

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. memo	Walter Delliger to Webb Hubbell re: D.C. National Guard (10 pages)		P5
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COLLECTION:

Clinton Presidential records
Domestic Policy Council
Bruce Reed (Crime)
OA/Box Number: 8413

FOLDER TITLE:

National Guard

rs12

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

October 22, 1993

REMARKS BY THE PRESIDENT
IN NAFTA MEETING WITH MEMBERS OF CONGRESS

The Cabinet Room

9:17 A.M. EDT

Q What do you think about sending the National Guard, or allowing the National Guard to patrol the city here?

THE PRESIDENT: I think it should be reviewed. I've given a lot of thought to it, and I've asked our Legal Counsel to get with the Justice Department and look into the legality of it and what the legal hurdles are, and also what the practical problems are.

Keep in mind, Guardsmen are not full-time military people; they do weekend duty, by and large. And except in the summertime, again by and large, they're not on full-time duty. So if you call out the Guard in other times in any substantial numbers, you can be disrupting the normal work lives of a lot of people.

But I'm very sympathetic with the problems that the Mayor has and that Washington has. There are 1,500 shootings here a year now. It's one reason -- I certainly hope that we can pass this crime bill in a hurry. If we do, we'll have another 50,000 police officers on the street, and it will reduce the pressure for National Guard officers.

But I will review it, and I think it deserves to be reviewed. It obviously is not a precedent that can easily be confined just to Washington, D.C. So there are a lots of questions that have to be thought through here. But I want to wait until she sends me the letter and then review the specific proposal.

I hope that we can use this moment to emphasize the need to move on the Brady bill, the crime bill, the question of whether minors should be restricted in the ownership of handguns, the questions of the assault weapons. I think all of these things are part of a rising tide of anger and fear and frustration on the part of the American people that we need to respond to.

Memorandum



Subject
National Guard opinion

Date
October 8, 1993

To
Andrew Beebe

From
Jeff Powell *JP*

The accompanying are the documents we discussed. As I mentioned the underlying legal memo ("Preliminary Draft") is being revised.

My number is 514-2069.

Withdrawal/Redaction Marker

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For a complete list of items withdrawn from this folder, see the
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Crime -
D.C. Nat.
Guard

THE WHITE HOUSE
WASHINGTON

October 23, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BERNARD W. NUSSBAUM
COUNSEL TO THE PRESIDENT

CLIFFORD M. SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: D.C. National Guard

Overview

Mayor Kelly's letter requests your support "to amend the Executive Order which prevents the Mayor of the District of Columbia from directly enlisting the assistance of the District of Columbia National Guard." She also announces her desire to use the D.C. National Guard to increase support of drug interdiction activities, to conduct roadblocks, and to augment the local police force.

We recommend the following:

(1) Mayor Kelly's request for authority over the D.C. National Guard through amendment of an Executive Order must be declined because such a change cannot be accomplished by Executive Order. Consistent with your views on D.C. statehood, however, you may wish to support the Mayor's request for a statutory change that would give her the same authority over the D.C. National Guard in its local militia status that Governors enjoy with respect to their state Guard units.

(2) You should not call the D.C. National Guard into service for law enforcement activities in either its federal status or in its general local militia status; you should, however, direct the Secretary of Defense and the Attorney General to work with the District to expand the District's participation in an existing federal program that uses local Guard units for federal drug interdiction support.

(3) Your response should include other responses to help the District with its crime problem. Two possible activities would be (i) directing FBI Director Freeh to oversee a D.C. Crime Federal Task Force marshalling federal law enforcement resources to target crime in the District (including FBI, DEA, ATF, U.S. Marshals, even Park Police) and (ii) calling for an expansive Police Corps program in the District.

This memorandum will review (1) the structure of the D.C. National Guard and the reasons why a statutory change would be necessary to give Mayor Kelly the authority she desires, (2) the possible uses of the D.C. National Guard under existing law, and (3) possible non-military options for additional federal law enforcement assistance in the District.

(1) The Structure of the D.C. National Guard and Mayor Kelly's Request

(a) State National Guard Units

State National Guard units are composed of civilians who may be called into Guard service in two different statuses -- federal status, which is under the control and direction of the President, and State militia status, which is under the control and direction of the Governor. As the Supreme Court recently explained, "members of [a] State Guard unit . . . must keep three hats in their closet -- a civilian hat, a state militia hat, and an army hat -- only one of which is worn at any particular time." Perpich v. Dept. of Defense, 496 U.S. 334, 348 (1990).

(b) D.C. National Guard

Like State National Guard units, the D.C. National Guard may be called into federal status service by the President. Unlike State National Guard units, however, the D.C. National Guard's local militia status is not subject to local control. Instead, under the D.C. Code, the President is the Commander-in-Chief of the D.C. National Guard. D.C. Code Sec. 39-109. A separate D.C. Code provision, moreover, prohibits the District from changing this provision without congressional approval. D.C. Code Sec. 1-233(b).

An Executive Order in effect since 1969 delegates extensive authority over the D.C. National Guard from the President to the Secretary of Defense. Under this Executive Order, the Attorney General is also assigned the responsibility for "advising the President" regarding "the alternatives available pursuant to law for the use of the National Guard to aid the civil authorities of the District of Columbia" and for "establishing after consultation with the Secretary of Defense law enforcement policies to be observed by the military forces in the event the National Guard is used in its militia status to aid civil authorities of the District of Columbia." EO 11485.

(c) Mayor Kelly's Request For An Amendment of the Executive Order

Mayor Kelly requests an amendment of the Executive Order to give her the same authority to use the D.C. Guard in local militia status that Governors enjoy. But this goal cannot be

achieved by Executive Order. Since the authority over the Guard is vested in the President by statute, the President's authority cannot be delegated to an official over whom the President has no direct control, such as the Mayor of the District. (The Justice Department's Office of Legal Counsel has confirmed that the President's authority over the National Guard cannot be delegated to the Mayor by Executive Order.)

Mayor Kelly's letter also notes that she is seeking a statutory change to grant her authority over the D.C. National Guard. One option to be considered is support for such a statutory change. A powerful argument in favor of such a change is that it would be consistent with the White House position on D.C. statehood and autonomy.

2. Possible Uses of the D.C. National Guard Under Current Law

Under current law, the D.C. National Guard could conceivably be used in one of three contexts: (1) federal status; (2) general local militia status; and (3) local militia status, but only within the parameters of an existing program created by a federal anti-drug statute passed in 1989.

Because it would avoid breaking new ground and creating troublesome precedents, we recommend the third alternative.

(a) Federal status

Although the President has authority to order the Guard into federal service to combat "domestic violence" that local authorities are unable to control, issues of enormous difficulty and complexity would be raised by a decision to call the Guard into federal service to combat crime in D.C. Notably, Mayor Kelly's letter does not specifically request this action.

The President has authority to order the National Guard into federal service for various purposes. One such purpose is to suppress any "insurrection, domestic violence, unlawful combination or conspiracy" that "hinders the execution of the law" and deprives constitutional rights, so long as the President finds that the existing authorities are unable or are failing to protect those rights. 10 U.S.C. 333(1). Using the Guard for this purpose requires a Presidential proclamation ordering the "insurgents" to disperse. This authority was used as the basis for Guard activities in desegregating Central High School in Little Rock and combatting riots in Chicago, Baltimore, and D.C. in 1967 and 1968.

Several serious problems would be presented by use of the Guard in this federal status to respond to crime in D.C. First, use of the Guard for this generalized purpose, rather than to restore order in a confined, brief, specific engagement, would go

substantially beyond existing precedents for use of the Guard in federal service.

Second, it would commit the Guard, in their federal service, to a role of uncertain scope and duration.

Third, it would put the White House in a difficult position with regard to possible requests from other crime-plagued localities (e.g., Miami, Chicago, New York, Los Angeles, Detroit).

Fourth, it would raise questions about the Posse Comitatus Act (18 U.S.C. 1385), which prohibits use of the Army and Air Force for execution of the laws, except where expressly authorized by the Constitution or statute. Although the authority of an express provision like the "domestic violence" provision mentioned above avoids violation of the Posse Comitatus Act, it could well be argued that extended use of the military in federal status to aid law enforcement conflicts with the spirit of the Posse Comitatus Act. (Indeed, DOJ believes that, if the "domestic violence" statutory authority were used in this context, Posse Comitatus concerns might require articulating a goal or objective that would enable withdrawal of the Guard after some reasonable period of time, rather than a possible indefinite supplementation of local law enforcement.)

Because of these legal and practical problems, we recommend against use of the D.C. National Guard in its federal status.

(b) General Local Militia Status

Although the President likewise has authority to use the D.C. National Guard in its local militia status for law enforcement activities, such a use would raise similar problems. Here too, it should be noted that the focus of Mayor Kelly's letter is a request for authority permitting her to take this step herself, rather than a request for the President to take this action.

The D.C. Code includes authority for assistance to "the civil authorities in the execution of the laws." D.C. Code Sec. 39-104. Nevertheless, a Presidential determination to deploy the D.C. National Guard in local militia status to aid in law enforcement efforts would raise many of the same problems as deployment in the Guard's federal status.

First, such a deployment would go substantially beyond existing precedents.

Second, a Presidential decision to deploy the National Guard in local militia status for this purpose would create

considerable pressure on Governors in States with high-crime cities to do the same.

Third, the niceties of the President resting on local militia status, rather than federal status, would probably be lost on the public. Whatever the general authority, the symbolic significance of the President calling out the military to patrol on a regular basis in the shadow of the White House and the Capitol would be enormous.

Fourth, deployment would again be of uncertain scope and duration.

Finally, funding for local militia status is ordinarily local, and it is unclear if the D.C. budget could presently support an extensive deployment of the National Guard in its general local militia status.

Because of these problems, we recommend against deployment of the D.C. National Guard in its general local militia status.

(c) Local Militia Status Under The Existing Federal Program

Under a statute enacted in 1989, the Secretary of Defense may provide funds to a Governor for State Guard activities that further drug interdiction and counter-drug objectives. 32 U.S.C. 112. In 1989, DOJ determined that the District may participate in this "Section 112" program.

According to the D.C. National Guard, approximately 35-50 Guard members are currently participating in the program on a day-to-day basis. (The D.C. Guard has a total of approximately 3500 members -- about 2000 in the Army Guard and 1500 in the Air Guard -- of whom approximately 550 are Military Police). The D.C. Guard members currently engage in various activities including helicopter and aerial surveillance for drug interdiction; aerial transportation and support; cargo inspection; coordination, liaison, and management activities; logistical and maintenance support; and educational programs.

The D.C. National Guard believes that their activities under this existing federal program can be easily expanded and fit comfortably within the parameters of the program. The existing activities can be increased, and other activities -- such as surface surveillance and surface transportation support -- could be undertaken and funded in the existing program.

Some limitations on the existing program should be noted. A legal limitation is that the Guard activity must have some relationship to the goal of drug interdiction and counter-drug activity, but DOD has apparently construed this requirement quite liberally.

A practical limitation is that the existing program is applied on a voluntary basis -- no Guard members are compelled to participate. The Commanding General of the D.C. National Guard estimates that an expanded program could draw a total of 85-100 volunteers, but probably no more. The D.C. National Guard apparently has suggested to the D.C. government that the city use the existing Section 112 program to increase D.C. Guard involvement, but the city has responded that it wants at least 400-500 Guard members (and, specifically, would like most or all of the D.C. Guard's 550 MP's). Thus, it is possible that reliance on the Section 112 program would draw criticism that it is inadequate because the numbers are too small -- and possibly because the tasks are too confined and not sufficiently dramatic to meet Mayor Kelly's goals.

Nevertheless, this option has much to recommend it. The great advantage of relying on this program is that, as part of an existing program, it would break no new ground and create no new precedents. The President, moreover, could direct the Attorney General and the Secretary of Defense to confer with the District about strategies for increasing D.C. National Guard involvement in the program. (It should be noted that, if the D.C. National Guard extended the program to unprecedented areas, questions might be raised about expanding the program to new terrain in other jurisdictions. At least such issues would arise, however, within an existing, congressionally sponsored and funded program). To the extent that the limit of volunteers is seen as a significant obstacle, moreover, it might be worth considering if there are ways to increase the incentive for D.C. Guard members to volunteer (for example, through some kind of recognition by the President or the Attorney General).

Because it represents application of an existing, widespread program, we recommend efforts to increase D.C. Guard involvement in the federal "Section 112" program.

3. Other opportunities for federal assistance

We believe that it would also be advisable to include non-military federal assistance options in your response to Mayor Kelly's request. Such options would reflect recognition of the appalling crime plague in the District, but would also direct attention to a range of possible responses. You have already given momentum to this approach by your reference to the crime bill in response to the question about Mayor Kelly's request. It may be advisable to include specific new initiatives as well.

Two possibilities come to mind. First, you could announce that FBI Director Freeh will chair an interagency Task Force to marshal federal law enforcement efforts in the District (including the FBI, DEA, ATF, U.S. Marshals Service, and even the Park Police). Second, you could call for an expansive Police

Corps program in the District. Since such a program provides educational assistance to young people in return for service, it would also serve to underscore the Administration's goals of community and service.

One possible criticism of these suggestions should be noted. In the last few years, the federal government has frequently announced new federal anti-crime initiatives in the District -- with little apparent lasting effect. In April 1989, for instance, drug czar William Bennett said that D.C. would be a "test case" in the federal government's war on drugs. Some press accounts of a new initiative might feature a retrospective of these past efforts.

Nevertheless, the advantages of announcing new federal anti-crime initiatives in the District -- including the opportunity to take a significant step against the intolerable crime spree and to broaden the dialogue beyond military responses -- outweigh this possible disadvantage.