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Will Indiana's self-defense measure mean "open season" on cops?

You may have heard of the bill passed recently by the Indiana General Assembly that gives citizens the right to physically resist--even with deadly force--any LEO they "reasonably believe" is unlawfully entering their dwelling or is about to cause them injury.

At this writing, the legislation awaits the signature of Gov. Mitch Daniels to become law. Daniels is expected to approve the measure this week.

When he does, "it will mean basically open season on police officers," predicts Tim Downs, president of the state FOP, which campaigned vigorously although unsuccessfully against the bill. "Law enforcement officers are definitely going to be put in harm's way."

In this report, we explore the background and implications of the new law, which understandably has sent shock waves through the Indiana law enforcement community and has cops in other states wondering if they're next.

HOT POTATO DECISION. The legislation was drafted in response to a controversial decision by the Indiana Supreme Court last May in a domestic disturbance case, *Barnes v. State of Indiana*.

Back in 2007, a distressed woman in southern Indiana had called 911 during a heated argument with her husband. When officers arrived, the man, "very agitated and yelling," belligerently informed them that they were "not needed." When they tried to enter the couple's apartment to check on the complainant's wellbeing, he blocked the doorway and shoved one officer against a wall. He was subjected to a neck restraint, Tasered, and then arrested on 4 counts, including battery on a police officer.

In appealing his subsequent conviction, the defendant argued that the officers' forcible entry was illegal and that he had a common-law right to "reasonably resist unlawful entry" by law enforcement into his home.

The state Supreme Court acknowledged that such a right, sometimes called the "castle defense doctrine," can be traced back to the Magna Carta of 1215. On 2 occasions, the U.S. Supreme Court has recognized it: in *Bad Elk v. United States* [177 US 529 (1900)] and in *United States v. Di Re* [332 US 581 (1948)].

However, legislative and judicial thinking has changed significantly in recent years, the Indiana Supreme Court majority pointed out in its 3-2 decision. The Model Penal Code has now eliminated the right because "alternate remedies," including civil suit, now exist for an "aggrieved" party and because forceful resistance is "likely to result in greater injury." A "majority of states have abolished the right" to resist via statutes and judicial opinions, the Court stated.

"We believe...that a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence," the justices declared. "[W]e find it unwise to allow a homeowner to adjudge the legality of police conduct in the heat of the moment. As we decline to recognize a right to resist unlawful police entry into a home, we decline to recognize a right to batter a police officer as a part of that resistance."

According to the Indianapolis Bar Assn., "the same issue has been ruled upon similarly" by courts in an overwhelming majority of other states.

Click here to read the full decision.

RESPONSE TO "UPROAR." According to media reports, the Court's ruling ignited a "public uproar." Before long, legislators had drafted an act in the Indiana General Assembly [Senate Bill 0001] to rectify the situation by affirming the "robust self-defense rights" of the state's residents.

Earlier this month, the bill was approved 38-12 by the state Senate and 67-26 by the House. In its final form, it includes these key provisions to "ensure that a citizen feels secure...against unlawful intrusion by another individual or a public servant"; e.g., an officer of the law:

• "A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:

> (1) "protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;
>
> (2) "prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or
>
> (3) "prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect."

• A person is *not* justified in using force against the police if he or she:

> (1) "is committing or escaping after the commission of a crime;
>
> (2) "provokes action by the public servant with intent to cause bodily injury;
>
> (3) "has entered into combat with the public servant or is the initial aggressor"...unless the officer "continues or threatens to continue unlawful action;

(4) "reasonably believes the public servant is...acting lawfully [or is] engaged in the lawful execution of [his] official duties."

However, the bill specifies that even deadly force can be justified in resisting the police if a citizen "reasonably believes" an officer is "acting unlawfully" and "the force is reasonably necessary to prevent serious bodily injury to the person or a third person." In other words, Downs states, "There is no limit on the resistance that can be used."

Click here to read the legislation in full.

POLICE REACTION. The only organized voice that has spoken out against this legislation, says President Downs, is the Indiana state FOP. When the bill was passed despite the group's vehement objections, Downs requested an audience with Gov. Daniels to plead in person for a veto. Early this week, he spent 20 minutes with Daniels but was unable to persuade him to kill the bill. At this writing, the governor is believed to be just hours away from affixing his approval.

Downs has been an active LEO for more than 3 decades, currently serving as chief of police for the Lake County (IN) SD, and he has headed the state FOP since 1999. We asked what he thinks will be the outcome when Daniels signs the legislation into law.

Downs: It's only a matter of time before an officer or a civilian gets seriously hurt or killed because of this law. At the very least, it will result in more use of force. If a subject offers resistance he believes is justified, an officer isn't going to just meekly back off. He'll escalate force to overcome the resistance, one or both of them will likely be injured or worse, and a subject who survives will go to prison.

With this law successfully on the books in Indiana, I believe other states may look at it and be encouraged to adopt similar legislation.

Force Science News: Are there any subtleties in this law that make it less crazy than it seems?

Downs: No, it's insane. Backers of the bill kept saying it gives the police more protection, but there is no protection in it whatsoever. Criminals and other people who dislike the police are interpreting it that they can do anything they want against us now. I'm already getting hate mail from people saying, "Let's get it on. If I kill you, I'm justified in doing it." This is potentially lethal thinking. I've not found a police officer yet who has anything good to say about this statute.

FSN: As the legislation is written, much hinges on a subject's "reasonable belief" as to whether an officer is acting lawfully. Don't most suspects automatically believe officers are wrong in the actions taken against them, regardless of the circumstances?

Downs: Suspects always think we're in the wrong. The average citizen, even if they're well-intentioned, has no training in the law and police procedure on which to base a 'reasonable' decision. They're going to subjectively judge the circumstances to decide whether an officer is acting lawfully. And this subjective decision is going to be made at a time when emotions are likely to be highly charged, and drugs and/or alcohol will be involved a huge percentage of the time, affecting people's thinking.

Police officers are called upon every day to investigate domestic disturbances, child and elder abuse, and many other serious matters. Sometimes they don't have time to secure a warrant, yet they're duty bound to make entry onto private property and into private residences in order to protect the innocent. Empowering people to resist them is a recipe for disaster that will lead to senseless loss of life.

FSN: Is there any leeway given for officers who make legitimate mistakes and unwittingly force entry into an incorrect residence?

Downs: No. This is one of the many realities of police work that the politicians who voted for this don't understand.

FSN: And if it is determined later that the belief on which a subject acted was not reasonable and therefore the resistance was *not* justified, by then the damage from resisting is already done, right?

Downs: Right.

FSN: Who was the driving force behind this legislation?

Downs: Well, one group that sticks out and that surprised me was the National Rifle Assn. They give a lot of money and backing to politicians, and NRA people lobbied hard at the state capitol in favor of this bill. They thought the Supreme Court decision last year gave authorities too much power.

Also the press got a lot of people upset about not being able to defend themselves from unlawful intrusions when the decision came down. One legislator told me that a poll showed that 60% of the citizenry favored the bill. You'd have to prove that to me. I find it hard to believe. Many, many civilians I spoke to thought it was ridiculous. We had many legislators on our side, including one who's a former police chief, but the ones against us had the power.

FSN: What do you recommend for Indiana officers as this bill becomes law?

Downs: Stay on high alert during any response, especially to a residence. Even more than before, you don't know what you may be going into.

FSN: Are you planning to test the constitutionality of this law?

Downs: We'll definitely have our attorneys look into any possible way we can get it reversed. This law is not only dangerous, it's not needed. If an officer acts unlawfully, there are plenty of state and federal statutes to deal with it. That's a matter best handled by a judge and jury, not by a person standing on a doorstep thinking, 'I'm going to take care of this myself.' "

FS News Extra: More mail on post-shooting procedures

The Los Angeles PD, 1 of the largest law enforcement agencies in the country, has post-OIS procedures that differ radically from those recommended to the federal DOJ by Atty. John Hoag, which we described in Transmission #199 [**CLICK HERE** to read it] and which readers commented on in a special transmission sent 3/16/12.

Now a reader intimately familiar with LAPD's policies adds his observations to the discussion...and takes issue particularly with Hoag's preference of having involved officers give voluntary statements after a shooting rather than compelled statements under *Garrity/Lybarger* protection.

Voluntary statement a matter of context
I have functioned as a rollout attorney representing LAPD officers involved in shootings for the last 16 years and have been called out in over 400 shootings.

People tend to take Mr. Hoag's recommendation of officers giving voluntary statements without knowing his context. I attended the certification class in Force Science Analysis and listened to his lecture. He has his reasons for this recommendation, but it does not transfer to LAPD and I suspect to many other departments.

At the end of his lecture, I asked him the following: "If you were representing an LAPD officer and were told that the officer WOULD be giving a statement before he is allowed to go home, even if the officer had been up over 24 hours (and sometimes longer); that the statement WOULD be tape recorded; that the attorney and officer WOULD NOT see the scene until actually going through the walk-through with the investigators; that any external tape of the shooting WOULD NOT be shown to the officer prior to the interview; would you still advise the officer to give a voluntary statement?"

His answer was that he would not. And neither do we.

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Atty. Hoag responds:
I did state that if I were faced with the L.A. system I would not recommend a voluntary statement. I do salute the officers and attorneys who have to function under that system, as it is broken. As I understand it, their current process is part of a federal consent decree. That process is fundamentally wrong and cannot produce the best possible statement from involved officers.