

17. The Expanding Federal Police Power

Congress should

- repeal all federal criminal statutes that involve conduct that takes place solely in one state, unless the conduct involves uniquely federal concerns, such as destruction of federal property; and
- tighten the Posse Comitatus Act so that it proscribes all use of military personnel and equipment, including the National Guard.

Since the 1980s the federal government has prompted the militarization of federal, state, and local law enforcement. That militarization has led not only to well-publicized disasters, such as Waco and Ruby Ridge, but to a widespread increase in violent law enforcement, which has played a major role in alienating Americans from their government. Such baleful consequences are the result of another dangerous trend, the expansion of the power of federal criminal justice far beyond its legitimate constitutional limits. Law and order begin at the top; the most important criminal justice reforms that Congress can enact are those that return federal law enforcement to its constitutional role.

The Constitution specifically authorizes federal enforcement of only three types of laws, all of which involve uniquely federal concerns. The first is based on the congressional power "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States." The counterfeiting enforcement power immediately follows the delegation of power to Congress to "coin Money, regulate the Value thereof, and of foreign Coin."

The second congressional criminal power is "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." The third is, "Congress shall have Power to declare

Punishment of Treason." Although counterfeiting, treason, and piracy clearly involve areas of federal, not state, concern, it is notable that, even in those cases, the authors of the Constitution felt a need specifically to authorize congressional law enforcement.

While the body of the Constitution grants only narrow criminal powers to the federal government, the Bill of Rights, in the Tenth Amendment, specifically reserves to the states all powers not granted to the federal government.

Even the *Federalist Papers*, which were, after all, a defense of increased federal power, made it clear that criminal law enforcement would not come within the federal sphere under the new Constitution. James Madison wrote that federal powers "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state."

Likewise, Alexander Hamilton, the most determined nationalist of his era, explained that state governments, not the federal government, would have the power of law enforcement and that that power would play a major role in ensuring that the states were not overwhelmed by the federal government: "There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice."

Madison, Hamilton, and Jefferson were right to recognize that law enforcement is properly a local matter. As former attorney general Edwin Meese put it, "Federal law-enforcement authorities are not as attuned to the priorities and customs of local communities as state and local law enforcement. In the Ruby Ridge tragedy, for example, would the local Idaho authorities have tried to apprehend Weaver in such an aggressive fashion? . . . More fundamentally, would Idaho officials have cared about two sawed-off shotguns? In the Waco situation, would the local sheriff's department have stormed the compound, or instead have waited to arrest David Koresh when he ventured into town for supplies, as he did frequently?"

Local law enforcement agencies spend local tax dollars and are directly accountable to local voters. In contrast, federal law enforcement agencies spend from a vast pool of "other people's money" and are subject, at most, to very indirect democratic control. It should be no surprise that so

much federal spending on crime goes to programs like Drug Abuse Resistance Education and the McGruff Crime Dog, which sound good on the Senate floor but have been proven to be failures by social scientists.

The bulk of federal law enforcement activities is not aimed at stopping the crimes against persons and property that concern most Americans. Instead, federal enforcement involves primarily statutory offenses: controlled substances, firearms, gambling, and the like. In many cases, the federal laws regarding victimless crimes are much more severe than state laws, as if the people of the 50 states were of such poor moral fiber that they are not "tough enough" on marijuana cultivation or possession of unregistered firearms.

The misuse of two constitutional powers has been the basis for the overexpansion of federal criminal power. The enumerated powers of Congress "to lay and collect taxes" and "to regulate Commerce . . . among the several States" have been turned by specious interpretation into congressional powers over issues that have nothing to do with taxes or with interstate commerce.

Recently, in *United States v. Lopez*, the Supreme Court reminded Congress that the interstate commerce clause is not a grant of general police powers and that "states possess primary authority for defining and enforcing the criminal law." Even after the *Lopez* decision, though, the huge infrastructure of federal criminal law remains in place. Today, there are more than 50 different federal law enforcement agencies, 200 federal agencies with some law enforcement authority, and more than 3,000 federal crimes.

Guns and drugs (two quintessentially nonfederal concerns) have been the primary engines for a massive expansion of federal law enforcement. From 1980 to 1992, the number of criminal cases filed in federal courts rose 70 percent; drug cases and firearms cases both quadrupled.

One key reason for growth of federal criminal powers beyond constitutional boundaries has been the gullibility of the media and the public in regard to various frauds and panics fomented by persons with an interest in centralizing more power in Washington. During the 1930s J. Edgar Hoover, director of the Federal Bureau of Investigation, falsely told the American people that an unprecedented wave of child kidnappings was in progress, and the FBI was rewarded with substantial attention and funding. In the 1980s a very different FBI earned itself more funding by putting out phony claims about a wave of serial killers of children.

In 1996 an organization named the Center for Democratic Renewal began making claims about an alleged wave of white-supremacist arson

attacks on black churches in the South. In fact, some of the "arsons" never took place, other "arsons" were accidental fires, and many white churches in the South have also been burned. Of the more than 90 fires at black churches, only 3 were set by racists. But the CDR's exaggerations fit the media's preconceptions about white racism, and so the "fact" of widespread racist church arsons became the pretext for yet more federal criminal power. The federal law against arson (which, of course, is illegal and vigorously prosecuted in every state under state law) was expanded even more.

Too often, the partisan debate on crime control misses the larger issue of the proper scope of federal power. Yes, it is true that President Clinton's plan to give local governments the money to put "100,000 new police on the street" actually provides funding for far fewer. But the more fundamental point is that federal control inevitably accompanies federal dollars. The trend toward centralization of criminal justice authority in Washington is a trend toward a *de facto* national police force, an entity of unparalleled danger to civil liberty. We should be thankful that the federal government has actually funded far fewer than 100,000 local police.

Likewise, use of federal funds to bribe states to enact particular types of laws regarding parole, juvenile justice, sex offender notification, or drug testing for drivers' licenses erodes the value of our federal system, whereby the 50 states can experiment with a variety of policies and serve as social laboratories. Instead, the diverse lessons from the 50 states are smothered by a national uniformity, often based on little more than what sounds good on the network news.

Perhaps the most dangerous effect of overfederalization of criminal law has been militarization of law enforcement. The Posse Comitatus Act of 1878 was passed to outlaw the use of federal troops for civilian law enforcement. The law made it a felony to willfully use "any part of the Army . . . to execute the laws," except where expressly authorized by the Constitution or by act of Congress.

An army's mission is to rapidly destroy enemies of a different nationality, while law enforcement is supposed to serve and protect fellow Americans, who are guaranteed presumptions of innocence and other rights. The military operates on principles of authoritarian control, with no room for dissent, for waiting for a consensus to form, or for democracy. Military training is antithetical to the values of due process and diversity on which civilian law enforcement must be founded.

As one modern court stated, the Posse Comitatus Act "is not an anachronistic relic of an historical period the experience of which is irrelevant to

the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing ‘the inherited antipathy of the American to the use of troops for civil purposes.’” Indeed, during the debate over ratification of the Constitution, the *Federalist Papers* assured Americans that the military would never be used against the American people.

Use of the military in domestic law enforcement has repeatedly led to disaster. In 1899 the Army was used to break up a *miner’s* strike at Coeur d’Alene, Idaho, arrest all adult males in the area, and imprison the men for weeks or months without charging them. The area was under martial law for two years. During and after World War I, the Army was used to break peaceful labor strikes, to spy on union organizers and peaceful critics of the war, and to respond to race riots by rounding up black “Bolshevik agitators.” Historian Jerry M. Cooper observes that the Army’s efforts “substantially slowed unionization for a decade.” One of the most egregious abuses of power in American history—President Truman’s illegal seizure of the steel mills—was carried out with the military, which obeyed an unconstitutional order in seizing the mills. During the Vietnam War, military intelligence was again deployed against domestic dissidents. “Military investigation of civil protest activity was precisely the kind of abuse of standing armies that eighteenth-century antimilitarists had feared,” Cooper observes. The 1970 killings of student protesters at Kent State University were, of course, carried out by a National Guard unit.

Judicial interpretation and acts of Congress have diluted the Posse Comitatus Act’s narrow limitations. For one thing, the prohibition on the use of military personnel and equipment does not mean those personnel cannot be used to assist law enforcement, only that they cannot be used directly for enforcing the law itself. In addition, the proscription of use of the military is limited to personnel; military equipment can be used, as long as the civilian agency pays rent for it. In drug cases, the military equipment is free.

The drug enforcement exceptions, added to the Posse Comitatus Act by amendment beginning in 1981, have been very effective at **undermining** the honesty of law enforcement. The U.S. Marshals Service falsely claimed a possible drug problem with the Weavers at Ruby Ridge in order to get military reconnaissance flights over the cabin. (The “hot spot” from the alleged drug lab turned out to be a doghouse.) And the bureau of Alcohol, Tobacco and Firearms invented a phony drug nexus at Waco in order to obtain massive assistance from the U.S. Army, the Texas National Guard, and the Alabama National Guard.

Because of modern **drug-war** exceptions to the original Posse Comitatus Act, every region of the United States now has a Joint Task Force staff in charge of coordinating military involvement in domestic law enforcement. In region six, the JTF's *Operational Support Planning Guide* enthused, "Innovative approaches to providing new and more effective support to law enforcement agencies are constantly sought, and legal and policy barriers to the application of military capabilities are gradually being eliminated." Civilian agencies routinely obtain free military support by lying about drugs; because there is no sanction for lying, obvious falsehoods are accepted by the military as a pretext for intervention.

In addition to the direct use of the military in law enforcement, many federal law enforcement agencies have created their own paramilitary units. The most well known of those is the infamous FBI Hostage Rescue Team, which has spent considerable time in recent years holding hostages and has not even attempted to rescue a hostage for several years. There are also 56 FBI SWAT teams.

Abandoning J. Edgar Hoover's principle that FBI agents should be well-trained **generalists**, the FBI SWAT units specialize in confrontation, rather than investigation, even though investigation is, after all, the very purpose of the bureau. Whereas **Hoover's** agents wore suits and typically had a background in law or accounting, SWAT teams wear camouflage or black **ninja** clothing and come from a military background. They are trained killers, not trained investigators.

The rest of federal law enforcement seems determined to match the FBI swashbucklers. The U.S. Marshals Service has its own 100-man Special Operations Group. The SOG is located at the William F. Degan Memorial Special Operations Center in Louisiana, which is named after one of the men involved in the senseless shootout in which nonsuspect 14-year-old Sammy Weaver was shot in the back as he attempted to flee to his cabin, in Ruby Ridge, Idaho.

The BATF, meanwhile, has its Special Response Teams, which are recruited by, in the words of one **ex-BATF** agent, "hand-picking these **superhormone** guys." Like other agencies, BATF has stepped up the training of its field commanders in military tactics, under the supervision of the Army. Even the National Park Service and the Department of Health and Human Services have their own SWAT teams.

Absolute **discipline** and adherence to orders may be a virtue in the military, but not in civilian law enforcement. Perhaps if the members of the three SRTs that were used in the Waco raid had included a larger

share of older, slower, and wiser agents, someone would have spoken up when the raid commanders yelled "He knows we're coming" and "Let's go." Rank-and-file defiance of the order to launch a surprise attack with no element of surprise would have saved the lives of the four BATF agents and the Branch Davidians. As Jim Jorgenson of the National Association of Treasury Agents points out, agents who can run fast while carrying a submachine gun are no substitute for agents with the maturity to know where to go, when to fire, and when not to fire.

Besides setting a bad example, the federal government actively works to militarize local law enforcement. For example, Mark Lonsdale, director of the federal government's Special Tactical Training Unit, writes that there are various governmental programs, including those run by the federal Drug Enforcement Agency, "available to local law enforcement" for marijuana control. "The thrust of this training is towards developing more of a military approach to tactics."

One morning the residents of Cass Corridor (a poor neighborhood in Detroit) were startled by the sounds of explosives and massive gunfire. While many residents hid, the few who dared to look outside found an 80-man Detroit Police Department practice assault in progress on a vacant four-story building in the neighborhood. The deputy police chief in charge of the practice assault accurately explained that such drills are routinely performed by police agencies in conjunction with the U.S. Army and other federal agencies.

The federal government's Advanced Research Projects Agency supervises a Joint Program Steering Group for Operations Other than War/Law Enforcement, which brings Defense Department and Justice Department officials together in order to find civilian law enforcement applications for military technology. The U.S. Army Aviation & Troop Command is selling surplus OH6-A helicopters to state and local governments for use in drug law enforcement.

While the drug war has been the primary vehicle for expanding use of the federal military in domestic law enforcement, other uses of the military are also becoming common. As illegal immigration has become an increasingly important political issue, the U.S. Army and Marines have been deployed along the Mexican border to assist federal and local border patrol.

The blurring of the distinction between civilian law enforcement and martial law has taken America a long way from the standards of the Constitution. Ever since Sen. Estes Kefauver discovered juvenile delinquency in the 1950s, some persons have found political advantage in

demanding ever-greater use of coercive federal power for domestic law enforcement. The framers of our Constitution were right to recognize the profound threat to civil liberty posed by a centralized, increasingly militaristic federal police force. If Congress is serious about restoring the rule of law, it should restore law enforcement to its proper custodians, the states.

Suggested Readings

Calabresi, Steven G. "A Government of Limited and Enumerated Powers: In Defense of *United States v. Lopez*." *Michigan Law Review* 94 (1995): 752-831.

Kopel, David B., and Glenn H. Reynolds. "Shirt-Pocket Federalism." Available from <http://i2i.org/CrimJust.htm>.

Reynolds, Glenn Harlan. "Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?" Cato Institute Policy Analysis no. 216, October 10, 1994.

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