MILITARY SURVEILLANCE

HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 2318

April 10, 1974

Testimony of Colonel John W. Downie, U.S. Army (Retired)

Senator Ervin. Counsel, call the next witness.

Mr. Baskir. Mr. Chairman, our next witness is **Col. John W. Downie**.

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Until his retirement last year, Colonel Downie served in a variety of important counterintelligence assignments here in the United States for the Army.

From July 1968 until April 1971, he was director of counterintelligence in the office of the Army's Assistant Chief of Staff for Intelligence.

In early 1971 he was in charge of a special 30-man task force appointed by the Army Chief of Staff to investigate charges of military surveillance in preparation for our hearings that year.

Later, Colonel Downie served as Deputy Commander of the U.S. Army Intelligence Command.

Mr. Chairman, accompanying him is Mr. William J. Bowe, an attorney and former domestic intelligence analyst with the Army's Counterintelligence Analysis Branch who worked with Colonel Downie.

Senator Ervin. I wish to welcome both of you gentlemen to the committee and express our appreciation for your willingness to come and give us the benefit of your views in respect to what I consider an important piece of legislation, not only from the standpoint of privacy of civilians, but also from the standpoint of the military.

TESTIMONY OF COL. JOHN W. DOWNIE, U.S. ARMY (RETIRED); ACCOMPANIED BY WIIIJAM J. BOWE, ESQ.

Colonel Downie. Mr. Chairman, thank you very much for vour kind invitation.

My statement, of course, is made at your invitation. In it I express my own opinions as an individual citizen.

I am no longer an active military officer; my statement has not been coordinated with, and does not represent the views of, the Department of Defense.

The purpose of S. 2318, as I understand it, is to amplify the Posse Comitatus Act of 1878. I believe there is a need to amplify that act. I leave comment on the details of S. 2-318 to those more skilled at Technicalities. I have no objection to this bill as it applies to the act. I believe the application of the bill is far more sweeping than intended. I do not claim to be a constitutional lawyer, but I am a citizen. The limitations on the bill which I suggest are, in my opinion, perfectly compatible with the objectives stated in the preamble to the Constitution.

The need to expand and clarify the Posse Comitatus Act of 1878 has been very recently demonstrated. The contemporary media headlines of 1967 to 1970 make evident the stimuli of the need among national leadership for information on impending and actual civil disturbances. Initially, it was expedient to use the Army to gather the information. Perhaps, in the long run, use of the Army spared the effort, time and cost of organizing, equipping and maintaining a civil element to perform the task. Patriotic, well-intentioned men of character did not weigh either the propriety or the principle involved in using the Army for this purpose. The current political and military leadership of the Armed Forces do not need the guidance of S. 2318. There will be new leaders in the future, however,

who will face changing social and political situations. The Posse Comitatus Act was not forgotten in the late 1960's; it was not believed to apply The lessons of the past should not be forgotten. The future deserves additional guidance in law.

I have said I have no objection to the provisions of the proposed bill as it amplifies the Posse Comitatus Act but that I believe the application of the bill is far more sweeping than may have been intended. In my opinion, the bill should recognize certain functions necessary to the successful accomplishment of the mission of the Armed Forces. These functions should be not only recognized but exempted from the application of the bill. These relate to the collection, storage, and use of information necessary to:

The successful conduct of military operations in foreign sovereignties;

The detection and neutralization of foreign espionage directed against the Armed Forces;

The maintenance of the morale, discipline, and loyalty of members of the Armed Forces;

The rational, equitable and legal conduct of that part of the business of the United States which is entrusted to the Armed Forces.

In the past 30 years or so the Armed Forces have been committed to a number of overseas missions; in some cases they are still there.

The circumstances which require commitment are not susceptible to long-range prediction and the decision for commitment is never within the authority of the Armed Forces. One has only to reflect on the problems of World War II and the absolute necessity of distinguishing between collaborationist and pro-ally, not to mention the distinctions between Gestapo, Abwehr, the Allgemeine SS, the NSKK, the HJ, the RAD and so on. To a greater or lesser extent, similar problems were present in Korea, the Dominican Republic, Lebanon and Vietnam. Commanders must be capable of identifying friendly and hostile orientations among the local populace and within the local government. It is conceivable that the security of the command and the success of the mission may be dependent upon such judgments. This information must be collected, analyzed and prepared for use within the United States in advance of contingencies. Once the overseas expedition is landed at its destination, the collections of all Government agencies are assembled in the United States in order to provide support to the overseas element. Because the bill does not exempt this form of foreign intelligence, it prohibits its practice among the Armed Forces, in the United States and overseas.

The detection and neutralization of foreign espionage directed against the Armed Forces involves both operational investigation and education in the United States and overseas. For both investigation and education, information on espionage organizations and personalities is important. Unfortunately, the occasion has arisen in which this information must be collected and stored for court-martial purposes. The bill, as now written, denies this capability to the Armed Forces.

The Armed Forces must be reliable, disciplined, and loyal. There is no democracy at the tip of a bayonet. The individual citizen-

soldier is entitled to his political beliefs, but the Armed Forces, as an entity, must be politically neutral. Desertion counselling, incitement to refuse duty, inducement to mutiny have, in the recent past, come from without the Armed Forces both in the United States and overseas. Had these efforts succeeded in creating an unruly, mutinous; and disloyal military, the results would have been catastrophic to our national interests and, quite possibly, to our constitutional form of government. Intelligent defense against such efforts while the Armed Forces does require information on the individuals and organizations involved. The bill does not permit the acquisition of this information.

Finally, there are a multiplicity of occasions in which intelligent response is required of Defense agencies to actions originating outside the military. These range from the bidder for the purchase of surplus military equipment to the requester for the provision of a public speaker.

Unless some information is available upon which to base a reasoned response, the public business will be reduced to absurdity.

In none of the four areas which I have discussed do I propose extending the investigative jurisdiction of the Armed Forces. I

argue the need to receive appropriate information from the civil agencies properly charged with investigative jurisdiction and the need to retain appropriate information.

In summary, I support the purpose of S. 2318. I believe its provisions is amplification of the Posse Comitatus Act are practical. I believe there is a requirement to limit the application of the bill, however, or, to put the matter more positively, to describe the permissible activities of the Armed Forces.

That concludes my formal statement, SIr, Chairman.

I would like to add one item if I may.

Very recently I received a copy of an Army estimate, an unclassified civil disturbance threat estimate for the 5-year period 1971 to 1975. The author of this estimate, incidentally, is **Mr. Bill Bowe**, if there are any questions to be put to the author of the estimate, there he is.

My first point is that the Army staff insisted on the specific authorization of the Under Secretary of the Army before this 5-year estimate was undertaken in 1970.

But second of all, this estimate is based on unclassified publicly available information. There is no covert system at all. I think when your staff reviews it they will find it isn't a bad estimate for a 5-year estimate. I would like to offer it to the committee, and I will be glad to receive any questions.

Senator Ervin. Yes, sir. The committee will be glad to receive it and note it an exhibit.

[The exhibit referred to follows:]

The Civil Disturbance Threat 1971-75

Senator Ervin. Colonel, yon speak on page 3:

In none of the four areas which I have discussed do I propose extending the investigative jurisdiction of the Armed Forces. I argue the need to receive appropriate information from the civil agencies properly charged with investigative jurisdiction and the need to retain appropriate information.

I take it that the four areas discussed at the top of page 2 : first, a successful conduct of military operations in foreign sovereignties; second, the detection and neutralization of foreign espionage directed against the Armed Forces; third, maintenance of the morale, discipline and loyalty of members of the Armed Forces; and fourth, the rational, equitable and legal conduct of that part of the business of the United States which is entrusted to the Armed

Forces are areas where the military may need information of civilians. I don't think there is a thing in this bill that would prevent the military from receiving such information from all civil

agencies properly charged with investigative jurisdiction or would prohibit them from retaining information which they receive from those civil agencies.

Colonel Downie. It may be necessary — first of all, as I say, I don't advocate extending the jurisdiction, Mr. Chairman. The Armed Forces now have jurisdiction in the United. States in the case of espionage committed by the Armed Forces. First, this fellow doesn't do espionage in a vacuum, and the man who is handling him, directing him, is a civilian. The civilian investigative jurisdiction of the FBI requires close collaboration between the two services. In that sense I am not saying the Army should investigate the civilians, but they should investigate that military man and receive information concerning the military.

Senator Ervin. I am unable to find a single syllable in this bill which restricts in any way the ability of the Armed Services to obtain information from any person who is a member of the Armed Services. It just doesn't apply to them at all. It only applies to individuals or organizations which are not a part of the Armed Services.

Colonel Downie. But I am afraid, Mr. Chairman, that is my problem. Without naming any foreign intelligence organizations neither they nor their members are members of our Armed Services, and yet we would need to collect information.

Senator Ervin. Well, I don't think the Congress of the United States has jurisdiction to legislate to protect the rights of foreign civilians.

Colonel Downie. This is in the United States, Mr. Chairman, as well as overseas.

But I am also afraid that I, as a professional intelligence officer, reading your bill, would say that ends my profession. I am not going to investigate anybody in these four areas. I am afraid we would misinterpret your intention.

Senator Ervin. This doesn't really keep the Armed Forces from investigating anybody with respect to anything except their beliefs, their associations and their political activities, nothing else. If they find any sabotage or espionage this bill doesn't apply to them.

We found in the course of the subcommittee's investigation that the Army collected a tremendous amount of information about people's political beliefs, about not only their associations which were perfectly legitimate, but the associations of some of their kinfolk, some of their wives or husbands. There was information collected and stored as to what people's political views were, and I don't think that is any business of the government, much less the Armed Forces.

Colonel Downie. I would agree with you on that, Mr. Chairman.

Senator Ervin. I wouldn't object to putting an amendment in that this bill does not apply to any collection of information that is directed towards the detection or neutralization of foreign espionage directed against the Armed Forces. I wouldn't object to an

amendment taking care of that objection, because it, certainly is not intended to be that.

Colonel Downie Mr. Chairman, you would console an elderly gentleman. retired, from Pennsylvania, if you would.

Senator Ervin. Thank you.

Do you have any questions?

Mr. Baskir. Colonel Downie, I wonder, since you are familiar with the information collected in the period the subcommittee investigated, I wonder if you would give an evaluation of that information in terms of what the military mission was at that time? How useful was it? Was it good information? Would it have served a purpose?

Colonel Downie. I am not sure that 99 percent of it served a useful purpose at the departmental level, that is, in Washington; it was undoubtedly of use to local commanders, if only to reassure them that everybody is looking around and there is no imminent civil disturbance.

In my personal opinion, the Army was as a civil disturbance instrument overused. I can see in Detroit in 1967 the unexpected situation requiring a considerable amount of force and the Army

might be required. I can see in the April 1968 disturbances, they were so widespread, civil authorities simply couldn't extend themselves. But I believe that the Army should not be employed in the civil disturbance role under any circumstances. That may sound dreadfully revolutionary, but it isn't.

Pennsylvania boasts the first civil disturbance under this Constitution, the Whisky Rebellion. and George Washington did not use the regular Army. George Washington brought in militia from other States because his principle was that the regular Army should not be used against American citizens. I think that is a heck of a fine principle. As he applied that principle there is undoubtedly a need someplace in the executive branch for information on what is happening, how many of them are there, where are they, do they have clubs, where am I going to put whatever element I am going to use to suppress this thing, but I think it is purely academic as far as the utility of the Army is concerned. The Army or the Navy or the Air Force should not be used.

Mr. Baskir. Your feeling that the military has been called upon too often in. civil disturbances leads to the next question I have.

During the course of the mid-1970's there was the development of what has come to be known as the Huston Plan. I know that plan was never carried out but there was subsequent to that the creation of something called the lEC or the Intelligence Evaluation Committee, which did include representation from the Department of Defense. About November or December. the President did say he disapproved of Army intelligence activities in the area of civilian activities, and in]March came the DOD regulation.

Was the participation of the Defense Department considered an exception to.the DOD regulation or just not covered?

Colonel Downie. I am afraid I am going to be lost in time. The Huston plan was in the summer of 1970, I believe.

Mr. Baskir. That is right.

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Colonel Downie. I believe in the version of the thing which I have seen printed in the newspapers, there is a startling statement, the current limitations or restrictions on the military will continue. There was no DOD Regulation at that time. The reference was to the restrictions imposed by the Military Departments on themselves. The Army was the most limited. There was no DOD policy involved in that one.

The lEC came about in December of 1970. I represented the Assistant Secretary of Defense for Administration on my attendance in this thing, and the DOD policy already was at that time that you accept nothing unless it has a direct bearing on the military. This policy was carried to the point where papers manufactured by the lEC were not taken into the Pentagon.

Mr. Baskir. I was going to ask you to describe the role of the Defense Department in the role of the operations of the lEC during

December and the following few months.

Colonel Downie. Fundamentally, I think the role was a very restrained one in the sense that as the representative to the IEC my instructions were that you do not accept any requirement for any military service, DOD or DIA, unless that requirement clearly bears on the mission of the military and is a legitimate requirement by the military, and no matter what the IEC produces you are not to accept any products unless it was of clear value to the military and the military mission. I don't believe there was ever any formal instruction. Mr. Froehlke sat me down and made it clear enough to me that it was a good solid policy to stick with, and I stuck with it.

Mr. Baskir. Mr. Jordan testified earlier this morning about the inability of the civilian authorities in the Justice Department to appreciate any limitations on the role of the military in this kind of activity. Did you find a similar thing about a year or so later with respect to the IEC?

Colonel Downie. I think the civilian professional members did, that is, the representatives of the intelligence agencies, because we have been well aware for years of the limitations which clearly keeps the military out of the investigation of civilians in the United States. This is not news to them.

Perhaps some of the Justice Department people who were more legally oriented than investigatively oriented had difficulty grasping that point.

Mr. Baskir. They should have been more alert to that. If they

are legally oriented, they are supposed to know what limitations are on the Defense Department.

Colonel Downie. Here again the Delimitations Agreement is an agreement that originated back in 1942 with Mr. Hoover and the chiefs of the Naval Intelligence organization. It is not a law.

Mr. Baskir. I think an example would be the Posse Comitatus Act of 1878 and the tradition of military separation.

Mr. Snider. Colonel Downie, you noted the DOD directive does not apply overseas. Do you see any problems with applying that directive overseas?

Colonel Downie. Now, remember that I left the working Army in April of 1972, so I can't give you current information. Subse-

quent to my last Army assignment I worked with a Defense organization. But there seemed to be no problem that I was aware of while I was still with the Army.

Mr. Snider. Insofar as collecting information on civilians and their political activities abroad is concerned, don't you think the DOD directive should apply or do you think we should have some other sort of restrictions on this activity?

Colonel Downie. I think there may be problems with the DOD directive in the legal sense. Berlin, as I understand, is one of those places where the United States has tried to provide as much local sovereignty as possible, but it is still technically an occupied country. I can see where the application of U.S. law doesn't work. You have no substitute such as the Justice Department which you would find in the United States.

Mr. Snider. Other law enforcement agencies?

Colonel Downie. That is right.

Mr. Snider. There is also a section in the DOD directive that permits certain special operations that are defined as covert penetrations of civilian groups in the United States. Do you see any reason for that sort of exception.

Colonel Downie. No; but I think whoever put it in probably thought the thing might pop up some day and he was doing two things. He was leaving an escape valve for himself in case he needed it, and he was directing, channeling information on the contemplation of such a thing to his office. It is sometimes better than to flatly prohibit something to say, ask me. At least you know the guy has it on his mind.

Mr. Snider. The Department has informed the subcommittee they have actually authorized a number of exceptions. They haven't given us the details — but no more than three a year since 1971. So we could have had as many as nine covert penetrations.

Colonel Downie. Are these in the United States?

Mr. Snider. Yes, in the United States.

Colonel Downie. News to me.

Senator Ervin. The Posse Comitatus Act is pretty narrow in scope. It has three provisions in effect. The first is that the President can use the Armed Forces only when unlawful obstructions, combinations, or assemblages are impending against the authority of the United States, making it impractical to enforce the laws of the United States in a State or territory by the ordinary course of judicial proceedings. I don't think you need any political spying for that purpose.

The second is that when there is an insurrection or domestic violence which so hampers the execution of the laws of that State within the United States that any part of its people are deprived of their rights, privileges, immunities, and protections named by the Constitution as secured in the law the civil authorities are unable to protect that right, privilege, or immunity.

The third is when this insurrection or conspiracy makes impossible the execution of the laws of the United States or impedes the course of justice under those laws.

Now, I agree with you. I think that the military has been used

too much. Of course, local people are always glad to have military brought in because it not only gives them aid but also relieves them of a great deal of responsibility.

Colonel Downie. And it is cheaper, also, Mr. Chairman.

Senator Ervin. This bill is not intended in any way to interfere in any manner with the control of the military over its own personnel, and it is certainly not intended to obstruct the gathering of information on any person engaged in espionage. I think under the law of the United States, anybody is entitled to believe anything he wants to, no matter how foolish it may be. In fact, the Supreme Court has said a man has a right to believe anything as long as he takes no action against the United States. I think the first amendment also gives the right to everybody to pick his own associations and his own associates. This word "political activity" as used in the bill doesn't trouble me, because I think that political activities are not illegal activities. I don't think they have anything to do with espionage. I think it is just exercising your right to express yourself and to carry on activities relating to government.

But I would be glad to have any suggestions for drafting which would remove the objection you voice, because it is certainly not my intention to interfere with such matters.

Colonel Downie. I appreciate that, Mr. Chairman, I really do.

Senator Ervin. Counsel, any further questions?