Equipping Law Enforcement Agencies

Should there by limits on using military equipment?

As Americans are watching the civil unrest unfold across the country, there have been growing concerns about the use of military equipment by civilian law enforcement in state and local communities. The United States Senate recently passed a police reform measure that received little fanfare but, if enacted, would make an important difference.

The Department of Defense has a program through which state and local law enforcement agencies may acquire surplus military equipment – the “1033 Program,” so named for the original statute that authorized its creation (today it is 10 U.S.C. 2576). On July 21, 2020, Senate Armed Services Committee Chairman James Inhofe (R-OK) proposed amending this program in S. 4049, the National Defense Authorization Act of FY 2021, to make small but important changes. The amendment would require that law enforcement not only receive training in the use of acquired military equipment, but also in “respect for the rights of citizens under the Constitution of the United States and de-escalation of force.” The amendment would also expand the list of prohibited items that cannot be transferred to add bayonets, grenades, weaponized tracked combat vehicles (like variations on tanks), and weaponized drones. The full Senate approved the amendment by a vote of 90-10. Two days later, the Senate passed S. 4049 by a bipartisan vote of 84-16. The House and Senate are now negotiating their competing Defense bills.

Congressional response to the civil unrest attributed to actions by local law enforcement is important. This past summer, protests erupted nationwide following the death of George Floyd while Minneapolis police restrained him, resulting in criminal charges against the officers involved. Demonstrations were predominantly nonviolent, and police response was mixed – with some law enforcement agencies showing support for the protesters. But some agencies engaged in tactics reminiscent of the militarized response by Ferguson, Missouri police in 2014 following the shooting death of Michael Brown. Those tactics – dressing in combat-style uniforms while brandishing military weapons and using armored vehicles – led then-President Obama to issue Executive Order 13688: “Federal Support for Local Law Enforcement Equipment Acquisition” in 2015. The order called for a review of the 1033 program and issued comprehensive recommendations for restricting and regulating the program. That Executive Order was revoked in 2017.

In 2018, the ABA adopted policy supporting the recommendations in the 2015 Executive Order. While the changes proposed by the current Inhofe amendment are more narrow than the 2015 recommendations and ABA policy, they are important because they show
there is consensus that increased accountability of the 1033 program is needed and the program is not going away.

The 1033 program was first created around the time of Prohibition to help law enforcement agencies better respond to organized crime. As it currently exists, the program also provides much needed supplies to law enforcement agencies such as bandages, cold weather clothing, sandbags, flashlights, etc. But while the need for the program may still be defensible, lawmakers are split on whether combat-related property should be used when the American people exercise their right to peaceably demonstrate. Given that divide, the Inhofe amendment’s restriction on what property should be available and requirement for civil rights and de-escalation training are small but important steps in the right direction.
VAWA Faces Hard Road Ahead

Competing bills threaten to stall reauthorization efforts

The Violence Against Women Act (VAWA), one of the most popular federal policies aimed at ending domestic violence, sexual violence and stalking, expired in February 2019 when partisan fighting over key provisions brought reauthorization efforts to a standstill. Unfortunately, it seems the same partisan arguments threaten to stall progress on the Act again this year.

Established in 1994 by the Violent Crime Control and Law Enforcement Act to aid in preventing violent crime, VAWA responds to the needs of victims, provides tools for holding offenders accountable, and sets up measures for data collection to learn more about these crimes. The program has been reauthorized in a bipartisan manner several times since its inception, most recently in 2013. However, VAWA reauthorization has become more and more contentious over time, resulting in multiple competing legislative proposals in both the House and Senate. Because of nuances between the proposed bills, ABA policy was not specific enough to allow the Association to take a position in support of one bill over another. That changed on August 6, 2020.

The ABA House of Delegates adopted resolution 113A at the Association’s annual meeting to update ABA policy from 2010 that supports VAWA reauthorization. Resolution 113A is a forward-looking resolution, preserving the hard-fought gains of previous reauthorizations while evolving to respond to emerging and unmet challenges.

The ABA’s new policy seeks to ensure that no rollbacks to existing VAWA protections will be made, such as removing nondiscrimination mandates or weakening outreach and services to underserved communities. By taking a trauma-centered approach and following the advice of experts who work to identify and meet the needs of survivors, a balance can be struck between defending the existing statute and being responsive to unmet needs.

In the current VAWA reauthorization process, the U.S. House of Representatives passed H.R. 1585 on April 4, 2019 with bipartisan support. On November 13, 2019, the Senate introduced S. 2843 as a companion to H.R. 1585. A week later, S. 2920 was introduced, an alternative VAWA reauthorization bill that includes rollbacks to the existing law. Both Senate bills remain pending.

The ABA will continue to advocate for reauthorization of VAWA as one of our legislative priorities. Our policy now supports proposals that restrict adjudicated abusers’ access to firearms by enforcing existing federal law and by closing the “boyfriend loophole” that
allows abusers not married to their victims a functional free pass from surrender provisions. ABA policy also supports VAWA pilot programs that would create responsibly crafted, victim-defined innovations to serve as alternatives to criminal justice penalties, as well as acknowledge that survivors have been requesting these alternatives for decades. Finally, the ABA supports expanding the inherent jurisdiction of tribal courts over gender-based violence on tribal lands.

If you would like to receive more information on VAWA reauthorization and/or assist the ABA in advocating on it, please visit the Grassroots Action Center and register for the Grassroots Action Team here.
COVID-19 and the Bar Exam

Balancing Safety and Legal Profession Concerns

COVID-19 has forced our country to adopt restrictions to keep all of us safe during this pandemic. There are still many who consider government-imposed regulations a violation of their civil rights, but most people are following scientifically available guidance, and, in many states, infection rates have consequently slowed. Such improvements have persuaded many governors to let restaurants, office buildings, and schools to open, provided people continue to wear masks, maintain social distancing, and sanitize their hands. But the race to ease restrictions while the pandemic continues has left many people confused or in professional limbo, including recent law school graduates who planned to take the bar exam this summer.

Anxiety over when and how new graduates will be able to take a bar exam has overtaken the pride and satisfaction they felt in earning their degree. Many states have delayed making decisions on whether to postpone the bar exam in hopes that things will improve, but continued delays are likely to make things worse as bar admission candidates from the spring of 2020 could have to compete for a spot to take the winter bar exam with those graduating mid-year.

Even in jurisdictions that have proceeded with their exams, decisions have been difficult. On August 4, 2020, the ABA House of Delegates heard from young lawyers and law students about the unsafe conditions at some in-person bar exams, with candidates having to choose between risking their health and that of their families or delaying the chance to practice law until it is safe. For jurisdictions offering a remote exam, software glitches created problems that required some cash-strapped candidates to buy new computer hardware as a condition of taking the exam. Ultimately, a divided ABA House of Delegates adopted policy that supports new law school graduates and calls on jurisdictions to adopt temporary examination and admissions procedures for those graduating or seeking admission to practice during this pandemic.

Two days after the ABA House adjourned, ABA President Trish Refo sent a letter to the Conference of Chief Justices calling on the Conference to develop a national strategy under which each jurisdiction would take appropriate action along these lines. Such measures might relate to the administration of the bar exam itself or to a special temporary admission to the bar, e.g., “diploma privilege.” These would be temporary changes and only as necessary to address the public health and safety issues presented during this crisis, while keeping open the doors to the legal profession.
Some have questioned whether the ABA’s new policy would have an impact, given how quickly jurisdictions must decide what to do. Within 24 hours of the ABA House vote, however, the adopted resolution was cited in support of an August 5th order by the Nevada Supreme Court to state bar examiners concerning the administration of a remote bar exam.

The ABA’s new policy will not guarantee a particular outcome by any jurisdiction, but it will hopefully help improve conditions for test takers and increase transparency over the process by shining a light on the challenges involved. The policy also helps new graduates and others seeking admission to practice law during the pandemic know that their concerns are understood and heard by the American Bar Association and the entire legal profession.
ABA Welcomes New Leadership

Congratulations to Incoming ABA Officers

Every summer during the ABA Annual Meeting, the American Bar Association conducts one of its most honored traditions, the passing of the presidential gavel and installation of new officers. While this usually happens with great fanfare in front of the nearly 600 members of the House of Delegates, the Association opted for a digital presentation due to the ongoing COVID-19 pandemic.

As a result, on August 4th, Patricia Lee “Trish” Refo became the first ABA president to be sworn in virtually, accepting the honor by video from the porch of the Sandra Day O’Connor house in Arizona. President Refo is a Partner in the law firm of Snell & Wilmer in Phoenix, where she chairs the firm’s Professional Liability Litigation Group and concentrates on complex commercial litigation and internal investigations.

Over the years, President Refo has held numerous high-ranking positions within the ABA, including serving as chair of the House of Delegates from 2014-2016. She also has served as chair of the ABA’s Section of Litigation, chair of the ABA Day Planning Committee, and director of the American Bar Endowment. Among her many awards and recognitions, she was named one of the 50 most influential women lawyers in America by the National Law Journal.

Calling upon lawyers to strengthen their resolve to be problem solvers, Refo gave currency to the ABA’s goals by stating, “We stand for a judiciary that is fair, impartial, and independent of the executive branch — of every administration. We stand for equal treatment of every person by the justice system. We stand for the rule of law in which citizens and government are held to account and where the laws are administered fairly and without regard to privilege. And we stand for free and fair elections, where all eligible citizens get to vote without impediments and have their vote counted.”

Other Incoming ABA Leadership

President-Elect: Reggie Turner

Also ascending to a new leadership position is ABA President-Elect Reginald “Reggie” Turner. A lawyer with the law firm of Clark Hill in Detroit, Michigan, he is an experienced and accomplished litigator, government affairs advocate, and strategic advisor. Turner not only has been active for years in the ABA, he also has served as president of the National Bar Association and the State Bar of Michigan. In his speech to the ABA House of Delegates,
Turner said, "The ABA is our collective effort to fulfill the Lawyer’s Oath. We work for just laws, human rights, a fair and efficient legal system, and meaningful access to justice for all."

Chair, House of Delegates: Barbara J. Howard

During the Annual Meeting, Barbara J. Howard started her two-year term as Chair of the House of Delegates. This is the second-highest elected position within the ABA. She is Principal of the law firm of Barbara J. Howard Co., L.P.A., a practice that focuses on family law, and has extensive experience within the organized bar. Having “grown up” in the ABA’s Young Lawyers Division, she has been a member of the House of Delegates since 1986 and served on all but one of its committees. She also is past president of both the Ohio State Bar Association and the Cincinnati Bar Association.

In addition to changes in these three Association leadership positions, other elected officers were also installed during the meeting. Pauline Weaver became Secretary of the Association for the next three years, and Kevin Shepard, who was Treasurer-Elect this past year, started his three-year term as the ABA’s Treasurer.

Finally, along with congratulating our new officers, the Governmental Affairs team would like to thank immediate Past-President Judy Perry Martinez for her outstanding leadership during such a tumultuous year. Her unwavering strength and responsiveness to emerging issues was an inspiration to the staff and members of the ABA.

The ABA is fortunate to have such committed and capable leadership. For more information on our ABA leaders, visit the Office of the President’s website here.
Calls for Police Reform and Racial Justice Spur a Flurry of Resolutions before the ABA House

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This article was originally published in the ABA Journal on August 4, 2020.

The ABA House of Delegates responded forcefully to calls for police reform at this year's annual meeting, passing resolutions calling for a curtailing of the qualified immunity doctrine blocking civil lawsuits and for heightened oversight of law enforcement through a national use-of-force database.

The House adopted Resolution 301A on qualified immunity with the backing of a vast majority of delegates at Tuesday's session. The legal doctrine has become a focal point for backers of police reform who see it as an obstacle to accountability for police misconduct.

In June, the U.S. Supreme Court declined to take on eight cases related to qualified immunity. Critics would like the court to review the doctrine, which they say shields officers accused of using excessive force or unlawful searches.

Absent a ruling from the Supreme Court, a report accompanying the resolution says legislatures should now review the doctrine to decide whether to curtail it.

Paul Wolfson of the ABA Section of Civil Rights and Social Justice argued that without ending or limiting the doctrine, people who are victims of police misconduct would have no avenue for relief.

"In recent months, we've all been vividly reminded of the need to deter and remedy unconstitutional conduct by law enforcement officers," Wolfson said. "Our fundamental constitutional rights will be meaningless unless those who are injured have a forceful remedy."
On Monday the House adopted Resolution 116A, which encourages the collection of records and data on use of deadly force, another flashpoint in the national debate over police brutality and racial injustice.

The passing of the resolution comes after both Republicans and Democrats have called for greater oversight of police officers through federal data collection.

Robert Harris, director of the Los Angeles Police Protective League—the union representing the Los Angeles Police Department—says a national registry is a “step in the right direction” but said that the ABA’s resolution on qualified immunity “misses the mark.”

“If the goal is to hold officers accountable, there’s a better way to do that,” Harris said in an interview.

Harris said that people filing lawsuits over police misconduct may still win damages, despite the legal doctrine. His union supports stronger use of force policies and officer training, as well as technology that flags and “weeds out” problem officers, he said.

Votes on lynching, protests and Juneteenth

On Tuesday, the House also passed and adopted Resolution 10I encouraging the creation of legislation outlawing lynching.

A federal law to criminalize lynching, the Emmett Till Anti-Lynching Act, has stalled in Congress, California Lawyers Association president Emilio Varanini said. Attorney Laura Farber said that it was time for the ABA to take a stand as she urged delegates to pass the resolution.

“I’m also disheartened, sad and frankly a little disgusted to know that here in 2020 we have not yet, and Congress has not yet passed legislation making lynching a hate crime—a federal crime,” Farber said.

Resolution 301C, also adopted Tuesday, asks the government to “desist” from using force to “suppress lawful First Amendment activity.” That comes after President Donald Trump sent federal officers to Portland, Oregon, who fired tear gas and stun grenades at demonstrators and hauled some protesters into unmarked vehicles.

Oregon Attorney General Ellen Rosenblum spoke in favor of the resolution. She said that in some cases, protesters had been grabbed off the street as they were leaving demonstrations. Federal officials had assaulted peaceful protesters, including the Wall of Moms activist group, she said.
“The federal government’s actions in Portland served as a direct assault on the right to organize, to assemble, to march and to protest,” Rosenblum said. “I sincerely hope never again to see these infringements upon people’s First and Fourth amendment rights in my city or any other.”

On Tuesday, the House also passed Resolution 301B to make Juneteenth a paid legal holiday. Black Americans have long celebrated June 19 to the mark the day that slaves in Galveston, Texas, learned they had been freed. Support for a national federal holiday has gained steam since the death of George Floyd while in police custody in May.

Delegate Deborah Enix-Ross said she could think of “no better way” for the ABA to show support for a “more just society” and an “understanding of our nation's history.”

“I know there are some who may have concerns about the economic impact of another federal holiday. But I would hope that we will never again equate the evils of slavery with economics. There is simply no price on doing what is right,” Enix-Ross said.

ABA president-elect Reginald Turner voiced his support for the resolution and said slavery was the nation’s “original sin.”

“Juneteenth is an appropriate commemoration of the end of slavery in the United States. It should be a national holiday, to be celebrated by all,” Turner said.

Capturing the moment

Because of the coronavirus pandemic, the ABA’s annual meeting was held online for the first time in its history. Against the backdrop of recent protests, the meeting became a forum for how the legal community can address police brutality and racial injustice.

In her final speech before she handed the gavel to incoming ABA President Patricia Lee Refo, Judy Perry Martinez urged lawyers to root out racism.

“Let none of us say the job is too big or the problems of racism run too deep,” Martinez said. “This is our torch to carry. Lawyers have a special responsibility to fight injustice, especially injustice caused by laws and practices that are racist and unjust in word or effect.”

At a the ABA forum “Justice and Policing—A Path Forward,” on Friday, Martinez asked Sen. Tim Scott, R-S.C., about his thoughts on police defunding and qualified immunity.

The senator said he was no stranger to discrimination. He said that in the last 20 years, he has been stopped by state or local police officers 18 times, including seven times while he was in office. Scott said that underlines the importance of voting in local elections.
“Those are the folks directly in positions of power to determine the type of local law enforcement you have,” Scott said. “When we don’t vote in those elections, we are actually taking a step back from the one place where police reform comes to life immediately.”

Scott, the GOP’s only African American senator, led a Republican bill on police reform that would require departments to use body cameras and limit the use of chokeholds. However, the bill would not loosen the qualified immunity doctrine. Scott bristled against the notion of defunding police departments. He said he instead supports a strategy of providing police units with mental health experts to help prevent incidents from escalating.

“The concept of defunding the police is the scariest thought I’ve ever heard as it relates to communities of color and the vulnerable communities,” Scott told Martinez.

**Curtailing immunity**

The report that accompanies Resolution 301A says qualified immunity makes it “virtually impossible” for people who have suffered violence at the police’s hands to obtain redress through civil court actions. The law also means that individual officers are rarely held to account for their actions, the report states.

“Without an effective civil remedy, serious abuses of governmental power will persist unchecked, many motivated by racial discrimination. That is not acceptable in the United States in the 21st century,” the report states.

Several states have moved forward on overhauling the definition of qualified immunity. Colorado passed a law in June that would make it easier for people injured by the police to override a qualified immunity defense and claim up to $25,000 in damages, Forbes reports. Massachusetts legislators are proposing police reforms that would curtail qualified immunity.

**Collecting data on deadly force**

Resolution 116A encourages governments to collect accurate records and data on deadly force incidents. The resolution encourages the creation of laws that would mandate an independent investigation if someone is killed during an encounter with law enforcement or in custody.

The resolution also calls for a national database that would record disciplinary actions against officers and complaints of excessive force. That could prevent officers with a history of using excessive force from moving from one jurisdiction to another.

The ABA Section of Civil Rights and Social Justice and the ABA Coalition on Racial and Ethnic Justice co-sponsored the resolution. Speaking in support, former ABA President
Robert Grey Jr. said demands for racial equality had grown louder because of recent events, including the death of George Floyd.

“It is now an American movement and one that demands accountability and responsibility,” Grey said.

President Bill Clinton’s sweeping crime bill in 1994 mandated the federal collection of use-of-force data from police departments. But reporting has not been enforced and is inconsistent.

The report that accompanied Resolution 116A estimates that in 2019, police killed more than 1,000 people but says those numbers are based on efforts by the Washington Post and other outlets to capture data. A central database is vital to ensure up-to-date and accurate information, the report says.

The House on Monday also adopted Resolution 106A on restorative justice. The resolution urges prosecutors, criminal defense attorneys and others in the criminal justice system to consider an approach that prescribes meetings between offenders and victims that are facilitated by trained specialists.
ABA House Concludes Historic Meeting after Adopting Robust List of New Policies

The American Bar Association House of Delegates adopted nearly 60 new policies at its two-day meeting Aug. 3-4, including a resolution that urges state lawyer-licensing authorities to make public health issues paramount for upcoming bar exams and provide options for recent graduates who cannot take the bar.

The HOD, as the 597-member group of state, local and specialty bar associations is known, met virtually because of the COVID-19 pandemic to conclude the 2020 Virtual ABA Annual Meeting, which began July 29. Among the resolutions adopted as policy are several aimed at improving police-community relations and attacking racial injustice, including a measure urging the curtailment of the defense of qualified immunity in civil suits brought against law enforcement officers.

With attention focused on police misconduct in the wake of the May 25 homicide of George Floyd and other police incidents, the HOD adopted Resolution 301A, which urges governments to limit the doctrine of police qualified immunity that was expanded during the past 40 years by the U.S. Supreme Court. Also, the House approved Resolution 116A, which asks governments to enact laws that require law enforcement agencies to keep records of incidents of deadly force or excessive non-lethal force, and that a fully independent prosecutor be appointed when an individual dies in the custody of or during an encounter with a law enforcement officer.

The bar exam resolution, 10G, was adopted by a 256-146 vote. It asks the highest court or bar admission authority in each state or other licensing jurisdiction to cancel or not administer in person the examination during the COVID-19 crisis unless cleared by public health authorities. The resolution offers several alternative approaches to the bar exam, including a diploma privilege during the crisis. But, it does not favor any specific option.

Across the country, state and other lawyer-licensing authorities made individual decisions on how best to approach the past July 2020 bar exam, and others are planned in the next few months. The bar exam is prepared by the National Conference of Bar Examiners (NCBE) and is administered independently of the American Bar Association and the ABA Council of the Section of Legal Education and Admissions to the Bar, which is sole national accreditor of U.S. law schools.
Proponents of the resolution said it was necessary to convey support for newly minted lawyers who are faced with taking the bar amid a pandemic, and that the recommendation merely suggests that licensing authorities examine various options. Opponents, who included the NCBE delegate, said the sponsors only made them aware of the proposal on the eve of the HOD meeting, and they took issue with its reference, citing diploma privilege as an option without fully exploring its implications. Their attempt to postpone debate failed by a wide vote.

Among several COVID-19-related new policies, the House adopted Resolution 10H that recommends governmental policies that minimize evictions and assist both landlords and renters faced with hardship because of the pandemic. Also, Resolution 117 recommends, among other aspects, that individual parties in court cases be offered a safe “in person hearing or delay” if the health crisis continues.

In other business, the HOD adopted:

- Resolution 111A, which establishes the ABA Best Practices for Third-Party Litigation Funding as policy. It is intended to serve as a guide for lawyers new to the practice of third-party litigation as well as more experienced attorneys and recommends that lawyers who engage in third-party financing detail the arrangement in writing, include the non-recourse or restricted nature of the financing, ensure that the client retains control of the case and protect the attorney-client relationship. It does not take a position on the use of the practice, which has ballooned into a major industry in the past few years.

- Two new policies that urge appropriate governmental entities to allow those incarcerated to vote. Resolution 116E recommends governments provide a process to allow eligible pre-trial detainees to obtain a ballot and be able to vote despite their detention. And Resolution 116H advocates for the repeal of laws that disenfranchise persons based upon criminal conviction and that voting rights be restored, without any requirements to fulfill financial obligations, for those currently and formerly incarcerated.

- Resolution 100B, which urges governmental bodies to enact legislation banning race discrimination on the basis of the texture, style or appearance of a person’s hair and encourages implicit bias training to eradicate discrimination based on these factors.

- A narrow exception to ABA Model Rule 1.8(e), which bars financial support for clients. Under Resolution 107, a lawyer representing an indigent client, either on a contingency fee or through a clinic on a pro bono basis, would be allowed to provide modest gifts, including for food, rent, transportation, medicine and other basic living expenses.

- Resolution 114, which urges that all national governments observe, respect and protect the independence of the International Criminal Court, a global judicial body. The new policy also condemned threats by governments to the ICC and its officers and personnel in the performance of their duties.
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- Resolution 301B, which supports establishment of June 19, or Juneteenth, as a paid, national legal holiday to commemorate the end of slavery.

The disposition of all HOD resolutions for the 2020 Annual Meeting can be found here.