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The Militarization of Domestic Law Enforcement: Pentagon Unilaterally Grants Itself Authority Over 'Civil Disturbances'

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The manhunt for the Boston Marathon bombing suspects offered the nation a window into the stunning military-style capabilities of our local law enforcement agencies. For the past 30 years, police departments throughout the United States have benefited from the government's largesse in the form of military weaponry and training, incentives offered in the ongoing "War on Drugs." For the average citizen watching events such as the intense pursuit of the Tsarnaev brothers on television, it would be difficult to discern between fully outfitted police SWAT teams and the military.

The lines blurred even further Monday as a new dynamic was introduced to the militarization of domestic law enforcement. By making a few subtle changes to a regulation in the U.S. Code titled "Defense Support of Civilian Law Enforcement Agencies" the military has quietly granted itself the ability to police the streets without obtaining prior local or state consent, upending a precedent that has been in place for more than two centuries.

The most objectionable aspect of the regulatory change is the inclusion of vague language that permits military intervention in the event of "civil disturbances." According to the rule:

> Federal military commanders have the authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances.

Bruce Afran, a civil liberties attorney and constitutional law professor at Rutgers University, calls the rule, "a wanton power grab by the military," and says, "It's quite shocking actually because it violates the long-standing presumption that the military is under civilian control."

A defense official who declined to be named takes a different view of the rule, claiming, "The authorization has been around over 100 years; it's not a new authority. It's been there but it hasn't been exercised. This is a carryover of domestic policy." Moreover, he insists the Pentagon doesn't "want to get involved in civilian law enforcement. It's one of those red lines that the military hasn't signed up for." Nevertheless, he says, "every person in the military swears an oath of allegiance to the Constitution of the United States to defend that Constitution against all enemies foreign and domestic."

One of the more disturbing aspects of the new procedures that govern military command on the ground in the event of a civil disturbance relates to authority. Not only does it fail to define what circumstances would be so severe that the president's authorization is "impossible," it grants full presidential authority to "Federal military commanders." According to the defense official, a commander is defined as follows: "Somebody who's in the position of command, has the title commander. And most of the time they are centrally selected by a board, they've gone through additional schooling to exercise command authority."

As it is written, this "commander" has the same power to authorize military force as the president in the event the president is somehow unable to access a telephone. (The rule doesn't address the statutory chain of authority that already exists in the event a sitting president is unavailable.) In doing so, this commander must exercise judgment in determining what constitutes, "wanton destruction of property," "adequate protection for Federal property," "domestic violence," or "conspiracy that hinders the execution of State or Federal law," as these are the circumstances that might be considered an "emergency."

"These phrases don't have any legal meaning," says Afran. "It's no different than the emergency powers clause in the Weimar constitution [of the German Reich]. It's a grant of emergency power to the military to rule over parts of the country at their own discretion."

Afran also expresses apprehension over the government's authority "to engage temporarily in activities necessary to quell large-scale disturbances."

"Governments never like to give up power when they get it," says Afran. "They still think after twelve years they can get intelligence out of people in Guantanamo. Temporary is in the eye of the beholder. That's why in statutes we have definitions. All of these statutes have one thing in common and that is that they have no definitions. How long is temporary? There's none here. The definitions are absurdly broad."

The U.S. military is prohibited from intervening in domestic affairs except where provided under Article IV of the Constitution in cases of domestic violence that threaten the government of a state or the application of federal law. This provision was further clarified both by the Insurrection Act of 1807 and a post-Reconstruction law known as the Posse Comitatus Act of 1878 (PCA). The Insurrection Act specifies the circumstances under which the president may convene the armed forces to suppress an insurrection against any state or the federal government. Furthermore, where an individual state is concerned, consent of the governor must be obtained prior to the deployment of troops. The PCA—passed in response to federal troops that enforced local laws and oversaw elections during Reconstruction—made unauthorized employment of federal troops a punishable offense, thereby giving teeth to the Insurrection Act.

Together, these laws limit executive authority over domestic military action. Yet Monday's official regulatory changes issued unilaterally by the Department of Defense is a game-changer.

The stated purpose of the updated rule is "support in Accordance With the Posse Comitatus Act," but in reality it undermines the Insurrection Act and PCA in significant and alarming ways. The most substantial change is the notion of "civil disturbance" as one of the few "domestic emergencies" that would allow for the deployment of military assets on American soil.

To wit, the relatively few instances that federal troops have been deployed for domestic support have produced a wide range of results. Situations have included responding to natural disasters and protecting demonstrators during the Civil Rights era to, disastrously, the Kent State student massacre and the 1973 occupation of Wounded Knee.

Michael German, senior policy counsel to the American Civil Liberties Union (ACLU), noted in a 2009 *Daily Kos* article that, "there is no doubt that the military is very good at many things. But recent history shows that restraint in their new-found domestic role is not one of them."

At the time German was referring to the military's expanded surveillance techniques and hostile interventions related to border control and the War on Drugs. And in fact, many have argued that these actions have already upended the PCA in a significant way. Even before this most recent rule change, the ACLU was vocal in its opposition to the Department of Defense (DoD) request to expand domestic military authority "in the event of chemical, biological, radiological, nuclear, or high yield explosive (CBRNE) incidents." The ACLU's position is that civilian agencies are more than equipped to handle such emergencies since 9/11. (ACLU spokespersons in Washington D.C. declined, however, to be interviewed for this story.)

But while outcomes of military interventions have varied, the protocol by which the president works cooperatively with state governments has remained the same. The president is only allowed to deploy troops to a state upon request of its governor. Even then, the military—specifically the National Guard—is there to provide support for local law enforcement and is prohibited from engaging in any activities that are outside of this scope, such as the power to arrest.

Eric Freedman, a constitutional law professor from Hofstra University, also calls the ruling "an unauthorized power grab." According to Freedman, "The Department of Defense does not have the authority to grant itself by regulation any more authority than Congress has granted it by statute." Yet that's precisely what it did. This wasn't, however, the Pentagon's first attempt to expand its authority domestically in the last decade.

Déjà vu

During the Bush Administration, Congress passed the 2007 Defense Authorization Bill that included language similar in scope to the current regulatory change. It specifically amended the Insurrection Act to expand the president's ability to deploy troops domestically under certain conditions including health epidemics, natural disasters and terrorist activities, though it stopped short of including civil disturbances. But the following year this language was repealed under the National Defense Authorization Act of 2008 via a bill authored by Vermont Senator Patrick Leahy (D-VT) who cited the "useful friction" between the Insurrection and Posse Comitatus Acts in limiting executive authority.

According to the DoD, the repeal of this language had more to do with procedure and that it was never supposed to amend the Insurrection Act. "When it was actually passed," says the defense official, "Congress elected to amend the Insurrection Act and put things in the Insurrection Act that were not insurrection, like the support for disasters and emergencies and endemic influenza. Our intent," he says, "was to give the president and the secretary access to the reserve components. It includes the National Guard and, rightfully so, the governors were pretty upset because they were not consulted."

Senator Leahy's office did not have a statement as of press time, but a spokesperson said the senator had made an inquiry with the DoD in response to our questions. The defense official confirmed that he was indeed being called in to discuss the senator's concerns in a meeting scheduled for today. But he downplayed any concern, saying, "Congress at any time can say 'we don't like your interpretation of that law and how you've interpreted it in making policy'—and so they can call us to the Hill and ask us to justify why we're doing something."

Last year, Bruce Afran and another civil liberties attorney Carl Mayer filed a lawsuit against the Obama Administration on behalf of a group of journalists and activists lead by former New York Times journalist Chris Hedges. They filed suit over the inclusion of a bill in the NDAA 2012 that, according to the plaintiffs, expanded executive authority over domestic affairs by unilaterally granting the executive branch to indefinitely detain U.S. citizens without due process. The case has garnered international attention and invited vigorous defense from the Obama Administration. Even Afran goes so far as to say this current rule change is, "another NDAA. It's even worse, to be honest."

For Hedges and the other plaintiffs, including Pentagon Papers whistleblower Daniel Ellsberg, the government's ever-expanding authority over civilian affairs has a "chilling effect" on First Amendment activities such as free speech and the right to assemble. First District Court Judge Katherine Forrest agreed with the plaintiffs and handed Hedges et al a resounding victory prompting the Department of Justice to immediately file an injunction and an appeal. The appellate court is expected to rule on the matter within the next few months.

Another of the plaintiffs in the Hedges suit is Alexa O'Brien, a journalist and organizer who joined the lawsuit after she discovered a Wikileaks cable showing government officials attempting to link her efforts to terrorist activities. For activists such as O'Brien, the new DoD regulatory change is frightening because it creates, "an environment of fear when people cannot associate with one another." Like Afran and Freedman, she too calls the move, "another grab for power under the rubric of the war on terror, to the detriment of citizens."

"This is a complete erosion of the rule of law," says O'Brien. Knowing these sweeping powers were granted under a rule change and not by Congress is even more harrowing to activists. "That anything can be made legal," says O'Brien, "is fundamentally antithetical to good governance."

As far as what might qualify as a civil disturbance, Afran notes, "In the Sixties all of the Vietnam protests would meet this description. We saw Kent State. This would legalize Kent State."

But the focus on the DoD regulatory change obscures the creeping militarization that has already occurred in police departments across the nation. Even prior to the NDAA lawsuit, journalist Chris Hedges was critical of domestic law enforcement agencies saying, "The widening use of militarized police units effectively nullifies the Posse Comitatus Act of 1878."

This de facto nullification isn't lost on the DoD.

The DoD official even referred to the Boston bombing suspects manhunt saying, "Like most

major police departments, if you didn't know they were a police department you would think they were the military." According to this official there has purposely been a "large transfer of technology so that the military doesn't have to get involved." Moreover, he says the military has learned from past events, such as the siege at Waco, where ATF officials mishandled military equipment. "We have transferred the technology so we don't have to loan it," he states.

But if the transfer of military training and technology has been so thorough, it boggles the imagination as to what kind of disturbance would be so overwhelming that it would require the suspension of centuries-old law and precedent to grant military complete authority on the ground. The DoD official admits not being able to "envision that happening," adding, "but I'm not a Hollywood screenwriter."

Afran, for one, isn't buying the logic. For him, the distinction is simple.

"Remember, the police operate under civilian control," he says. "They are used to thinking in a civilian way so the comparison that they may have some assault weapons doesn't change this in any way. And they can be removed from power. You can't remove the military from power."

Despite protestations from figures such as Afran and O'Brien and past admonitions from groups like the ACLU, for the first time in our history the military has granted itself authority to quell a civil disturbance. Changing this rule now requires congressional or judicial intervention.

"This is where journalism comes in," says Freedman. "Calling attention to an unauthorized power grab in the hope that it embarrasses the administration."

Afran is considering amending his NDAA complaint currently in front of the court to include this regulatory change.

As we witnessed during the Boston bombing manhunt, it's already difficult to discern between military and police. In the future it might be impossible, because there may be no difference.
