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Police Use Of Deadly Force

AB 931

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Following a controversial shooting in Sacramento, California, legislation has been introduced to change the legal standard for law enforcement in California from using "objectively reasonable force" to "necessary force." Under this new standard, police officers would be legally allowed to use deadly force only if "there were no other reasonable alternatives to prevent serious injury or death," according to a spokesperson for the ACLU. (see FSN #363). Also, it should be noted that the push for this type of legislative change is not limited to California. Also, I raise the concern as to future potential application of these proposals to the general citizenry. Is the fundamental right of self defense itself at risk?

Preliminarily, AB 931 provides that a peace officer shall not use deadly force against a person who poses only a danger to him or herself. Next, AB 931 seems to address the issue of fleeing violent felons and expressly requires that there be "an imminent risk of serious bodily injury or death to the officer or to another person if the subject is not immediately apprehended." (This appears to address an issue under current California law relating to Tennesssee v. Garner (1985) 471 U.S. 1, 3, 11. See CALCRIM Jury Instruction No. 507).

Revision of Standard for Use of Deadly Force by Police

However, under AB 931, Penal Code section 196, would modify the definition of justifiable homicide by "public officers" (e.g., Police) and "those acting by their command in their aid and assistance" as requiring that such be "**necessary** given the **totality of the circumstances**, pursuant to subdivision (d) of 835a" (which is defined below) (emphasis added). There is substantive concern as to this proposed change. To grasp the significance, we must look at how AB 931 defines critical terms such as "necessary".

Force Science News #363 was issued just before release of the exact language of AB 931. But, the concerns voiced in FSN #363 seem to apply to the actual proposed legislation.

The concerns about the revised standard are set forth in FSN #363:

> "Judging an officer's decisions in the bright light of day, when the smoke has cleared and the danger has passed and when you know the actual facts and circumstances, is clearly untenable. Officers cannot be expected to determine in the split-seconds available to them whether the weapon is real, the knife is sharp, the attacker is skilled, or even if the object in the hand is a gun or a phone when there is what reasonably appears to be an immediate threat to safety.
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> Requiring officers in dangerous circumstances to further evaluate and make sure their actions are necessary could mean death, for example, when an individual reaches for his waistband. Maybe the suspect is just pulling up his pants or grabbing his cell phone—or maybe he's drawing a gun.
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> The cost of a "necessary" standard will be officer hesitation and deaths, a confusion in the legal standard for state and federal claims, and a monetary windfall to plaintiffs in civil litigation at great cost to taxpayers.
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> This proposal is politically and financially motivated in a time when criminal consequences have been minimized and offenders are empowered by the lack of meaningful consequences. …
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> …The goal of those who seek to change the standard is simple. They want to prosecute more LEOs who use deadly force.
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> Much of their criticism of police behavior is born of ignorance regarding not only the laws of the use of force, but also the mechanics of the use of force, the force options available to LEOs, the potential danger of a suspect, and the speed and reality of deadly force encounters. …
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> [and quoting from] a Ninth Circuit Court of Appeals case, *Scott v. Henrich*, (39 F3d 912, 914):
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>> "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission.
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>> "Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only.
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>> "Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under

> stress and subject to the exigencies of the moment. …" [End of quoting FSN #363].

The text of AB 931, **<u>deletes</u>** the provision of Penal Code Section 835a providing that a peace officer "who makes or attempts to make an arrest **need not retreat or desist from his efforts** by reason of the resistance or threatened resistance of the person being arrested…" (emphasis added). On the other hand, the present statutory language is retained which provides that the peace officer is not deemed an aggressor or lose[s] his right to self-defense by the use of reasonable force to effect the" [arrest, prevent escape or overcome resistance]. Thus, the police officer seems to be relegated to merely being deemed a "non aggressor", and not having lost his right of self-defense under the proposed legislation.

The proposed legislation also provides, inter alia:

"(d) (1) Notwithstanding any other law, a peace officer may use deadly force only when such force is **necessary** to prevent imminent and serious bodily injury or death to the officer or to a third party. …" (emphasis added).

Now, let's address the "devil in the details".

AB 931 specifically defines the term "**necessary**" and the terms used to define "necessary" (e.g., "totality of the circumstances", "reasonable alternative", "de-escalation"). Thus:

> "…(A) "**Necessary" means** that, given the **totality of the circumstances**, a **reasonable peace officer would conclude** that there was **no reasonable alternative** to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or to a third party.
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> **Reasonable alternatives include**, but are not limited to, **deescalation**, **tactics** set forth in the officer's training or in policy, and **other reasonable means of apprehending the subject or reducing the exposure to the threat**.
>
> (B) The "**totality of the circumstances**" includes, but is not limited to, the facts available to the peace officer at the time, the conduct of the subject and the officer leading up to the use of deadly force, and whether the officer's conduct was consistent with applicable training and policy.
>
> (C) "**Deescalation**" means taking action or communicating verbally or nonverbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction of the force necessary. Deescalation tactics include, but are not limited to, warnings, verbal persuasion, and tactical repositioning." (emphasis added).

So when Islamic Terrorists (a socially sensitive classification) hit your local grade school, will the police be outside dithering as gun fire is being heard and your children are dying?

Using the criteria of AB 923: Will the Officers be deciding whether to retreat? Moreover, are they now required to "retreat"? [In this regard, the text of AB 931, **deletes** the provision of Penal Code Section 835a providing that a peace officer "who makes or attempts to make an arrest **need not retreat or desist from his efforts** by reason of the resistance or threatened resistance of the person being arrested…". On the other hand, it is noteworthy that under California law, a mere citizen "need not retreat" – CALCRIM Jury Instruction No 505. AB 931 is only directed towards the Police, at this stage]. Should the Officers desist from efforts due to the resistance or threatened resistance? Do they "deescalate" by seeking out and bringing on scene a local Imam? Do they verbally persuade by calling the terrorists to "prayer"? In the time it took you to read this paragraph 15 children or more are now dead. The "resources" now called for in the legislation are now simple to articulate - more body bags for the children.

Is the Right of Self Defense the real target?

AB 931 presently addresses use of deadly force by police officers. If enacted in its present configuration, it would appear that that possibly a police officer in California will be more constrained in the use of deadly force that a "mere" citizen. Is this intended?

When I contacted the office of a legislator who introduced this bill, I was advised that this legislation was only dealing with use of deadly force by police, and not use of deadly force by citizens. Assuming such to be the case, then not only does this proposed legislation jeopardize police AND the citizens they may be seeking to protect during a deadly encounter , but it simultaneously ignores the overall ramifications on the field of deadly force law in California. The legislation ignores the reality of deadly force encounters and the action / reaction continuum.

But, another possibility is that our "Oath" breaking politicians and their minions have a more long term plan. First, modify the deadly force standards for police into an unworkable "standard". Next, follow up with "conforming" amendments for the citizenry. After all, it is reasonable to assume that future argument will be made (either legislatively and/or by judicial fiat) that the standards for a citizen's use of deadly force must be brought into conformity with the "more restrictive" and hind sight 20/20 standards applied to law enforcement.

Consider that with the relentless ongoing attacks on your God given right of self defense, and the individual right to keep and bear arms, it may be appropriate to step back and view this use of deadly force law change as yet another means by which the right of self defense itself will become so entangled and obscured as to serve as a government confiscation of the very right itself.

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