

Local Democratic Oversight of Police Militarization

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INTRODUCTION

Many Americans were shocked when, in November 2014, law enforcement agencies in Ferguson, Missouri responded to local protests with what appeared to be tanks, assault rifles, and officers dressed like soldiers. Michael Brown (a black, unarmed, eighteen-year-old preparing for college) had been shot to death by a white police officer, and it had just been announced that Darren Wilson, the officer who shot him, would not be indicted. People were justifiably sad, angry, and despairing, and they went to the streets in peaceful protest. Almost immediately, what appeared to be paramilitary squads appeared, dressed in riot gear, and carrying equipment that looked more appropriate for a warzone than for a suburban main street. Many Americans were shocked and deeply troubled. Very quickly, the phrase “police militarization” became almost a household term.

There is no real question that the police have become excessively militarized.¹ Furthermore, the American Civil Liberties Union (ACLU) conducted a study in 2014 and found that not only have the police become excessively militarized, but also that police militarization has occurred with little to no public oversight.² The ACLU also identified three federal programs that create incentives for local law enforcement agencies to become excessively militarized: the Department of Defense’s 1033 program (“1033 program”), the Department of Homeland Security’s Homeland Security Grant Program (“HSGP”), and the Department of Justice’s Justice Assistance Grants program (“JAG”).³

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¹ See generally Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282 (2015). However, some members of the law enforcement community disagree. See, e.g., Doug Deaton, *Police Militarization and One Cop’s Humble Opinion*, POLICEONE.COM (Aug. 15, 2013), <http://www.policeone.com/militarization/articles/6390637-Police-militarization-and-one-cops-humble-opinion/> [<http://perma.cc/7T5C-NGRD>].

² AM. C.L. UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING (2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rell.pdf> [<http://perma.cc/WZE2-MGNX>] [hereinafter ACLU Report].

³ Each of these programs is described in more detail in Part I.

For context, it might be helpful to understand what happens during a SWAT deployment, and why SWAT deployments are often referred to as paramilitary raids. When the police believe they have probable cause that there is evidence of criminal activity in a person's home (most often evidence of drug possession), they ask a judge to issue a search warrant. If they obtain a search warrant, they are able to serve the warrant on the suspect's home. At this point in the process, the police have not actually obtained evidence of a crime; they simply have a warrant authorizing them to search for evidence of a crime. In other words, the suspects involved are still presumed to be innocent.

The police are not *required* to use a SWAT team to serve a search warrant. Most police departments have some standards to guide them in decisions about when to deploy a SWAT team, and most allow for SWAT deployment in cases involving hostages, barricades, active shooters, or other emergency scenarios, or in "high-risk" warrant scenarios. But what constitutes a "high-risk" scenario depends largely on the subjective beliefs of the officers involved. This creates a danger that a police department might use a SWAT team unnecessarily.

When a SWAT team is deployed, a group of officers approaches a home, often at night, and often having been transported in a "tactical vehicle" (these are armored vehicles that appear to be tanks, but are not tanks in the proper sense because they are not armed and have wheels rather than tank tracks). They typically use some form of weapon to break down doors and windows, such as battering rams or explosives. They frequently use "distraction devices" such as flashbang grenades—explosive devices that are used to distract the occupants of a building while a SWAT team is attempting to secure the scene. Flashbang grenades produce an extremely bright flash of light that temporarily over-stimulates the retina and causes temporary blindness (lasting five to ten seconds). They also make a deafening noise that makes people feel disoriented and can cause a lingering ringing. Although they are generally considered to be nonlethal, they have been known to set homes on fire and induce heart attacks, both sometimes resulting in death.⁴ Officers often yell at residents, including children, to get on the floor with their hands behind their backs, and sometimes use handcuffs to secure the scene. They have been known to break doors and windows, as well as furniture, and to kill pets. In other words, SWAT deployments—also known as paramilitary raids—are extremely violent occurrences that induce terror in the people subjected to them.⁵

The central theses of this article are that: (1) police have become inappropriately and dangerously militarized, and (2) recent political developments have presented an opportunity for the reassertion of local control. This

⁴ See Virginia Hennessey, *Monterey County Agrees to Pay \$2.6 million in 'Flash-Bang' Death of Greenfield Man*, THE MONTEREY HERALD (Aug. 19, 2013, 12:01 AM), http://www.montereyherald.com/localnews/ci_23897554/monterey-county-agrees-pay-2-6-million-flash [<http://perma.cc/FHH3-D6ZD>].

⁵ See generally ACLU Report, *supra* note 2.

article will argue that the lack of local democratic oversight in the acquisition of weaponry, in conjunction with federal incentives to acquire military-style weapons and vehicles, has created a situation where police are inappropriately and dangerously militarized. It will also argue that the present political climate presents an opportunity to reassert local control of the police weapon acquisition, and thus curb police militarization, and aims to equip local actors with the tools to do so effectively. Finally, it will offer some suggestions for structuring oversight in local jurisdictions.

Part I of this article provides an overview of police militarization and explains why it is problematic. Part II describes the history of police militarization, including links to the failed War on Drugs, race disparities, and lack of oversight. Part III addresses the present opportunity to reassert oversight. Part IV contains a toolkit for local communities and local governing bodies to exercise oversight over local police militarization.

I. OVERVIEW OF POLICE MILITARIZATION

Police militarization has four main aspects: (1) the “1033 program” (launched in the 1990s, this program authorizes the U.S. Defense Department to transfer military equipment to local law enforcement agencies), along with other federal funding streams that provide money to local governments (money which is often used to purchase paramilitary weapons on the private market);⁶ (2) federal law enforcement agencies’ use of Special Weapons and Tactics (SWAT) teams; (3) local law enforcement agencies’ use of SWAT teams (often using weapons received from the Defense Department or purchased using federal dollars); and (4) a culture of policing that emphasizes fear and control rather than fairness and community safety. This article focuses on the provision of federal funds and equipment, and local law enforcement agencies’ use of paramilitary weapons and tactics.

Some of the equipment, such as desks and computers, that is transferred through the 1033 program is not weaponry, but even some of the non-weapons that are transferred, such as battle dress uniforms and night vision goggles, are military in nature and designed for active combat. And of course much of what is transferred is heavy weaponry designed for active combat. For example, over 500 police departments have received Mine Resistant Ambush Protected (MRAP) vehicles—armored vehicles designed to withstand roadside bombs.⁷

⁶ See generally Karena Rahall, *The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex*, 36 CARDOZO L. REV. 1785 (2015); Jeffrey A. Endebak, *More Bang for Their Buck: How Federal Dollars are Militarizing American Law Enforcement*, 47 J. MARSHALL L. REV. 1479 (2014).

⁷ See ACLU Report, *supra* note 2, at 4.

Local law enforcement agencies have received billions of dollars' worth of military equipment through the 1033 program.⁸ A few examples of unnecessary or disproportionate acquisitions include:

- Police in Johnston, Rhode Island, with a population less than 29,000, acquired two bomb disposal robots, ten tactical trucks, thirty-five assault rifles, more than 100 infrared gun sights, and two pairs of footwear designed to protect against explosive mines. The Johnson police department has sixty-seven sworn officers.
- The parks division of Delaware's Department of Natural Resources was given twenty M16 rifles, while the fish and wildlife enforcement division obtained another twenty M16s, plus eight M14 rifles and ten .45-caliber automatic pistols.
- Campus police at the University of Louisiana, Monroe, received twelve M16s to help protect the 8,811 students there.
- The warden service of Maine's Department of Inland Fisheries and Wildlife received a small aircraft, ninety-six night vision goggles, sixty-seven gun sights, and seven M14 rifles.

When the police are armed with weapons designed for combat, it gives the appearance that they are an invading army.⁹ This undermines public trust because it makes the people being policed feel as though they are being treated as a military enemy. And trust is important—scholars have demonstrated time and again that trust is critical in maintaining public safety.¹⁰ When police respond with an unnecessary degree of force or a military appearance, they risk turning what might otherwise be a peaceful encounter into a violent attack.¹¹

Local police departments can also buy weapons using money obtained through the Department of Justice's Justice Assistance Grant (JAG). Through this program, the Bureau of Justice Assistance (BJA) administers a fund and calculates grant amounts set according to a formula established by Congress.¹² Sixty percent of the funding goes to State Administering Agencies to

⁸ Shawn Musgrave et al., *The Pentagon Finally Details its Weapons-for-Cops Giveaway*, THE MARSHALL PROJECT (Dec. 3, 2014, 7:35 PM), <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway> [http://perma.cc/8LBC-98S6].

⁹ Tom Nolan, *Stop Arming the Police Like a Military*, DEFENSE ONE (June 24, 2014), <http://www.defenseone.com/ideas/2014/06/stop-arming-police-military/87163> [http://perma.cc/8TQ4-CTUZ].

¹⁰ See generally Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008), http://moritzlaw.osu.edu/osjcl/Articles/Volume6_1/Tyler-Fagan-PDF.pdf [http://perma.cc/T9GC-ZER4].

¹¹ See Jesse Singal, *How Militarizing Police Can Increase Violence*, N.Y. MAG. (Aug. 14, 2014), <http://nymag.com/scienceofus/2014/08/how-militarizing-police-can-increase-violence.html> [http://perma.cc/94ZL-VPVZ].

¹² *How Byrne JAG Grants are Awarded and Distributed*, NAT'L CRIM. JUST. ASS'N, <http://www.ncja.org/how-byrne-jag-grants-are-awarded-and-distributed> [http://perma.cc/Q62E-V628].

be distributed to local governments; the remaining forty percent goes directly from the BJA to local governments.

Grantees of the JAG program are permitted by statute to spend the funding in any of seven categories: law enforcement; courts (prosecution and indigent defense); crime prevention and education; corrections and community corrections; drug treatment and enforcement; program planning, evaluation, and technology; and crime victim and witness programs.¹³

Most of the funding goes to law enforcement. Between April 2012 and March 2013, JAG grantees spent sixty-four percent of their JAG funding on law enforcement, nine percent on courts, six percent on crime prevention and education, and five percent on drug treatment.¹⁴ In that period, state and local police departments used JAG funding to buy hundreds of lethal and less-lethal weapons, tactical vests, and body armor.¹⁵

Another federal program that provides funding that local police departments can use to buy military-style weapons is the Department of Homeland Security's Homeland Security Grant Program.¹⁶ The Department spent over \$1 billion on this program in fiscal year 2015.¹⁷

Police militarization is not only about equipment and tactics—it is also about culture.¹⁸ Today, officers are trained to think like soldiers. Training materials often have titles such as “Warrior Mindset/Chemical Munitions” and urge trainees to “Steel Your Battlemind,” where “battlemind” is defined as “a warrior’s inner strength to face fear and adversity during combat with courage. It is the will to persevere and win. It is resilience.”¹⁹ In general, policing has evolved into a combat-like culture, in which the police are trained to think of the communities they are sworn to protect and serve as enemy battlegrounds. For example, the Doraville, Georgia police department posted a video on its website that appears to be a recruitment video and shows officers pulling up to a training ground in a SWAT vehicle, throwing tear gas, and emerging from the vehicle with assault rifles drawn. It flashes images of “The Punisher,” a fictional vigilante who employs violent tactics in his war on crime. It also contains audio of the song “Die Motherf——r

¹³ See *How Byrne JAG is Used*, NAT'L CRIM. JUST. ASS'N, <http://www.ncja.org/issues-and-legislation/about-byrne-jag/how-byrne-jag-used> [<http://perma.cc/F2MF-MC9V>].

¹⁴ BUREAU OF JUSTICE ASSISTANCE, GRANT ACTIVITY REPORT: JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, APRIL 2012–MARCH 2013 2 (2013), https://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf [<http://perma.cc/9DWF-QLQJ>].

¹⁵ *Id.* at 4.

¹⁶ See *Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/homeland-security-grant-program> [<http://perma.cc/MJU3-KWSQ>].

¹⁷ See *Fiscal Year 2015 Homeland Security Grant Program*, FED. EMERGENCY MGMT. AGENCY, http://www.fema.gov/media-library-data/1438021101390-ce3bbdde8b84b174b8212cfd7aaa5c3/FY_2015_HSGP_Fact_Sheet_Allocations.pdf [<http://perma.cc/526Q-6PPC>].

¹⁸ See generally Cynthia A. Brown, *Police and Corrections Officers Serving in the Military: Divided Loyalties: Ethical Challenges for America's Law Enforcement in Post 9/11 America*, 43 CASE W. RES. J. INT'L L. 651 (2011).

¹⁹ See ACLU Report, *supra* note 2, at 23.

Die,” by Dope.²⁰ Doraville, Georgia is a town of approximately 8,000 people; it is difficult to know whether larger police departments have used anything similar, or how common videos such as this one are. Regardless, this video is emblematic of a highly militarized policing culture.²¹

This article will argue that police militarization is problematic because: (1) it alienates and intimidates local residents, (2) it disproportionately impacts communities of color, (3) it gives the impression of an invading army, (4) it has perverse effects on police culture, and (5) it escalates violence and puts lives at risk.

II. HISTORY OF POLICE MILITARIZATION, INCLUDING LINK TO WAR ON DRUGS, RACIAL DISPARITIES, AND LACK OF OVERSIGHT

Police militarization is closely connected to the “War on Drugs,” which President Nixon launched in 1971, and which gained steam throughout the 1980s and 1990s.²² During this time period, states and the federal government passed numerous criminal laws designed to incarcerate people who used drugs, including marijuana, and to incarcerate them for longer periods of time.²³ Many states and the federal government also passed numerous “mandatory minimum” sentencing laws (laws that remove all discretion from judges imposing sentences), including for drug possession.²⁴

The link between the War on Drugs and police militarization was not coincidental. The 1033 program was originally enacted as part of the 1989 National Defense Authorization Act, and authorized the Department of Defense (“DOD”) to transfer equipment to local police departments that was “suitable for use by such agencies in counterdrug activities.”²⁵ In 1996, Congress made the program permanent and expanded its scope to require that preference be given to transfers made for the purpose of “counterdrug and counterterrorism activities.”²⁶ The program has given over \$5 billion worth of military equipment to local law enforcement agencies since 1990, according to data released by the Pentagon in November 2014.²⁷ Thus, the

²⁰ Radley Balko, *Tiny Georgia Police Department Posts Terrifying SWAT Video*, WASH. POST (Aug. 13, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/08/13/tiny-georgia-police-department-posts-terrifying-swat-video> [http://perma.cc/KLX4-LMJC].

²¹ See generally Nolan, *supra* note 9.

²² A Brief History of the Drug War, DRUG POLICY, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> [http://perma.cc/H3DK-PY2M].

²³ *Id.*

²⁴ FAMILIES AGAINST MANDATORY MINIMUMS, *Mandatory Sentencing Was Once America's Law-and-Order Panacea. Here's Why it's Not Working*, PRISON POLICY, <http://www.prisonpolicy.org/scans/famm/Primer.pdf> [http://perma.cc/8GL7-8XQH].

²⁵ NAT'L INST. OF JUSTICE, *Federal Property and Equipment Manual: Federal Sources of Personal Property for Law Enforcement*, PUBLIC INTELLIGENCE 5 (July 2002), <http://info.publicintelligence.net/FederalPropertyManual.pdf> [http://perma.cc/GU2J-PNK2].

²⁶ ACLU Report, *supra* note 2, at 16.

²⁷ Musgrave et al., *supra* note 8.

intent was very deliberate—to use the United States military in waging the domestic War on Drugs.

However, support for the War on Drugs is at an all-time low. Sixty-seven percent of Americans today think the government should focus more on treatment than on policing and prosecuting drug users.²⁸ In addition, support for marijuana legalization has grown dramatically: in 1969, only twelve percent thought marijuana possession should be legal, but today, fifty-four percent of Americans support marijuana legalization (opposition to legalization dropped from eighty-four percent to forty-two percent during the same time period).²⁹ Support for changes in drug sentencing laws has grown over time as well. Since 2001, support for moving away from mandatory drug sentences has grown from forty-six percent to sixty-three percent, while opposition to moving away from mandatory drug sentences has shrunk from forty-five percent to thirty-two percent.³⁰

It is worth asking why the police continue to wage a War on Drugs that lacks a public mandate. It is easy to argue that police militarization is needed from a public safety standpoint because drugs and violence are highly correlated. But the data does not bear this out. Certainly, the police need to be able to protect themselves, and ought to have the equipment they need to handle dangerous situations. But the data simply does not demonstrate that the police need to be as militarized as they are—in fact, the ACLU study found that the unnecessary deployment of a SWAT team tends to *increase* the use of violence and the threat of danger.³¹

Police militarization is also closely connected to racial disparities in policing. The staggering racial disparities in policing policies and practices have been well documented.³² Disparity exists in the context of police militarization as well. The ACLU study examined thousands of SWAT deployment reports and found that Black and Latino people were much more likely to be impacted by SWAT deployments than white people, and that the disparity was even greater in SWAT deployments conducted for the purpose of serving a drug-related search warrant.³³

²⁸ *America's New Drug Policy Landscape*, PEW RES. CTR. (Apr. 2, 2014), <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape> [<http://perma.cc/E2N9-LJMZ>].

²⁹ *Id.*

³⁰ *Id.*

³¹ See generally ACLU Report, *supra* note 2.

³² See Andrew Cohen, *What We've Learned About Racial Disparity in Policing Since Ferguson*, THE MARSHALL PROJECT (Nov. 19, 2014, 6:31 PM), <https://www.themarshallproject.org/2014/11/19/what-we-ve-learned-about-racial-disparity-in-policing-since-ferguson> [<http://perma.cc/FA7B-HFGN>]; *Racial Disparities in Criminal Justice*, AM. C.L. UNION (2015), <https://www.aclu.org/issues/mass-incarceration/racial-disparities-criminal-justice> [<http://perma.cc/EKY4-6GP6>]; Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA TODAY (Nov. 19, 2014, 2:24 PM), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/> [<http://perma.cc/D877-MV9X>].

³³ See generally ACLU Report, *supra* note 2.

SWAT teams were created in the late 1960s as “quasi-militaristic” squads capable of addressing serious and violent situations that presented imminent threats such as riots, barricade and hostage scenarios, and active shooter or sniper situations.³⁴ The first SWAT team, at the Los Angeles Police Department, was developed in the wake of a series of emergency situations in which local police felt unable to respond as swiftly or as effectively as was necessary. SWAT teams have since expanded in number, and are used with greater frequency and, increasingly, for purposes for which they were not originally intended—overwhelmingly to serve search warrants in drug investigations.

Dr. Peter Kraska, Professor of Justice Studies at Eastern Kentucky University, has surveyed police departments across the country on their use of SWAT teams and estimates that the number of SWAT teams in small towns grew from twenty percent in the 1980s to eighty percent in the mid-2000s, and that as of the late 1990s, almost ninety percent of larger cities had them.³⁵ He also estimates that the number of SWAT raids per year grew from 3,000 in the 1980s to 45,000 in the mid-2000s.³⁶ David Klinger and Jeff Rojek, both at the University of Missouri-St. Louis’s Department of Criminology and Criminal Justice, conducted a study using SWAT data from 1986 to 1998 and found that the overwhelming number of SWAT deployments studied were for the purpose of serving a search warrant (34,271 for warrant service, in contrast to 7,384 for a barricaded suspect and 1,180 for hostage-taking cases).³⁷ This highlights an important point—the increase in the number of SWAT raids does not necessarily correlate with an increase in violence. The ACLU found that the overwhelming majority of SWAT raids it studied were for the purpose of serving a search warrant in drug cases, not cases involving violence.³⁸

Police use of SWAT teams for the purpose of serving a search warrant erodes public trust, particularly in communities of color, and turns what should be a peaceful encounter into a paramilitary raid on a person’s home. Hundreds of people have been killed during the course of unnecessary SWAT raids, including children and the elderly.

For example, Tarika Wilson died when SWAT officers broke down her front door and opened fire into her home. Ms. Wilson was not a suspect in a criminal case. When SWAT officers broke down her door and shot her, she was holding her 14-month-old son. The baby was injured, but survived. The

³⁴ See DARYL GATES, CHIEF: MY LIFE IN THE LAPD 115–16 (1992).

³⁵ See Peter Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 1, 6 (2007), <http://www.cjmasters.eku.edu/sites/cjmasters.eku.edu/files/21stmilitarization.pdf> [<http://perma.cc/5XMM-A4A6>].

³⁶ See *id.* (noting that the vast majority of SWAT deployments were for the purpose of serving a search warrant rather than for other purposes).

³⁷ See David A. Klinger and Jeff Rojek, *Multi-Method Study of Special Weapons and Tactics Teams 7* (Aug. 2008) (unpublished manuscript), <https://www.ncjrs.gov/pdffiles1/nij/grants/223855.pdf> [<http://perma.cc/E5CS-ZQER>].

³⁸ See ACLU Report, *supra* note 2, at 31.

SWAT team had been looking for Ms. Wilson's boyfriend on suspicion of drug dealing when they raided Ms. Wilson's rented house on the Southside of Lima, Ohio, the only city with a significant African-American population in a region of farmland.³⁹

Another example is Bounkham Phonesavanh (Baby Bou Bou). After the Phonesavanh family's home in Wisconsin burned down, they drove their minivan to stay with relatives (a Laotian family) in a small town just outside of Atlanta, Georgia. Just before 3:00 a.m. on a night in May 2014, a team of SWAT officers armed with assault rifles burst into the room where the family was sleeping. They were looking for a cousin, whom they suspected of possessing approximately fifty dollars worth of drugs. Although kids' toys littered the yard, the police claimed they had no way of knowing children might be present. One of the officers threw a flashbang grenade into the room, and it landed in Baby Bou Bou's crib, blowing a hole in his chest that exposed his ribs, covering him in third degree burns, severely disfiguring his face, and placing him in a coma. Baby Bou Bou survived, but he had to undergo several surgeries, at great cost to his parents—a poor and homeless couple.⁴⁰

These two examples help to illustrate the very real and tragic human consequences of police militarization.

There has been virtually no oversight of police militarization. The federal government requires local law enforcement agencies to provide very little information to justify their requests for military equipment or funding. Significantly, the federal government has not, to date, required law enforcement agencies to provide any evidence that the communities they are sworn to protect and serve actually want their police to have military equipment. In other words, police departments today are able to obtain and use weapons and other equipment, much of which is designed for combat, without notifying, much less getting approval from, the communities they serve.

III. OVERSIGHT OPPORTUNITY

In June of 2014, the ACLU published a report called *War Comes Home: The Excessive Militarization of American Policing*.⁴¹ In it, the ACLU recommended that local and county governments create or authorize an agency to ensure that its local law enforcement agencies are not excessively militarized. The report also recommended that the agency's responsibilities should include approving or disapproving all:

- Requests for the receipt of weapons and vehicles through the 1033 program, which authorizes the Defense Department to “transfer” (i.e., give) military equipment to local police departments;

³⁹ See *id.* at 5.

⁴⁰ *Id.* at 14.

⁴¹ See generally *id.*

- Requests for grant funding from the federal government that will be used to purchase military-style weapons and vehicles; and
- Proposals to purchase military-style weapons from vendors.⁴²

On January 16, 2015, President Barack Obama issued Executive Order 13688—Federal Support for Local Law Enforcement Equipment Acquisition to “identify actions that can improve Federal support for the appropriate use, acquisition, and transfer of controlled equipment by State, local, and Tribal law enforcement agencies (LEAs).”⁴³ The Executive Order established a Federal Interagency Law Enforcement Equipment Working Group, which consulted with stakeholders and deliberated to develop a set of recommendations, released in May 2015.

One of the recommendations is to require local governments to submit requests for controlled equipment. Controlled equipment is equipment that is dangerous but for which there could be some legitimate use. This is distinct from prohibited equipment, for which there is no legitimate use at the local level. The purpose of this reform is to provide “evidence of a civilian governing body’s review and approval or concurrence of the LEA’s acquisition of the requested controlled equipment.”⁴⁴ The recommendation also defined a “governing body” as “the institution or organization that has direct budgetary oversight or fiscal/financial control over the requesting LEA.”⁴⁵

The Obama Administration has committed to this recommendation (in addition to other important recommendations), publicly. In May 2015, President Obama offered the following remarks at a community center in Camden, New Jersey:

[M]ilitarized gear can sometimes give people a feeling like there’s an occupying force, as opposed to a force that’s part of the community that’s protecting them and serving them. It can alienate and intimidate local residents, and send the wrong message. So we’re going to prohibit some equipment made for the battlefield that is not appropriate for local police departments.⁴⁶

Additionally, the President has directed departments and agencies to put the working group’s recommendations into practice and to continue to partner with law enforcement and local communities during the implementation process.⁴⁷ This is significant for several reasons, including the fact that

⁴² *Id.* at 43.

⁴³ Exec. Order No. 13,688, 80 Fed. Reg. 3451 (Jan. 16, 2015).

⁴⁴ LAW ENF’T EQUIPMENT WORKING GRP., RECOMMENDATIONS PURSUANT TO EXECUTIVE ORDER 13688: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 26 (2015), https://www.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf [<https://perma.cc/BJA7-6VXR>] [hereinafter Working Group Report].

⁴⁵ *Id.* at 40 n.29.

⁴⁶ Press Release, White House, Remarks by the President on Community Policing (May 18, 2015), <http://www.whitehouse.gov/the-press-office/2015/05/18/remarks-president-community-policing> [<http://perma.cc/Q8QT-ZXL5>].

⁴⁷ *See, e.g.*, Press Release, White House, FACT SHEET: Creating Opportunity For All Through Stronger, Safer Communities (May 18, 2015), <http://www.whitehouse.gov/the-press->

there will now be at least some local oversight. As noted earlier, police militarization has occurred with little to no public oversight, and this is an important step toward remedying that problem. For the first time, police departments that want to acquire controlled equipment from the DOD will have to obtain the approval, or at least the concurrence, of the local body that has direct budgetary oversight or fiscal control over the department. The working group also promulgated a list of equipment types that will be not be transferred under any circumstances. These are tremendous steps forward.

The list of prohibited equipment that may not be acquired under any of the various federal programs developed by the President's Task Force includes tracked armored vehicles, weaponized aircraft and vehicles, bayonets, grenade launchers, and large-caliber firearms.⁴⁸ This is an important development. It defies reason that local law enforcement agencies would have access to grenade launchers, but until now, they have. Several law enforcement agencies, including the Los Angeles School District, have received them (the district has decided to return them to the DOD).⁴⁹ Banning the transfer of grenade launchers, weaponized aircraft, bayonets, and large-caliber firearms is a positive development—local law enforcement agencies should never have been able to acquire these items in the first place. But arguably, it does not go far enough, for MRAPs and other pieces of military equipment like LRADs (long-range acoustic devices that create a piercing noise used to disperse protestors) are still transferrable. Very few armored vehicles that are transferred to local law enforcement agencies are “tracked”—the over 500 MRAPs that have been sent to local law enforcement agencies to date are wheeled as opposed to tracked.⁵⁰

The working group also developed a unified list of equipment that law enforcement may acquire only in accordance with new and more rigorous controls.⁵¹ This controlled list includes armored vehicles, tactical vehicles, riot gear, and specialized firearms and ammunition. This is a very positive development, and it is requests for these types of equipment that must be accompanied by a certification of approval or concurrence by the local governing body with direct budgetary oversight of the requesting agency.

The “new and more rigorous controls” include several core components. One is uniform acquisition standards—across all programs, the transfer of equipment on the controlled list will require the consent of the appropriate local civilian governing body (e.g., City Council, County Coun-

office/2015/05/18/fact-sheet-creating-opportunity-all-through-stronger-safer-communities [http://perma.cc/C5LB-PAYU].

⁴⁸ See Working Group Report, *supra* note 44, at 12–13.

⁴⁹ Musgrave et al., *supra* note 8.

⁵⁰ An armored vehicle can be wheeled, tracked, or both. Tracked armored vehicles, such as the M113, have a slightly more militaristic appearance, and are typically armed. Wheeled armored vehicles are faster and designed to be driven on roads; as noted, they are designed to withstand roadside bombs.

⁵¹ See Working Group Report, *supra* note 44, at 14–15.

cil, Mayor) as well as a clear and persuasive explanation of the need for the equipment and the appropriate law enforcement purpose that it will serve.⁵²

The second is training and protocols—in order to receive controlled equipment, law enforcement agencies must commit to have in place “general policing” training standards, including training on community policing, constitutional policing, and community impact.⁵³ Agencies must also agree to protocols on the appropriate use, supervision, and operation of such equipment.

The third is required data collection—law enforcement agencies must collect and retain certain information whenever such equipment is involved in a “significant incident.”⁵⁴ Upon request or during a compliance review, the law enforcement agency must provide this information to the federal agency that supported the equipment’s acquisition. This information will also be made publicly available in accordance with the law enforcement agency’s applicable policies and protocols.

The Stop Militarizing Law Enforcement Act, introduced in September of 2014, would require the DOD to ensure that local law enforcement agencies requesting military equipment certify that the agency notified the local community of the request by “publishing a notice of such request on a publicly accessible Internet website; posting such notice at several prominent locations in the jurisdiction of the recipient; and ensuring that such notices were available to the local community for a period of not less than 30 days.”⁵⁵

Thus, the bill would require notice, but not approval. In that sense, the Administration’s decision to require approval, or at least concurrence, is significant—for the first time, local communities will have a say in whether they want their police departments to obtain military equipment from the Pentagon under a program that was created to arm the police with combat-ready weaponry and use that weaponry to wage the War on Drugs.

Thus, there are a number of avenues worth exploring in the effort to impose more local democratic oversight of police militarization.

The next section will focus directly on the first control established by the President’s Task Force—the requirement that requests for controlled equipment be accompanied by a certification that the local governing body consents to the acquisition of the equipment. This goes directly to the question of oversight and is one of the most significant components of the new protocols.

⁵² *Id.* at 4–5, 28.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Stop Militarizing Law Enforcement Act, H.R. 5478, 113th Cong. § 3(a)(8) (2014).

IV. TOOLKIT FOR COMMUNITIES AND LOCAL GOVERNING BODIES

Local communities will now have an opportunity to weigh in on whether their police departments will be able to obtain controlled military equipment from the Pentagon. But what should they say? What arguments should they present if they wish to voice opposition to the requests?⁵⁶

Local communities can and should, at a minimum, insist that police departments explain the basis for any request for controlled equipment from the DOD. Today, law enforcement agencies can obtain virtually any type of equipment without presenting an explanation of, let alone a justification for, the request.

People should also understand that the police are able to purchase any weapons and other tactical gear they need on the private market. Of course, if the goal is to reduce militarization across the board, allowing the police to buy paramilitary weapons on the private market is not a significant improvement. However, two factors undercut that argument: (1) the 1033 program blurs the line between the military and the police—allowing police departments to buy weapons on the private market at least solves that problem and (2) there is local oversight of police department budgets—this way local governments have some control over what their departments buy. Numerous private contractors exist that sell virtually all types of tactical equipment, and they market aggressively on the web, using printed materials, and at trade shows.⁵⁷ It is worth noting that the intended audience for these trade shows includes both members of the military and members of the law enforcement community. Local police departments purchase these items using funding received from the federal government, but also using local funds. The task force's recommendation is that the agency authorized to approve requests for 1033 equipment be the entity that has direct control over the law enforcement agency's budget—if a local community wants their police department to have these weapons, but not to get them from the DOD, they can request that more funding be budgeted for this purpose.

In terms of specific requests for equipment, local communities could essentially take three positions: (1) oppose all 1033 requests for controlled equipment, (2) oppose requests for weapons and other types of equipment designed for combat, or (3) oppose requests for weapons only. Opposing all requests for 1033 equipment is the strongest position, and probably the best from the standpoint of ending police militarization. The paragraphs below lay out points to make in support of each position.

⁵⁶ This section is intended for communities that have concerns about their police departments' receipt of military equipment from the DOD. Of course, local communities may also wish to express support for such requests.

⁵⁷ See, e.g., *Company*, TACTICAL PRODS. GRP., <http://www.tacprogroup.com/company.html> [<http://perma.cc/RDZ6-N946>]; N.Y. TACTICAL OFFICERS ASS'N, *Tactical Conference 2016*, <http://www.nyttacticalexpo.com/> [<http://perma.cc/8RHT-74T3>].

People could oppose *all* requests for controlled equipment from the Pentagon. The argument in support of that position is that historically, we have drawn a clear line between the police and the military because democratic societies do not condone military oversight in the domestic sphere—in other words, we do not want to live in a police state. The 1033 program blurs the line between the police and the military. The U.S. was founded in part on the notion that living under martial law-like conditions is undemocratic, and the 1033 program comes too close to martial law.

In addition, the 1033 program was created during the height of the War on Drugs. Even if we needed the program then (a debatable proposition), the War on Drugs is widely considered a failure.⁵⁸ Police departments should not continue to aggressively fight a failed and costly war, and they do not need controlled military weapons from the Pentagon to protect their communities. In fact, use of military equipment tends to *escalate* the risk of violence and often puts people at risk.⁵⁹

Alternatively, an individual or group might be comfortable with their police departments obtaining military non-weapons such as desks and computers, but oppose requests for military weapons and other equipment designed for combat (riot gear, including battle dress uniforms and night vision goggles). The argument here would be that although the program is outdated, use of military non-weapons is cost-effective and safe. Police departments need resources like desks and computers, and there is no reason for local police departments not to take advantage of the Pentagon's excess equipment. They could still oppose requests for weapons such as MRAPs and AR-15s, and riot gear—these were designed for combat and have no place on American streets.

A third option would be to oppose requests for weapons only, and support requests for other types of military gear. The argument is essentially the same as the one above; though it allows for the argument that non-weaponized military gear has some place in local law enforcement. Communities taking this position may wish to request that the police should have to demonstrate a compelling need for non-weaponized military gear such as battle dress uniforms and night vision goggles.

⁵⁸ See, e.g., Joshua D. Wild, *Epic Failure: The Uncomfortable Truth About the United States' Role in the Failure of the Global War on Drugs and How it is Going to Fix it*, 36 SUFFOLK TRANSNAT'L L. REV. 423, 423 (2013); Nick Clegg & Richard Branson, *We Have Been Losing the War on Drugs for Four Decades - End It Now*, THE GUARDIAN (Mar. 3, 2015, 5:00 PM), <http://www.theguardian.com/commentisfree/2015/mar/03/war-on-drugs-british-politicians-nick-clegg-richard-branson> [<http://perma.cc/J249-Z4ZU>]; Rebecca Gordon, *The Failed War on Drugs in Mexico (and the United States)*, MOYERS & COMPANY (Mar. 27, 2015), <http://billmoyers.com/2015/03/27/can-say-blowback-spanish/> [<http://perma.cc/37E8-JX44>]; Carly Schwartz, *America's War on Drugs Has Failed. This Program Might be the Solution*, HUFFINGTON POST (May 7, 2015, 10:59 AM), http://www.huffingtonpost.com/2015/05/07/war-on-drugs_n_7164914.html [<http://perma.cc/QF7Z-UZKH>].

⁵⁹ See, e.g., ACLU Report, *supra* note 2, at 39.

This shift in policy presents a tremendous opportunity for local governments to apply some oversight to law enforcement agency requests for controlled 1033 equipment. But the opportunity may be lost if local governments lack the background and expertise they need to evaluate requests for such equipment.

Local governing bodies such as city councils should set a very high bar when evaluating such requests. They could, of course, adopt a policy of disapproving all such requests for the reasons set forth in the previous section, essentially that: (1) the program blurs the line between the police and the military (a line established because democratic societies do not condone military oversight in the domestic sphere) and (2) the program was established at the height of the War on Drugs—a war that has been an abject failure—and the police should not continue to use controlled military equipment to fight a failed and costly war that has no public mandate.

Local lawmakers should also keep in mind, as should members of the general public, that law enforcement agencies do not actually *need* this equipment because they can obtain whatever weapons and equipment they want on the private market. Local law enforcement agencies receive billions of dollars from the federal government to purchase such equipment. And, because local oversight agencies will have direct oversight of law enforcement's budget, the agency could budget additional funding for the purchase of tactical gear if it thought that law enforcement had demonstrated the need for such equipment. Again, allowing police departments to purchase paramilitary weapons on the private market is not ideal, but at least it avoids unhealthy entanglement between the police and the military, and local jurisdictions play a role in overseeing police department budgets.

They should also take to heart any concerns expressed by the local citizenry. Trust between the police and local communities is extremely important in ensuring both that the police can do their job and that people are treated fairly. If members of a local community do not want a particular type of military weapon or equipment to be used by their police department, the local government should take this very seriously. Of course, one could argue that a majority of a local electorate could *want* the police to have an MRAP because they predict that the police would not use the MRAP in their part of the city. There are two responses: (1) there has been very little support expressed in the public domain for police departments to obtain MRAPs—virtually every article that has been published on this topic has taken the view that local use of MRAPs (in any part of a city) is inappropriate;⁶⁰ and

⁶⁰ See, e.g., Vincent Carroll, *Just What Your Local Police Don't Need—an MRAP*, DENVER POST (Dec. 10, 2013), http://www.denverpost.com/carroll/ci_24696707/just-what-your-local-police-dont-need-mdash [<http://perma.cc/XG9E-V5FG>]; Molly Redden, *Documents Reveal the Fearmongering Local Cops Use to Score Military Gear from the Pentagon*, MOTHER JONES (Aug. 9, 2015), <http://www.motherjones.com/politics/2015/08/new-documents-reveal-fearmongering-local-cops-use-score-military-gear-pentagon> [<http://perma.cc/5N6L-GBPP>]; David Welna, *Should Local Police Get the Military's Extra Armored Trucks?*, NPR (Sept. 3, 2014),

(2) majority opinion is not the only factor that local governing bodies should consider in evaluating requests for MRAPs—if the local government believes that the police are more likely to use MRAPs in only certain parts of town (in a manner that disparately impacts only certain residents), it should take that into consideration.

I propose that local lawmakers apply the following framework in evaluating requests for controlled 1033 equipment and deciding whether to approve them.

First, requesting agencies should, at a minimum, be required to provide an explanation of the need for the equipment, and the explanation should be evaluated carefully. Generic claims that the equipment is necessary for the agency to carry out its mission should be rejected outright. Generic claims that the equipment is necessary to protect officer safety should also be rejected.⁶¹ It is true that there are guns in many communities, but again, the police can obtain the equipment and weapons they need on the private market. In addition, this is the safest time to be a police officer.⁶² If officer safety is provided as the explanation for the request, the requesting agency should be required to explain *why* officer safety is a concern and *how* the requested equipment will be used to address that problem.

Second, requesting agencies should be required to demonstrate that there is a compelling need for the particular equipment being requested in that particular community. They should be required to show that there is a specific law enforcement concern that *cannot* be addressed safely without access to the requested equipment.

Third, requesting agencies should be required to explain why, if they need the equipment, they cannot purchase the equipment on the private market. They should be required to demonstrate that there is no way they can obtain the requested equipment other than through the 1033 program.

<http://www.npr.org/2014/09/02/345275751/should-local-police-get-the-militarys-extra-armored-trucks> [<http://perma.cc/5VQG-CT5L>]; Graham Kates, *Experts: Most Police Depts. Don't Need Armored Trucks*, CBS NEWS (Dec. 3, 2015), <http://www.cbsnews.com/news/san-bernardino-shooting-experts-say-most-police-departments-dont-need-armored-trucks/> [<http://perma.cc/G72A-LURU>].

⁶¹ It could be argued that the police are safe now precisely *because of* police militarization, but there is no evidence that that is true. Crime is down across the board in the United States. If we are going to accept “officer safety” as a justification for police militarization, we have to accept life under martial law-like conditions.

⁶² See, e.g., Christopher Ingraham, *There's Never Been a Safer Time to be a Cop—Or a More Dangerous Time to be a Criminal*, WASH. POST (Nov. 24, 2014), <https://www.washingtonpost.com/news/wonkblog/wp/2014/11/24/theres-never-been-a-safer-time-to-be-a-cop-or-a-more-dangerous-time-to-be-a-criminal/> [<http://perma.cc/3A6H-YUPB>]; Jamiles Lartey, *2015 May Be One of the Safest Years for Law Enforcement in a Quarter Century*, THE GUARDIAN (Sept. 4, 2015 12:26 PM), <http://www.theguardian.com/us-news/2015/sep/04/police-deaths-2015-law-enforcement-safety> [<http://perma.cc/6NL3-TE4S>]; Mark J. Perry, *Is There Really a War on Cops?*, AM. ENTERPRISE INST. (Sept. 9, 2015, 2:58 PM), <https://www.aei.org/publication/is-there-really-a-war-on-cops-the-data-show-that-2015-will-likely-be-one-of-the-safest-years-in-history-for-police> [<http://perma.cc/VJ6M-A8BP>].

Fourth, requesting agencies should be required to make available to the local governing body, and to the public, an inventory of all the equipment it has previously received through the 1033 program.

Fifth, requesting agencies should be required to make available to the local governing body, and to the public, all available information concerning funding it receives from the federal government and how it spends the funding.

CONCLUSION

No Americans want to see a replay of the events in Ferguson. No Americans want young mothers to be gunned down while holding their babies or infants to be blown up by grenades. Everyone wants the police to have the tools that they need to keep us (and themselves) safe, but a militarized police force is not the answer.

The Obama Administration has taken some very important steps in the needed effort to rein in police militarization. The police have become excessively militarized without any public oversight at any level of government, but the lack of local oversight is particularly troubling. The police should not be able to obtain heavy military equipment without the communities they serve having an opportunity to weigh in on the advisability of receiving such equipment from the United States Department of Defense.

The new requirement, that requests for controlled equipment be accompanied by a certification that the local governing body consents to the acquisition of the equipment, is a tremendous step forward. But it will do little good if citizens who want to express concern over the receipt of such equipment do not have the tools to craft arguments to express those concerns. And it will do little good if local governing bodies do not have a framework in place for evaluating requests for controlled 1033 equipment. This article represents an attempt to provide both—tools for communities and a framework for local governments. If local communities are able to stop or limit the acquisition of controlled military equipment by law enforcement agencies, this will represent progress in the effort to demilitarize police and create more trusting relationships between law enforcement agencies and the communities they serve.

