"The War on Drugs and Trump's Domestic Uses of the Military"

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The law governing domestic military deployments is old. Much of the statutory law on which it rests dates to the 18th and 19th centuries. Yet the age of statutes like the Posse Comitatus Act (PCA) (which, generally, criminalizes using the military for law enforcement activities) can mask the degree to which Congress and the executive branch reshaped this area of law during the War on Drugs, and the 1980s particularly. Together, these changes in statutory law and executive branch practice integrated the Defense Department into civilian counterdrug efforts in way which directly set up the second Trump administration's domestic uses of the military.

How the War on Drugs Changed the Statutory Law Governing Domestic Military Operations

Throughout the 1980s there was strong congressional interest, on both sides of the aisle, in finding ways for the military to support federal counterdrug operations. The expansion of military involvement in anti-narcotics efforts began in 1981, when Congress enacted legislation authorizing the military to provide equipment and personnel support to civilian law enforcement agencies. As Democratic Representative William Hughes put it, this legislation, now codified at Chapter 15 of Title 10, was needed to combat, "the growing problem of drugs in our country." Moreover, legislators believed the PCA impeded the federal government's ability to address this drug problem. Republican Representative Harold Sawyer, for example, argued that the PCA "as interpreted [by courts] has become an impediment to cooperation between military and civilian law enforcement agencies."[1] Impeding integration of the military into domestic law enforcement is, of course, the plain purpose of the PCA. Yet Representative Sawyer decried the fact that many lower-level commanders were reluctant to provide more robust support to law enforcement counterdrug operations due to concern that they would face prosecution under the PCA.

The Defense Department, both during these 1981 debates and in the years which followed, was decidedly unenthusiastic about participating in counterdrug efforts. Speaking in 1981, Representative Sawyer himself noted that "the military is not very delighted about providing equipment or base facilities or personnel" for such operations. Moreover, he worried that, even after Congress enacted statutes enabling the military to support counterdrug efforts, the Pentagon would not make full use of these new authorities. He wasn't too far off the mark. Speaking four years after this body of statutory law entered into force, Defense Secretary Caspar Weinberger called using the military for these purposes "pretty absurd." And a Pentagon

spokesperson argued that using the military to assist civilian law enforcement agencies in, "attacking the supply part of the [drug] problem has not been sufficiently effective."

But Congress would not be deterred. Between 1982 and 1990, there were no fewer than eighteen hearings concerning military support of domestic counterdrug operations. The General Accounting Office (today the Government Accountability Office) issued no fewer than five reports on the same topic. All the while, Congress continued to enact legislation embedding the military yet further into domestic counterdrug operations. Some of this legislation took the form of additional authorities to support civilian law enforcement. In the 1986 Defense Department Authorization Act, for example, Congress required the Department to submit a plan for how it would support civilian counterdrug operations. The 1989 National Defense Authorization Act (NDAA) designated the Department the "single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States." The 1990 NDAA directed the Secretary of Defense "to the maximum extent practicable" to conduct military training in drug-interdiction areas. And the 1991 NDAA authorized a laundry list of direct support, from intelligence analysis to "base of operations" support, that the military could provide in direct support of counterdrug operations (now codified, in considerably similar form, at 10 U.S.C. § 284).

Just as significant as these new authorizations were changes Congress enacted through appropriations law. The explanatory reports accompanying the fiscal year 1984 and 1985 Defense Department Appropriations Acts, for example, directed that a subset of funds be used for particular counterdrug initiatives. The first such initiative was "Operation BAT," a counterdrug effort taken in coordination with The Bahamas. The second dedicated $24 million to purchasing 12 C-12 cargo aircraft, six of which would be used to compensate for an equal number loaned to the U.S. Customs Service for counterdrug operations. In the fiscal year 1989 Appropriations Act, Congress went a step further, enacting (for the first time, to my knowledge) a separate fund for military counterdrug activities. This practice continues to this day; Congress regularly appropriates upwards of $1 billion annually for Defense Department counterdrug missions.

Finally, Congress specifically targeted the National Guard as a vehicle for increasing the military's role in counterdrug operations. The 1989 NDAA, for example, authorized the Secretary of Defense to provide funds to governors who submitted a plan to use their National Guard, in a state duty status, for counterdrug operations. These funds could be used for National Guard members' pay, allowances, travel, and related expenses. Crucially, since National Guard members in a state duty status are not part of the federal Armed Forces, they were not subject to the PCA during these operations. This was the first of what would become an increasingly common pattern of using National Guard members in state duty status for federal missions to avoid the limits of the PCA. Today, this is often achieved through a mobilization authority codified at 32 U.S.C. § 502(f).

Executive Branch Actions Expanding the Military's Domestic Role

While Congress was legislating around the PCA for counterdrug purposes, executive branch lawyers were doing much the same through a growing body of Office of Legal Counsel (OLC) memoranda. This practice continued a trend that began in the 1970s. During the Nixon Administration, for example, OLC expanded the scope of the protective power—a theory of implied presidential authority to use the military to protect federal functions, persons, and property. Historically, the executive branch had understood this implied authority as requiring some nexus to federal property or the U.S. mails. In a 1971 opinion regarding the use of troops to ensure federal employees could get to work during planned Vietnam War protests, however, OLC expanded this theory by claiming a presidential authority to use the military to protect any federal functions, divorced from any particular federal property.

Executive branch lawyers continued this practice in the 1980s with a series of opinions regarding implied exceptions to the PCA. The executive branch had long asserted a number of contexts within which the Act's prohibitions did not apply. One such example was a base commander's authority to enforce good order and discipline on a military installation, including against civilians. OLC reasserted this power in a 1977 memo concerning protection of a powerplant on a military installation and a 1980 memo concerning the housing of Cuban migrants on Florida military bases.

By the late 1980s, however, OLC began to take more significant swipes against the PCA. In 1989, OLC opined that the PCA impliedly only pertained to domestic military activities (this, interestingly, was contrary to at least some earlier War Department practice). Later that year OLC went further, asserting that the Act "does not prohibit military involvement in actions that are primarily military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws." As I have explored elsewhere, OLC's only support for this idea, now known as the "military purpose doctrine," was Defense Department regulations, all of which appear to date no earlier than the 1980s.

Trump's Domestic Deployments and the War on Drugs

The second Trump administration's domestic military deployments rely, in significant degree, on the body of statutory law and executive branch practice which were developed during the 1970s and 1980s. Indeed, the administration has talked about its deportation program and counterdrug aspirations as one and the same. The military deployment in Los Angeles, for example, is founded on the more expansive understanding of the protective power asserted in 1971. The Defense Department's operational support to the Department of Homeland Security (DHS) is based on a combination of 10 U.S.C. § 284 and a further expansion of departmental authority (enacted in 2016) to provide support at the southern border. The Defense Department's support of DHS migrant detention at Guantanamo Bay is also predicated on 10 U.S.C. § 284. Although details are hazy, it seems at least likely that the administration is basing the wide range of detention activities military personnel are performing at Guantánamo Bay on OLC opinions

regarding the PCA's extraterritorial application (though whether this conclusion should apply in the context of Guantánamo Bay is itself suspect). And the law enforcement actions that the military is taking in the growing number of national defense areas that extend across the southern border are founded in OLC opinions concerning a base commander's authority and the military purpose doctrine.

Nearly a decade ago Rebecca Ingber observed how forces within the executive branch serve, systematically, as a "slow, staircase-like, one-way ratchet, over time expanding and then entrenching assertions of power." Though Ingber was addressing foreign affairs matters, it is no less true for the law of domestic military deployments. This tendency is all the stronger when Congress not only acquiesces in, but willingly abets, expansive executive actions. Indeed, eroding the distinction between the military establishment and civilian law enforcement is precisely what many members of Congress in the 1980s wanted to achieve. In 1982, Representative Glenn English gushed that "[t]he relaxing of the restrictions of the [PCA] is a major step forward in the war on drug traffic." In 1985, the principal architect of this body of legislation, Representative Charles Bennett, wrote that the PCA "has very little to recommend its continuation" and that it "would be well if the original Comitatus legislation were repealed, outright and entirely." Reflecting on the military's support to drug interdiction efforts in 1988, Representative Bill Nichols pointedly argued that "it is important that the Department of Defense realize that the time has come to step up this issue" and that "[p]eople in this country may decide to adjust the priorities of the military."

These sentiments are nearly indistinguishable from those found in any number of Trump administration executive orders concerning the military's domestic role. In Executive Order 14167, for example, Trump assigned to U.S. Northern Command "the mission to seal the border and maintain the sovereignty, territorial integrity, and security of the United States by repelling forms of invasion including unlawful mass migration, narcotics trafficking, human smuggling and trafficking, and other criminal activities." Trump reinforced this vision of an integrated military-law enforcement enterprise in his declaration of a national emergency at the southern border. In this executive order, Trump directed that the Secretary of Defense "take all appropriate action to facilitate the operational needs of the Secretary of Homeland Security at the southern border." Although the current administration's rhetoric focuses more on deportation than countering drug flows, scholars have long noted the intimate connection between the War on Drugs, immigration, and deportation.

The Road Ahead

Looking to the years ahead, I see two forms of risk to the public's documented antipathy to using the military for domestic operations. The first is predictable—an intensification of ongoing domestic military deployments. The second is less determinate—involving potentially novel ways in which this legal regime may yet be deployed. There are, of course, authorities outside this body of law which the president may use to involve the Armed Forces in domestic

operations. The provisions of the Insurrection Act are a particularly noteworthy example. Since there are already fantastic pieces on the risks posed by the Insurrection Act (as well as the Alien Enemy Act), I will set them to the side here.

First, the Trump administration is poised to double-down on existing domestic uses of the military. In the "big, beautiful bill," Congress appropriated $1 billion specifically:

> "for the deployment of military personnel in support of border operations, operations and maintenance activities in support of border operations, counter-narcotics and counter-transnational criminal organization mission support, the operation of national defense areas and construction in national defense areas, and the temporary detention of migrants on Department of Defense installations, in accordance with chapter 15 of title 10, U.S. Code."

This is on top of the $1.14 billion slated for the Department's counterdrug activities in the 2026 appropriations act as well as other funds to backfill projects from which the Defense Department took money for domestic operations since President Trump's second inauguration.

Appropriations law can be a powerful deterrent to growing the Defense Department's domestic role. But with each successive appropriations act, Congress is walking back from this potential check on the executive branch. Litigation regarding the Los Angeles deployment and detention at Guantánamo Bay is another ongoing and important check on executive overreach. But without a Congress willing to assert its power over appropriations or to exercise existing statutory authorities, there is much that Trump can do under the law and precedent which come out of the War on Drugs.

Second, looking to paths not yet taken, the second Trump administration has only just begun to do more with National Guard members in a 32 U.S.C. § 502(f) duty status. Recall that, building on a practice pioneered during the War on Drugs, this statute allows the National Guard to avoid the PCA because individual members remain part of their state militias when conducting a mission requested by the president or secretary of defense. I anticipate the administration will continue to make greater use of this authority, particularly if it (predictably) wants the military to more directly participate in deportation efforts.

National Guard deployments in a Section 502(f) duty status at the southern border would return to a practice from Trump's first term. As I have demonstrated elsewhere, however, the risks attendant to mobilizations under Section 502(f) extend far beyond the southern border. At the time of this writing, we are seeing this in the increasing deployment of non-DC National Guard personnel to Washington, DC. And although details are hazy, I would not be surprised to see it used again for the recently announced National Guard deployment to Memphis. This again repeats a practice from President Trump's first term, during which National Guard were brought to Washington, DC in response to Black Lives Matter protests under this legal authority. But the threat extends further. While military intervention at polling places did not manifest in the 2020

election, it is an area that remains susceptible to an aggressive executive seeking to employ the military. Criminal law restricts military interference in federal elections, but that regime, almost entirely codified at 18 U.S.C. § 592-593, is just as old as the PCA and suffers from the same ambiguities and risk of abuse. As I have analyzed in greater depth elsewhere, it seems quite clear that the prohibitions of Section 593 would not apply to National Guard forces in a Section 502(f) duty status. The best reading of Section 592, I believe, indicates that it *would* still apply to National Guard in a Section 502(f) duty status. But enough ambiguity remains for a motivated president, like Trump, to take advantage of this outdated statutory language. Joseph Nunn has articulated a number of ways in which the flexibility provided by Section 502(f) may be more constrained than commonly thought. The ongoing litigation surrounding the spring 2025 Los Angeles deployment will provide our best insight yet into whether litigation will be an effective means for limiting Trump's future uses of National Guard in a Section 502(f) duty status.* * *

The War on Drugs powerfully shaped the law of domestic military deployments. To a considerable degree, it provided the legal architecture upon which Trump's present uses of the military are built. This body of law also hold the keys to more aggressive tactics which have yet to be pursued. Reckoning with these changes is essential to legal reforms which, I hope, will follow the deployments we see over the months and years to come.