

TESTIMONY OF WILLIAM J. BOWE
U.S. SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON SEPARATION OF POWERS
April 9-10, 1973

Senator Ervin. Counsel, any further questions?

Mr. Baskir. Mr. Bowe, do you have a statement, also?

Mr. Bowe. Yes. I have a statement which I have submitted to the staff, and I would like to make a few comments from the statement with respect to the bill.

TESTIMONY OF WILLIAM J. BOWE

Mr. Chairman, I appreciate the opportunity to make a few comments today concerning the Senate bill before the committee.

I was assigned, when I entered the Army in 1968, to the Counter-intelligence Analysis Branch of the 902d Military Intelligence Group headquartered in "Washington, D.C.

Among the functions of the branch was the requirement to respond to intelligence and analytical requirements levied by the Office of the Assistant Chief of Staff for Intelligence of the Army

at the Pentagon. It is in this connection that I had the opportunity to work with Colonel Downie, and in connection with this work, I received a great deal of familiarity with the issues that have been under discussion here today.

Reflecting the turmoil of the period of service in the Army, 1968 to 1971, I was engaged in the preparation of intelligence estimates on the necessity for deploying or employing Regular Army troops for use in the control of civil disturbances unable to be handled by State National Guards and local security forces.

The estimate, which was submitted for the record, I think, extends for the proposition that no large collection mechanism of the Army or any of the other services was required for the Army to prepare reasonable threat estimates which are an essential guide to

74

training functions related to this most sensitive of Army missions, control of civil disturbances involving citizens of the country.

In connection with the preparation of estimates relating to the commitment of Regular Army troops, I was engaged in the analysis of and was familiar with raw intelligence data produced by or disseminated to the Departments of Army, Navy, and Air Force, State National Guards, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the Community Relations Division of

the Department of Justice, the Law Enforcement Assistance Administration and city and State police agencies.

In the winter of 1971, during earlier hearings conducted by this subcommittee, I served as a member of the special task force that was established by the Secretary of the Army to collect information necessary to respond to the questions raised in the course of such hearings. Data on computerized and manual counter-intelligence retrieval systems of the Army and the interface between such systems and other intelligence bureaucracies was developed by the special task force for use by the General Counsel of the Department of Defense, J. Fred Buzhardt, and the Secretary of the Army, Robert F. Froehlke.

As a result of the foregoing, I believe I am in a fair position to evaluate the need for legislation restricting the ability of the Armed Forces to conduct domestic intelligence activities of the nature and extent conducted in the 1960's and early 1970's.

There is no doubt in my mind that it is essential that a bill along the lines of Senate bill 2318 be enacted into law. In the absence of restrictive legislation, the Army has twice become deeply enmeshed in developing national intelligence networks aimed at the compilation of political data concerning civilians. The first period began during the First World War and continued through roughly 1924. The second period occurred during the 1960's. The unsupervised application of computers to domestic intelligence activities in this latter period by major and minor Army commands alike proved an enormous stimulus to the collection of personal information relating to individuals guilty of no violations of law.

The estimate entitled 'Civil Disturbance Threat, 1971-1975, which Colonel Downie submitted for the record, and which was ordered prepared after the Kent State shooting, stands for the proposition that no direct intelligence collection effort by the Army was required for the Army to prepare from unclassified sources reasonable threat estimates which are an essential guide to training functions related to this most sensitive of Army missions, the control of civil disturbances involving citizens of the country.

With the vast potential for abuse inherent in the new "technology and with the twice proven tendency of the military to unnecessarily expand domestic intelligence functions in a period of severe civil disorder, the Congress would be shirking its responsibility, in my opinion, if it did not pass legislation defining clear limitations on the domestic intelligence functions of the military. Department of Defense and Armed Forces regulations alone will not be sufficient

75

safeguard against the dangers inherent in coupling military surveillance of civilians with the new computer technology.

The key difficulties in the proper drafting of such necessary legislation are: (1) to permit the Armed Forces and the State Militia to carry out innocent housekeeping functions related to their presence in and around civilian communities, and (2) to permit the military to carry out effectively their missions under law to restore domestic

order, without having either of these two functions improperly expanded in a period of upheaval and civil dislocation into a broad warrant to intrude into what must remain, essential}, the civil realm.

In my view, the bill before us today does not fully surmount these two difficulties. Therefore, I respectfully offer the following suggestions for amending Senate bill 2318.

First, the proposed new subsection 1386 (b)(4) of chapter 67, title 18, United States Code, found on page 3, lines 10 to 12 of the bill, should be deleted in its entirety in my view. This subsection, as presently drafted, provides an escape hatch whereby State militia are excepted from the limitations of the bill whenever such militia are under other than Federal control. This is virtually all of the time. It seems to me that the restrictions imposed by the bill are not unreasonable and to permit State militia units to compile otherwise prohibited information, except during the very limited period when they are subject to Federal control, would be to open a back door through which Federal Armed Forces could gain access to otherwise proscribed information.

Second, I would recommend a section in lieu of the deleted section, and I have submitted to your committee a text of this proposed section, which appears as exhibit A to this statement. I believe the proposed text makes clear that the ordinary and inevitable contacts of the Armed Forces with civilians, which arises out of the presence of military installations in civilian communities, are not proscribed by the bill

Senator Ervin. "What effect does this bill have on those contacts?
I can't see it. This bill is very narrow.

Mr. Bowe. I can see speech requests coming in for military people. I believe Colonel Downie mentioned that there is, inevitably, information collected pursuant to the sale and disposal of certain surplus military equipment. Since I don't feel that a myriad activity

Senator Ervin. There is nothing in this bill that would affect the sale of surplus military property. It doesn't even touch the subject. The only thing this prevents would be the collection or the acquisition of information by the military relating to beliefs, associations, and political activities of people not having a relation to Armed Forces.

Mr. Bowe. Query whether the possession of Congressional Directory by a member of the Armed Forces would involve a proscribed activity under this legislation in that it would pinpoint information on the political beliefs of civilians?

Senator Ervin, I can't concede that, I cannot see how this would

32-996 — 74-

affect the ordinary relationship between the military and civilians. I am at a total loss to understand that. I am willing to receive information and suggestions for drafting, but I can't see it. It doesn't undertake to regulate this. It simply undertakes to regulate the use of the military to spy on civilians for the purpose of obtaining information about their beliefs or their associations or their political activities.

I will say this, I don't think Congress ought to regulate the State militia unless it is called into service for the Federal Government or into training. I don't think Congress ought to undertake to regulate what the Governor of a State, as the commander in chief of a militia, can do.

Mr. Bowe. I suppose if you fail to treat the State militia in the same way you treat Federal Armed Forces, you run a clear likelihood in a period of disruption that the State militia, prior to being called into Federal service, will collect a vast amount of information concerning political beliefs of civilians and this information will be spread in files up and down the chain of command. Then the militia will be called into Federal service and the storage and use of this information will all be illegal.

Senator Ervin. I think the right of a Governor to use the militia is much broader than the right of the President to use the Army, because most State laws provide that the Governor in his discretion can use the militia for the purpose of assisting the civilian authorities when the civilian authorities are unable to cope with the situation. That is quite broader than the Posse Comitatus Act.

Mr. Bowe. Except it seems to me that whether a State militia, in collecting information, is acting legally or illegally depends upon a presidential proclamation placing the militia in Federal service. Following the giving of such a proclamation. State militia could find they were in violation of a law. On their way to control a civil disturbance situation. State militia could be destroying the very information that under this law they had collected through the exception.

I believe that this is a technical problem which should be addressed.

"While it is always possible that individual commanders may attempt to broadly construe their permitted activities under this legislation in a way not intended, it is my feeling that if Senate bill 2-S18 is enacted into law, such activities will never get out of hand in the way they did two other times in this century when no legislation existed and there was no legislative history offering guidelines for proper domestic military intelligence activities.

Finally, I would like to suggest that a section be added to the bill which would specifically authorize the maintenance of limited but proper data bases essential for the efficient conduct of military operations undertaken pursuant to 10 U.S.C., sections 331 through 333. A draft of this is proposed section has been submitted as exhibit B to this statement.

It seemed quite clear to me during my work with Colonel Downie that there was absolutely no question but that there was a broad

educating function to be served within the Army and the other

77

services to give commanders at all levels an accurate and undistorted view of their missions in periods of civil dislocation. also, there clearly was a need to collect and disseminate general planning data without which military operations could not be effectively conducted.

If you do not properly bat down alarmist opinions, which become very 'widespread in a period of unrest, then you run the risk that troops and commanders, when they finally are committed to a situation, will be unfamiliar with the nature of the threat that they are addressing. Since the commitment of Armed Forces to control civil disorders involve the use of a blunt instrument to begin with, if you send in people with an incorrect perspective of what they are actually going to be dealing with, you may find yourself faced with the kind of tragedy that occurred at Kent State. It would be my recommendation that some estimating function at the departmental level be specifically authorized by the bill to serve the training and informational purposes essential to prevent unnecessary loss of life.

It is felt that the section set out in exhibit B would be a useful addition to the bill in that it would more precisely strike a proper balance between the legitimate needs of military forces in preparing for civil disturbance activities and the illegitimate collection, stor-

age, and dissemination of information on individuals and organizations beyond the limits of strict military necessity. It is further believed that a section along these lines would be in keeping with the recommendations made by Cyrus Vance in his after-action report prepared following his service as a special representative of the President in Detroit during the riots in that city in July 1967.

It is also necessary to insure that the Armed Forces, and particularly the Army, have a clear idea of whether or not there is in fact a military requirement for them to be committed to a particular situation. There is a long tradition in this country of keeping Regular Armed Forces from being committed to civil disturbances except where absolutely necessary. I think it is important that the commitment of the Federal Armed Forces never be made on political grounds. With the departmental level estimating function that I have suggested be retained, I think it is more likely that commitments will be made on military grounds alone. Officers with operational responsibility will have disorders placed in proper perspective and you will also insulate the Army from political pressures that might improperly intrude into the question of whether or not Federal forces should be committed in a given case.

Senator Ervin. That is one of the purposes of this bill, to keep the Army out of political affairs. I don't think it is any business of the Army to collect information concerning political activities of people with no connection with the Army.

Mr. Bowe. One thing that I encountered as an analyst in the later part of the 1960's was the fact that there was a lieutenant general of the Army and an Air Force major general in command of

180 officers and enlisted men assigned to the Directorate for Civil Disturbance Planning and Operations, later the Directorate for

78

Military Support or DOMS, the operational arm established to coordinate Federal troops once they had actually been committed to a civil disturbance. One hundred or so enlisted men is not a large command for officers in such a Directorate unless civil disturbances actually give rise to the opportunity to exercise the potentially broader command functions that they are charged with. When civil disturbances require Army intervention, task forces are mobilized and the command function of these officers is expanded. Inevitably, in a period of declining civil disorders, if you have a large organization searching for a mission, there will be a tendency, I think a perfectly innocent one, for those charged with operational responsibilities to inflate the likelihood that Federal troops will have to be committed. This, in turn, increases the chance that an atmosphere will be created which will make more commitment or deployment of Federal troops more likely, even though they may not be strictly required due to military necessity. Upon reflection, it seems to me that it is in the interests of both the citizenry and the Army to have somewhere within the Army a nonoperational element charged with giving independent analyses of the situations that are likely to in-

volve, or more importantly not involve, the Army.

Senator Ervin. There is nothing in this bill that would interfere with that, unless they send out military agents to get information about the beliefs and associations and views of political activities. This bill wouldn't affect that at all.

Mr. Bowe: Well, I am pleased to hear that is your view.

Senator Ervin. I don't think you can draw a bill and specify everything it doesn't apply to. You would have to draw a bill as long as the U.S. Code, I am afraid.

i think the bill only applies to the things it says it applies to.

Any questions?

Mr. Baskir. No.

Senator Ervin. Thank you very much. I appreciate your appearance.

Colonel Downie. Thank you.

Mr. Bowe. Thank you.

[The exhibits referred to follow:]

Exhibit A

(b) The provisions of this section shall not apply to the use of the Armed Forces of the United States or the militia of any State * * *

(4) to collect, maintain, store or disseminate information relating to liaison with local, state and federal officials or community organizations and groups for the purpose of establishing and maintaining community relations in the vicinity of military Installations or defense facilities.

Exhibit B

(c) Nothing in this section shall be construed to prohibit the collection, maintenance, storage, dissemination or development of:

(1) Strategic and tactical information reasonably required for adequate preparation for operations undertaken pursuant to Title 10, United States Code, Sections 331, 332 and 383, including, but not limited to, identification of bivouac locations, preparation of maps, development of logistics data, ground and air reconnaissance and such other general planning and operational information as the Secretary of Defense by regulation, may provide:

(2) Liaison information related to local, state and Federal officials and

79

non-governmental persons and organizations useful in the support of military operations undertaken pursuant to Title 10, United States Code, Sections 331,

332 and 333; or ^ ,.

(3) Estimates as to the likelihood of deployment or employment of military forces in connection with military operations undertaken pursuant to Title 10, United States Code, Sections 331, 332 and 333, prepared through the analysis of unclassified sources of information generally available to the public or other sources of information received through liaison with local, state and federal agencies.

Provided, however, that nothing in this subsection 1386(c) shall be construed to permit the maintenance, storage or dissemination of extensive files and records, whether manual or computerized, relating to individuals or organizations: and provided, further, that all information permitted to be collected pursuant to this section which relates to the political, social or religious beliefs, associations or activities of individuals or organizations which is not transferred to civilian authorities for law enforcement purposes, shall be destroyed within sixty days following the completion of military operations conducted pursuant to Title 10, United States Code, Sections 331, 332 and 333.

Mr. Baskir. Mr. Chairman, our final witness this morning is Mr. John Shattuck, staff counsel for the American Civil Liberties Union.