



Armies of the right: Enlisting the military in law enforcement

by Harvey A. Silverglate

For two centuries, American citizens have enjoyed the luxury of relative security from their own armies. With self-satisfaction approaching smugness, we have been able to look (or laugh) down our noses at the military excesses that have plagued Europe, not to mention the endless string of coups and juntas that have bedeviled Latin America and other "undeveloped" areas.

But even the most basic of freedoms can be attacked, and even the apparently secure rights of citizens rest upon a foundation of changeable consensus. Given the attitudes of the current crew in Washington, we may yet find out how secure we are. For each house of the Congress has now passed its own version of a proposed law that will begin breaching the wall between military and civilian authority — by allowing

ment agencies with information and intelligence "collected during the normal course of military operations that may be material to a violation of any federal or state law," as well as to loan military equipment, bases, and facilities, including spy satellites, to all such agencies.

The House version adds a few nightmarish twists of its own. For example, military personnel would be allowed not only to train civilian officials and assist them in investigations, but also to participate directly, with the Drug Enforcement Administration and other federal agencies, in seizures and arrests if a violation of federal drug laws is suspected.

Thus, after two centuries of assiduous effort to keep the mili-

his position. A century earlier, James Madison had stated in the debate over ratification of the Constitution that a standing army is a great threat to the republican form of government, but that it is an especially great threat when involved in the enforcement of civilian laws. The Constitution does not say that a standing Army shall be called out to execute the laws. The (civilian) militia ought to be called out to suppress smugglers. Will this be denied? (It is precisely this proposition of course, which is being denied — and being denied, ironically, in one of the very cases Madison chose for his argument.)

Congressman J. Proctor Knott of Kentucky seconded Kimmel's arguments. He noted that the separation of the military from civilian law enforcement was not a partisan question. "It is a ques-

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the military to be employed in enforcing civilian laws, most especially the laws against trafficking in certain drugs. Once the two already similar versions of this bill are reconciled in a House-Senate conference committee, the barrier between the army and the police will have been dealt a serious blow.

Legislation that would involve the military in enforcement of the civilian laws is a radical initiative by the present "conservative" Congress. Technically, the legislation is an amendment to the *Posse Comitatus* Act of 1878, which was itself a rider to an Army appropriations bill passed by Congress, and has been carried forward on the nation's statute books in one form or another ever since. Even before 1878, though, the separation of military and civilian power was a long-established principle of the Republic; the 1878 act simply made it a crime for anyone to use the armed forces "to execute the laws." It provides a \$10,000 fine and two years in prison for willful violations.

The new legislation has, in two somewhat different versions, been passed by the US Senate (on May 14) and the House of Representatives (on July 15). The Senate version provides, in essence, that the secretary of Defense "may assign any member of the armed forces to train federal, state, and local civilian law-enforcement officials" and "to provide expert advice." In addition, the military would be allowed to provide all civilian law-enforce-

(Thomas Viles assisted in the research for this article.)

tary out of civilian affairs and to avoid the establishment of even a nationwide police force, the Congress is about to take the first step toward a sort of merger of the military and civilian law-enforcement agencies. Most immediately and most dangerously, the military would now be empowered to conduct joint operations with one of the most corrupt and most troublesome of federal law-enforcement agencies, the DEA.

The *posse comitatus* statute was passed by the Congress during an era when the line between the civilian and military forces was becoming just a bit too blurred for comfort. In the period immediately after the Civil War, when federal troops were still stationed in the South, it was discovered that they were interfering with the voting rights of Southern Democrats, as well as acting to suppress the manufacture of bootleg liquor. Thus the *posse comitatus* was introduced in Congress, and the ensuing debate emphasized the dangers of military involvement in civilian law enforcement. Congressman William Kimmel of Maryland noted that such use of the military had no basis in law, and that if any such statute had been on the books it would have meant that "the republic has descended to the lowest depth — a despotism." Kimmel publicly expressed his thanks to the Almighty "that no such statute exists, and I trust the day may never arrive when a Congress of the United States will be so servile as to enact such a law."

The day has apparently arrived.

Kimmel had good support for

tion that rises above the party. It is a question that addresses itself to the conservative men, whether upon the other side of the house or this." (Knott would likely roll over in his grave were he to learn how his descendants, the "conservative men" in Congress today, are trivializing this American article of political faith.)

Senator Augustus S. Merrimon of North Carolina chimed in during the Senate debate on the *Posse Comitatus* Act. He warned that the military forces "cannot be employed for ordinary (i.e., civilian) purposes The truth is," argued Merrimon, "that whenever this is done, if this doctrine is to prevail in this country, it will be a long way in the march toward absolute despotism." He countered the arguments of his fellow legislators that the military would make a useful contribution to the vigorous enforcement of the civilian laws: "The unrestrained use of the Army is despotism Oh, no; it is not enforcing the law, it is subverting the law. That is the difference." Senator Benjamin H. Hill from Georgia wrapped up the argument by noting that any government that has to call in an army to enforce the laws "is a failure" already and might as well throw in the towel. "Whenever the idea obtains that you need a military power to govern the great body of the people of this country, you have given up the fundamental theory of your system of government; it is gone."

The congressmen who argued fiercely and successfully for passage of the *Posse Comitatus* Act were able to invoke none other

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concern about this proposal, O'Neil merely chuckled. "Looks like you're in for a year of disappointments," he allowed.

Maybe so. But perhaps the biggest disappointment is to see the committee that Ed Boland promised would not become the "unquestioning ratifier of all that the intelligence community proposes" turn into such a close facsimile of just that. □

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than General Henry Halleck, who in 1870, while commander of the military district of Kentucky, observed that the use of troops in enforcing civilian laws "seems to increase rather than diminish the necessity of resorting to such force in civil matters." He noted that "the ill-disposed become more and more exasperated by being coerced by force which they think has been unconstitutionally employed against them, and the better-disposed relax their efforts to punish local crimes on the plea this duty now devolves on the military."

Ironically, while the subversion of the *Posse Comitatus Act* today has the active support of the Department of Justice, this violent break with tradition has some elements of the military establishment worried. Associate Attorney General Rudolph W. Giuliani urged Congress to authorize the use of military personnel to operate naval vessels and aircraft against smugglers outside American boundaries, and for surveillance anywhere of air and sea traffic. Yet William H. Taft IV, general counsel for the Department of Defense, opposed any legislation that would have military personnel acting in a law-enforcement capacity that might lead to arrests and seizures. *The New York Times* reported that

unnamed Defense Department officials, joining in with civil libertarians, "fear that any erosion of the long tradition of keeping the armed forces out of routine law enforcement . . . could detract from military preparedness, blur the historic separation between the military and civilian government, and threaten civil liberties." The degree to which dangerous thinking has gripped the Department of Justice and both houses of Congress is perhaps most clearly demonstrated when Defense Department personnel who are *opposed* to military involvement in civilian affairs insist on speaking to the *Times* only off the record.

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The mingling of the military forces with the civilian law-enforcement establishment, and especially the commitment of the military to Drug Enforcement Administration (DEA) operations, becomes even more ominous when considered along with proposals afoot to merge the DEA with the FBI. Historically, the DEA and its predecessor agencies — including the original Federal Bureau of Narcotics, under the leadership of the infamous Harry Anslinger — have presented serious problems to the federal government. Their work introduced to the federal level a problem — namely, corruption — which has long plagued state and local narcotics and vice squads. Such units have the unpleasant — but frequently, to their members, quite profitable — task of seeking to regulate conduct which large numbers of people consider perfectly harmless, and which in fact is in demand. It is not surprising that the cynical among them take advantage of the opportunities for big bucks; what's more alarming, a certain proportion of those who remain straight do so because they are

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true believers, overzealous holy warriors. Which in turn may help explain why drug agents on all levels of government have long been responsible for an inordinately high percentage of abuses of civil rights and civil liberties.

So bad has been the reputation of federal narcotics agents that for many years the late director of the FBI, J. Edgar Hoover — not known as a shrinking violet — successfully resisted efforts to combine the DEA and the FBI. Hoover always had one reason or another to avoid taking the DEA under his wing, but it was widely reported and believed that Hoover's real objection was that involvement with drug-law enforcement would corrupt FBI agents in the same way that it has corrupted narcotics agents at all

levels. (Indeed, for all its other faults, the FBI has generally had a reputation, even among cynics and skeptics, of being a disciplined and relatively corruption-free agency.)

Hoover's successors similarly have managed to resist the periodic calls for merger. Now, however, with the Reagan Justice Department in the driver's seat, FBI Director William Webster has changed the tune. Webster now argues that the FBI is able and willing to absorb the DEA, possibly as a "wholly owned" subsidiary of sorts.

It is one thing for the FBI to swallow and attempt to remake a civilian drug-enforcement agency which is about a fourth its size. It is quite another for the Bureau to attempt, virtually simultaneously, to cope with the armed forces. The House amendment to the *posse comitatus* statute provides that in any joint undertaking between drug-en-

forcement agents and the armed forces, the "federal drug-enforcement officials will maintain ultimate control over such operation." While apparently a weak bow to the long-established principle of civilian control over the military, this provision does not make clear how the leadership of the DEA, which has been unable to discipline its own agents, or the FBI, which has for decades feared and resisted trying to manage the DEA, will succeed in exercising "ultimate control" over military personnel.

These efforts to consolidate three major engines of force in our society — the FBI, the DEA, and the armed forces — come at a time when voices from many quarters decry a perceived increase in crime in this country. Whether or not these perceptions are accurate, they are no excuse for subverting fundamental American institutions aimed, ultimately, at preserving both lib-

erty and safety. After all, countries like Argentina have never succeeded in ensuring domestic tranquillity by delegating law-enforcement responsibilities to the military.

Indeed, the late Chief Justice Earl Warren, in a 1962 article, noted that at the time of the Constitutional Convention this country was faced "with formidable problems." He pointed out that the English, the French, the Spanish, and various Indian tribes all were "ready and eager to subvert or occupy the fledgling republic." Nevertheless, Warren noted, "in that environment our Founding Fathers conceived a Constitution and Bill of Rights." There was, noted Warren, "no call for a garrison state in those times of precarious peace. We should heed no such call now."

To heed a call now to involve the army in the enlarged "war on crime" and "war on drugs" is to ignore the warning of another Supreme Court voice, the late William O. Douglas. In a case

challenging the practice of military intelligence agencies' spying on civilians in this country, Douglas observed that the danger of descending into tyranny "exists not only in the bold acts of usurpation of power but also in gradual encroachments."

Indeed, once the civilian law-enforcement agencies at all levels see how easy it is, in these days of reduced government budgets for any activity other than national defense, to rely on the vast resources of the military to enforce civil laws, the military's jurisdiction is sure to spread to other areas as well. The long-standing dread of a national police force will have been shown to be an illusory worry. We should have been worrying about the military instead.

To cite the warning of Luther Martin of Maryland at the Constitutional Convention: "When a government wishes to deprive its citizens of freedom and reduce them to slavery, it generally makes use of a standing army." □