

MAINE STATE LEGISLATURE

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September 12, 1924

To Hon. Percival P. Baxter, Governor of Maine
Re: President's Calling out the Guard

Your inquiry received . . . whether, if these was no situation such as to repel invasion, suppress insurrection or execute the laws, the President through the State Adjutant General can call out the militia without your consent.

The provision of the military law with reference to calling out the militia is given in Public Laws of 1917, Chapter 259, Sections 9 to 15, Inclusive. Of these sections the following refer to the calling out of the militia or National Guard by the President of the United States.

"Sec. 9. . . Whenever the national guard of this state or a part thereof is called forth under the constitution and laws of the United States, the governor shall, unless the order for the call specifies otherwise, order out for service the National guard or such part thereof as may be required; . . .

"Sec. 12. Whenever any portion of the unorganized militia is called forth under the constitution and laws of the United States, the members thereof shall be immediately mustered into the service for such period as the call may prescribe; . . .

"Sec. 14. Whenever unorganized militia or the national guard, or both, or any number of them or either of them, shall be called forth under the constitution and laws of the United States, and the orders for that purpose shall not be issued to or transmitted through the governor of the state, any officer or officers of the militia or national guard receiving such orders not so issued or transmitted shall communicate the same to the governor as soon as practicable.

"Sec. 15. Whenever the President shall call forth the national guard, or any number of them, to be employed in the service of the United States, and specifies in his call the period for which such service is required, the national guard, so called, shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President; provided, that no enlisted man of the national guard shall be liable to service beyond the term of his existing enlistment."

Under the sections above quoted, it would be my understanding that the President of the United States has the right to call out the National Guard or militia when the Constitution and laws of the United States so permit. In this respect our State law ties back into the Federal law as it may exist at any time. In other words, the justification for the President so to make a call of the National Guard or militia is based on whatever the Federal Constitution provides or the Federal law at any time prescribes.

Further, this call from the President, based on the Federal Constitution and laws as they may exist, may be issued to the Governor of the State or may be transmitted directly to other officials, in which latter case, under Section 14 above cited, any officer or officers of the National Guard or militia receiving such orders is to communicate them to the Governor as soon as possible.

In short, in circumstances coming within the Federal laws, the President of the United States has the right to go over the head of the Governor and issue orders directly to the officers of the National Guard or militia who are then to communicate them to the Governor, or who have the right to go ahead and follow out those orders without waiting for further orders from the Governor.

Whether the President can issue such an order where there is no situation such as to repel invasion, suppress insurrection or execute the laws, depends wholly on the wording of the Constitution and laws of the United States as they may exist at any time and not on the wording of the law of this State. The President's power is wholly defined in the Federal statutes, and the statutes of the State of Maine in this respect are ancillary to the Federal statutes in carrying out the provisions of the Federal law.

Your inquirer also asks, "Are there any other points of constitutional rights that you might question and do you know on what ground the State of Nevada refused financial aid?"

The first part of this question is not definite enough to answer, and the second part of it is something to be answered in Nevada and not here.

Clement F. Robinson
Deputy Attorney General