Police as Soldiers

While police departments that would be generally recognizable to modern observers have been a part of local government for more than 150 years,¹ the last 30 years have been characterized by an increase in military-style techniques and equipment among law enforcement agencies across the country.² The federal government has encouraged cooperation between military forces and local police as well as a blurred line between police and military.³ Such aggressive policing conflicts with the strategy of proactive cooperation between police and community organizations advocated by the Department of Justice because the focus is placed on criminals rather than the policed community.⁴ This paper will describe the connections between local police forces and the military-industrial complex as well as the legal problems arising from such militarization. Militarization has led to numerous abuses of asset seizure laws, potential violations of the Posse Comitatus Act, and conflicts with the legal principles animating the Third Amendment.

The Emergence of SWAT

Special Weapons and Tactics Teams, or SWAT, were designed to provide military-trained support to regular police and were formed in response to several high-profile sniper attacks in the 1960s.⁵ Such SWAT teams were initially used for urban riot control and raids on violent groups such as the Black Panthers,⁶ but they were utilized for drug raids after the

² See id. at xi–xii (citing adoption of “battle dress uniforms” by police, using “military-grade weapons,” training under “Navy Seals or Army Rangers,” and purchasing equipment from military contractors).
³ See id. at 243–44 (describing creation of “regional and multijurisdictional narcotics task forces” funded by federal appropriations and asset seizures who receive grants based, in part, on amount of drug arrests); Sean J. Kealy, Reexamining the Posse Comitatus Act: Towards a Right to Civil Law Enforcement, 21 YALE L. & POL’Y REV. 383, 384 (2003) (noting cooperation encouraged by the Military Cooperation with Law Enforcement Officials Act of 2003)
⁴ See, e.g., Community Policing Defined 3, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP’T OF JUSTICE (“Community policing is a philosophy that promotes organizational strategies, which support the systematic use of partnerships and problem-solving techniques, to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.”), available at http://www.cops.usdoj.gov/Publications/e030917193-CP-Defined.pdf.
⁶ Id.
declaration of a “war on drugs” during the Reagan Administration. Congress passed the Military Cooperation with Law Enforcement Act in 1981, which permitted the military to provide training and certain equipment to local law enforcement for anti-drug policing. SWAT teams began using armored personal carriers and other military equipment during the mid-1980s. Purchases of military equipment were further encouraged by a 1994 executive order authorizing the transfer of used military equipment to law enforcement and establishing a reutilization program to facilitate the sales.

There are over 40,000 SWAT deployments per year according to an estimate from 2005. In comparison, SWAT teams were deployed approximately 3,000 times per year in the early 1980s. Additionally, some high-crime areas are patrolled by military-trained officers rather than traditional police. The evolution of military-style tactics has been accompanied by increased use of military language to describe domestic policing, including the “war on drugs” of the 1980s, the “war on violence” of the 1990s, and the warnings that domestic violence is a threat to the United States’s “national security.” Police contractors use this language to sell their gear to police departments. This “military-criminal justice blur” has created several legal issues, as American law has traditionally sought to separate military and police functions of government.

Asset Forfeiture and the Rise of SWAT as Paramilitary

One of the primary factors supporting the proliferation of SWAT teams is that police forces are able to keep much of the cash and property seized during raids. The federal

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7 Id.
8 Id.
9 See BALKO, supra note 1, at 154–57 (describing purchase of armored personnel carrier by Los Angeles during the 1984 Olympic Games).
10 BALKO, supra note 4, at 7.
12 Id.
13 Id. at 3.
15 For example, Heckler and Koch marketed a semi-automatic rifle to SWAT teams with the slogan, “From the Gulf War to the Drug War—Battle Proven.” BALKO, supra note 1, at xii.
16 Peter B. Kraska, The Military-Criminal Justice Blur, in MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM, supra note ___, 3, 3 (“[T]he bureaucracy and functions of the military are meant to be clearly separated from the bureaucracy and functions of the police and criminal justice system.”).
government enacted the first civil forfeiture statute for drug offenses in 1970.\textsuperscript{17} Congress expanded the statute in 1986 by permitting the government to seize “substitute assets” when forfeitable assets are unavailable, allowing federal agencies to seize “cash, bank accounts, jewelry, cars, boats, airplanes, businesses, homes, and land.”\textsuperscript{18} Civil asset forfeiture states are often used to seize the property of family members who failed to alert the police about drug activities on their property.\textsuperscript{19} The Drug Enforcement Administration is allowed to distribute money to state and local police departments to supplement their funds,\textsuperscript{20} leading to especially aggressive raids designed to seize valuable property.\textsuperscript{21} In 2012, the DEA shared $616 million in receipts from asset sales with state and local police forces.\textsuperscript{22}

Asset forfeiture has commonly been used to fund SWAT teams and create multijurisdictional “narcotics task forces” that also buy equipment from these funds.\textsuperscript{23} Asset forfeiture has given SWAT forces and narcotics task forces some financial independence from the jurisdictions they work in.\textsuperscript{24} Some states have attempted to rein in asset forfeiture by diverting funds to other programs, but police forces have sidestepped these laws by making drug investigations federal investigations rather than state investigations.\textsuperscript{25} District attorneys and police often oppose asset forfeiture reform, specifically noting that it would cost their departments money.\textsuperscript{26} Asset forfeiture has also resulted in arguably bad policing, as police may defer arrest until after sales to seize cash rather than drugs\textsuperscript{27} or focus on seizing cash rather than...
drugs. It also has led to “cash for freedom” deals, where local jurisdictions agree to drop charges in exchange for the forfeiture of cash or other valuable seized items.

Using asset forfeiture as a funding source has also led to several questionable asset seizures overturned by courts. For example, the Nebraska district court recently ordered the government to return over $1 million seized from an individual driving from California to New Jersey. The money was invested by Tara Mishra for a nightclub in New Jersey to be opened by the Dheris, the parties detained in Nebraska. The police officer claimed that he was suspicious because the Dheris stayed in Los Angeles for a short period of time and “the fact that the rental cost for the vehicle for a week was over $2,000.” After the Dheris were arrested, the police said that a K-9 dog found traces of drugs on the money seized in the car, but the money was transferred to a bank for a cashier’s check before the claimants had a chance to test the money. The district court found that government gave “no evidence that these proceeds, i.e. the money, is [sic] traceable to any drug transactions.” The court discounted the drug sniff because there was no way to test the amount of drugs on the money, which was the primary link between the money and drug crimes. The court was also concerned about the Dheris, who first stated that the money was being transported for a friend, then claimed that the money was theirs, and finally disclaimed any interest in the money while being allowed to keep several thousand dollars found on Mr. Dheri’s body. Similarly, a Massachusetts district court found that the federal government could not seize a motel on the basis of a limited number of drug crimes committed at the motel when the owner of the motel was involved in none of the crimes, the crimes involved small amounts of drugs, and the crimes were committed by different guests. Asset forfeiture

28 BALKO, supra note 1, at 154 (noting that it is “far more likely” for officers “to pull over suspected drug-running vehicles in the lanes leading out from large metropolitan areas . . . than the lanes leading in”).


31 Id. at 1056.

32 Id. at 1055.

33 Id. at 1056–57.

34 Id. at 1062.

35 Id.

36 Id. at 1063.

abuses are not limited to drug cases,

but these cases suggest that the federal government is especially interested in connecting valuable property to drugs and that such connections are often based on light evidence favorably construed to the government’s interests.

**SWAT and the Third Amendment**

The Third Amendment requires that “[n]o soldier shall, in time of peace be quartered in any house, without consent of the Owner.”

This amendment was an extension of the English prohibition of housing soldiers in private homes, a right referenced in English law after the Glorious Revolution in 1688. It was included in the Constitution because the British quartered soldiers in cities such as Boston and New York after the Seven Years’ War. These soldiers were also funded by taxes from colonists, leading to colonial distrust of armies as well. These issues were addressed in the Third Amendment, which established a right against quartering troops in private homes during peacetime.

The Third Amendment’s scope has not been clearly established because few cases have relied on the Third Amendment for relief. The Second Circuit found that the Third Amendment applies to the National Guardsmen as well as the federal army and that it protects against quartering when the occupant does not have fee simple ownership of the property. On the other hand, the Tenth Circuit found that the Third Amendment does not protect property owners from

38 See, e.g., United States v. $35,131.00, Case 4:11-CV-02659 (S.D. Tex. Aug. 2, 2013) (unpublished opinion) (denying forfeiture order and ordering payment of attorney’s costs where airport security agents asked traveler to estimate amount of money carried for a declaration and then seized money and traveler’s checks when traveler underestimated).

39 U.S. CONST. AMEND. 3.


41 Id. at 200–02 (describing effects of Quartering Act).

42 Id. at 200 (citing the Stamp Act).


44 Id. at 425 (distinguishing Third Amendment from American precedents that stated preference against quartering troops in private homes rather than banning the act).

45 See Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (judging a “novel claim based on the Third Amendment, a provision rarely invoked in the federal courts).

46 Id. (“We agree with the district court’s conclusion that National Guardsmen are “Soldiers” within the meaning of the Third Amendment . . . Moreover, we agree with the district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.”).

47 Id. at 962 (finding protection under the Third Amendment for all property rights “recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others”).
uncompensated use of airspace above their property, finding that an expectation to exclude aircraft from the space is unreasonable because that airspace is considered a “public highway” and that it would be unreasonable to ascribe an original intent of requiring the military to seek permission from each landowner for such a minor intrusion on property rights.\textsuperscript{48} The Third Amendment has been used by the Supreme Court as proof of the founders’ intent to protect some right of privacy through the Bill of Rights.\textsuperscript{49}

Scholars have debated the scope of the Third Amendment; some support a narrow proscription against forced quartering by a narrow group of government employees,\textsuperscript{50} while others contend that the Third Amendment should be read to protect against abuse of property rights by a wider variety of individuals with military-like force.\textsuperscript{51} Christopher Schmidt suggests that a CIA agent can be considered a soldier within the definition of the Third Amendment because intelligence collection is analogous to military reconnaissance and one section of the CIA, the Office of Military Affairs, “provides support for the military and is part of the military team.”\textsuperscript{52} He also argues that FBI agents are occasionally soldiers for purposes of the Third Amendment because FBI agents have performed many tasks for the military during the War on Terrorism.\textsuperscript{53} A liberal interpretation of the Third Amendment may support categorizing police officers as soldiers when performing tasks in furtherance of declared international conflicts such as the War on Terrorism or the War on Drugs.

In *Rise of the Warrior Cop*, Radley Balko claims that the militarization of police violates the principles of the Third Amendment, or the “Symbolic Third Amendment.”\textsuperscript{54} Balko argues that the Third Amendment was part of multiple amendments designed to maintain state control over law enforcement through the militia except when the national government was necessary.\textsuperscript{55} Federal government officials were not used for “routine law enforcement” until the 1850s, when

\textsuperscript{48} *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1043 (10th Cir. 2001) (suggesting that Third Amendment claim “borders on frivolous”) (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)).

\textsuperscript{49} *Katz v. United States*, 389 U.S. 347, 350 n. 5 (1967) (“The Third Amendment’s prohibition against the uncompensated peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion.”).

\textsuperscript{50} Fields, *supra* note ___, at 204 (“Unlike most of the other amendments, [the Third Amendment] was concise and addressed only a single issue. It was also unique in that its principal exception was embodied in its text.”).

\textsuperscript{51} Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 596 (2004) (suggesting that “a soldier need not be formally linked to the armed services” so long as they are “a skilled warrior or a militant leader, follower, or worker”).

\textsuperscript{52} *Id.* at 597–98.

\textsuperscript{53} *Id.* at 602–04 (providing examples of FBI capture of Al Qaida leader and interviewing American residents to locate targets in Iraq).

\textsuperscript{54} BALKO, *supra* note ___, at 18.

\textsuperscript{55} *Id.* at 15–16 (also citing the Second and Tenth Amendments).
the U.S. Marshals were given the power to raise posses to enforce the Fugitive Slave Law.\textsuperscript{56} Balko finds that the Third Amendment is one cause of the traditional belief of strong separation between police and military.\textsuperscript{57} Balko does not clearly indicate the force of the Symbolic Third Amendment, but he uses it as a normative argument against the proliferation of SWAT teams in modern police forces.\textsuperscript{58}

A recent case has been filed in Nevada alleging a violation of the Third Amendment by police. SWAT officers in Hendersonville, Nevada wanted to use the plaintiffs’ house as a reconnaissance post for an ongoing domestic violence investigation against one of their neighbors.\textsuperscript{59} The plaintiffs refused the demand, and the SWAT officers entered the house without a warrant and subsequently arrested two of the plaintiffs for obstructing an officer.\textsuperscript{60} The plaintiffs allege that the house was then searched without a warrant and used as a surveillance post by SWAT officers.\textsuperscript{61} The charges against the plaintiffs were eventually dismissed with prejudice.\textsuperscript{62}

No additional actions have occurred in this case, but it faces several hurdles before the plaintiffs can show a Third Amendment violation. First, the court will have to find that the Third Amendment is incorporated and enforceable against state governments. The Second Circuit stated that the Third Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment.\textsuperscript{63} One professor argues that the Third Amendment should not be incorporated into the Due Process Clause, though, because states are prohibited from raising an army with

\textsuperscript{56} Id. at 19–23.
\textsuperscript{57} Id. at 25 (citing Posse Comitatus Act, which “prevents domestic law enforcement officials from using the military to enforce the law without authority from the president or Congress”).
\textsuperscript{58} Id. at 193 (when criticizing Clinton era officials for a “formalized technology and equipment sharing agreement,” Balko quips that “the policies that Clinton implemented showed little understanding or appreciation of the Symbolic Third Amendment”).
\textsuperscript{61} Id. at ¶¶ 35 & 36.
\textsuperscript{62} Molly McDonough, Rare 3rd Amendment Suit Filed After Family Says Police Occupied Their Homes to Watch Neighbor, ABA JOURNAL (July 9, 2013, 2:00 PM), http://www.abajournal.com/news/article/3rd_amendment_suitFiled_after_family_says_police_occupied_their_homes.
\textsuperscript{63} Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (“Moreover, we agree with the district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.”); see also Engblom v. Carey, 522 F. Supp. 57, 65 (S.D.N.Y. 1981) (incorporating Third Amendment for application against states because right against forced billeting as a right “rooted in the tradition and conscience of our people as to be ranked as fundamental”).
“soldiers” by the Constitution, the Third Amendment was practically not used or considered at the time the Fourteenth Amendment was drafted, and the amendment is designed to resolve a specific concern and thus is not “fundamental to the American scheme of justice.” Second, the plaintiffs will have to show that SWAT officers are “soldiers” within the meaning of the Third Amendment. Current case law only has extended the definition of soldier to include National Guard members, but at least one law professor suggests that the conduct of SWAT officers in this case is similar to military conduct.

Finally, the plaintiffs have to show that their property deprivation is one covered under the Third Amendment. The amendment proscribes “quarter[ing] in any house.” The Second Circuit noted that the privacy interest protected by the Third Amendment was interpreted to cover more than fee simple ownership in closely analogous cases. It permitted a Third Amendment claim where the plaintiffs were tenants at a government building a quarter-mile from a prison, plaintiffs provided most of the furnishings in their dorms, and plaintiffs were evicted from the building for six days during a strike so National Guard soldiers could stay in the dorms. The plaintiffs in this case appear to have a similar ownership interest in their home, but the complaint does not state how long the plaintiffs were refused access to their home. No court has decided this issue, but there is also no temporal standard provided in the Third Amendment.

Ultimately, the Third Amendment appears to be unlikely to provide much protection against the proliferation of SWAT teams, even though the Third Amendment suggests constitutional questions about the blurred line between police and soldiers. The Third Amendment does not clearly extend to police intrusions into citizens’ homes, and even if it does,

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65 See Ilya Somin, A Real Live Third Amendment Case, VOLOKH CONSPIRACY (July 4, 2013, 6:16 PM) ([A]s Radley Balko describes in his excellent new book The Rise of the Warrior Cop, many police departments are increasingly using military-style tactics and equipment, often including the aggressive use of force against innocent people who get in the way of their plans. If the plaintiffs’ complaint is accurate, this appears to be an example of that trend.”), http://www.volokh.com/2013/07/04/a-real-live-third-amendment-case/.
66 U.S. CONST. AMEND. 3.
67 Engblom, 677 F.2d at 962 (“When determining whether a legitimate expectation of privacy exists for the purposes of the Fourth Amendment, for instance, the Supreme Court has rejected the notion that a protected privacy interest must be `based on a common-law interest in real or personal property.’”).
68 Id. at 959–61 (describing facts that indicated landlord-tenant relationship, including the fact that plaintiffs were charged $36 monthly rent and prohibited from deducting rent from taxes).
69 See Somin, supra note 43 (As far as I know, no federal court has ever ruled on this aspect of the definition of “quartering.”); see also Engblom v. Carey, 572 F. Supp. 44 (S.D.N.Y. 1983) (dismissing Third Amendment claim in Engblom v. Carey on qualified immunity grounds).
qualified immunity is likely to protect police officials in suits brought under the Third Amendment.\textsuperscript{70}

\textsuperscript{70} Engblom, 572 F. Supp. at 44