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The Martial Law Act of 2006

by James Bovard

Martial law is perhaps the ultimate stomping of freedom. And yet, on September 30, 2006, Congress passed a provision in a 591-page bill that will make it easy for President Bush to impose martial law in response to a terrorist “incident.” It also empowers him to effectively declare martial law in response to what he or other federal officials label a shortfall of “public order” — whatever that means.

It took only a few paragraphs in a \$500 billion, 591-page bill to raze one of the most important limits on federal power. Congress passed the Insurrection Act in 1807 to severely restrict the president’s ability to deploy the military within the United States. The Posse Comitatus Act of 1878 tightened those restrictions, imposing a two-year prison sentence on anyone who used the military within the United States without the express permission of Congress. (This act was passed after the depredations of the U.S. military throughout the Southern states during Reconstruction.)

But there is a loophole: Posse Comitatus is waived if the president invokes the Insurrection Act.

The Insurrection Act and Posse Comitatus Act aim to deter dictatorship while permitting a narrow window for the president to temporarily use the military at home. But the 2006 reforms basically threw any concern about dictatorial abuses out the window.

Section 1076 of the Defense Authorization Act of 2006 changed the name of the key provision in the statute book from “Insurrection Act” to “Enforcement of the Laws to Restore Public Order Act.” The Insurrection Act of 1807 stated that the president could deploy troops within the United States only “to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy.” The new law expands the list of pretexts to include “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition” — and such a “condition” is not defined or limited.

One might think that given the experience with the USA PATRIOT Act and many other abuses of power, Congress would be leery about giving this president his biggest blank check yet to suspend the Constitution. But that would be naive.

The new law was put in place in response to the debacle of the federal response to Hurricane Katrina. There was no evidence that permitting a president far more power would avoid future debacles, but such a law provides a comfort blanket to politicians. The risk of tyranny is irrelevant compared with the reduction of risk of embarrassment to politicians. According to Washington, the correct response to Katrina is not to recognize the failure of relying on federal agencies a thousand miles away but rather to vastly increase the power of the president to dictate a solution, regardless of whether he knows what he is doing and regardless of whether local and state rights are trampled.

The new law also empowers the president to commandeer the National Guard of one state to send to another state for as many as 365 days. Bush could send the South Carolina National Guard to suppress anti-war protests in New Haven. Or the next president could send the Massachusetts National Guard to disarm the residents of Wyoming, if they resisted a federal law that prohibited private ownership of semi-automatic weapons. Governors' control of the National Guard can be trumped with a simple presidential declaration.

Section 1076 had bipartisan support on Capitol Hill, including support from Sen. Carl Levin (D-Mich.), Sen. John Warner (R-Va.), Sen. Ted Kennedy (D-Mass.), and Rep. Duncan Hunter (R-Calif.), chairman of the House Armed Services Committee. Since the law would give the feds more power, it was very popular inside the Beltway.

On the other hand, every governor in the country opposed the changes. Sen. Patrick Leahy (D-Vt.), the ranking Democrat on the Senate Judiciary Committee, warned on September 19, 2006, that "we certainly do not need to make it easier for presidents to declare martial law." Leahy's alarm got no response. Ten days later, he commented in the *Congressional Record*, "Using the military for law enforcement goes against one of the founding tenets of our democracy."

A U.S. Enabling Act

The new law vastly increases the danger from the actions of government provocateurs. If there is an incident now like the first bombing of the World Trade Center in February 1993, it would be far easier for the president to declare martial law — even if, as then, it was an FBI informant who taught the culprits how to make the bomb. Even if the FBI masterminds a protest that turns violent, the president could invoke the "incident" to suspend the Constitution.

"Martial law" is a euphemism for military dictatorship. When foreign democracies are overthrown and a junta establishes martial law, Americans usually recognize that a fundamental change has occurred. Perhaps some conservatives believe that the only change when martial law is declared is that people are no longer read their Miranda rights before they are locked away.

“Martial law” means: Obey soldiers’ commands or be shot. The abuses of military rule in Southern states during Reconstruction were legendary, but they have been swept under the historical rug.

Section 1076 is an Enabling Act-type legislation — something which purports to preserve law and order while formally empowering the president to rule by decree.

Bush can commandeer a state’s National Guard any time he declares a “state has refused to enforce applicable laws.” Does this refer to the laws as they are commonly understood — or to the “laws” after Bush “fixes” them with a signing statement? Unfortunately, it is not possible for Americans to commandeer the federal government even when Bush admits that he is breaking a law (such as the Anti-Torture Act).

Section 1076 is the type of “law” that would probably be denounced by the U.S. State Department’s Annual Report on Human Rights if enacted by a foreign government. But when the U.S. government does the same thing, it is merely another proof of benevolent foresight. The “comfort blanket” on Section 1076 is that the powers will not be abused because the president will show more concern with the Bill of Rights than Congress did when it rubberstamped this provision. This is the same “pass the buck on the Constitution” that worked so well with the PATRIOT Act, the McCain Feingold Campaign Reform Act, and the Military Commissions Act. As long as there is hypothetically some branch of the government that will object to oppression, no one has the right to fear losing his liberties.

The military on the home front

Section 1076 is more ominous in light of the Bush administration’s long record of Posse Comitatus violations. Since 2001, the Bush administration has accelerated a trend of using the military as a tool in the nation’s domestic affairs. From its support of the Total Information Awareness surveillance vacuum cleaner, to its use of Pentagon spy planes during the Washington-area sniper shootings in 2002, to the Pentagon’s seizures of Americans’ financial and other private information without a warrant, the Bush administration has not hesitated to use military force and intimidation at home whenever convenient. And Americans may have little or no idea of how far the military has actually gone on the home front, given the Bush team’s obsessive secrecy.

The Pentagon has sent U.S. military intelligence agents on domestic fishing expeditions. In 2004, two U.S. Army intelligence agents descended on the University of Texas’s law school in Austin. They entered the office of the *Journal of Women and the Law* and demanded that the editors turn over a roster of the people who attended a recent conference on Islam and women. The editors denied having a list; the behavior of one agent was described as intimidating. The agents then demanded contact information for the student who organized the conference, Sahar Aziz. University of Texas law professor Douglas Laycock commented,

We certainly hope that the Army doesn't believe that attending a conference on Islamic law or Islam and women is itself ground for investigation.

Military officials later declared that U.S. Army intelligence agents had overstepped their bounds. But this did not stop the Bush administration from having a provision inserted in a bill passed in secret session by the Senate Intelligence Committee that would allow military intelligence agents to conduct surveillance and recruit informants in the United States.

Wired.com reported,

Pentagon officials say the exemption would not affect civil liberties and is needed so that its agents can obtain information from sources who may be afraid of government agents.

The provision would authorize military agents to go undercover and never inform their targets that they were dealing with a G-man. Kate Martin, director of the Center for National Security Studies, denounced the provision:

This ... is giving them the authority to spy on Americans. And it's all been done with no public discussion, in the dark of night.

The controversy over the amendment scuttled its enactment, though it is unclear whether that has deterred the military from expanding its domestic spying.

There is no Honesty-in-Absolute-Power mandate in the federal statute books. The more power government seizes, the more easily it can suppress the truth. There is nothing to prevent a president from declaring martial law on false pretexts — any more than there is to prevent him from launching a foreign war on false pretenses. And when the lies become exposed years later, it could be far too late to resurrect lost liberties.

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