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From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission

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From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission

Cadman Robb Kiker III*

Abstract

We are at the dawn of a new era of policing in the United States. In recent months, images of armed police officers patrolling the streets of Ferguson, Missouri, and of a toddler burned by a Georgia SWAT team's grenade have been indelibly branded into America's social consciousness. There is a unique bipartisan outcry from Washington in a time otherwise marked by bitter political divides. Politicians and journalists alike are questioning the efficacy of a militaristic police force and the path that led to this shift in the paradigm of policing.

This Essay examines the how and why of police militarization in the United States; it details some of the most egregious instances of police overreach, mission creep, and proliferation of military-style police units treating citizens as an enemy population. It seems all is quiet in Congress after a few seemingly futile hearings on militarization. The Executive Branch has released suggestions that are expected to manifest in an executive order any day. Unfortunately, all of these solutions are too little, too late. The streets of America are much more akin to a war zone than the democratic nation that our Founders envisioned, and it is up to the people, at a local level, to reclaim what was intended.

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Table of Contents

| | |
|--|-----|
| I. Introduction | 283 |
| II. The Militarization of Police: Sources and Mission Creep | 285 |
| III. Existing Limitations: A Policy Against Military Involvement in Civilian Affairs | 291 |
| IV. The Federal Response to Militarization: Too Little Too Late..... | 295 |
| V. Conclusion..... | 297 |

“The means of defence against foreign danger, have been always the instruments of tyranny at home.”—James Madison¹

I. Introduction

Over the last several decades, there has been a paradigm shift within police departments across the United States.² Public

1. James Madison, *Speech from the Constitutional Convention June 29, 1787*, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 465 (Max Farrand, ed. 1911).

2. See WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING, AM. CIVIL LIBERTIES UNION (2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rell1.pdf> [hereinafter ACLU Report] (detailing the use of paramilitary police units, the sources of the equipment used by such units, the effect that militarization has on policing generally, and the disparate effect of modern policing units on various communities—most notably minority communities); Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99 (2003) (discussing the details of the decay of the protections afforded by the Posse Comitatus Act (PCA), 18 U.S.C. § 1385 (2012), upon the advent of the global war on terrorism); Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments* (Cato Inst., Briefing Papers No. 50, 1999), <http://www.cato.org/sites/cato.org/files/pubs/pdf/bp50.pdf> (providing a history of the rise of paramilitarism in the United States up to 1999, beginning in the 1960s); Hank Johnson & Michael Shank, *Why Do Police Departments Need Military Vehicles and Weapons?*, USA TODAY (Mar. 10, 2014, 5:07 PM), <http://www.usatoday.com/story/opinion/2014/03/10/america-police-military-weapons-column/5789445/> (last visited Feb. 16, 2015) (detailing the acquisition of military vehicles and weapons by multiple American towns and some of the

concern about the militarized form of local policing has become much more vocal following an unfortunate incident in August 2014, in which a Caucasian police officer shot and killed an unarmed African-American teen in Ferguson, Missouri.³ The public's response was initially concerned with racial issues, prompting protests and some instances of looting and violence. Local law enforcement responded by sending in police that were virtually indistinguishable from soldiers, equipped with military weapons, equipment, body armor, and armored vehicles to disperse the demonstrators.⁴ These events prompted many to ask how the shift to a militarized police force could go largely unnoticed until now. More importantly, now that the militarized police force is a reality, what can we do about it? Does it violate our Constitution or our federal laws?

This Essay presents answers to both of these questions. First, this Essay presents a short explanation of the sources of this militarization. Next, it explores the relevant legal prohibitions on military policing and our longstanding policy against military involvement in civilian legal affairs. It continues by examining the government's response to the public outcry in Ferguson. Finally, this Essay will assess potential responses to the militarization of the police force, concluding what can and should be done to address this policy concern. It is important to note that this Essay does not advocate on behalf of a specific political ideology or agenda, but rather attempts to lay bare an

programs that law enforcement agencies use to acquire them) (on file with the Washington and Lee Law Review).

3. See Elliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), <http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know/> (last visited Feb. 16, 2015) (on file with the Washington and Lee Law Review).

4. See Paul Szoldra, *This Is the Terrifying Result of the Militarization of Police*, BUS. INSIDER (Aug. 12, 2014, 4:05 PM), <http://www.businessinsider.com/police-militarization-ferguson-2014-8> (last visited Feb. 16, 2015) (quoting a soldier from the U.S. Army's 82nd Airborne Division who referred to the Ferguson, Missouri police response to protestors by stating that "[w]e rolled lighter than that in an actual warzone") (on file with the Washington and Lee Law Review).

important issue, analyze the contextual underpinnings, and present a prudent path forward.

II. The Militarization of Police: Sources and Mission Creep

The concept of the “warrior cop”⁵ we see patrolling the streets of America today has been created as a response to the various “wars” propagated by numerous politicians. There have been “wars” on crime, drugs, and, since the terrorist attacks on September 11, 2001, terrorism.⁶ The slide towards militarization began in the 1960s with the war on crime, during which police departments around the country created paramilitary-style police units. Former Los Angeles Police Chief Daryl Gates envisioned the first of these tactical units as a response to the futility of traditional police tactics—such as having officers present as a deterrent—during the 1966 Watts riots.⁷ Gates created the first Special Weapons and Tactics (SWAT)⁸ team to react to high-risk situations, employing military-style guerrilla warfare and counter-sniper tactics he sourced from a nearby U.S. Marine

5. This term has been attributed to Radley Balko. *See generally* RADLEY BALKO, *RISE OF THE WARRIOR COP* (2013).

6. *See* Karl Bickel, *Will the Growing Militarization of Our Police Doom Community Policing?*, *COMMUNITY POLICING DISPATCH*, U.S. DEP’T JUST. (Dec. 2013), http://cops.usdoj.gov/html/dispatch/12-2013/will_the_growing_militarization_of_our_police_doom_community_policing.asp (last visited Feb. 16, 2015) (stating that a combination of academies modeled after military boot camp, military style uniforms, an “us versus them” mentality, and the war on crime, war on drugs, and war on terrorism threaten community policing) (on file with the Washington and Lee Law Review).

7. Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 675 (2001) (citing DARYL GATES, *CHIEF: MY LIFE IN THE L.A.P.D.* 110 (1992); ROBERT L. SNOW, *SWAT TEAMS 6–7* (1996)).

8. The term “SWAT” will be used henceforth to refer to all special units or tactical teams within a law enforcement agency that are used for high-risk or critical situations. These teams are referred to by a number of acronyms such as HRT (Hostage Response Team), SERT (Special Emergency Response Team), SRT (Special Reaction Team), SOG (Special Operations Group), and ESU (Emergency Services Unit). Many of these acronyms are department specific.

Corps unit.⁹ Gates deployed his SWAT team for the first time against the Los Angeles headquarters of the Black Panthers.¹⁰ The botched raid resulted in the use of over five thousand rounds of ammunition and Gates asking Los Angeles Mayor Sam Yorty to request permission from the Department of Defense (DOD) to fire a grenade into the headquarters.¹¹ Radley Balko notes that, in retrospect, it was not the use of a grenade launcher that was remarkable, but “the procedures, the caution, and the trepidation that went into procuring the grenade launcher. About twenty years later, the Pentagon would begin giving away . . . plenty of grenade launchers.”¹² Today, at least two *university* police departments have procured grenade launchers from the federal government.¹³ The grenade launchers have never been used and the campus police departments only have access to gas canister ammunition.¹⁴ The troubling issue, however, is the lack of oversight and discretion on behalf of the federal government that allowed a campus police department to obtain a weapon of war.

The number of specialty police units—and the frequency of their use—expanded in the 1980s to meet the needs of the war on drugs.¹⁵ Today, seventy-nine percent of SWAT team deployments

9. See Singh, *supra* note 7, at 676 (citing DARYL GATES, CHIEF: MY LIFE IN THE L.A.P.D. 109 (1992)).

10. See *id.* at 678.

11. John Payne, *How Police Became a Standing Army*, AM. CONSERVATIVE (Jan. 2, 2014), <http://www.theamericanconservative.com/articles/how-police-became-a-standing-army/> (last visited Feb. 16, 2015) (reviewing Radley Balko’s book, *Rise of the Warrior Cop*) (on file with the Washington and Lee Law Review).

12. *Id.* (internal quotation marks omitted) (quoting BALKO, *supra* note 5, at 79–80).

13. Tyler Kingkade & Alexandra Svokos, *Campus Police Are Stocking up on Military-Grade Weapons*, HUFFINGTON POST (Sept. 15, 2014, 5:47 PM), http://www.huffingtonpost.com/2014/09/15/campus-police-weapons_n_5823310.html (last updated Sept. 16, 2014, 4:59 PM) (last visited Feb. 16, 2015) (explaining what kinds of weapons are in the possession of universities and colleges and noting that sixty-three college campuses have acquired M-16s, twenty-seven have received M-14s, and six have procured mine-resistant vehicles from the Department of Defense) (on file with the Washington and Lee Law Review).

14. *Id.*

15. See Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 7

are for the execution of a warrant, most commonly in drug investigations.¹⁶ The expense of the weapons and gear used by such units made them cost prohibitive in small communities until the advent of the federal 1033 Program.¹⁷ This program, operated by the DOD, allows for surplus military weaponry and gear to be transferred to local law enforcement agencies.¹⁸ Although the equipment supplied by the 1033 Program is free, many small law enforcement agencies could not justify the related maintenance expenses to their respective tax bases at the time the program was introduced.

This changed after 9/11. Suddenly, the federal government tasked every law enforcement agency in the United States—no matter the size—with being a part of the “global war on terrorism.”¹⁹ This new federal mandate also resulted in a massive reorganization of several federal agencies, many of them falling under the control of the newly formed Department of Homeland Security (DHS).²⁰ The DHS has become a powerhouse agency with a 2013 expenditure of over sixty billion dollars.²¹ Some of

(1997) (explaining that paramilitary police units (PPUs) expanded to being used for “high risk warrant work,” which is almost entirely drug raids).

16. ACLU Report, *supra* note 2, at 5 (“SWAT teams were often deployed—unnecessarily and aggressively—to execute search warrants in low-level drug investigations; deployments for hostage or barricade scenarios occurred in only a small number of incidents.”).

17. National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, 110 Stat. 2422 (1996). This Act was an update to the 1208 Program, which was included in the 1991 National Defense Authorization Act. *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, 104 Stat. 1485 (1990).

18. *See About the 1033 Program*, L. ENFORCEMENT SUPPORT OFFICE, DEF. LOGISTICS AGENCY, <http://www.dispositionservices.dla.mil/leso/Pages/default.aspx> (last visited Feb. 11, 2015) (describing how the 1033 Program operates) (on file with the Washington and Lee Law Review).

19. *See The Global War on Terrorism: The First 100 Days*, U.S. DEP’T STATE, <http://2001-2009.state.gov/s/ct/rls/wh/6947.htm> (last updated Jan. 20, 2009) (last visited Feb. 11, 2015) (discussing the U.S. reaction to 9/11 and associated changes in law enforcement) (on file with the Washington and Lee Law Review).

20. *See Creation of the Department of Homeland Security*, DEP’T HOMELAND SEC., <http://www.dhs.gov/creation-department-homeland-security> (last updated Oct. 21, 2014) (last visited Feb. 16, 2015) (on file with the Washington and Lee Law Review).

21. BUDGET-IN-BRIEF FISCAL YEAR 2014, DEP’T HOMELAND SEC.,

this immense budget is available to local law enforcement agencies in the form of grants that can be used to acquire military equipment from the federal government.²² As of 2007, approximately eighty percent of U.S. towns with a population between twenty-five thousand and fifty thousand people maintained a SWAT team.²³ More current numbers of nationwide SWAT deployments are generally unavailable due to a lack of oversight. However, a Maryland law requiring police departments to track SWAT deployments released a report showing that Maryland alone deployed a SWAT team an average of four-and-one-half times per day in 2014 and that over ninety-three percent of those deployments were for the execution of a search warrant.²⁴ Nearly sixty percent of those deployments were for nonviolent crimes.²⁵

As an additional incentive for repeated deployment, SWAT team use can be self-funding. As Peter B. Kraska and Victor E. Kappeler found in a 1996 survey, the execution of warrants on private residences has become a proactive policing tool in which officers are often just as concerned with seizing money and weapons as they are drugs for the purpose of funding new military-style equipment.²⁶ When performing these drug raids,

<http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>.

22. See *Find and Apply for Grants*, DEP'T HOMELAND SEC., <http://www.dhs.gov/how-do-i/find-and-apply-grants> (last updated Oct. 29, 2012) (last visited Feb. 16, 2015) (describing how law enforcement may apply for such equipment) (on file with the Washington and Lee Law Review); *Funding for Equipment*, NAT'L INST. JUST., <http://www.nij.gov/funding/Pages/equipment-funding.aspx> (last updated Sept. 7, 2013) (last visited Feb. 11, 2015) (listing new and surplus equipment funding programs for law enforcement, including the 1033, 1122, and DHS programs) (on file with the Washington and Lee Law Review).

23. Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 507 (2007), <http://cjmasters.eku.edu/sites/cjmasters.eku.edu/files/21stmilitarization.pdf>.

24. See MD. STATISTICAL ANALYSIS CTR., GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, FIFTH REPORT TO THE STATE OF MARYLAND UNDER PUBLIC SAFETY ARTICLE § 3-507, FISCAL YEAR 2014 SWAT TEAM DEPLOYMENT DATA ANALYSIS 3, 6 (2014), <http://www.goccp.maryland.gov/msac/documents/SWATReportFY2014.pdf>.

25. *Id.* at 6.

26. See Kraska & Kappeler, *supra* note 15, at 9 (noting that money and

officers often request “no-knock” warrants, claiming that law enforcement interests merit the lightning-fast display of overwhelming force.²⁷ However, even if the officers are unable to obtain a no-knock warrant, the consequences of proceeding with a no-knock raid anyway are nearly non-existent since the Supreme Court ruled in 2006 that such a raid does not trigger the exclusionary rule.²⁸ The aforementioned ACLU report indicates that, of the law enforcement agencies that it surveyed, SWAT teams were deployed for active-shooter or hostage situations only seven percent of the time.²⁹

The use of SWAT has become so prolific that it seems at times to border on the absurd. The Eleventh Circuit recently ruled in *Berry v. Leslie*³⁰ that police officers using SWAT tactics to perform a *regulatory* raid on Orlando, Florida barbershops violated the Fourth Amendment.³¹ In 2009, the Fifth Circuit allowed a civil rights claim to continue against Louisiana police for a SWAT raid of a nightclub that the officials couched as a regulatory inspection.³² In St. Louis County, Missouri—home to Ferguson—police have announced that it is their standard procedure to use a SWAT team to serve *any* felony warrant.³³

asset seizure through “warrantwork” has become a “proactive policing tactic, perhaps more prevalent than undercover work, of PPUs conducting military-style investigatory drug raids on private residences”).

27. See *Wilson v. Arkansas*, 514 U.S. 927, 929–37 (1995) (finding that the common law knock-and-announce rule is part of the reasonableness analysis of the Fourth Amendment and various factors may justify an unannounced entry).

28. See *Hudson v. Michigan*, 547 U.S. 586, 596–99 (2006) (noting that increasing professionalism of police forces and civil rights suits were enough of a police deterrent to knock-and-announce violations and finding that the exclusionary rule was not warranted in knock-and-announce violations). The exclusionary rule originated in *Weeks v. United States*, 232 U.S. 383 (1914), and was applied to the states via the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court rejected its “indiscriminate application” in *United States v. Leon*, 468 U.S. 897, 908 (1984).

29. See ACLU Report, *supra* note 2, at 5.

30. 767 F.3d 1144 (11th Cir.), *order vacated pending rehearing en banc*, *Berry v. Orange County*, 771 F.3d 1316 (11th Cir. 2014).

31. See *id.* at 1154.

32. *Club Retro v. Hilton*, 568 F.3d 181, 195 (5th Cir. 2009) (noting that defendants were not entitled to qualified immunity for their entry and search of Club Retro).

33. George Sells, *Warrant Served by SWAT Team Causes Scare in South*

Finally, in perhaps the most egregious example of SWAT mission creep in recent memory, an Arkansas police chief announced a policy in 2012 that called for SWAT officers to patrol the streets of an exceptionally small town, stopping every pedestrian who crossed their path and demanding identification and a reason for being out walking.³⁴ According to the chief, those who were unable or refused to produce identification would likely be charged with obstructing a government operation.³⁵ All of these situations violate the intended role of police in society. As John Paul and Michael Birzer note in their essay on the social relations between police and the public, “[t]he job of the police is to react to the violence of others, to apprehend criminal suspects and deliver them over to a court of law[,]” not to “initiate[] violence on command [without concern for] the Bill of Rights.”³⁶ It is abundantly clear that this mindset does not pervade modern policing in the United States.³⁷

Some of these raids have had tragic consequences. In Detroit, a seven-year-old girl was shot in the head and killed after a SWAT team entered her home.³⁸ The suspect that the team

County, Fox2Now St. LOUIS (Aug. 13, 2013, 9:36 PM), <http://fox2now.com/2013/08/13/warrant-served-causes-scare-in-south-county-neighborhood/> (last updated Aug. 14, 2013, 9:31 AM) (last visited Feb. 11, 2015) (on file with the Washington and Lee Law Review).

34. Radley Balko, *The Police State Comes to Arkansas*, HUFFINGTON POST (Dec. 18, 2012, 8:50 AM), http://www.huffingtonpost.com/radley-balko/the-police-state-comes-to_b_2321878.html (last updated Feb. 17, 2013, 5:12 AM) (last visited Feb. 16, 2015) (on file with the Washington and Lee Law Review).

35. *See id.*

36. John Paul & Michael L. Birzer, *Images of Power: An Analysis of the Militarization of Police Uniforms and Messages of Service*, 32 FREE INQUIRY IN CREATIVE SOC. 121, 124 (2004) (quoting Weber, *supra* note 2, at 10).

37. *See, e.g.*, Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me*, WASH POST (Aug. 19, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/> (last visited Feb. 16, 2015) (“[I]f you don’t want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you.”) (on file with the Washington and Lee Law Review).

38. Kate Abbey-Lambertz, *How a Police Officer Shot a Sleeping 7-Year-Old to Death*, HUFFINGTON POST (Sept. 17, 2014, 5:39 PM), http://www.huffingtonpost.com/2014/09/17/aiyana-stanley-jones-joseph-weekley-trial_n_5824684.html (last updated Oct. 2, 2014, 2:59 PM) (last visited Feb. 16,

sought lived in the other unit of the girl's family's duplex, and a man detained on the street before the raid warned the officers that there were children in the home.³⁹ In Cornelia, Georgia, a SWAT team executed a no-knock warrant on a suspected drug dealer and, before entering the home, threw a "flash bang" grenade that landed in the crib of a small child, severely burning the child's face.⁴⁰ Since the incident, a grand jury has cleared the raiding officers of any wrongdoing and the county has rescinded an initial offer to pay for the child's medical expenses.⁴¹ But it is not always the residents of a raided home that are the victims of these aggressive tactics. Although police departments often cite "officer safety" to justify the tactics used in these raids, the SWAT officers themselves have been the victims of violence when an unsuspecting homeowner mistook a no-knock raid for a home invasion and opened fire in perceived self-defense.⁴² In one case in Texas, a grand jury refused to indict a man who killed a police officer under the belief that the officer was a criminal breaking into his home.⁴³

III. Existing Limitations: A Policy Against Military Involvement in Civilian Affairs

Since 1776, the United States government has erected barriers against military involvement in civilian affairs. Courts

2015) (on file with the Washington and Lee Law Review).

39. *Id.*

40. Elliott C. McLaughlin, *No Indictments for Georgia SWAT Team That Burned Baby with Stun Grenade*, CNN (Oct. 7, 2014, 5:50 PM), <http://www.cnn.com/2014/10/07/us/georgia-toddler-stun-grenade-no-indictment/> (last visited Feb. 11, 2015) (on file with the Washington and Lee Law Review).

41. *Id.*

42. See *Botched Paramilitary Police Raids*, CATO INST., <http://www.cato.org/raidmap> (last visited Jan. 2, 2015) (mapping and listing various examples of botched paramilitary police raids) (on file with the Washington and Lee Law Review).

43. Clay Falls & Michael Order, *Man Charged with Killing Burleson County Deputy No Billed by Grand Jury*, KBTX.COM (Feb. 7, 2014, 8:50 PM), <http://www.kbtx.com/home/headlines/Man-Charged-With-Killing-Burleson-County-Deputy-No-Billed-by-Grand-Jury-243993261.html> (last visited Feb. 16, 2015) (on file with the Washington and Lee Law Review).

have long noted these restrictions, viewed as utterly essential to basic liberty,⁴⁴ and exemplified by such laws as the Third Amendment to the Constitution,⁴⁵ the Insurrection Act,⁴⁶ and the Posse Comitatus Act (PCA).⁴⁷ The quartering of British troops in colonial Boston in the late eighteenth century served as a partial catalyst to the Revolutionary War.⁴⁸ These troops were placed among the dissident population of Boston as a show of power in an attempt to coerce an increasingly volatile populace into submission.⁴⁹ The Founders took issue with military law enforcement for several reasons, but none was more infuriating to those under martial law than their inability to dispense justice

44. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 15–16 (1972) (“[A] traditional and strong resistance of Americans to any military intrusions into civilian affairs . . . found early expression, for example, in the Third Amendment’s explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.”); *United States v. Dreyer*, 767 F.3d 826 (9th Cir. 2014) (holding that a NCIS sweep of civilian computers throughout Washington state for child pornography violated the Posse Comitatus Act and that the evidence should be excluded because of “a traditional and strong resistance of Americans to any military intrusion into civilian affairs” (quoting *Laird*, 408 U.S. at 15)). The PCA was originally enacted on the understandings that “[t]he great beauty of our system of government is that it is to be governed by the people,” and that if we use the “military power . . . to discharge those duties that belong to civil officers and to the citizens,” we “have given up the character of [our] Government; it is no longer a government for liberty; it is no longer a government founded in the consent of the people; it has become a government of force.” 7 CONG. REC. 4247 (1878) (statement of Sen. Benjamin Hill). See generally CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW (2012), <https://www.fas.org/sgp/crs/natsec/R42659.pdf>.

45. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”). See generally Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117 (1993) (detailing the origins and use of the Third Amendment).

46. 10 U.S.C. §§ 331–35 (2012).

47. 18 U.S.C. § 1385 (2012).

48. See DOYLE & ELSEA, *supra* note 44, at n.12 (“The soldiers, one ought always to remember, went into Boston not as an occupying army but rather as a force of uniformed peace-keepers, or policemen. Their role as even the radicals conceived it was to assist the executive and if necessary the courts to maintain order.” (internal citation omitted)).

49. See *id.*

when a soldier committed a crime.⁵⁰ The militarized police forces in the United States today mirror the British military that occupied Boston most vividly in this light.

It is difficult to hold an officer personally liable for a crime or civil rights violation committed while exercising official police business. In the civil context, qualified immunity has become an almost insurmountable tool to prevent the personal liability of law enforcement officers.⁵¹ As for criminal liability, a local law enforcement officer is nearly insusceptible to grand jury indictment.⁵²

A cursory legal analysis of the aforementioned Insurrection Act, PCA, and Third Amendment⁵³ demonstrates that there is nothing strictly *illegal* about a militarized local police force.⁵⁴ For

50. See THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776) (“He [King George] has affected to render the Military independent of and superior to the Civil power . . . [He has assented to] protecting them [the soldiers], by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”).

51. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”); Philip M. Stinson, Steven L. Brewer Jr., Theresa M. Lanese & Mallorie A. Wilson, *Federal Civil Rights Litigation Pursuant to 42 U.S.C. §1983 as a Correlate of Police Misconduct*, AM. SOC’Y OF CRIMINOLOGY (Nov. 2014), http://works.bepress.com/cgi/viewcontent.cgi?article=1037&context=philip_stinson (discussing a study of how civil litigation against police officers relates to officer misconduct).

52. See Philip M. Stinson, Evin J. Carmack, Jacob M. Frankhouser & Mallorie A. Wilson, *Police Crime Arrests in the United States, 2011*, AM. SOC’Y OF CRIMINOLOGY (Nov. 2014), http://works.bepress.com/cgi/viewcontent.cgi?article=1039&context=philip_stinson (noting that during a seven-year period, ending in 2011, forty-one police officers were charged with either murder or manslaughter out of 2,600 justifiable homicides that were reported to the F.B.I. in the same period) (on file with the Washington and Lee Law Review); James C. McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0 (last visited Feb. 16, 2015) (noting how “the justice system can favor the police, often shielding them from murder or serious manslaughter charges”) (on file with the Washington and Lee Law Review).

53. See *supra* notes 44–47 and accompanying text.

54. See generally DOYLE & ELSEA, *supra* note 44 (discussing the legal underpinnings and application of the PCA); Canestaro, *supra* note 2, at 100

example, for the purposes of Posse Comitatus, the militarized local police forces are not “part of the Army or Air Force” under the direct command of the Department of Defense.⁵⁵ Further, the PCA was substantially weakened in 1981 to allow the military to more completely participate in the war on drugs.⁵⁶

Be this as it may, the strict legality of an action taken in reliance on the status quo does not lend credence to the proposition that it is the moral, ethical, or prudent path for our society, as we have so painfully learned in the past.⁵⁷ Therefore, now is the time for action; be it legislation, litigation, or a shift in policy, an effective solution to this threat to liberty must be found. A glimmer of hope in the litigation context has recently surfaced in a judicial strengthening of the long-neglected PCA. In *United States v. Dreyer*,⁵⁸ the Ninth Circuit held that—beyond the criminal sanctions included in the statute, which have never been successfully invoked—a PCA violation can lead to the exclusion of evidence.⁵⁹

(noting that “increased public confidence in the military and judicial deference to military actions have undermined the principles upon which the PCA was founded” and there is a resulting increase in the DOD’s legal freedom to intervene domestically).

55. See, e.g., DOYLE & ELSEA, *supra* note 44, at 54 (discussing the legal test to determine whether military activity in support of civilian authorities violated the PCA); Canestaro, *supra* note 2, at 123 (discussing the phrase “any part of the Army” within the PCA).

56. See DOYLE & ELSEA, *supra* note 44, at 41–46 (noting the expansions made to the PCA during the 1981 amendments); Canestaro, *supra* note 2, at 114–16 (discussing the 1981 amendments to the PCA).

57. See, e.g., U.S. CONST. art. I, § 2, (outlining the three-fifths compromise); *id.* art. I, § 9, (discussing the “importation of such persons”); *id.* art. IV § 2 (“No person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor”); Indian Removal Act, 4 Stat. 411, § 1 (1830) (providing for an exchange of land with the Indians and their removal); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (concluding that the doctrine of “separate but equal” was constitutional), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (finding that segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment).

58. 767 F.3d 826 (9th Cir. 2014).

59. See *id.* at 835–36 (noting that there is a need to exercise the exclusionary rule because “there is evidence of widespread and repeated violations” (internal citations omitted)).

IV. The Federal Response to Militarization: Too Little Too Late

Shortly after the public display of power in Ferguson, the U.S. Senate began reacting to public outcry over the efficacy of militarized police forces. As part of this bipartisan reaction, Senators “criticized federal programs that outfit police departments with military gear, saying they waste funds and sow mistrust between law enforcement and the communities they police.”⁶⁰ While initially promising, as of the time of this writing, any congressional action on this issue seems unlikely.

In 2014, President Barack Obama ordered a review of the acquisition programs that funnel military-grade equipment to local law enforcement agencies.⁶¹ The Executive Office of the President released its conclusions in a memorandum that detailed the sources of the questionable equipment being used on American streets and posited suggestions for curtailing law enforcement militarization in December 2014.⁶² In January 2015, President Obama signed an executive order creating “law enforcement working group” co-chaired by the Secretaries of Defense and Homeland Security and the Attorney General.⁶³ The executive order requires the working group to: (1) “identify agency actions that can improve Federal support for the acquisition of controlled equipment” by local law enforcement

60. Andrew Grossman, *Senators Criticized Growing Militarization of Local Police Departments*, WALL ST. J. (Sept. 9, 2014, 7:38 PM), <http://www.wsj.com/articles/senators-criticize-militarization-of-local-police-departments-1410287125> (last visited Feb. 11, 2015) (on file with the Washington and Lee Law Review).

61. Mark Landler, *Obama Offers New Standards on Police Gear in Wake of Ferguson Protests*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/us/politics/obama-to-toughen-standards-on-police-use-of-military-gear.html> (last visited Feb. 16, 2015) (on file with the Washington and Lee Law Review); Alicia Parlapiano, *The Flow of Money and Equipment to Local Police*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/interactive/2014/08/23/us/flow-of-money-and-equipment-to-local-police.html> (last visited Feb. 16, 2015) (on file with the Washington and Lee Law Review).

62. See EXEC. OFF. OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION (Dec. 2014), http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf.

63. Exec. Order No. 13,688, 80 Fed. Reg. 3451, 3451–3453 (Jan. 22, 2015).

agencies (LEAs); and (2) “provide [a report containing] specific recommendations [and an implementation plan] to the President regarding actions that can be taken to improve the provision of Federal support for the acquisition of controlled equipment by LEAs.”⁶⁴

It is doubtful that the working group created by President Obama will recommend complete demilitarization of the police or shift the culture of militarization. In fact, these proposals may exacerbate the situation. For example, the committee suggests that it is “possible that an increase in technology sharing, cross-training and increased operational relationships between LEAs and the military can foster an environment at the local level in which it is difficult to distinguish between the appropriate *military* use and the appropriate *LEA* use of the same equipment.”⁶⁵ It seems that the executive response to the perceived over-militarization of American police will include actual military training and closer relations between law enforcement and military organizations, which will likely intensify the military mindset adopted by police forces.

Additionally, the President’s memorandum contains a suggestion that law enforcement agencies should “have policies in place that address appropriate use and employment of controlled equipment, as well as protection of civil rights and civil liberties.”⁶⁶ While facially a bold and admirable endeavor, this too falls short of what is needed. As evidenced by the July 2014 death of Eric Garner at the hands of the New York Police Department, the existence of a department policy does little to assure law enforcement accountability. After all, the officer responsible for Mr. Garner’s death violated a longstanding policy of his department and was not indicted.⁶⁷ Another suggestion contained

64. *Id.*

65. EXEC. OFF. OF THE PRESIDENT, *supra* note 62, at 4.

66. *Id.* at 6.

67. See Ray Sanchez & Shimon Prokupecz, *Protests After N.Y. Cop Not Indicted in Chokehold Death; Feds Reviewing Case*, CNN (Dec. 4, 2014, 6:09 AM), <http://www.cnn.com/2014/12/03/justice/new-york-grand-jury-chokehold/> (last visited Feb. 16, 2015) (describing Garner’s death, the police officer’s violation of department policy, and the lack of indictment for that violation and Garner’s death) (on file with the Washington and Lee Law Review).

in the memorandum would “[r]equire after-action analysis reports for significant incidents involving federally-provided or federally-funded equipment.”⁶⁸ While this recommendation appears to have value, one can only speculate as to what constitutes “significant incidents.” As explained in detail above, SWAT deployment has become a daily occurrence in the United States, with St. Louis County, Missouri, maintaining a policy that all felony warrants must be served by a SWAT team.⁶⁹ Thus, it is very unlikely that such routine practice would qualify as “significant.” Further, the aforementioned self-funding nature of these tactical teams would suggest that many of them are no longer in need of federal funding or equipment, and will therefore be able to functionally ignore any suggestions made by the President’s working group.⁷⁰

This ability to evade federal oversight is the reason that localities must ensure that law enforcement agencies remain accountable to the communities they serve. In this sense, the White House review succeeds. The memo suggests that the President “[r]equire local civilian (non-police) review of and authorization for LEAs to request or acquire controlled equipment.”⁷¹ Some states have already responded to botched raids and militarized tactics by enacting legislation aimed at gathering statistics on the issue.⁷² Such laws are promising, and certainly have merit, but policies must be implemented to limit SWAT raids to the originally intended scope of hostage and active shooter situations.

V. Conclusion

68. EXEC. OFF. OF THE PRESIDENT, *supra* note 62, at 6.

69. *See* Sells, *supra* note 33 (describing Missouri’s policy of SWAT team use).

70. *See* Kraska & Kappeler, *supra* note 15, at 9 (describing the means by which certain police forces are self funded).

71. EXEC. OFF. OF THE PRESIDENT, *supra* note 62, at 6.

72. *See, e.g.*, UTAH CODE ANN. § 77-7-8.5 (2014) (requiring law enforcement agencies to report several statistics involving SWAT deployment); MD. STATISTICAL ANALYSIS CTR., *supra* note 24.

The citations presented in this Essay are a demonstration of the important first step that our country has taken in the demilitarization of police: awareness. The sources above represent all sides of the political, socioeconomic, and cultural spectrum, serving as a representation of the true import of the issue. However, it is critical that the American people take hold of this wave of public discourse to effect true change upon the destructive policies outlined herein. The people must strive to reintegrate police forces into the communities that they serve. The normalization of SWAT raids must stop, and officers' faith in their own communities must be restored. No longer can we allow the overarching concept of "officer safety" to degrade justice and democracy. Rather, the paragon of a safe police officer is one that is protected by the community itself, not at war with it. Localities must pass their own laws and policies that demilitarize law enforcement agencies and allow communities to move forward with a proactive police force that restores the lost adage of "peace officer."