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THE USE OF THE ARMY IN AID OF THE CIVIL POWER.

BY
G. NORMAN LIEBER,
JUDGE-ADVOCATE GENERAL,
U. S. ARMY.

WASHINGTON:
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WAR DEPARTMENT.

Document No. 64.

OFFICE OF THE JUDGE-ADVOCATE GENERAL.

THE USE OF THE ARMY IN AID OF THE CIVIL POWER.

By the use of the Army in aid of the civil power is here meant its use under some power granted by the Constitution of the United States, either directly or through the medium of legislation. "War powers," independent of the Constitution, whatever they may be, and whether legislative or executive, are no part of this subject.[1] The use here spoken of has reference to the occasions for the employment of the Army, that is, to the purposes for which it may be used, and not to what it may do in carrying out the use. The occasions had in view are those of resistance to the law not amounting to war, and the subject to which these observations will be more especially addressed is the employment of the Army in executing the laws of the United States and in protecting their instrumentalities of government against unlawful interference.

The Army Appropriation Act of June 18, 1878, contained the following provision:

"From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of

[1] The North American Review for November, 1896, publishes the writer's views on what constitutes the justification of the war power known as "martial law." The position is there taken that martial law is defensible only as an exercise of executive military power founded in actual necessity, thus disagreeing with the view, sometimes advanced, that it is within the power of Congress to authorize it.

said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment."

From June 30th until November 21st, 1877, the Army of the United States was maintained without any appropriation, the two Houses of Congress having failed to agree. It would be foreign to the purpose of these remarks to comment on this significant fact in our constitutional history, but the proceedings in Congress which led to the failure of the Army Appropriation Act at the second session of the Forty-fourth Congress, and those which resulted in the above legislation, are part of the history of the subject under consideration.

On the 22d of January, 1877, the President, in response to a resolution of the House of Representatives, made the following communication:

"To the HOUSE OF REPRESENTATIVES:

"On the 9th day of December, 1876, the following resolution of the House of Representatives was received, viz:

"'*Resolved*, That the President be requested, if not incompatible with the public interest, to transmit to this House copies of any and all orders or directions emanating from him or from either of the Executive Departments of the Government to any military commander or civil officer, with reference to the service of

the Army, or any portion thereof, in the States of Virginia, South Carolina, Louisiana, and Florida, since the 1st of August last, together with reports, by telegraph or otherwise, from either or any of said military commanders or civil officers.'

"It was immediately, or soon thereafter, referred to the Secretary of War and the Attorney General, the custodians of all retained copies of 'orders or directions' given by the Executive Department of the Government covered by the above inquiry, together with all information upon which such 'orders or directions' were given.

"The information, it will be observed, is voluminous, and, with the limited clerical force in the Department of Justice, has consumed the time up to the present. Many of the communications accompanying this have been already made public in connection with messages heretofore sent to Congress. This class of information includes the important documents received from the governor of South Carolina, and sent to Congress with my message on the subject of the Hamburgh massacre; also the documents accompanying my response to the resolution of the House of Representatives in regard to the soldiers stationed at Petersburgh.

"There have also come to me and to the Department of Justice, from time to time, other earnest written communications from persons holding public trusts and from others residing in the South, some of which I append hereto as bearing upon the precarious condition of the public peace in those States. These communications I have reason to regard as made by respectable and responsible men. Many of them deprecate the publication of their names as involving danger to them personally.

"The reports heretofore made by committees of Congress of the results of their inquiries in Mississippi and in Louisiana, and the newspapers of several States recommending 'the Mississippi plan,' have also furnished important data for estimating the danger to the public peace and order in those States.

"It is enough to say that these different kinds and sources of evidence have left no doubt whatever in my mind that intimidation has been used, and actual violence, to an extent requiring the aid of the United States Government, where it was practicable to furnish such aid, in South Carolina, in Florida, and in Louisiana, as well as in Mississippi, in Alabama, and in Georgia.

"The troops of the United States have been but sparingly used, and in no case so as to interfere with the free exercise of the right of suffrage. Very few troops were available for the purpose of preventing or suppressing the violence and intimidation existing in the States above named. In no case except that of South Carolina was the number of soldiers in any State increased in anticipation of the election, saving that twenty-four men and an officer were sent from Fort Foote to Petersburgh, Va., where disturbances were threatened prior to the election.

"No troops were stationed at the voting-places. In Florida and in Louisiana, respectively, the small number of soldiers already in the said States were stationed at such points in each State as were most threatened with violence, where they might be available as a *posse* for the officer whose duty it was to preserve the peace and prevent intimidation of voters. Such a disposition of the troops seemed to me reasonable, and justified by law and precedent, while its omission would have been inconsistent with the constitutional duty of the President of the United States 'to take care that the laws be faithfully executed.' The statute expressly forbids the bringing of troops to the polls, 'except where it is necessary to keep the peace,' implying that to keep the peace it may be done. But this even, so far as I am advised, has not in any case been done. The stationing of a company or part of a company in the vicinity, where they would be available to prevent riot, has been the only use made of troops prior to and at the time of the elections. Where so stationed, they could be called, in

an emergency requiring it, by a marshal or deputy marshal as a *posse* to aid in suppressing unlawful violence. The evidence which has come to me has left me no ground to doubt that if there had been more military force available, it would have been my duty to have disposed of it in several States with a view to the prevention of the violence and intimidation which have undoubtedly contributed to the defeat of the election law in Mississippi, Alabama, and Georgia, as well as in South Carolina, Louisiana, and Florida.

"By Article IV, section 4, of the Constitution, 'The United States shall guarantee to every State in this Union a republican form of government, and on application of the legislature, or of the executive (when the legislature can not be convened), shall protect each of them against domestic violence.'

"By act of Congress (Rev. Stat., U. S., sec. 1034, 1035) the President, in case of 'insurrection in any State,' or of 'unlawful obstruction to the enforcement of the laws of the United States by the ordinary course of judicial proceedings,' or whenever 'domestic violence in any State so obstructs the execution of the laws thereof, and of the United States, as to deprive any portion of the people of such State' of their civil or political rights, is authorized to employ such parts of the land and naval forces as he may deem necessary to enforce the execution of the laws and preserve the peace, and sustain the authority of the State and of the United States. Acting under this title (69) of the Revised Statutes, United States, I accompanied the sending of troops to South Carolina with a proclamation such as is therein prescribed.

"The President is also authorized by act of Congress 'to employ such part of the land or naval forces of the United States' * * * 'as shall be necessary to prevent the violation and to enforce the due execution of the provisions' of title 24 of the Revised Statutes of the United States for the protection of the civil rights of citizens, among which is the provision against conspiracies 'to prevent by force, intimidation,

or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for President, or Vice-President, or as a member of Congress of the United States.' (Rev. Stat., U. S., 1989.)

"In cases falling under this title, I have not considered it necessary to issue a proclamation to preclude or accompany the employment of such part of the Army as seemed to be necessary.

"In case of insurrection against a State government, or against the Government of the United States, a proclamation is appropriate; but in keeping the peace of the United States at an election at which members of Congress are elected, no such call from the State or proclamation by the President is prescribed by statute or required by precedent.

"In the case of South Carolina, insurrection and domestic violence against the State government were clearly shown, and the application of the governor founded thereon was duly presented, and I could not deny his constitutional request without abandoning my duty as the Executive of the National Government.

"The companies stationed in the other States have been employed to secure the better execution of the laws of the United States and to preserve the peace of the United States.

"After the election had been had, and where violence was apprehended by which the returns from the counties and precincts might be destroyed, troops were ordered to the State of Florida, and those already in Louisiana were ordered to the points in greatest danger of violence.

"I have not employed troops on slight occasions, nor in any case where it has not been necessary to the enforcement of the laws of the United States. In this I have been guided by the Constitution and the laws which have been enacted and the precedents which have been formed under it.

"It has been necessary to employ troops occasionally to overcome resistance to the internal-revenue laws,

from the time of the resistance to the collection of the whisky tax in Pennsylvania, under Washington, to the present time.

"In 1854, when it was apprehended that resistance would be made in Boston to the seizure and return to his master of a fugitive slave, the troops there stationed were employed to enforce the master's right under the Constitution, and troops stationed at New York were ordered to be in readiness to go to Boston if it should prove to be necessary.

"In 1859, when John Brown with a small number of men made his attack upon Harper's Ferry, the President ordered United States troops to assist in the apprehension and suppression of him and his party, without a formal call of the legislature or governor of Virginia, and without proclamation of the President.

"Without citing further instances, in which the Executive has exercised his power as commander of the Army and Navy to prevent or suppress resistance to the laws of the United States, or where he has exercised like authority in obedience to a call from a State to suppress insurrection, I desire to assure both Congress and the country that it has been my purpose to administer the executive powers of the Government fairly, and in no instance to disregard or transcend the limits of the Constitution.

"U. S. GRANT."

The bill passed by the House of Representatives at the second session of the Forty-fourth Congress proposed to reduce the numerical strength of the Army and to prevent its use in support of the claims, or pretended claims, of any State government or officer, until such government should be duly recognized by Congress. The reason assigned for this was the improper use of the Army in the Southern States. Thus, Mr. J. D. C. Atkins, a member from Tennessee, said:

"Had the people been allowed without Federal coercion to manage their own affairs since the war,

they would have done so much more justly to all concerned and with far greater satisfaction to a very large majority of the people even of the Northern States.

"The disrupted condition of society which the war left among other evils as a heritage to the South, and which almost always follows civil wars from necessity, afforded a pretext for the use of the Army in those States. And as the dominant party determined to tear down the old State governments and also the new ones which were set up by President Johnson and enter upon its famous and ill-advised reconstruction policy—and I only speak of it now for the purpose of a historical illustration—and to do this were compelled to inaugurate the rotten-borough or carpet-bag system of representation and government, which required, or they supposed it did, the presence of the Army to make it successful, time, partial success, and habit have rendered the use of the Army in the Southern States a seeming necessity to the ruling authorities at Washington. It is to this use of the Army that I object. It is degrading to the dignity of an American soldier to make a policeman of him; it is insulting to his chivalry and patriotism, it is dwarfing his noble profession to the ignoble level of a Turkish Janizary, who never tasted the sweet waters of liberty, but was born and bred beneath the frowning shadows of despotism and thinks it an honor to lick the hand of his master, or but touch the hem of his garment, or die for his defense.

"American soldiers policemen! Insult if true, and slander if pretended to cover up the tyrannical and unconstitutional use of the Army by protecting and keeping in power tyrants whom the people have not elected; and but for Federal military protection their governments would fall at the first breath of popular expression. The hollow insincerity and circumlocution which have attended every step of the unconstitutional use of the United States Army deserves the scorching denunciation of every true soldier and of every lover of his country and of its Constitution.

"The process has been to first stifle the lawful will of the people and set up in power these minions of despotism. This has been done by driving at the point of the bayonet the legally elected legislators and officers of those States from power. United States district judges have been invoked to violate the law and issue orders wholly illegal and unconstitutional, under which pretended judicial authority these unpardonable outrages upon civil liberty have been committed. In this manner these pretenders becoming the *de facto* governments, the President then virtuously and patriotically responds to their call for troops to protect them in their infamous assumption of authority. When this point is reached the law-abiding Executive, full of devotion to the Constitution and with a heart always yearning for peace, panoplied with magisterial power, recurs to the fourth section of the fourth article of the Constitution with infinite satisfaction, and forthwith military aid is afforded the men whom he, in violation of the Constitution, first created with his own usurping hand. Such has been the process.

"The last section of this bill seems to me to be a very salutary one. It provides that no part of the money appropriated by it shall be used in any State to maintain the political power of any State government, but to leave the people of a State perfectly free to regulate their own affairs in their own way, subject to the Constitution of the United States."

A part of the remarks of another member, Mr. H. B. Banning, of Ohio, who also discussed the subject at considerable length, is given in Appendix A, under the heading, used by him, of "*The Object of Our Army.*"

And when the bill was before the Senate Mr. Bayard said:

"It is not merely the cost of the Army; it is the question of the *employment of the Army.* That is the cause of the deep feeling which pervades the people

of this country to-day, and which forms the chief difference between the two Houses of Congress in respect to the present bill. It is not worth while to attempt to disguise it; the fact is that a widespread belief exists that the Army of the country has been employed and is still being used for purposes dangerous to the liberties of the country. That forms the objection to the increase of the military establishment and forms the reasons for the reduction proposed by the Representatives of the people. I only speak of that which we all know, which the whole country knows, of the improper uses to which the Army has been put in certain States of the Union during the last few years.

"It is now apparent that the outgoing administration tardily admit this policy in the use of the Army to have been a serious mistake and it seems are taking steps to abandon it. We hear something of a similar suggestion, a faint adumbration of opinion, from the incoming administration that they are in accord with these last expressions of opinion on the part of the present administration. I sincerely hope this may be so. In my judgment it would have been wiser had the House of Representatives moved directly, not by way of lessening appropriations, but directly, for the repeal of all those war measures authorizing the use of the Army in the several States which have found place upon our statute books in the last fifteen years. The use of military force of the nation for the execution of the laws should certainly be the very last resort, and not, as of late years, the very first. I hope the day is near at hand when we shall repeal all this military legislation which has sprung up under a semi-revolutionary condition of affairs, and permit us to return where the Constitution intended our administration of government should be restricted, only to enforce laws by the military power as a last resort, and even when the military power was called in in aid of the civil power it was to be the militia of the States, and not the Army of the nation.

* * * * *

"After all, the cure for such evils must be in the public opinion of an intelligent and courageous people, and that public opinion will practically enforce itself upon the exigencies of the occasion. We know there were emergencies, ten or twelve years ago, which, thank heaven, no longer exist, and there can be no doubt that laws for which there was a pretext or a real cause at that time are no longer the meet and proper laws for a peace establishment. It is not the size of the Army, it is the *use* to which the Army is applied; it is the extraordinary laws under which the Army can be unjustly used and has been used. It is the repeal of those laws that I seek, in order that the country may be put *in statu quo ante bellum*. It is that the use of the military as an aid to civil power should be the very last resort in a government of laws, and that, under our system, where the laws are to be enforced in aid of the State, the State militia, and not the Army of the United States, should be called upon."

The Senate passed a substitute for the House bill, leaving the Army on its existing footing, and omitting the provision restricting its use. The House thereupon refused to concur in the amendments, and the bill failed to become a law; the Army Appropriation Act for the fiscal year ending June 30th, 1878, not being passed until November 21st, 1877.

Similar debates were had the next year. Mr. Wm. Kimmel, a member from Maryland, then very fully discussed the subject of the employment of the Army to execute the laws, and offered the following as an amendment to the Army Appropriation Act: "*Provided*, That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress"—

language substantially the same as that finally enacted, except in one important particular, namely, the recognition by the final enactment of the fact that there is self-acting authority in the Constitution for the employment of the Army. This clause received earnest consideration in the Senate, where it was amended so as to contain such recognition. "As a matter of course," said Mr. Windom, "you can not limit the power of the President as authorized and granted by the Constitution."

The debate was an interesting one, but too long to follow in detail.[1] An attempt was made to strike out the word "expressly," but that failed. But, manifestly, the clause, as enacted, recognizes the Constitution as a direct source of authority for the employment of the Army. This is a very important consideration in the construction of the legislation. And another matter of great importance is also to be observed with reference to it. The enactment prescribes that it shall be unlawful to employ any part of the Army as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except when it is *expressly* authorized by the Constitution or by act of Congress. Now, it is evident that the word "expressly" can not be construed as placing a restriction on any constitutional power. If authority so to use the Army is included in a constitutional power, although it be not

[1] When the bill was reported from the conference committee, Mr. Hewitt, of New York, who had charge of it, said:

"Thus have we this day secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people."

A strong expression of the feeling existing at that time.

expressly named, it can not, of course, be taken away by legislation.[1] So that, so far as any such constitu-

[1] Ex-Attorney General Miller, in a letter to Attorney General Olney, dated July 11, 1894, said:

"Without assuming that what I may say or think is of any special value, I beg to say that what you have done and what you have said, so far as the same has been brought to my attention, in connection with the current strike and labor troubles, has my cordial commendation and is, as I think, entitled to the approval of all good citizens. That the President has the authority and that it is his duty to use the whole power of the Government for the enforcement of the laws of the United States seems to me to be axiomatic. It is made his duty to take care that the laws be faithfully executed. He is made Commander-in-Chief of the Army and Navy. In my judgment, the power thus conferred is given in order that he may execute the duty thus imposed. For this reason, I have always been of the opinion, and so advised President Harrison, that the *posse comitatus* statute, in so far as it attempted to restrict the President in using the Army for the enforcement of the laws, was invalid, because beyond the power of Congress; that it was no more competent by a statute to limit the power of the President, as Commander-in-Chief, to use the Army for the enforcement of the laws than it is competent to limit by statute the exercise of the pardoning or appointing power. Holding these views, I repeat that I have been gratified at the decision and vigor with which the President's power as Commander-in-Chief has been exercised, as I think I may justly assume, under your advice." (H. R. Doc. 9, Part 2, 54th Cong., 2d sess., p. 108.)

Pomeroy divides the executive attributes and functions under the Constitution into three classes, viz: First, those which are completely conferred by the terms of the organic law; secondly, those which depend upon some prior statute of Congress for the opportunities and occasions upon which they may be exercised; and, thirdly, those which depend upon some prior laws of Congress, not only for the opportunities and occasions for their exercise, but for their number, character, and scope. And he says: "So far as the President has executive functions directly conferred upon him, he is independent of Congress. It was never intended that the legislature should draw to itself the duty of administering the laws which it makes. There is danger, it can not be doubted, lest the Congress should trench upon the attributes of the Executive. This is not done by interfering with the class of powers first above stated (secs. 635, 636). The subject-matter of these powers lies so plainly beyond the sphere of the legislature, that any assertion of jurisdiction over them is hardly to be anticipated. The tendency, if it exist at all, is to control

tional power is concerned, the clause must be read as though the word "expressly" were omitted. Nor, indeed, would the enactment qualify future legislation, if it should be manifest that the intention of the later legislation is to confer the authority. But the intention would have to be very evident, because the presumption would be that the later legislation is intended to be controlled by the earlier.

Among the acts of Congress regarded as expressly authorizing the employment of the Army in executing the laws, was the act of February 25, 1865, embodied in section 2002 of the Revised Statutes, forbidding the use of troops at any place in a State where an election should be held, unless it should be necessary "to repel the armed enemies of the United States, or to keep the peace at the polls." In the Army Appropriation Act of June 23, 1879, it was prescribed that no money appropriated by the act should be used "for the subsistence, equipment, transportation, or compensation of any portion of the Army of the United States, to be used as a police force to keep the peace at the polls at any election held within any State." And the Army Appropriation Act of the following year contained a similar provision, with a proviso to the effect that nothing in it should be construed to prevent the use of troops "to protect against domestic violence in

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the President in the exercise of his functions of the second class (sec. 637); or to commit those of the third class (sec. 638) to subordinates, and to limit and restrain the President in any practical exercise over those subordinates, of his power to 'take care that the laws be faithfully executed.' I need hardly say that such legislation is opposed to the spirit of the organic law; and if it became general, would break down the independence of the Executive, and practically reduce the Government to a single political branch." (Pomeroy's Constitutional Law, 537, *et seq.*)