide enough scale to warrant a request and an affirmative response under section 331, the President will have sufficient grounds for invoking sections 332 and 333(2) along with 331 in dealing with the situation. Disorders of this magnitude are bound to violate Federal as well as State laws, and to obstruct the operations and endanger the property of the Federal Government. The absence of express authority under section 331 to federalize the Guard of the requesting State is therefore no obstacle to securing unified Federal command over all military forces in the field, pursuant to the several provisions of Chapter 15 of Title 10 (sections 331-34). 5/ It should be noted, however, that in the absence of a request under section 331 based on the inability of the requesting State to restore law and order with all the resources at its command, including its own National Guard in militia status, and an affirmative Presidential response under section 331 to that request, there will not ordinarily be sufficient grounds for using Federal military force pursuant to sections 332 and 333(2) alone to suppress the disturbance. The primary responsibility for preserving a climate of law and order in which Federal as well as State laws can operate remains with the States under our Federal system. 6/

5/ It has also been suggested that since the federally recognized portion of the Army National Guard is a reserve component of the armed forces (10 U.S.C. 261), that portion of the Guard of the requesting State may be included among the "armed forces" which the President is authorized to "use" under section 331. However, as discussed below in section 2 of this memorandum, reserve components may not be used as parts of the armed forces until they are called or ordered into active service pursuant to statutory authority. The President's authority under section 331 to "use" the armed forces does not include authority to order into active service reserve components of the armed forces.

6/ However, if the primary effect of a disturbance should be to obstruct the execution or enforcement of Federal laws, or if this should be the incidental effect of a disturbance that continues for an unreasonable length of time without a request for aid being submitted by the Governor to the President under section 331, intervention under section 332 or 333(2) alone to suppress the disturbance may be justified.

2. Use of Reserves under Chapter 15. The second question is whether units of the Army Reserve, as part of the "armed forces," 6/ may be ordered into active service and "used" by the President pursuant to 10 U.S.C. 331-333 to suppress civil disorders. For simplicity of presentation, the question will be discussed in terms of the Army, but the same analysis would be applicable to the Air Force and Navy Reserves.

The National Defense Act of 1916, as amended, established the National Guard of the United States and the Organized Reserve Corps as reserve components of the Army. These are now the Army National Guard of the United States and the Army Reserve. As reserve components of the Army, they were from the time of their creation part of the "land and naval forces" of the United States.

Under present Title 10, both the Army Reserve and the Army National Guard of the United States are reserve components of the Army, 10 U.S.C. 261, and thus within the statutory definition of the "armed forces" of the United States, 10 U.S.C. 101(4). However, we believe, and we understand the Army lawyers concur, that it is implicit in the reserve provisions of Title 10 that reserve components may not be "used" as part of the armed forces, in the sense of sections 331-333, until they have been "called" or "ordered" to active duty pursuant to statutory authority. See especially 10 U.S.C. 672, 682, 3495. 7/ The Army National

---

6/ Prior to the Act of August 10, 1956, 70A Stat. 1, the predecessor provisions to 10 U.S.C. 331 and 333 authorized the President to use such part of the "land or naval forces" as he deems necessary for the purposes of these provisions, while the predecessor provision to 10 U.S.C. 332 authorized use of "land and naval forces." That Act codified these as sections 331-333 of Title 10, United States Code, and substituted the words "armed forces" for the quoted phrases. The legislative history makes clear that this codification did not intend any substantive change. Moreover, the variant uses of the words "and" and "or" in the predecessor sections do not appear to have any significance.

7/ Pursuant to section 682, it is clear that units of the Army Reserve on active duty may be used to suppress civil disorders upon exercise of the President's authority under sections 331-333.

Guard, as the "militia" of a State, explicitly may be "called" into Federal service pursuant to 10 U.S.C. 331 or 332, and we understand section 333 likewise to require a "call" though the word is not used there. Cf. 10 U.S.C. 3500.

There is no similar authorization in sections 331-333 for ordering to active duty units of the Army Reserve. Permanent authority for ordering various parts of the Army Reserve to active duty is to be found in 10 U.S.C. 672, 673 and 674, none of which appears applicable at the present time. Temporary authority to order units of the Ready Reserve to active duty now exists in the so-called Russell Amendment (Title I, 1967 Defense Appropriations Act, 80 Stat. 981), which authorizes the President until June 30, 1968 to order such units of any of the armed forces to active duty for up to 24 months.

With the exception of exercise of the temporary authority contained in the Russell Amendment, it appears that under present law units of the Army Reserve may not be ordered to active duty to suppress civil disorders.