THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

THE CONSTITUTIONAL IMPLICATIONS OF THE USE OF MILITARY EQUIPMENT BY LAW ENFORCEMENT

EXECUTIVE SUMMARY

&

POLICY BRIEF

SUBMITTED BY

THE CONSTITUTION PROJECT COMMITTEE ON POLICING REFORMS

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EXECUTIVE SUMMARY

Background

The Constitution Project Committee on Policing Reforms ("Committee") is grateful to the President's Task Force on 21st Century Policing ("Task Force") for soliciting comments regarding the use of military equipment by domestic law enforcement. The Committee comprises diverse individuals with expertise in law enforcement, legal analysis, and the issues implicated in the attached brief.[1] As military-grade weapons, equipment, and surveillance tactics are available to state and local law enforcement agencies, the Committee is concerned with the constitutional issues that may arise with the use of such equipment. Recent protests over the deaths of civilians by police officers in Ferguson, Missouri and in New York City have given rise to a robust national conversation on the use (and even simple display) of military weapons by law enforcement and its impact on community policing. Additionally, there is renewed focus on the use of Special Weapons and Tactics ("SWAT") teams nationwide, particularly the use of SWAT teams to execute search warrants.

There are a number of sources that delve into the historical background of police militarization, its causes and effects, and the dangers it can pose to both law enforcement and civilians. The Committee's attached policy brief explores the constitutional implications of the use of military equipment by state and local law enforcement.[2] Given the new creation of the Task Force and its 90-day mandate, the Committee had limited time to submit a timely statement to the Task Force. Please note that the views of the Committee on these issues and recommendations may evolve over time, after further research, internal discussion, and analysis. However, the Committee felt it must submit its current views and recommendations for consideration as important policy decisions are contemplated by the Administration and the U.S. Department of Justice. Over the next month, the Committee will further refine its views and publish a more nuanced, detailed, and thorough report and set of recommendations, which will be available on The Constitution Project's website.

The attached report is not intended to be legal advice nor is it comprehensive. Instead, the Committee hopes that readers will better understand how military equipment and tactics, when used by law enforcement for domestic policing, raise a host of constitutional questions and that safeguards must be implemented to prevent miscarriages of justice. Below is an executive summary of the attached report, including the Committee's recommendations.

First Amendment

Local law enforcement's use of military surveillance techniques and military equipment, from armored personnel carriers to Long Range Acoustic Devices ("LRADs"), can implicate an individual's right to free speech under the First Amendment. This threat arises from two potential

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[1] The full list of Committee members who support this submission is available in Appendix A. The full policy brief is attached as Appendix B.

[2] The Constitution Project (TCP) sincerely thanks the law firm of Latham & Watkins LLP, which provided a team of pro bono attorneys to guide the Committee on Policing Reforms in crafting this submission. The Latham team included Cameron Krieger, Thomas Heiden, Kathleen Lally, Catherine Sullivan, Michael Fielkow, Stephen Schmulenson, and Chris Dyess, all of whom provided significant time and tremendous guidance to this effort. TCP also thanks the law firm of Steptoe and Johnson LLP for its provision of an initial memorandum on some of the issues addressed in this policy brief.

sources: one, the chilling effect that visible firepower can have on a protester or a potential protester; and two, the fact that the use of such equipment may not be narrowly tailored to meet a significant governmental interest.

Regarding the former, the *threat* of military equipment and surveillance techniques alone may give rise to constitutional concerns. This paper examines the recent trend towards "preemptive policing" as well as research that has been conducted into the "weapons effect." Preemptive policing covers a number of police activities that occur prior to a law being broken, from shutting down meetings to arresting protesters. Protesters' knowledge that police will apply sophisticated surveillance programs borrowed from military intelligence agencies against them, or that police may arrive in armored personnel carriers and potentially use tear gas, may deter protests before they even begin. Empirical research suggests that a police force using military equipment may deter protesters to a greater degree than a traditional police force.

Second, if the government possesses a legitimate interest in crowd control when citizens are exercising their right to free speech and assembly, law enforcement's use of military equipment and surveillance techniques must be sufficiently narrowly tailored to advance that interest. Indeed, the government may regulate speech in a public form if the restriction is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. Considering the wide range of military equipment and tactics available to local law enforcement, it may be unclear whether the deployment of military weapons and tactics is narrowly tailored to achieve a significant government interest. Such constitutional questions are typically fact-specific. This report encourages the government to address potential First Amendment infringement.

Fourth Amendment

The use of military equipment by law enforcement may also implicate Fourth Amendment rights, which guarantee the right of people to be secure against unreasonable searches and seizures. The analysis, however, is also highly fact-driven and it is thus difficult to determine whether the use of military tactics and equipment rises to a *per se* violation. Conceptually, it is helpful to consider the impact of police militarization on Fourth Amendment rights in two different contexts: warrantless searches and searches conducted pursuant to a warrant.

Because warrantless searches are presumptively unreasonable, the question becomes whether a particular form of police surveillance qualifies as a search. With federal programs providing high-tech military equipment to local law enforcement, this question has become even more pressing. The Supreme Court has held, for example, that use of a thermal imaging device to scan levels of heat inside a house is a search, in part because the device provided information that could not be obtained through physical surveillance and used technology not available to the general public. In contrast, the use of night vision goggles does not constitute a search, since this technology can be purchased by the general public. The use of different and potentially more sophisticated equipment has less clear constitutional implications. Use of military-grade technology -- as well as collection of the masses of information available through other electronic data sources -- may be a boon to the efficiency of law enforcement, but the invasion into personal privacy gives rise to serious Fourth Amendment concerns.

In searches conducted pursuant to a warrant, the questions are somewhat different. The

Committee is concerned with the proliferation of SWAT teams, the increased use of no-knock warrants, and the deployment of SWAT teams with military gear to execute routine search warrants. Unannounced entries and the use of certain equipment during forced entries give rise to Fourth Amendment concerns. The lack of standards for both issuing a no-knock warrant and deploying SWAT to execute these warrants gives rise to a significant likelihood of Fourth Amendment violations.

Similarly, use of battering rams and flashbang grenades when executing no-knock warrants is also of concern. These tools are often procured by local law enforcement from military surplus programs. Questions are raised by the frequency with which these devices are used and the damage to community members and property that result. Although use of these devices is may be merited in "high risk" situations, courts have provided little guidance in defining those "high risk" scenarios warranting use of battering rams and flashbang grenades. And too many searches that are classified *ex ante* as "high risk" appear to have been conducted in homes with children present, where no weapons were present, where only very small amounts of drugs were found, or even when police executed the warrant at the wrong address. Evidence also suggests that the use of these devices can escalate what might otherwise have been a non-violent search.

Due Process

The use of military weapons and tactics by local law enforcement agencies will implicate due process rights in limited circumstances. The Supreme Court has circumscribed substantive due process claims to those cases in which another constitutional Amendment, *e.g.*, the Fourth or the Eighth, would not apply. Due process thus has a narrow window of applicability, relevant most often in the "pre-trial detainment" period between the time of arrest and conviction. During that period, the use of military equipment is unlikely to raise concerns in many scenarios.

The standard for a due process violation is that police conduct must "shock the conscience." Under this standard, even if military tactics and equipment are used with severe negligence in a detainment situation, a court is unlikely to find a violation of the law. A possible exception is if a detainee injured in the course of an arrest. Due process protections prohibit law enforcement from displaying "deliberate indifference" to the "serious" medical needs of a pre-trial detainee, requiring that police officers at least respond to the injuries of arrestees. Because certain military-styled technologies common in SWAT raids, such as assault rifles, flashbang grenades and battering rams may be more likely to cause physical harm to an arrestee, a law enforcement officer's due process obligation to provide such medical care may arise more often.

Procedural due process is generally satisfied so long as post-deprivation procedural remedies are available for property owners to recover any seized assets. Moreover, the destruction of property during an arrest, which seems most relevant to the discussion of SWAT and the execution of search warrants, is typically analyzed as a Fourth Amendment issue, so also does not raise many due process concerns.

Equal Protection

Concerns about violations of the Fifth and Fourteenth Amendments' guarantee of equal protection have been raised as Americans observe the incidents that recently unfolded during protests nationwide. Certainly, significant public opinion about police militarization focuses on the

use of military equipment and tactics against communities of color. At the same time, those seeking to challenge the use of military equipment and tactics under the rubric of Equal Protection would likely face a number of barriers, discussed in more detail in the attached policy brief.

Conclusion & Recommendations

It is clear that the use of military weapons and tactics by local law enforcement agencies presents a variety of constitutional concerns. It is also clear, however, that an individual asserting a legal claim for potential constitutional violations will face a number of barriers and such claims have only a marginal likelihood of success. That said, it is likely that as the number of law enforcement agencies receiving and using military equipment increases, the number of suits alleging constitutional violations will also rise. As such, the recommendations below and in the attached policy brief focus not only on the potential for constitutional violations, but also include policy choices that could minimize the potential for such violations.

Create Clear and Consistent Standards

- States should work to create standards for law enforcement regarding the deployment and training of SWAT teams and other tactical teams. Any such standards should include, among other things:
    - Policies limiting the use of SWAT and other tactical teams in which there is a threat to the lives of civilians or police;
    - Standards and specific criteria[3] that must be met prior to approval of use of SWAT or other tactical teams;
    - Pre-approval by a supervisor or high-ranking official for the use of SWAT or other tactical teams;
    - Written plans setting forth the reasons for the use of SWAT or other tactical team, including a description of the operation prior to deployment; and
    - Policies requiring SWAT teams to include trained crisis negotiators.
- States and/or law enforcement agencies should create standards for application and issuance of no-knock warrants. It may be helpful to set forth various factors that may be considered -- such as violent crime history and corroborating evidence other than, or in addition to, an anonymous source -- and require documentation of these criteria and supervisory approval prior to requesting a no-knock warrant from a judicial officer.
- States should enact laws that would prevent the use in legal proceedings of evidence that was obtained in violation of the traditional rule that police should knock and announce their presence, unless such evidence was properly obtained with a no-knock warrant.
- The federal government should create clear standards to assess requests for new equipment under the 1033 Program (the federal program provisioning military equipment to local police), including requiring specific justification for the equipment requested and limiting the types of material that the law enforcement agencies may acquire based upon the equipment that they already have and/or the needs of their location.
- As part of the 1033 Program, the Department of Defense should require that law enforcement agencies report on the uses of 1033 equipment as well as conduct regular audits and report routinely on current inventory.

[3] The Committee is still discussing proposed criteria, and more detailed criteria recommendations will be available in the final, forthcoming report.

Improve Training and Emphasize the Peace-Keeping Role of Police

- Jurisdictions must improve training for law enforcement agencies and emphasize that the use of military equipment and tactics must be limited and deployed in unique circumstances. Training must highlight the peace-keeping role of law enforcement as distinct from the combative role of the military.
- Local law enforcement agencies should engage in more community outreach and community-oriented policing and engage in less "preemptive" policing. For example, officers may want to engage in "know your rights" presentations at community centers or schools either with local activist groups or by themselves. Additionally, training should include a component to help officers identify, confront, and discard biases that affect the way they interact with community members.
- Jurisdictions should supplement equipment training with legal training so that local law enforcement officers are informed with respect to the relevant legal standards accompanying certain types of surveillance. To the extent that officers already receive training regarding warrant requirements, ensure that such training incorporates discussion of major case law and legislation -- including the Electronic Communications Privacy Act -- governing contexts in which requirements for obtaining search warrants might vary.

Create Transparency and Oversight

- States should enact laws that require law enforcement agencies to report data regarding the use of SWAT. A non-exhaustive list of important content to be captures in these data include when SWAT teams were deployed, where they were deployed, the circumstances of the deployment and the compliance with the applicable deployment standard, what equipment was used, whether any people or animals sustained injury or were killed, and whether any drugs, weapons or other contraband were recovered. These data should be reported on a regular and uniform basis and be publicly accessible.
- States should enact similar reporting requirements for the issuance of no-knock warrants.
- States should enact laws that require law enforcement agencies to report data regarding complaints of excessive force and other constitutional violations. States should collect information, including figures regarding the settlements and awards paid, as well as litigation costs for police misconduct lawsuits. These data should be publicly available.
- States should ensure that there is an independent agency or civilian review board that monitors SWAT deployments, no-knock warrants and use of other military equipment by law enforcement and that the agency or board has the ability to address complaints from civilians as well as recommend or implement reform. Such bodies should be empowered to evaluate trends and address patterns that emerge, rather than merely review individual cases as they arise.
- Law enforcement agencies receiving federal funds for the purchase of equipment should be required to report the equipment purchased with those funds. These reports should be publicly available.
- Congress should condition the receipt of federal funds for policing and military equipment on complying with uniform reporting and training requirements.

APPENDIX A

The following members of The Constitution Project Committee on Policing Reforms endorse this submission to the President's Task Force on 21st Century Policing:

Azizah al-Hibri
Professor Emerita, The T.C. Williams School of Law, University of Richmond; Founder and Board of Directors, KARAMAH: Muslim Women Lawyers for Human Rights

David E. Birenbaum
Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; US Ambassador to the UN for UN Management and Reform, 1994-1996; Assistant General Counsel to the National Advisory Commission on Civil Disorders, 1968

Cheye M. Calvo
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Peter B. Kraska
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Visiting Lecturer in Public Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University

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William S. Sessions
Holland & Knight, LLP; Director, Federal Bureau of Investigation (1987-1993); Chief Judge, United States District Court, Western District of Texas (1980-1987), Judge, (1974-1987); United States Attorney, Western District of Texas (1971-1974)

Kami Chavis Simmons
Professor of Law and Director of the Criminal Justice Program, Wake Forest University School of Law

Neal R. Sonnett
Member, ABA Board of Governors, 2009-2012; Chair, ABA Section of Criminal Justice, 1993, and ABA Section of Individual Rights and Responsibilities, 2008-2009; President, American Judicature Society, 2006-2007; President, National Association of Criminal Defense Lawyers, 1989-1990; Assistant United States Attorney and Chief, Criminal Division, Southern District of Florida, 1967-1972

Vincent Southerland
Senior Counsel, NAACP Legal Defense and Educational Fund

Norm Stamper
Chief, Seattle Police Department, 1994-2000; Executive Assistant Chief of Police, San Diego Police Department, 1966-1994

James Trainum
Criminal Case Review & Consulting; Detective, Metropolitan Police Department of DC, 1983-2010

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Lecturer in Law and Executive Director, Center for Technology, Innovation and Competition, University of Pennsylvania Law School; Affiliate Scholar, Stanford Law School Center for Internet and Society

John K. Van de Kamp
Counsel, Mayer Brown LLP; Former California Attorney General, 1983-1991; Former Los Angeles County District Attorney, 1975-1983; Federal Public Defender, Los Angeles, 1971-1975

John W. Whitehead
President and Founder, The Rutherford Institute; constitutional attorney; author of the award-winning 2013 book, "A Government of Wolves: The Emerging American Police State."

Lawrence B. Wilkerson, Col, USA (Ret)
Distinguished Visiting Professor of Government and Public Policy at the College of William and Mary; former Chief of Staff to Secretary of State Colin Powell and special assistant to chairman of the Joint Chiefs of Staff, General Colin Powell

Hubert Williams
Immediate Past President, Police Foundation; former Newark Police Director; founding President of the National Organization of Black Law Enforcement Executives (NOBLE); former Special Advisor to the Los Angeles Police Commission

Michael A. Wolff
Dean and Professor of Law, Saint Louis University School of Law; former Judge and Chief Justice of Supreme Court of Missouri

APPENDIX B

POLICY BRIEF

THE CONSTITUTIONAL IMPLICATIONS OF THE USE OF MILITARY EQUIPMENT BY LAW ENFORCEMENT

BY

THE CONSTITUTION PROJECT COMMITTEE ON POLICING REFORMS

I. Background

Recent events in Ferguson, Missouri, and across the country have caused many to question the use of military equipment and tactics by state and local law enforcement in the United States. In truth, this debate has been ongoing for some time. Although focus in the past has been on the use of Special Weapons and Tactics (SWAT) teams by law enforcement, additional questions have risen with the use of military-grade equipment during political protests. This paper will examine the constitutional issues that may be raised by these situations, both in the provision of military equipment and its deployment by local law enforcement.

Historically, law enforcement and the military have served different purposes.[4] The military's mission is often framed to "search and destroy" enemies located outside the U.S, while the mission of local police is to "serve and protect" its local communities.[5] There are undoubtedly situations in which it may be necessary for police to use military weapons and tactics. For example, in New Orleans during Hurricane Katrina, police used Humvees and other military equipment to help civilians trapped by flood water. Military equipment and tactics were intended to be used on a limited basis in high-risk situations, such as an active shooter or hostage and barricade scenarios. However, the increasing provision and use of military equipment by law enforcement has caused concern, even among law enforcement personnel. The essential function of law enforcement becomes muddled when officers are equipped with military-grade gear and vehicles in carrying out their duties in local communities and homes.[6]

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[4] The Posse Comitatus Act, passed in 1878, prohibits military personnel from providing direct assistance to civilian law enforcement. Since the 1980s, a series of laws, orders, and directives from Congress and the White House have softened the impact of the Act, allowing indirect assistance to local law enforcement through the sharing of information, equipment, and training. *See* Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, July 2006, at 15, available at http://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america (hereinafter "Balko White Paper").

[5] Balko White Paper at 15.

[6] For example, one police chief expressed a common fear that military gear and training "paints civilians as the enemy in the eyes of police officers." Balko White Paper at 16.

Federal programs, such as the Department of Defense's 1033 program, have made military-grade equipment available to local law enforcement.[7] In 2013 alone, according to the Defense Logistics Agency, the 1033 program gave $450 million worth of equipment to local law enforcement. Other programs provide federal money to local law enforcement, and often this funding is tied to achieving certain goals related to drug policing. These programs have led to local law enforcement agencies acquiring significant military equipment; for example, a small town in New Hampshire received an armored personnel carrier based on alleged "threats of terrorism."

One of the most compelling examples of the potential misuse of the program comes from the small town of Morven, Georgia. With a population of less than 600 people, Movern had received over $4 million worth of military equipment by 2013, despite having very little crime. The police chief formed a SWAT team with the surplus equipment, including a Humvee and an armored personnel carrier, and acquired boats and scuba gear to form a dive team, despite the fact that Movern is not near a body of water deep enough to use such gear. The Movern police chief stated that, with the equipment that town has received through the 1033 program, he could "shut this town down" and "completely control everything."[8]

Extensive transfers of equipment and vehicles have taken place through the program - in some cases, the amount of equipment rivals that of a small country. For example, the state of Arizona has received 29 armored personnel carriers, 9 military helicopters, nearly 800 M-16 automatic rifles, more than 400 bayonets, and more than 700 pairs of night-vision goggles.[9] In addition. the federal government and most state and local governments fail to exercise a significant degree of oversight of either the acquisition of these materials or their deployment. Indeed, the federal government, which is the grantor of such equipment, does not impose or enforce any meaningful oversight regarding those law enforcement agencies that receive equipment or of law enforcement's subsequent use of it. A few states have begun to enforce

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[7] For purposes of this paper, the focus will be on weapons, vehicles, and other tactical military equipment that is being allocated to local law enforcement. Surplus equipment provided under the 1033 program also includes things like electrical wire, office supplies, and clothing. *See Most Popular Items in the Defense Department's 1033 Program*, U.S. NEWS & WORLD REPORT, Aug. 21, 2014, available at http://www.usnews.com/news/blogs/data-mine/2014/08/21/most-popular-items-in-the-defense-departments-1033-program.

[8] *AP Impact: Little Restraint in Military Giveaways*, NATIONAL PUBLIC RADIO, July 31, 2013, available at http://www.npr.org/templates/story/story.php?storyId=207340981.

[9] *Arizona Has More Military Gear than Some Small Countries*, ARIZONA CAPITOL TIMES, Sept. 30, 2014, available at http://azcapitoltimes.com/news/2014/09/30/arizona-military-equipment-more-than-some-small-countries/.

oversight and standards, but those states are moving of their own accord and are atypical. Local recipients vary even more widely, but generally act like any grantee, subject to the conditions of a grant. Although some local departments have been temporarily suspended from the 1033 program because they have been unable to locate weapons obtained through the program, it does not appear that any level of government conducts routine audits. For example, Arizona's state coordinator is a police detective who has stated that he relies on the applying agencies to "self-report."[10]

Arizona is not alone: the state coordinators required by the 1033 program are often local police officers charged with reviewing the applications of their peers, and it seems many of those applications are accepted at face value. It also does not appear that the federal government exercises an in-depth review of applications it processes directly. In Keene, New Hampshire, for example, the local police department received funds through a program run by the Department of Homeland Security ("DHS") to purchase an armored personnel carrier by stating the vehicle was necessary to protect against potential acts of terror. A Keene city councilperson said the application mentioned terrorism because "that's just something you put in the grant application to get the money. What red-blooded American cop isn't going to be excited about getting a toy like this?"[11]

It is also necessary to consider the use of military tactics and training by law enforcement. Many local law enforcement agencies receive training from former military personnel. Though more research needs to be done on the psychological effects of the specific situation, existing research suggests that, by equipping police officers like soldiers and using catchphrases like "From Warfighter to Crimefighter," police are more likely to act aggressively, and situations are more likely to escalate simply from having heavier firepower visible to citizens.

Despite the stated purpose of programs like the 1033 program or the DHS grant program to protect against terrorism and similar threats, the equipment and money flowing through these programs is far more often used for routine community police work, such as serving search

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[10] *ACLU Knocks PSCO on Surplus Use*, COPA MONITOR, July 2014, available at http://www.copamonitor.com/news/local/article_c95a12be-fe27-11e3-9714-0019bb2963f4.html?mode=jqm.

[11] *War Comes Home: The Excessive Militarization of American Policing*, AMERICAN CIVIL LIBERTIES UNION, June 2014, at 26, available at https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf (hereinafter "ACLU Report").

warrants or policing protests. In considering the constitutionality of these programs and how this equipment is used by local law enforcement, it is worth a brief overview of some history.

SWAT teams, which started in Los Angeles in the 1960s in response to the Watts riots, were originally conceived as a more militarized part of local law enforcement, with the specific mission to deploy on a limited basis in high-risk situations. As both money and equipment became more available to support these teams, however, their use spread widely. When the "War on Drugs" escalated in the 1980s, the number of SWAT teams ballooned and those teams were used more and more for routine police work like executing search warrants, particularly in search of drugs.

In the late 1990s, 90% of cities and towns and 65% of mid-sized cities had a SWAT team.[12] Today, towns with as little as a few thousand people boast SWAT teams.[13] Indeed, the use of SWAT teams from 1980 to 2000 has increased by approximately 1,500 percent.[14] And, in part because of a need to justify the expense of maintaining such a team and in part to generate revenue from drug arrests, SWAT is now deployed far more often to execute search warrants than any of its original purposes.[15] While certainly there are search warrant situations that merit the use of military equipment and tactics, the basis for classifying these warrants as high-risk in many cases appears unsupported. Often, a warrant is issued only on the uncorroborated word of an anonymous informant. Both the decision to request a no-knock warrant and the decision to send SWAT to execute a warrant are essentially at the discretion of local law enforcement, with no clear guidelines and with a lack of oversight by the courts.[16] This reliance on law enforcement's discretion is an insufficient safeguard. As one study found, guns were located in only a third of the searches in which police officers claimed the presence of guns warranted SWAT.[17]

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[12] Peter B. Kraska and V. E. Kappeler, "Militarizing American Police: The Rise and Normalization of Paramilitary Units," Social Problems 13 (1997): 1–18. 46; Peter B. Kraska and Louis J. Cubellis, "Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing" Justice Quarterly 14, no. 4 (December 1997): 605–29.

[13] Balko White Paper at 9.

[14] Peter Kraska, Militarizing the American Criminal Justice System, Richmond, VA: Northern University Press (2001).

[15] ACLU Report at 4 (79% of SWAT deployments in 2011-2012 were to execute search warrants).

[16] Balko White Paper, note 17 at 35 (virtually all no-knock warrants issued in a seven-month period in Denver were issued based only a police assertion that the search could be dangerous; some judges issued no-knock warrants even though police asked for a regular warrant).

[17] ACLU Report at 33 (weapons found in only 35% of searches where police had predicted weapons would be found).

More troubling, there is evidence that the use of no-knock warrants and the use of SWAT teams to execute those warrants *increases* danger for law enforcement and community members, rather than decreasing it.[18] No-knock warrants are often executed at times when people are likely to be asleep, and police often use devices such as flashbang grenades and battering rams to increase the element of surprise. Unsurprisingly, these tactics tend to confuse and frighten the inhabitants of a house, who are often woken from sleep to find their houses being stormed by what appear to be heavily-armed soldiers. These tactics have led to a significant number of tragic deaths and injuries, of both law enforcement officers and civilians.[19] And, of course, even in those situations where no one is physically harmed, there are consequences to the use of these military tactics on individual freedom and liberties, as will be explored below.

This policy brief examines the effects of the use of military equipment and tactics in both protest and search warrant situations on constitutional rights. The following analysis and ensuing recommendations are not intended to be legal advice nor are they comprehensive. Instead, the Committee hopes that readers will better understand how military equipment and tactics, when used by law enforcement for domestic policing, raise a host of constitutional questions and that safeguards must be implemented to prevent miscarriages of justice.

II. Police Militarization and the First Amendment

Any situation involving protesters and law enforcement may give rise to concerns regarding First Amendment violations, but the use of military weapons and tactics by law enforcement agencies in these interactions creates unique concerns.[20] To be sure, a militarized police force may be essential to protect civilians and law enforcement when protests turn to riots and protesters turn violent. In other instances, as discussed in more detail below, the use of military equipment and tactics may impinge on citizens' First Amendment rights.

a. Use of Military Equipment to Control Protesters Must be an Appropriately "Narrowly Tailored" Method of Controlling Speech

The right to free speech by the public is, of course, not completely unrestricted. The government may regulate speech to "time, place, and manner of expression" in a public forum if

[18] Balko White Paper at 19.

[19] Balko White Paper at 43, Appendix of Case Studies

[20] US Con. 1st Amnd. ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.").

the restriction is content-neutral,[21] narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.[22] For example, police may require anti-abortion activists to protest elsewhere in the interest of public safety when activists block a pedestrian walkway.[23] If law enforcement officers are able to control protesters who are exercising their First Amendment rights ***without*** the use of military equipment, there may be an argument that using such equipment is not "narrowly tailored" to serve a significant governmental interest.[24]

Law enforcement's use of military equipment and tactics to control protesters would not be a violation of the First Amendment *per se* – as noted above, there are situations where such activity is justified – but the equipment used and the circumstances of the use must be considered. Law enforcement agencies have acquired a wide range of military-grade weapons ranging from protective gear to airplanes to armored Humvees to automatic assault rifles.[25] Mere use of military-grade protective gear during protests, no matter how peaceful, is not likely to be found to have violated the First Amendment. Police use of protective equipment to the extent it would even be considered a restriction of free speech, would likely be content-neutral, narrowly tailored to serve a significant government interest and leave open other avenues of communication.[26]

The police's proactive use of military weapons and tactics *against* protesters, however, is more likely to violate the First Amendment. For example, local law enforcement used Long Range Acoustic Devices ("LRADs") in protests in New York City after the grand jury decided

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[21] In general, if government regulation of speech is not content-neutral, it must meet a higher burden, or strict scrutiny. Under this standard, content-based government restriction on speech must be necessary to "promote a compelling interest" and must be the "least restrictive means to further the articulated interest." *See Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989). For example, a regulation restricting anti-abortion protests in general would fail to meet the "least restrictive means" test if the purpose of the regulation was to silence those protesters. This standard would apply if the use of military equipment and tactics by law enforcement were intended simply to silence protestors.

[22] *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

[23] *McTernan v. City of York*, 564 F.3d 636 (3d Cir. 2009).

[24] *See, e.g.*, Alan O. Sykes, *The Least Restrictive Means*, 70 U. Chi. L. Rev. 403, 403-04 (2003) (noting in the regulatory context "when an alternative [method] unquestionably achieves a clearly stipulated [] objective at equal or lower cost [] while imposing a lesser burden on [free speech], the alternative is 'less restrictive'")

[25] Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES, June 9, 2014, at A1.

[26] *See, e.g.*, Noelle Phillips, *Denver Police Union Objects to Ban on Protective Gear During Protests*, THE DENVER POST, Dec. 11, 2014 available at http://www.denverpost.com/news/ci_27118194/denver-police-union-objects-ban-protective-gear-during (police union representative arguing that protesters in Denver had been growing more violent and police had a right to protect themselves using helmets and body armor).

not to indict the officer who killed Eric Garner.[27] LRADs were developed in response to the October 2000 bombing of the USS Cole by Islamic terrorists.[28] The purpose of an LRAD is to emit an extremely loud noise reaching as high as 149 decibels in an effort to deter unwanted aggressors.[29] An LRAD can cause headaches, earaches, and permanent hearing damage by exceeding the 130-decibel threshold for possible hearing loss by nearly 20 points.[30] It may be more difficult for law enforcement to argue that using military equipment like LRADs is necessary or even narrowly tailored for crowd control, and the use of such equipment might raise First Amendment concerns.[31]

b. The Threat of Military Equipment and Tactics Can Chill Free Speech

Because of the psychological implications of using military weapons, equipment, and tactics, the *threat* of a militarized police force may chill constitutionally-protected speech and present a greater risk of violating the First Amendment more than the actual use of those weapons and tactics.

i. Police Militarization as a Preemptive Policing Tactic

Researchers studying police tactics have noted a shift from reactive policing to preemptive policing beginning in the late 1990s.[32] Traditionally, preemptive police tactics include arrests, shutting down organizational meeting places, and the confiscation of literature in an attempt to deter active protesters.[33]

A militarized police force may be another development in the use of preemptive policing as protesters react to the knowledge of police militarization. It is routine for media to show video of previous demonstrations depicting protesters as violent complete with images of a militarily

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[27] *See, e.g.*, Colin Moynihan, *Concerns Raised Over Shrill Device New York Police Used During Garner Protests*, N.Y. TIMES, Dec. 12, 2014.

[28] Lily Hay Newman, *This is the Sound Cannon Used Against Protestors in Ferguson*, SLATE, Aug. 14, 2014 available at http://www.slate.com/blogs/future_tense/2014/08/14/lrad_long_range_acoustic_device_sound_cannons_were_used_for_crowd_control.html

[29] *Id.*

[30] *Id.*

[31] Gideon Orion Oliver, *Letter to Commissioner Bratton and Deputy Commissioner Byrne: The NYPD's Use of Long-Range Acoustical Devices for Crowd Control*, Dec. 12, 2014, available at http://www.commondreams.org/news/2014/12/15/national-lawyers-guild-challenges-nypd-use-sound-cannons-against-peaceful-protesters

[32] Heidi Boghosian, THE ASSAULT ON FREE SPEECH, PUBLIC ASSEMBLY, AND DISSENT 19, National Lawyers Guild (2004).

[33] *Id.*

equipped police force.[34] The media therefore creates a fear of anticipated confrontation between protesters and a militarized police force.[35] In addition, police frequently engage in pubic training drills and media showcases of weapons and tactics.[36] These forms of pre-protest intimidation may deter people from protesting long before the protest even begins. Moreover, whether consciously or not, law enforcement may be more inclined to use military weapons and tactics as the number of protesters declines, since they may perceive that the use of such weapons has succeeded in keeping the "peace."

In addition to deterring protesters from turning out to protest, the threat of a militarized police force may pre-emptively chill First Amendment speech during the event. For example, during the protests in Ferguson, Missouri, the police instituted a "five-second rule."[37] Any protesters caught standing still for longer than five seconds were subject to arrest.[38] The five-second rule, and similar restrictions on the right to protest, may pose First Amendment concerns as they seek attempts to restrict protesters from exercising their right to protest where they choose. While the police may not actually use military equipment and tactics on protesters, First Amendment concerns may arise if protesters are less likely to object to police requests because they fear police retaliation with military grade weapons.

ii. The Psychology of a Militarized Police Force: The "Weapons Effect"

Research into the effect of the presence of weapons on individuals' willingness to exercise First Amendment freedoms supports the concern that citizens are less likely to protest when police are equipped with military-grade weapons. For citizens who do attend protests and public gatherings, the "weapons effect" holds that the mere presence of weapons primes individuals for more aggressive behaviors -- both law enforcement and protesters.[39] Moreover, when faced with stressful situations, individuals adopt roles that help define how they react to the presence of

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[34] *Id*.

[35] *Id.*

[36] Gan Golan, *Closing the Gateways of Democracy* (Sept. 2005) (unpublished Master's thesis, Massachusetts Institute of Technology) (on file with Massachusetts Institute of Technology library).

[37] Lee Rowland, *There is No 5-Second Rule for the First Amendment, Ferguson*, AMERICAN CIVIL LIBERTIES UNION, Aug. 21, 2014, available at https://www.aclu.org/blog/free-speech-racial-justice/there-no-5-second-rule-first-amendment-ferguson

[38] *Id.*

[39] *See* Singal, *supra.*

those who may mean harm.[40] In other words, because individuals, whether law enforcement or civilians, associate military equipment with combat, using this equipment in the civilian context may cause law enforcement and community members to behave more aggressively, and even as adversaries.[41]

As a result of both protesters and law enforcement officers being primed for more aggressive behavior, First Amendment rights may be chilled, as individuals are less likely to participate in protests they view as dangerous. With the presence of military weapons escalating the possibility of aggression by both community members and law enforcement, a violent protest is more likely. Once a protest turns violent, police are more likely to use military tactics to control the crowd and a court is more likely to find use of that military equipment reasonable. Moreover, empirical research suggests that the use of military equipment and tactics by police officers may deter citizen participation in future protests. [42]

III. Implications of Police Militarization on Fourth Amendment Rights

The Fourth Amendment guarantees the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[43] The use of military equipment, surveillance, and tactics by law enforcement has the potential to impinge on citizen's Fourth Amendment rights, though the analyses of such implications are necessarily fact-driven. This section explores the military equipment and technology most used by police officers and discusses circumstances in which police behavior is and is not likely to be considered a search and, in the event of a search, circumstances in which the search is and is not likely to be considered reasonable.[44]

In analyzing how the use of military equipment by local police forces might give rise to Fourth Amendment violations, it is useful to conceptualize two distinct search and seizure

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[40] *Id.*

[41] *Id.*

[42] Jennifer Earl & Sarah A. Soule, *The Impacts of Repression: The Effect of Police Presence and Action on Subsequent Protest Rates*, 30 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 75, 83 (2010).

[43] U.S. CONST. amend. IV.

[44] To qualify as a search under the Fourth Amendment, a government official must violate an individual's subjective expectation of privacy, and that expectation of privacy must be an objectively reasonable one. Information that individuals reveal to other people or hold out to the public is not subject to an expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring).

scenarios: (1) searches conducted before any warrant is applied for or obtained (warrantless searches), and (2) searches conducted pursuant to some type of warrant.

a. Warrantless Searches and Seizures

The government continuously develops sophisticated methods of information gathering and surveillance. Because warrantless searches are, with certain, limited exceptions, presumptively unreasonable, the primary issue presented in these cases is whether the form of the police surveillance qualifies as a search.[45] The two types of surveillance discussed below, sensory-enhancing technology used to visually survey an individual's property and electronic location surveillance, frequently raise Fourth Amendment concerns when law enforcement officers use them prior to obtaining a warrant.

i. Sensory-Enhancing Technology

Sensory-enhancing technology has been a major focus of Fourth Amendment jurisprudence as courts continue to address what people can "reasonably" consider private -- an inquiry that grows even more relevant as police officers use the advanced technology provided to them by military equipment programs. In *Kyllo v. United States*, the Supreme Court drew the line at what constitutes a search in cases involving visual surveillance where technology provides information to the government that could not have been obtained through physical surveillance, and where the technology used is not commercially available to the general public.[46] In *Kyllo*, a police officer using a thermal imaging device to scan levels of heat emanating from an individual's home was found to have conducted a search, since the sense-enhancing technology provided information about the interior of the home that could not have been obtained without a physical intrusion into the constitutionally-protected area.[47] Moreover, because the thermal imaging technology in question is not in general public use, the government's use of that technology violated an expectation of privacy that "society is prepared to recognize... [as] reasonable."[48] In contrast, at least one court has found that the use of night vision goggles to

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[45] *See Groh v. Ramirez*, 540 U.S. 551, 559, 124 S. Ct. 1284, 1290, 157 L. Ed. 2d 1068 (2004).

[46] *Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2038, 2043, 150 L. Ed. 2d 94 (2001).

[47] *Id.* (noting also the Court's concern over such equipment being used by law enforcement for the invasion of the home).

[48] *Katz*, 389 U.S. at 361(Harlan, J., concurring); *see also Florida v. Jardines*, 133 S. Ct. 1409, 1417, 185 L. Ed. 2d 495 (2013) (holding that the warrantless use of a drug-sniffing dog on an individual's porch constituted a search of the home, since the police officers used a device "not in general public use" (a trained drug-detection dog) to learn details about the inside of the home that they would not otherwise have discovered without entering the premises).

observe an individual's property or vehicle does not constitute a search, since night vision goggles are "available to the public via internet."[49] And unlike a thermal imaging device that reveals information that would be unknowable without a physical intrusion, night vision goggles "merely amplify ambient light" to allow the wearer to see things at night, they do not allow the wearer to "see through walls."[50]

Local police forces currently receive ballistic and night vision goggles through supply programs with the federal government.[51] Both types of goggles are readily available for purchase by the general public and neither is sufficiently sense-enhancing such that it would allow gathering of information that would be unavailable but for a physical intrusion. As such, use of these types of equipment will likely not raise many constitutional issues.[52] To the extent that local police forces receive other types of surveillance technology from military programs, however, there may be greater Fourth Amendment concerns. For example, police using "Millivision" technology -- a type of camera that measures electromagnetic radiation -- to pick up on weapons and other substances concealed under an individual's clothing is likely to raise serious Fourth Amendment concerns.[53]

ii. Information-Gathering Electronic Surveillance

The burgeoning use of sophisticated electronic communication has led to recent developments in Fourth Amendment jurisprudence regarding when surveillance of that communication qualifies as a search. For instance, the availability of advanced GPS technology allows local law enforcement to track the location of a possible suspect for lengths of time that would be impractical or impossible through actual visual surveillance. As such, courts struggle with what is colloquially known as the "mosaic doctrine;" in other words, if a person's present location is revealed to the public and not subject to a reasonable expectation of privacy, at what

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[49] *United States v. Vela*, 486 F. Supp. 2d 587, 590 (W.D. Tex. 2005).

[50] *United States v. Dellas*, 355 F. Supp. 2d 1095, 1107 (N.D. Cal. 2005).

[51] ACLU Report at 13.

[52] *See, e.g., United States v. Vela* 486 F. Supp. 2d at 590 (holding that the warrantless use of night vision goggles to observe the inside of an individual's vehicle did not constitute a search in violation of the Fourth Amendment); *see also People v. Deutsch*, 44 Cal. App. 4th 1224, 1228 n.1 , 52 Cal. Rptr. 2d 366, 367 n.1 (1996) (holding that use of thermal imaging device on individual's residence was an unreasonable search prohibited by the Fourth Amendment, and distinguishing the thermal imaging device used from infrared devices like night vision goggles because night vision goggles amplify the infrared spectrum of light).

[53] *See generally* George Dery II, *Remote Frisking Down to the Skin: Government Searching Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals*," 30 CREIGHTON L. REV. 353 (1997).

point does an individual have a reasonable expectation of privacy in the prolonged surveillance of his or her location?[54]

In considering this issue, the U.S. Court of Appeals for the District of Columbia noted that the likelihood a stranger would observe all of a person's movements over a prolonged period is essentially nonexistent, and that continuous monitoring reveals a more intimate picture of a person's life than surveillance of that person's "disconnected" movements.[55] The Court held that the district court erred in admitting evidence that was acquired by a GPS device that tracked defendant for nearly a month, because the defendant had a reasonable expectation of privacy in his movements as the totality of his movements over that month were not actually exposed to the public.[56] Justice Sotomayor echoed these conclusions in a recent concurrence, noting that the theory that people have no expectation of privacy in information they make known to others is "ill suited for the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[57] These issues may become more significant if military-grade surveillance equipment and technology is widely available to state and local law enforcement.

b. Searches and Seizures After Obtaining a Warrant

Because the Fourth Amendment protects people from "unreasonable" searches, the crux of a Fourth Amendment claim where an officer possesses a valid warrant is often whether the search was reasonable. The use of SWAT teams and military equipment by local law enforcement officials raises Fourth Amendment issues in the context of unannounced entries, as well as with respect to certain equipment used during forced entries.

i. No-Knock Searches and the Proliferation of SWAT Deployment

When serving a search warrant, law enforcement officials must "knock and announce" their presence, unless exigent circumstances exist, *i.e.*, if it would threaten someone's safety or if

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[54] *Compare United States v. Knotts*, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983) (holding that the monitoring of a beeper attached to an individual's vehicle was not a search within the contemplation of the Fourth Amendment because a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another), *with United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010) *aff'd in part sub nom. United States v. Jones*, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (recognizing that "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene").

[55] *See United States v. Maynard*, 615 F.3d at 562.

[56] *Id.* at 558.

[57] *United States v. Jones*, 132 S. Ct. 945, 957, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurrence).

the warning would defeat the point of the search by giving the suspect enough time to discard any evidence.[58] These exceptions, however, are largely in the hands of individual police officers, judges and courts, with little guidance from the Supreme Court.[59]

There also appears to be little oversight of no-knock warrants.[60] An investigation that followed the shooting of a man during a no-knock raid in Denver lead to the discovery that "nearly all no-knock warrant requests over the past seven months -- most of which involved narcotics cases -- were approved merely on police assertions that a regular search could be dangerous for them or that the drugs they were seeking could be destroyed."[61] That same investigation revealed that "no-knock search warrants appear to be approved so routinely that some Denver judges have issued them even though police asked only for a regular warrant."[62] Of 163 affidavits for no knock warrants, only seven had specific allegations that the suspect had been seen with a gun, and nearly all of the warrants were granted solely on the basis of an anonymous tip and an officer's claim, with no supporting evidence, that weapons would be present at the scene or that the suspect would likely dispose of evidence.[63] Moreover, the exclusionary rule does not apply to no-knock violations, meaning evidence obtained through illegal means is not required to be suppressed.[64]

The lack of clear guidance for determining when no-knock warrants are appropriate and the lack of regular oversight of such warrants makes no-knock warrants ripe for potential for constitutional violations.[65] Moreover, the proliferation of SWAT team deployment by local law enforcement for routine drug searches only serves to heighten the concern. A study found that 79 percent of SWAT deployments were "for the purpose of executing a search warrant, most

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[58] *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Richards v. Wisconsin*, 520 U.S. 385 (1997).

[59] Balko White Paper at 30.

[60] *But see Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948) (emphasizing the importance of judicial oversight of no-knock warrants: "[t]he point of the Fourth Amendment... is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

[61] Balko White Paper at 35.

[62] *Id.* at 24.

[63] *Id.*

[64] *Hudson v. Michigan*, 547 U.S. 586 (2006).

[65] *See, e.g.*, *Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) (holding that an officer's no-knock entry of individuals' home based on "generalized concerns about evidence preservation and officer safety" was unreasonable and violated those individuals' Fourth Amendment rights).

commonly in drug investigations."[66] SWAT teams are intended for emergency or "high-risk" scenarios, but according to the study, a "lack of clear and legitimate standards" for what constitutes a "high-risk" scenario "may result in the excessive and unnecessary use of SWAT deployments in drug cases."[67] Indeed, only seven percent of SWAT deployments were for hostage, barricade, or active shooter situations.[68] Given that SWAT teams are frequently used to execute no-knock warrants, the lack of clear standards for both SWAT team deployment and no-knock searches makes it more likely that citizen's Fourth Amendment rights will be violated in the execution of such searches.[69]

ii. Excessive Force Relating to Battering Rams and Flashbang Grenades

Local law enforcement officers and SWAT teams regularly use battering rams and flashbang grenades to carry out drug and other non-violent crime investigations, sometimes resulting in excessive force claims against those officers.[70] Officers are given very little instruction regarding their appropriate use, and innocent bystanders are forced to face the sometimes fatal consequences.[71]

1. Battering Rams

Battering rams are just one type of "forced entry tool" that police departments receive through federal equipment programs.[72] As the name implies, the battering ram is the primary tool "used [by law enforcement] to hit and break through walls and doors."[73] Battering rams can also take many forms, ranging from hand-held devices to armored tanks specially equipped with a 14-foot horizontal steel battering ram capped with a steel plate. The method of police entry into a home is a factor in assessing the reasonableness of a search, thus, the use of a battering ram is not *per se* unconstitutional. In barricade and hostage situations, the use of a battering ram may very

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[66] ACLU White Paper at 31.

[67] *Id.*

[68] *Id.*

[69] *See, e.g.*, *Bishop v. Arcuri*, 674 F.3d 456.

[70] *See Boyd v. Benton Cnty.*, 374 F.3d 773, 779 (9th Cir. 2004) (holding that the use of a flashbang device was an unconstitutional use of excessive force where police deployed it with reason to know there were several occupants inside and without considering alternatives).

[71] William K. Rashbaum, *Woman Dies After Police Mistakenly Raid Her Apartment*, N.Y. TIMES, May 17, 2003, available at http://www.nytimes.com/2003/05/17/nyregion/woman-dies-after-police-mistakenly-raid-her-apartment.html.

[72] ACLU White Paper at 13.

[73] *Id.* at 21.

well reflect the level of necessary force. However, problems arise when this equipment is used in the execution of warrants for non-violent drug investigations. Indeed, SWAT teams forced entry into a person's home using a battering ram or breaching device in 65% of drug searches.[74] As with no-knock raids, the reasonableness of the search employing a battering ram is determined in light of the officer's perspective during the execution of the warrant, providing officers with a lot of latitude in deciding when to use these devices and underscoring the factual nature of these excessive force claims.[75]

2. Flashbang Grenades

Like battering rams, flashbang grenades can cause serious harm to people and property. A flashbang grenade is an "explosive device" that produces "an extremely bright flash of light that... causes temporary blindness" and is intended to distract the occupants of a building while a SWAT team attempts to secure the scene.[76] In order for the use of a flashbang grenade to be considered reasonable, the search must be considered "high-risk"[77] and where "high-risk" is not explicitly defined, and the standard of reasonableness is, again, based on the law enforcement officer's perception during the execution of the warrant.[78] Flashbang grenades are often used by officers to stun or distract the occupants of a home to prevent them from creating a safety threat. One concern is whether the frequency with which officers use flashbang grenades is justified in light of the number of suspects that present a real threat to officer safety. Additionally, the use of disorienting equipment may in fact increase threats to officer and bystander safety.[79] As discussed above, the use of military-grade weapons and equipment, as well as the military tactics favored by SWAT teams, make what would otherwise be routine searches more likely to escalate in violence, which has led to death, injury, and psychological harm to citizens, including innocent citizens, citizens suspected of only misdemeanors or non-violent crimes, and law enforcement

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[74] *Id*. at 3.

[75] *See Walker v. City of Wilmington*, 360 F. App'x 305, 313 (3d Cir. 2010) (holding that officers' use of armed SWAT team during no-knock raid, including use of a battering ram, during execution of a search warrant was objectively reasonable when viewed "from the perspective of a reasonable officer on the scene").

[76] ACLU White Paper at 21.

[77] *Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 966 (7th Cir. 2003).

[78] *Graham*, 490 U.S. at 396.

[79] Balko White paper at 32.

officers.[80] As with the battering ram, the use of a flashbang grenade to temporarily blind, deafen, and disorient suspects during a non-violent drug investigation may seem excessive in light of the threat posed to officers, but courts addressing each excessive force claim must examine the specific facts of each case and the alleged uncertainty at the time of a search.[81]

IV. Due Process: Filling the Gaps of the Fourth Amendment

Although many fear that the increased use of military tactics and weaponry by local law enforcement agencies will increase violations of the due process rights set forth in the constitution, a close examination of the law reveals that such tactics by police are only likely to implicate the Due Process Clause in the rarest of circumstances. Instead, the Supreme Court has held that most challenges to police action are more properly brought under the Amendment that addresses the specific behavior challenged; for example, under the Fourth Amendment, which governs all claims arising in the course of an arrest, investigatory stop and or other "search or seizure" (including the planning stages)[82] or the Eighth Amendment, which governs post-conviction claims.[83] Because "due process" is frequently misunderstood, this section provides a basic overview of the law and then discusses the certain, limited circumstances in which police use of military technology could give rise to a due process violation.

The Due Process Clause of the Fourteenth Amendment warrants that no state actor may deprive any person of "life, liberty or property without due process of law."[84] Courts have derived two notions of due process: procedural and substantive. While police militarization would not generally seem to implicate procedural due process concerns,[85] it may raise some substantive due process issues worthy of enhanced focus.

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[80] *Id.* at 43, Appendix of Case Studies.

[81] *See Bing ex rel. Bing v. City of Whitehall, Ohio*, 456 F.3d 555, 569 (6th Cir. 2006) (noting that the determination of reasonableness of police use of flashbang devices requires a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake" from the "perspective of a reasonable policeman on the scene").

[82] At least one circuit court has held that the ***planning*** of a SWAT raid should be challenged and analyzed under the Fourth Amendment. *See Terebesi v. Torreso*, 764 F.3d 217, 233 (2d Cir. 2014).

[83] *Graham v. Connor*, 490 U.S. 386, 395 (1989) (where "an explicit textual source of constitutional protection" addresses a particular sort of government behavior, courts must rely on that Amendment, rather than the amorphous and open-ended concept of substantive due process, to resolve the issue).

[84] U.S. Const. amend. XIV, § 1.

[85] Procedural due process bars the government from denying recognized constitutional or state law-based rights to life, liberty, or property without fair procedure. Examples of typical police-related procedural due process claims include claims that delays between the taking of property and the disposition of forfeiture proceedings were

a. Substantive Due Process Concerns in the Context of Police Militarization

Substantive due process bars certain wrongful government actions and "arbitrary" deprivations of life, liberty and property "regardless of the fairness of the procedures used to implement them."[86] Substantive due process protects certain fundamental liberty interests, either implied elsewhere in the constitution or in the necessary framework for American society.[87] In the context of police-related substantive due process claims, courts have held a variety of different types of claims to be viable, including challenges to the conditions of pretrial detention, use of excessive force, denial of medical care, failure to prevent suicide and failure to protect from harm.[88]

Police-related causes of actions based upon substantive due process, however, are generally only appropriate if the challenged conduct does not implicate the Fourth or Eighth Amendments; for example, if the cause of action arose (a) prior to or during the course of an arrest, but the police conduct does not constitute a Fourth Amendment "search or seizure"[89] or (b) during the "pre-trial detainment" period, which can generally be thought of as beginning immediately after either arrest or a judicial finding of probable cause and ending at the time of conviction.[90] The sections below discuss specific situations in which police militarization may implicate substantive due process claims.

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excessive or that property was wrongfully destroyed or improperly returned following seizure. *See, e.g.*, *Alexander v. Ieyoub*, 52 F.3d 554 (5th Cir. 1992); *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994); *Winters v. Board of County Comm'rs*, 4 F.3d 848 (10th Cir. 1993). Notably, however, the destruction of property incident to an arrest is not generally evaluated under the Due Process Clause, but instead falls under Fourth Amendment reasonableness reviews (under which the destruction of property is generally not deemed a Fourth Amendment violation). *United States v. Banks*, 540 U.S. 31, 41-42 (2003); *United States v. Ramirez*, 523 U.S. 65, 68 (1998). Given the types of procedural due process claims that are typically brought, it does not appear likely that the increased use of military equipment and tactics by local law enforcement would raise many substantial or new procedural due process concerns.

[86] *Cnty. of Sacrament v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

[87] Ivan E. Bodensteiner & Rosalie B. Levinson, 1 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:16 1 (updated Nov. 2014).

[88] *See generally*, Catherine T. Struve, *The Conditions of Pretrial Detainment*, 161 U. PA. L. REV. 1009, 1023-1033.

[89] Such claims arise in only unique circumstances, typically, where a police-related harm has occurred but a "seizure" has not yet occurred; for example, where police were on scene and a suspect committed suicide prior to arrest or certain high-speed car chases where, by flashing their lights, the police sought to stop a suspect's car but the suspect fled, eventually crashing or being accidentally run into by the pursuing police. *See, e.g.*, *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993); *Lewis*, 523 U.S. at 844 (referring to *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989)); *California v. Hodari D.*, 499 U.S. 621 (1991). These claims, even if they tangentially implicate military technology, are uncommon enough to warrant extensive discussion. Further, the police are rarely deemed to be liable. *See, e.g.*, *Cutlip v. City of Toledo*, 488 Fed.Appx. 107 (6th Cir. 2012).

[90] Unfortunately, a precise definition of when an arrestee is considered in pre-trial detainment is difficult to provide. Pre-trial detainment refers to the period of time after the arrest or seizure of a defendant, when the Fourth

i. Excessive Force Claims: "Shocks the Conscience"

As under the Fourth Amendment, the Supreme Court permits "excessive force" claims to be lodged against law enforcement officers under the Due Process Clause.[91] Although the increased use of military weapons and tactics may lead to more overall accusations of excessive violence or force by police, such claims are not likely to arise during the pre-trial detainment period and thus are not likely to arise under the Due Process Clause. A substantial increase in due process-based excessive force claims is therefore unlikely as a result of police militarization.

Furthermore, for those claims that do properly arise under the Due Process Clause -- for example, it would not be difficult to imagine a case involving the unnecessary use of pepper spray or a Taser, items which sometimes can be obtained from military surpluses, against an arrestee already in police custody -- the burden of proof for establishing a due process violation is substantially higher than under the Fourth Amendment.[92] This is because "[substantive] due process guarantees [do] not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm," but rather, substantive due process is considered reserved for the most egregious governmental abuses, those that do "not comport with the traditional ideas of fair play and decency"[93] or "interfer[e] with the rights 'implicit in the concept of ordered liberty.'"[94]

Amendment presumably no longer applies, but prior to trial or conviction, before the Eighth Amendment is applicable. *See Lewis*, 523 U.S. at 843-44; Struve, 161 U. PA. L. REV. 1009. The question of when Fourth Amendment protections end and due process protections begin, however, has not been addressed by the Supreme Court, and the lower courts have developed diverging standards. *Compare, e.g.*, *Chambers v. Pennycook*, 641 F.3d 898, 905 (8th Cir. 2011) (concluding that the Fourth Amendment, not due process, still applies in the period immediately after an arrest (citing *Moore v. Novak*, 146 F.3d 531, 535 (8th Cir. 1998))) *and Fontana v. Haskin*, 262 F.3d 871, 878-82 (9th Cir. 2001) (holding that the Fourth Amendment "seizure" continues so long as arrestee is still in arresting officers' custody and prior to a probable cause hearing) *and Aldini v. Johnson*, 609 F.3d 858, 866-67 (6th Cir. 2010) (holding that for warrantless arrests, the dividing line between the Fourth and Fourteenth Amendments is at the probable cause hearing), *with Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc), abrogated on other grounds by *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam) (identifying that due process applies immediately after arrest) *and Brothers v. Klevenhagen*, 28 F.3d 452, 456 (5th Cir. 1994) (similar). *See also Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (applying due process to a post-arrest claim for "custodial mistreatment" but the Fourth Amendment to plaintiff's excessive force claim); *Frohmader v. Wayne*, 958 F.2d 1024, 1026-28 (10th Cir. 1997) (concluding that the Fourth Amendment should be applied to excessive force claims that arise prior to a probable cause hearing, but due process to denial of medical care claims). For a more complete analysis of the different circuits, see Struve, 161 U. PA. L. REV. 1009.

[91] *Lewis*, 523 U.S. at 843-45; Beyer, 30 URB. LAW. at 67-71; *cf. Albright v. Oliver*, 510 U.S. 266 (1994).

[92] *Lewis*, 523 U.S. at 843-45.

[93] *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

[94] *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

To that end, the Supreme Court has identified that a substantive due process violation by an actor of the state will only occur when an officer' or department's conduct "shocks the conscience."[95] While this standard is difficult to explicitly define, the Court has described it as a "yard stick… poin[ting] the way" towards impermissible conduct. On one end of the spectrum, "conduct *intended* [emphasis added] to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level;" on the other end, negligence or gross negligence, is substantially less likely to violate the constitution.[96]

ii. Denial of Medical Care Claims: "Deliberate Indifference"

The one situation that is most likely to raise due process concerns in the context of police militarization is when police are dealing with detainees injured in the course of an arrest. A number of courts have held that police officers have a due process obligation to provide medical treatment to arrestees injured in the course of detainment.[97] Because certain military-styled technologies common in SWAT raids, such as assault rifles, flashbang grenades and chemical irritants may be more likely to cause physical harm to an arrestee, a law enforcement officer's obligation to provide such medical care may arise more frequently in those situations.

Due process protections prohibit law enforcement from displaying, at the very least,[98] "deliberate indifference" to the "serious" medical needs of a pre-trial detainee.[99] Deliberate indifference in this context is defined as a reckless or intentional disregard for the substantial risk posed by a detainee's medical condition, which may have arisen in the course of arrest; again, mere negligence is not enough.[100] While this standard of care is largely deferential to law

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[95] *Lewis*, 523 U.S. at 846-855.

[96] *Id*. at 847 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (emphasis supplied).

[97] *See, e.g.*, *City of Revere*, 463 U.S. 239; *Barrie v. Grand County, Utah*, 119 F.3d 862 (10th Cir. 1997); *Weyant v. Okst*, 101 F.3d 845 (2d Cir. 1996); *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994).

[98] The Supreme Court has yet to formally declare a level of care owed to persons injured in the course of arrest; however, it has indicated that "the due process rights of [such] a person... are at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere*, 463 U.S. at 244 (citing to *Bell v. Wolfish*, 441 U.S. 520 (1979)). The Eight Amendment standard, "deliberate indifference," has thus been broadly applied by the lower courts when reviewing medical care cases under due process. *See Weyant*, 101 F.3d at 856; *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Boring v. Kozakiewicz*, 833 F.2d 468, 471 (3d Cir. 1987) (applying a quasi-test).

[99] *City of Revere*, 463 U.S. at 244-245; *Weyant*, 101 F.3d at 856.

[100] *Id*. (referencing the Eighth Amendment standard laid out in *Farmer v. Brennan*, 511 U.S. 825 (1994)).

enforcement, it requires that police officers affirmatively respond to injuries. Often, liability will turn on whether the officer knew of the detainee's medical condition.[101]

Note that due process review will apply in some, but not all denial of medical care claims. As in other situations, whether Due Process Clause obligations are legally associable will depend on when the cause of action arises.[102] Because medical care cases are likely to arise in or continue into the period following the actual moments of arrest, they are more likely than most cases to fall under the umbrella of due process.

V. Police Militarization and the Equal Protection Clause

Under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment, the state and federal governments, respectively, are prohibited from enacting laws or policies that would deprive anyone of their fundamental rights and from using existing laws in a manner that would violate those rights.[103] The recent rise in the use of military-grade weapons and tactics by local law enforcement has caused many to question whether such weapons and tactics may violate the Equal Protection Clause. In fact, public opinion is often that police intentionally use military weapons against minority communities simply because of their race.[104] Despite public opinion, however, those seeking to challenge the militarization of local police under the rubric of Equal Protection would likely face a number of barriers. This section explores some of the challenges that may arise in the context of police militarization.[105]

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[101] *Id*. (referencing *Farmer*, 511 U.S. 825).

[102] Although courts will only apply due process if the cause of action arose during the period of pre-trial detainment, some circuits are willing to apply due process in more situations involving denial of medical care allegations, as opposed to those alleging excessive force.

[103] *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race . . . the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause").

[104] Lindsey Cook, *Poll: Blacks Less Confident in Police*, U.S. NEWS AND WORLD REPORT, Aug. 20, 2014, http://www.usnews.com/news/blogs/data-mine/2014/08/20/poll-blacks-report-less-confidence-in-police-and-more-discrimination.

[105] A plaintiff brining an Equal Protection claim must prove that a law or government policy has both a discriminatory impact and a discriminatory purpose behind its enforcement. *See Washington v. Davis*, 426 U.S. 229, 239 (1976); Jody Feder, *Racial Profiling: Legal and Constitutional Issues* at 4, CONG. RESEARCH SERV. RL 31130 (2012), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1919&context=key_workplace, at 6; Alyssa A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* (John Rubin ed., UNC School of Government, 2014), available at

a. The Use of Military Weapons by Local Police in the "War on Drugs"

Equal protection concerns may arise through the use of military-grade weapons and tactics as a part of the federal government's "War on Drugs," the use of SWAT teams armed with military grade weapons significantly increased.[106] Drug-related SWAT raids more frequently occur in communities of color.[107] Indeed, many racial minority groups feel that police unfairly target their communities.[108]

Yet statistics alone are insufficient to sustain an Equal Protection challenge. In *McCleskey v. Kemp*, the Supreme Court rejected an Equal Protection claim based upon statistics that showed that African-Americans were sentenced to death by Georgia's courts at a higher rate than whites, holding that such statistics were not sufficient evidence of a discriminatory purpose behind the application of the state's death penalty.[109] The Court stated that while a "stark" pattern of a discriminatory impact *may* be enough to prove discriminatory purpose, the statistics relating to the death penalty contained too many variables to prove a discriminatory purpose.[110] In the wake of *McCleskey*, many courts have held that statistical evidence alone is insufficient to prove a discriminatory purpose to sustain an Equal Protection claim.[111]

In the context of an Equal Protection challenge, statistics related to use of SWAT teams in drug-related raids are likely to be viewed similarly to the statistics at issue in *McCleskey*, barring a petitioner from seeking redress due to repeated government conduct that appears to violate the Equal Protection clause. Instead, each drug raid would have to be viewed in the context of its unique circumstances to determine the appropriate level of force. Moreover, unlike death penalty cases and criminal trials in general, where it is impermissible for jurors to use race as a factor in

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http://defendermanuals.sog.unc.edu/defender-manual/16. This can be difficult to prove if a law or policy does not explicitly discriminate against certain groups but arguably has a discriminatory impact. *See* Feder, *supra*.

[106] ACLU Report at 31-33.

[107] *Id.* at 8, 35-36 (61% of the people affected by drug-related SWAT raids were African-American and Latino).

[108] Cook, *supra; see also* Kevin Zeese & Margaret Flowers, *Ferguson Exposes the Reality of Militarized, Racist Policing*, POPULAR RESISTANCE: DAILY MOVEMENT NEWS AND RESOURCES, Aug. 17, 2014, https://www.popularresistance.org/ferguson-exposes-the-reality-of-militarized-racist-policing/.

[109] *McCleskey v. Kemp*, 481 U.S. 279, 293-95 (1987).

[110] *Id.* (holding that juries in death penalty cases were unique compositions that could decide cases differently depending on the circumstances of each case, making comparisons between death penalty cases difficult).

[111] Grine & Coward, *supra*.

their decisions, police can sometimes use race as a factor in enforcement operations. In particular, if the police are acting upon a tip that describes a certain suspect by his race, they may use that information as one among many factors in deciding to take action.[112] Thus, a court could examine other evidence of discriminatory purpose behind the use of SWAT teams before relying on statistical evidence alone.

If a plaintiff could successfully prove both a racially discriminatory impact and purpose in the use of SWAT teams in drug raids, however, a court would likely subject the policy to "strict scrutiny."[113] As such, the police would have to show that its use of a SWAT team was necessary to achieve a compelling government interest, here preventing drug use and sale. While the government certainly has compelling reasons to limit drug use and sale, it is questionable whether a SWAT team is necessary to achieve this purpose. Strict scrutiny is a high standard, and there is a possibility that a court could find based on the evidence that a less violent means of investigating for drugs may be sufficient to achieve the same government interest.

b. Equal Protection Concerns Related to Use of Military Weapons in Protests

Police use of military-grade weapons and tactics as a crowd control mechanism in protests may also raise Equal Protection issues. In some instances, these confrontations became violent, with the police firing rubber bullets or otherwise threatening the use of force to break up protests.[114] There is a public perception that law enforcement officers respond to civil unrest by communities of color with a disproportionate show of force, regardless of the political basis for

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[112] *United States v. Weaver*, 966 F.2d 391, 392-93 (8th Cir. 1992) (upholding the conviction of an African-American drug courier whom police had stopped on a tip that "a number of young roughly dressed black males from street gangs in Los Angeles frequently brought cocaine into the Kansas City area").

[113] There are three levels of review for an Equal Protection claim: "strict scrutiny," "intermediate scrutiny" and " rational basis review." Courts typically reserve "strict scrutiny" for cases of discrimination based on race and national origin. Under strict scrutiny the government must show that its means are "narrowly tailored" to achieve a "compelling government interest[]." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). Under "intermediate scrutiny," which courts typically reserve for cases of discrimination based on gender, the government must show its means are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 472 (1988); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976). Finally, under "rational basis review," which courts typically reserve for all other cases, the plaintiff has the burden of proof to show that the government's means are not rationally related to "some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The claims discussed in this section would most likely be subject to strict scrutiny. *See Adarand*, 515 U.S. at 227 (holding "that all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

[114] Zeese & Flowers, *supra*.

the protest or other civil disobedience.[115] The key Equal Protection issue becomes whether police deploy military style force to contain protests by racial minorities more frequently than for non-minority groups, regardless of the actual threat of violence.

As such, it may be possible to argue that police use of military-grade weapons and tactics in response to race-related protests, no matter how peaceful, has a discriminatory purpose. Rather than offer statistical evidence by itself, a plaintiff could point to a historical pattern of treatment of protests. The Supreme Court has endorsed this type of evidence, holding that all "circumstantial and direct evidence of [discriminatory] intent as may be available"[116] should be examined, and that a plaintiff may introduce "[t]he historical background of [a] decision [as an] evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."[117] Although the Court has cautioned that establishing a pattern may be difficult, a plaintiff may nonetheless introduce evidence of a police department's or state's historical treatment of other protesters,[118] as well as direct evidence in the form of statements made by the police or contained in their reports regarding enforcement operations.[119]

If a plaintiff can prove a racially discriminatory purpose, a court may subject police use of military grade weapons and equipment in a protest scenario to strict scrutiny.[120] As discussed above, the government would have to show that its means were necessary to achieve a compelling government purpose, which here may be the safety of the public. However, studies note that use of military equipment and tactics by law enforcement incites more violence.[121]

c. Equal Protection and Border Patrol

Latino groups in Arizona won an injunction against the sheriff of Maricopa County, Joe Arpaio, from using a person's Latino heritage as cause for police stops when no other factors give

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[115] Indeed, the events in Ferguson can be contrasted with the events in Keene, New Hampshire, where police also used military-grade equipment in responding to an actual riot that ensued at a pumpkin festival. *See* Emanuella Grinberg, *Why Pumpkin Fest Riots are not like Ferguson*, CNN NEWS, Oct. 21, 2014, available at http://edition.cnn.com/2014/10/21/living/keene-pumpkinfest-riot-ferguson/

[116] *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

[117] *Id.* at 267.

[118] *See id.* at 266; *McCleskey*, 481 U.S. at 293-95.

[119] *See* Grine & Coward, *supra*.

[120] *See Adarand*, 515 U.S. at 227 (holding that a court must review all Equal Protection and Fifth Amendment Due Process claims based on racial classifications under strict scrutiny).

[121] ACLU Report at 39.

rise to reasonable suspicion of unauthorized immigration status.[122] The district court concluded that the plaintiffs had presented, among other claims, a valid Equal Protection claim because the sheriff had a discriminatory purpose in enforcing the law.[123] While the primary focus of the lawsuit was not the use of military-grade weapons and tactics, similar policies could become the focus of another Equal Protection lawsuit involving Latino communities affected by border patrol operations. Indeed, Arizona has already applied for and received military grade weapons and equipment from federal programs for border patrol purposes.[124]

d. Equal Protection Challenges to Individual Police Action

Individual police officers who use military-grade weapons to enforce the law and do so with a discriminatory purpose may also be subject to an Equal Protection suit.[125] An officer's purpose, however, is difficult to prove and is subjective.[126] A plaintiff could present evidence such as what the officer said to him or her before and during an arrest, records of the officer's treatment of similar suspects or other records from internal investigations of the officer's conduct, to name a few.[127] Such a suit would only challenge an officer's individual purpose for using military-grade weapons or tactics.

VI. Conclusions and Recommendations

It is clear that the use of military weapons and tactics by local law enforcement agencies presents a variety of constitutional concerns. It is also clear, however, that an individual asserting a legal claim for potential constitutional violations will face a number of barriers and such claims have only a marginal likelihood of success. That said, it is likely that as the number of law enforcement agencies receiving and using military equipment increases, the number of suits alleging constitutional violations will also rise. As such, the recommendations below and in the attached policy brief focus not only on the potential for constitutional violations, but also include policy choices that could minimize the potential for such violations.

Create Clear and Consistent Standards

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[122] *Melendres v. Arpaio*, 989 F.Supp.2d 822 (D.Ariz. 2013).

[123] *Id.*

[124] ACLU Report at 13.

[125] *Whren*, 517 U.S. at 813; Feder, *supra*.

[126] Feder, *supra* at 4-5.

[127] Grine & Coward, *supra*.

- States should work to create standards for law enforcement regarding the deployment and training of SWAT teams and other tactical teams. Any such standards should include, among other things:
    - Policies limiting the use of SWAT and other tactical teams in which there is a threat to the lives of civilians or police;
    - Standards and specific criteria[128] that must be met prior to approval of use of SWAT or other tactical teams;
    - Pre-approval by a supervisor or high-ranking official for the use of SWAT or other tactical teams;
    - Written plans setting forth the reasons for the use of SWAT or other tactical team, including a description of the operation prior to deployment; and
    - Policies requiring SWAT teams to include trained crisis negotiators.
- States and/or law enforcement agencies should create standards for application and issuance of no-knock warrants. It may be helpful to set forth various factors that may be considered -- such as violent crime history and corroborating evidence other than, or in addition to, an anonymous source -- and require documentation of these criteria and supervisory approval prior to requesting a no-knock warrant from a judicial officer.
- States should enact laws that would prevent the use in legal proceedings of evidence that was obtained in violation of the traditional rule that police should knock and announce their presence, unless such evidence was properly obtained with a no-knock warrant.
- The federal government should create clear standards to assess requests for new equipment under the 1033 Program (the federal program provisioning military equipment to local police), including requiring specific justification for the equipment requested and limiting the types of material that the law enforcement agencies may acquire based upon the equipment that they already have and/or the needs of their location.
- As part of the 1033 Program, the Department of Defense should require that law enforcement agencies report on the uses of 1033 equipment as well as conduct regular audits and report routinely on current inventory.

[128] The Committee is still discussing proposed criteria, and more detailed criteria recommendations will be available in the final, forthcoming report.

Improve Training and Emphasize the Peace-Keeping Role of Police

- Jurisdictions must improve training for law enforcement agencies and emphasize that the use of military equipment and tactics must be limited and deployed in unique circumstances. Training must highlight the peace-keeping role of law enforcement as distinct from the combative role of the military.
- Local law enforcement agencies should engage in more community outreach and community-oriented policing and engage in less "preemptive" policing. For example, officers may want to engage in "know your rights" presentations at community centers or schools either with local activist groups or by themselves. Additionally, training should include a component to help officers identify, confront, and discard biases that affect the way they interact with community members.
- Jurisdictions should supplement equipment training with legal training so that local law enforcement officers are informed with respect to the relevant legal standards accompanying certain types of surveillance. To the extent that officers already receive training regarding warrant requirements, ensure that such training incorporates discussion of major case law and legislation -- including the Electronic Communications Privacy Act -- governing contexts in which requirements for obtaining search warrants might vary.

Create Transparency and Oversight

- States should enact laws that require law enforcement agencies to report data regarding the use of SWAT. A non-exhaustive list of important content to be captures in these data include when SWAT teams were deployed, where they were deployed, the circumstances of the deployment and the compliance with the applicable deployment standard, what equipment was used, whether any people or animals sustained injury or were killed, and whether any drugs, weapons or other contraband were recovered. These data should be reported on a regular and uniform basis and be publicly accessible.
- States should enact similar reporting requirements for the issuance of no-knock warrants.
- States should enact laws that require law enforcement agencies to report data regarding complaints of excessive force and other constitutional violations. States should collect

information, including figures regarding the settlements and awards paid, as well as litigation costs for police misconduct lawsuits. These data should be publicly available.

- States should ensure that there is an independent agency or civilian review board that monitors SWAT deployments, no-knock warrants and use of other military equipment by law enforcement and that the agency or board has the ability to address complaints from civilians as well as recommend or implement reform. Such bodies should be empowered to evaluate trends and address patterns that emerge, rather than merely review individual cases as they arise.
- Law enforcement agencies receiving federal funds for the purchase of equipment should be required to report the equipment purchased with those funds. These reports should be publicly available.
- Congress should condition the receipt of federal funds for policing and military equipment on complying with uniform reporting and training requirements.