Mrs. Copeland

4 AUG 9 1963

To Civil 8/9

4 In response to your oral request, attached is a memorandum, prepared in this X Office, concerning the designation of members of the National Guard of the District of Columbia as Special Police.

4 20. Assistant Attorney General, Civil

Norbert A. Schlei

AUG 9 1963

Memorandum concerning the designation of members of the National Guard of the District of Columbia as Special Police

A decision has been made to use members of the National Guard of the District of Columbia to supplement the civilian police force in handling the crowd that is expected to participate in the civil rights demonstration on August 28, 1963. Members so used would not be "federalized" for this purpose, but, instead, would serve in their capacity as members of the District of Columbia militia.

A question has arisen as to whether members of the Guard may be designated as "Special Police", and vested with the powers thereof, under the provisions of Sections 378 and 379 of the Revised Statutes of the District of Columbia (D.C. Code, 4-133). The purpose of such designation would be to avoid litigation, civil and criminal, involving the legality of actions, including arrests, by Guardsmen.

Sections 378 and 379 (as codified) read as follows:

"The Board of Commissioners may, upon any emergency of riot, pestilence, invasion, insurrection, or during any day of public election, ceremony, or celebration, appoint as many special privates without pay, from among the citizens, as it may deem advisable, and for a specified time. During the term of service of such special privates, they shall possess all the powers and privileges and perform all the duties of the privates of the

standing police force of the District and such special privates shall wear an emblem to be presented by the commissioners." [Emphasis added.]

The legislative history of those sections (formerly Sections 20, 23 of the Act of August 6, 1861 (12 Stat. 324, 325)) sheds no light upon the precise purpose or scope of those provisions.

Some of the terms used in those provisions create doubt as to whether those provisions were intended to authorize the designation of National Guardsmen as Special Police in situations of this type.

Those provisions describe a number of situations in which Special Police may be designated, but only two of those situations--ceremonies or celebrations--can reasonably be considered as describing a demonstration or rally of the type scheduled. The normal dictionary meaning of these terms appears to encompass a rally or demonstration of this type; however, it could be urged that those provisions are applicable only with respect to "official" ceremonies or celebrations such as inaugural ceremonies, or Fourth of July celebrations. We understand that the Government of the District of Columbia has officially recognized this event by approving rally and parade plans, and that the Civil Service Commission has recognized the event by urging Federal agencies to adopt a liberal policy toward granting annual leave and leave without pay on August 28, 1963, which might be enough to constitute this as an officially recognized ceremony or celebration.

On balance, it is doubtful that a designation of Guardsmen as Special Police could be successfully challenged on the grounds that this is not a ceremony or celebration within the meaning of Sections 378 and 379.

Next, the statutory language provides that Special Police shall be designated "from among the citizens" and that language might be construed as excluding National

Guardsmen since they are members of the Armed Forces.

However, this provision can be construed as excluding aliens rather than members of the Armed Forces. In addition, even if that language was intended to bar the designation of military personnel, it could be argued that National Guardsmen (when not federalized) are primarily citizens rather than soldiers and are therefore eligible for designation.

It could also be argued that National Guardsmen are both citizens and soldiers, and that Sections 378 and 379 merely require that a designee be a citizen and in no way bars a citizen simply because he is a part-time soldier.

Once again, on balance, it seems doubtful that the designation of a non-federalized National Guardsman as a Special Policeman under the circumstances here contemplated would be declared invalid.

Since the only reason for designating National Guardsmen as Special Police is to afford them additional protection in any litigation that might arise out of their activities in support of the civilian police force and since there is no readily discernible way in which a Guardsman could be adversely affected if his designation as a Special Policeman were subsequently declared unauthorized, it seems reasonable to resolve all doubts concerning the scope of Sections 378 and 379 in favor of a construction that these sections authorize the designation of National Guardsmen as Special Police. If a court subsequently rules to the contrary, Guardsman involved will be in no worse legal position than he would have been had he not been designated as a Special Policeman. Therefore, there appears to be a possible advantage to be gained, and nothing to be lost, if Guardsmen are so designated.

The Posse Comitatus Act (18 U.S.C. 1385) prohibits the use of the Army or Air Force as a posse comitatus or to otherwise execute the laws except in cases or under

circumstances especially authorized by the Congress or an Act of Congress. That Act is not applicable in this case because the Guard is being used in its District of Columbia status rather than in its Federal status (comparable to the National Guard of Maryland being used in Cambridge), and because this use is expressly authorized by Section 44 of the Act of March 1, 1889 (D.C. Code 39-602).

Aside from the foregoing, it should be noted that the final clause of Section 58 of the Act of March 1, 1889 (D.C. Code 39-705), expressly provides that no officer or enlisted man shall be liable to civil or criminal prosecution for any act done while in discharge of his military duty. This would appear to include duty performed pursuant to Section 44 of that Act (D.C. Code 39-602).