
Police Misconduct and Civil Rights Law Report

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POSSE COMITATUS, DRUGS, AND THE MILITARIZATION OF LOCAL POLICE

by Lynne Wilson

Introduction

Barely a soul stirred in the sleepy pre-dawn hours of Friday, October 30, 1998 at the King/Garvey Cooperative Complex in San Francisco's Western Addition housing project. Suddenly, with no warning, a mob of men wearing what looked like battle fatigues and black masks simultaneously crashed through apartment doors after blasting the hinges off with "shock-lock" rounds. The men, officers from numerous federal, state and local drug squads or agencies, forced nearly everyone in sight to the ground, using assault rifles and screaming obscenities as they did so.

"Flash-bang grenades" cleared out rooms quickly. Parents watched helplessly as sobbing children were torn from them. Grandmothers froze as rifles grazed their necks. Officers shot a dog named Bosco inside an apartment, took him outside and then shot him again. Terror reigned.

The King/Garvey Cooperative "raid" netted eleven arrests, a pound of marijuana, four ounces of crack cocaine, seven pistols and \$4,000 cash. At a November 4, 1998 San Francisco Police Commission hearing, residents described the cash as monies raised to pay for a deceased resident's funeral rather than drug monies. Scores of distraught residents also described the trauma they had been forced to endure. Kitt Crenshaw, the San

Francisco Police Department narcotics lieutenant who initiated and oversaw the operation, stated that the raid was designed to "put fear into the hearts" of a gang called the "Knock Out Posse." "I feel bad for the innocent women and children that were there, but in a way they do bear some responsibility for harboring drug dealers," said Crenshaw. Christian Parenti, "The SFPD Uses SWAT-Style Equipment to Raid a Western Addition Housing Project: Does Military Gear Encourage Military Policing?" San Francisco Bay Guardian, November 18, 1998.

Crenshaw's King/Garvey Cooperative raid squad included agents from the San Francisco Police Department's Narcotics Division, SFPD's SWAT team, SF District Attorney's Office, the Federal Bureau of Investigation [FBI], the federal Drug Enforcement Agency [DEA], and the federal Bureau of Alcohol, Tobacco and Firearms [ATF]. Such multi-jurisdictional efforts that essentially use military tactics in an effort to eradicate drugs have mushroomed around the country.

Such tactics are evident in the following examples. The simultaneous execution of nine search warrants in a rural county in Washington state by 135 officers and troopers from the following agencies: the DEA, the ATF, Washington Air Force and Army National Guards, Washington State Patrol, three county sheriff SWAT teams,

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and four small city police departments. The raid, conducted in July 1994, involved the same tactics as those used in the King/Garvey raid described above. It netted 54 marijuana plants, two misdemeanor arrests for possession and eight terrified small children, not to mention numerous traumatized adults. The search warrants alleging that the residents were running an international drug operation with underground marijuana farms turned out to be the fabrications of an unidentified informant. Victims, who found it nearly impossible to identify which black-masked, battle-fatigued, rifle-waving agent did what to who in the early morning darkness, settled the case out of court. Thurston County Superior Court Search Warrant File No. 668; Claims for Damages filed with the separate agencies in 1996.

North Carolina's "Operation Read-Rock" conducted in July 1994 in the city of Chapel Hill and involving the combined resources of the North Carolina State Bureau of Investigation's Special Response Team [SRT] and local police Special Weapons and Tactics [SWAT] teams. In "Operation Read-Rock," like in the Washington case above, 45 assault-rifle-waving, ninja-hooded officers executed a blanket search warrant that gave officers the authority to search every person and vehicle in a one-block mostly-black business area of the city. The warrant request, submitted after numerous complaints about drug trafficking from business owners had been lodged, stated, "We believe there are no innocent people at this place. Only drug sellers and drug buyers are on the described premises." Storm trooper tactics were used to search black club patrons as well as anyone else who happened to be black and in the sealed-off area at the time. Whites were permitted to leave. *Barnett v. Karpinos*, 460 S.E.2d 208, 212 (N.C. App. 1995) (holding the search warrant invalid on Fourth Amendment grounds "as little more than a general warrant"), *review denied*, 463 S.E.2d 232 (N.C. 1995); Parenti, *supra*.

Horrible incidents like those in San Francisco, Chapel Hill and Thurston County will surely increase in the future, as the federal government's support of paramilitary and military drug war tactics spreads. Multi-jurisdictional drug task forces that in many cases include the military resources of state National Guard agencies and the technical resources of federal law enforcement agencies are now commonplace.

The U.S. Attorney in Seattle, for example, recently had a portion of Washington state designated as one of 17 national "High Intensity Drug Trafficking Areas." This gives local law enforcement agencies access to the most up-to-date high-tech equipment and sophisticated intelligence devices such as "bird dogs" that attach to cars. Washington's new drug war effort is funded with a \$3 million federal grant and includes the combined resources of the FBI, DEA, U.S. Customs Service, U.S. Marshall's Services, the ATF, the Immigration and Naturalization Service and something called the "Western States Infor-

mation Network" working in conjunction with local police. Paul Shukovsky, "Drug War Stepped Up in Seven Counties," *Seattle Post-Intelligencer*, January 2, 1998, at B1-B2.

Other such multi-jurisdictional drug war efforts now exist in Philadelphia and New York. *See, e.g.*, Howard Goodman, "Operation Sunrise Will Target Drug-Plagued Fairhill and Kensington Sections," *Philadelphia Inquirer*, June 15, 1998 (describing the combined efforts of 200 Philadelphia officers and numerous state and federal agencies); Patricia J. Williams, "Fate and Fundamentalism," *The Nation*, December 1, 1997 at 10 (describing the shooting of 17-year-old Andrew Burgess in Queens, New York, by a federal marshal who was part of a "High Intensity Drug Trafficking Area" multi-agency stake-out).

That local police departments wholeheartedly embrace their roles as foot soldiers in the federal government's "War on Drugs" is not surprising, given the vast array of support that is being doled out. That local police are now performing essentially military and paramilitary operations in that war is also not surprising, given the numerous recent amendments that the U.S. Congress has enacted to the Posse Comitatus Act of 1878, the post-Reconstruction statute that prohibits the direct use of military troops in local law enforcement. 18 U.S.C. § 1385 [Posse Comitatus Act]; 10 U.S.C. §§ 371-382 [Military Support for Civilian Law Enforcement Agencies]. Recent Congressional support for military involvement in the "War on Drugs" is evidenced by the use of National Guard troops in "Drug Interdiction and Counter-Drug Activities," sanctioned by 32 U.S.C. § 112 and federal agencies furnishing to local police military hardware such as armored personnel carriers. This article is an effort to trace the political and legal sources of this recent post-Cold War shift in local law enforcement tactics.

Background

Paramilitary and tactical policing that uses the equipment, training, rhetoric and tactics of warfare is clearly on the rise. According to a study by Professor of Sociology Peter Kraska of Eastern Kentucky University, more than 30,000 heavily armed, military-trained police units now roam the United States. The number of paramilitary police "call-outs" quadrupled between 1980 and 1995. Between 1982 and 1995, the percentage of local police agencies with active paramilitary units (SWATs or SRTs) rose from 59 percent to 90 percent. Peter Kraska & Victor Kappeler, "Militarizing American Police: The Rise and Normalization of Paramilitary Units," 44 *Social Problems* 1 (1997).

Huge federal drug war budgets (and expanded legal authority) fuel this proliferation. The Department of Defense [DOD] currently transfers to local police agencies military hardware and technical equipment developed primarily for warfare at a mind-boggling rate: Be-

tween 1995 and 1997, for example, the DOD gave local police 1.2 million pieces of military hardware including more than 3,800 M16 automatic assault rifles; 2,185 Ruger M14 semiautomatic rifles; 73 M79 grenade launchers; and 112 armored personnel carriers (APCs). Military gear given to local departments also includes helicopters and electric generators. Parenti, *supra*. In addition, police departments fattened with federal monies purchase military hardware on the "open" market: San Francisco's 45 officer SWAT team not only buys its own AR 15 and MP53 assault rifles but has also purchased two APCs from the United Kingdom. *Id.*

This rise in "open market" purchases has spawned an entire industry for tactical weaponry and equipment, with arms manufacturers such as Heckler & Koch and Smith & Wesson hawking their wares to local departments with special SWAT training camps and competitions. Heckler & Koch operates a mobile training camp that provides convenient SWAT training for every local police department using its "MP5," an automatic weapon much favored by special forces teams. Chuck Taylor, "Up Close & Personal with the H&K MP-5," *Guns & Weapons for Law Enforcement*, September 1997, at 12, 68. The National Tactical Officers Association [NTOA], a nonprofit organization that boasts 10,000 members, not only conducts pricey SWAT training and competitions, but it also runs a for-members-only website <<http://www.ntoa.org>> that features articles such as "The Legal Aspects of Using Diversionary Devices" and "Avoiding Civil Liability in Joint Operations."

What is missing from all the sales and training hype are clear standards and guidelines as to how (and when) tactical units with their high-tech weapons and military-style approach should be used. To date, according to Peter Kraska, no standardized SWAT policies or procedures exist, although both NTOA and the International Association of Chiefs of Police are making efforts. "Departments are pretty much on their own," says Kraska, as to what weapons and equipment they use and how they use them. Lynne Wilson, "Selling SWAT," *Covert Action Quarterly*, Fall 1997, at 22.

Predictably, as departments operate in a standardless void and as federal largesse increases, so do the scenarios in which paramilitary units are deployed. Fifteen years ago, municipal tactical units were called out once a month on average and then only for rare hostage or barricaded suspect situations. By 1995, that number rose to seven call-outs per month, with more than 75 percent of the "events" consisting of drug raids such as those described above. Peter Cassidy, "Operation Ghetto Storm: The Rise in Paramilitary Policing," *Covert Action Quarterly*, Fall 1997, at 21.

Increasingly, these tactical units are evolving from emergency response teams to a standard part of everyday policing. Some cities such as Fresno, California now use their SWAT teams, complete with black jumpsuits,

military helmets, and submachine guns, for routine patrols in high crime areas, with tactical operations taking place nearly every night. Parenti, *supra*. The Fresno "Violent Crime Suppression Unit" is equipped with two helicopters with infra-red scopes, an army-surplus APC, attack dogs, smoke bombs, and numerous other pieces of military hardware. Since 1994, it has been free to use aggressive, unorthodox tactics such as deploying "troops" for street sweeps in a poor, minority neighborhood that residents call "The Dog Pound." Parenti, *supra*. "It's a war," says Fresno Sgt. Margaret Mims.

One commander of a paramilitary unit in a Midwestern city described how his team patrols in full "battle dress uniform" [BDU], cruising the streets in an armored personnel carrier: "We stop anything that moves. We'll sometimes even surround suspicious homes and bring out the MP5s. We usually don't have any problems with crackheads cooperating." Cassidy, *supra* at 21. See also Parenti, *supra* (describing the escalation in Fresno of a routine traffic stop into a SWAT style search and standoff involving 32 officers from six different police agencies).

Not all local police officials, however, enthusiastically endorse the use of organized paramilitary units or PPUs. The increased use of PPU "callouts," says Lt. Tom Gabor of the Culver City, California Police Department, has "less to do with officer or citizen safety issues than with

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justifying the cost of maintaining the units...There exist literally thousands of unnecessary units." Lt. Gabor claims that regular patrol officers could have handled 99 percent of the cases in which SWAT units were utilized. FBI Law Enforcement Bulletin, April 1993.

SWAT style policing with militarized training, equipment and organization causes police officers to treat mundane police situations as worthy of a military scale response. "The fundamental problem with the SWAT model is that if police become soldiers, the community becomes the enemy," says Sacramento State University sociologist Tony Platt, who has studied the rise in tactical policing. "Paramilitary policing erodes the idea of police as public servants subordinate to community needs." Says Peter Kraska, "The more paramilitary police units exist, the more all policing will be militarized." Parenti, *supra*.

The Posse Comitatus Act

Former Los Angeles Police Commissioner Darryl Gates was the first to utilize a local SWAT team in the 1960s, and for the next twenty years, the use of either military hardware or paramilitary units were relatively rare occurrences. The key exceptions were the use of military equipment and advisors during the large student demonstrations of the early 1970s and in the 1973 American Indian Movement occupation at Wounded Knee, South Dakota. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Section 1983 claims arising out of confrontation between Ohio National Guard and Kent State students not barred by the Eleventh Amendment); *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (affirming jury verdict for defendant Mississippi state patrol officers where Jackson State plaintiffs did not sustain causation burden of proof). Other efforts to insert the military personnel into or to utilize military equipment or operations in local law enforcement were considered potentially prohibited by the Posse Comitatus Act [the Act], 18 U.S.C. § 1385.

In its present form, the Posse Comitatus Act provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Congress passed the Act in 1878 to end military occupation of the defeated Southern states during the post-Civil War reconstruction period. Southern Democrats had complained bitterly about the oppressive use of the military in a law enforcement role. David Adams, "Internal Military Intervention in the United States," 32 *Journal of Peace Research* 197 (1995).

The statute embodies the long-standing principle in Anglo-American law that there should be a total separa-

tion of military from civil law enforcement. See generally Roger Hohnsbeen, "Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement," 54 *George Washington Law Review* 404 (1986). As one Southern Senator stated during debates over the Act, "whenever you conclude that it is right to use the Army to...discharge those duties that belong to civil officers and to the citizens, then you have given up the character of your Government; it is no longer a government for liberty...it has become a government of force." 7 *Cong. Rec.* 4247 (1878) (statement of Sen. Hill).

Significantly, the Act applies both to prohibit the direct involvement of the military in law enforcement and the use of "any part...of [the military]...otherwise to execute the laws..." This appears to prohibit indirect involvement such as the supply of support, training, intelligence and equipment, unless explicitly sanctioned by Congress or the Constitution. One court has held so, finding the Act "absolute in its command and explicit in its exceptions." *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

"Posse comitatus" is literally the power of a sheriff to summon the assistance of a county's entire population above the age of 15 to help keep the peace or to pursue and arrest felons. 1 W. Blackstone, *Commentaries* * 343-344. By its terms, the Act prohibits members of the Army and the Air Force from joining such a posse. However, the Act has been held to apply to the Navy and to the Marines as a matter of policy. *United States v. Walden*, 490 F.2d 372, 374-75 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974); *People v. Blend*, 175 Cal. Rptr. 263 (Cal. App. 1981) (Act applies to all military branches); Department of Defense Directive 5525.5. *But see United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986) (Act applies only to Army and Air Force); *State v. Short*, 775 P.2d 458 (Wash. 1989) (the Act does not apply to the Navy therefore no exclusion of testimony by Navy undercover drug agent).

Because the federalized National Guard is part of either the Air Force or the Army, it is covered by the Act. 10 U.S.C. §§ 3078, 8078; *Perpich v. Department of Defense*, 496 U.S. 334, 344 (1990) (National Guardsmen lose status as members of state National Guard when "drafted into federal service by the President"). When acting as a militia, however, a state National Guard is exempt from the Act's proscriptions. *United States v. Benish*, 5 F.3d 20, 26 (3d Cir. 1993) (Pennsylvania National Guard not in federal service at time of marijuana surveillance). The Act does not apply to the Coast Guard. *United States v. Chaparro-Almeida*, 679 F.2d 423 (5th Cir.), *cert. denied*, 459 U.S. 1156 (1982); *Jackson v. State*, 572 P.2d 87 (Alaska 1977).

Although the Act mandates criminal penalties for a violation, no one has ever been prosecuted for violating it. Prosecution is the only remedy as the Act does not

provide for a private right of action. Although attempts have been made to obtain civil damages for violations of the Act, recovery has only been successful against military officials for violating a plaintiff's Fourth Amendment rights under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *Lamont v. Haig*, 539 F. Supp. 552 (W.D.S.D. 1982) (recovery for Wounded Knee residents only available as *Bivens* action).

Criminal defendants have similarly been unsuccessful in using the Act to exclude military witness testimony, even where officers were acting in violation on the Act. *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988) (even if Army undercover agent acted in violation of Act, no exclusion of testimony in cocaine conspiracy case); *Hildebrandt v. State*, 507 P.2d 1323 (Okla. 1973) (military investigators not prohibited from testifying regarding LSD purchase from defendant). Military officers conducting internal investigations who happen to uncover alleged wrongs by civilians are also not prohibited from testifying. *State v. Presgraves*, 328 S.E.2d 699 (W. Va. 1985) (defendant convicted of conspiring to deliver marijuana).

Finally, where a military agent is involved in a state criminal arrest or investigation of another military officer, courts have uniformly held no violation of the Act. One state court, for example, held no violation of the Posse Comitatus Act where a military purpose justified the military's involvement with local law enforcement. *State v. Nelson*, 260 S.E.2d 619 (N.C. 1979) (upholding felony convictions of defendant soldiers stationed at Ft. Bragg). See also *State v. Sanders*, 281 S.E.2d 7 (N.C. 1981) (military street patrol conducted solely for the purpose of removing personnel back to Ft. Bragg); *State v. Trueblood*, 265 S.E.2d 662 (N.C. App. 1980) (defendant Army officer's drug dealing was of direct concern to military). Other courts have held no violation of the Act where the military officer's involvement was personal, not military, in nature. *People v. Burden*, 303 N.W.2d 444 (Mich. 1981) (Air Force member acted as drug undercover agent as part of plea bargain unrelated to military status).

Consistent with the Act's language, courts require the active involvement of military officers done at the request of local law enforcement before a violation will be found. Such cases are few. In the civil context, only the federal government itself has successfully raised the Posse Comitatus Act as a defense to a negligence claim brought under the Federal Tort Claims Act. *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961) (United States could not be held liable for alleged negligence of Air Force helicopter operators assisting local police in search in violation of the Act). In the criminal context, only one state court has held that the exclusionary rule applies where a military officer directly participated in a search for drugs and pulled a gun on the defendant during the arrest. *Taylor v. State*, 645 P.2d 522 (Okla. 1982).

Posse Comitatus and the Law of Wounded Knee

Criminal litigation arising out of 1973 American Indian Movement's uprising at Wounded Knee, South Dakota, did much to simultaneously clarify and confuse what military behavior does and does not constitute a violation of the Posse Comitatus Act. During the takeover, Army officers and the South Dakota National Guard supplied law enforcement officials with military equipment including ammunition, weapons, flares, and armored personnel carriers. Mechanics from both the Nebraska and the South Dakota National Guards repaired and maintained the personnel carriers. The U.S. government charged four defendants with obstructing justice in violation of 18 U.S.C. §231(a)(3), an offense requiring interference with any "law enforcement officer lawfully engaged in the lawful performance of his official duties." *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974); *United States v. McArthur*, 419 F. Supp. 186 (D.N.D.); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975); *aff'd sum nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977). Each court assumed that the National Guards had been federalized and were thus subject to the Act.

Each of the four defendants argued that the government could not prove "lawful performance" because civil reliance on military assistance at Wounded Knee violated the Act. Although the four courts looked at the same evidence, each came to a separate conclusion. The *Banks* court granted the motion for acquittal on the obstruction charges, stating that civil law enforcers had used the military "as a posse comitatus or otherwise." *Banks*, 383 F. Supp. at 375. The *Jaramillo* court held that while the Act does not *per se* prohibit the furnishing of military equipment such as armored personnel carriers, advice rendered by military officers and the equipment maintenance performed by military personnel so "pervaded" the activities of civilian personnel that there was a reasonable doubt as to whether law enforcement officers were lawfully engaged in the performance of their duties. *Jaramillo*, 380 F. Supp. at 1379, 1381.

The *Red Feather* court agreed with the *Jaramillo* court that "direct active use" of military material violates the Act. But the *Red Feather* court went further to list what "active" military roles are forbidden in civil law enforcement: arrests, seizing evidence, searching persons or buildings, investigating crimes, interviewing witnesses, pursuing escaped prisoners and searching for suspects. *Red Feather*, 392 F. Supp. at 925. In addition, the *Red Feather* court held as acceptable certain "passive" military roles that indirectly aid civil law enforcers, including the presence of military personnel giving advice or recommendations on tactics or logistics, delivering and maintaining military material, training civilian officials in the use and care of equipment and conducting aerial reconnaissance. *Id.*

Significantly, the *McArthur* court like the *Red Feather* and the *Jaramillo* courts before it concluded that the Act forbade neither the military's giving material or equipment to civil law enforcers nor the lending of military advisors. *McArthur*, 419 F. Supp. at 194-95. However, although three of the four Wounded Knee courts came to this conclusion, none agreed on the standard to be applied to precisely determine when the Act is violated.

This disagreement, combined with the one previous interpretation in the civil context, has created confusion about the Act's parameters. Compare *McArthur*, 419 F. Supp. at 194-95 (military involvement is acceptable as long as citizens are not subjected to military compulsion); *Red Feather*, 392 F. Supp. at 923 (presence of military is permissible if it does not involve direct active use of troops in civil law enforcement); *Jaramillo*, 380 F. Supp. at 1379-80 (presence of military personnel must not pervade or influence the actions of civil officials) with *Banks*, 383 F. Supp. at 375 (mere presence of military advisors is unacceptable involvement) and *Wrynn*, 200 F. Supp. at 465 (use of military personnel and equipment violated the Act). While the Eighth Circuit upheld the Wounded Knee convictions, agreeing with the *McArthur* court's rationale that passive military involvement is not prohibited, it did little to clarify the law on the Act's parameters. *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976) (military assistance given to civilian authorities at Wounded Knee did not violate the Act).

The "Drug War" Amendments to the Posse Comitatus Act

Then came the Drug War in the early 1980s and the beginning of an almost obsessive Congressional determination to insert a military presence into domestic drug law enforcement, Act or no Act. After the inconsistencies of the Wounded Knee cases, confusion persisted in the courts over what level of military involvement constituted a violation of the Posse Comitatus Act. *People v. Blend*, 175 Cal. Rptr. 263 (Cal. App. 1981) (expressly recognizing the lack of agreement among jurisdictions, both federal and state). Of particular concern was just where "active" participation ended and "passive" participation began. Because of the conflicting caselaw, military authorities expressed reluctance to assist civil law enforcement in the drug war even if the aid might be considered "legally proper." 1981 U.S. Code Cong. & Admin. News at 1785.

Congressional hearings were held in 1981 to consider whether amendments were needed to the Act that would more clearly enable the military to "passively" provide intelligence, material, transport services and training to local law enforcement agencies. In debating the proposed amendments, members likened drug smugglers to an "invading army" that was pitted against local law enforcers so lacking in resources that they could interdict only fifteen percent of the then \$80 billion worth of drugs flowing into the country. See Posse Comitatus Act Hearings,

reprinted at 127 Cong. Rec. 14,982 (1981) (statement of Rep. Zeferetti); 14,986 (Rep. Shaw); 14,984 (Rep. Railsback); 2003 (Sen. Nunn).

Congress passed amendments to the Posse Comitatus Act as part of the Department of Defense Authorization Act of 1982, codified at 10 U.S.C. § 371-378 ["Military Support for Civilian Law Enforcement Agencies"]. The amendments passed over the numerous objections of civil liberties groups. Most important of these was the prediction that even passive military assistance such as the provision of equipment and equipment operators on a routine basis would unduly threaten the civil-military separation. *Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 39, 42 (1981) (statement of Prof. Christopher Pyle). Further, the ACLU warned that permitting military personnel to train civilians in the operation of military equipment would allow the military to assume functions that should be the responsibility of police academies. ACLU Letter to House Judiciary Comm. Chairman Rodino (June 8, 1981). Certain restrictions were added because of these objections.

The 1981 amendments to the Posse Comitatus Act permit the military to provide civilian law enforcement officials with information [§ 371], equipment and facilities [§ 372] as well as training and advice [§ 373]. They further give military personnel limited authority to actually operate or maintain equipment made available to civilian forces in certain situations such as aerial reconnaissance when enforcing drug laws [§ 374]. At least one court has interpreted the statute as permitting the use of both military equipment *and* military operators in assisting local police officers in searches involving drugs. *United States v. Garcia*, 909 F. Supp. 334, 339 (D. Md. 1995) (Secretary of Defense has designed military dogs as "equipment" and requires military handlers to accompany dogs as "operators" of the equipment); *Ezenwa v. Gallen*, 906 F. Supp. 978 (M.D. Pa. 1995) ("ionscon" reading to detect heroin conducted by Delaware National Guard).

Outside of the operation of equipment, the amendments bar the "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity *unless such activity by such member is otherwise authorized by law* [emphasis supplied]." 10 U.S.C. § 375 [Restriction on Direct Participation by Military Personnel]. Assistance to civilian law enforcement in the form of equipment is also prohibited if doing so would "adversely affect the military preparedness of the United States." 10 U.S.C. § 376 [Support Not to Affect Adversely Military Preparedness].

In 1980, Congress also passed the "Maritime Drug Law Enforcement Act," 46 App. U.S.C. § 1901 et. seq. Navy vessels now typically assist in drug interdiction operations by transporting Coast Guard officers to a tar-

get vessel and towing the seized ships back to port. Navy officers now directly participate in searches and seizures of vessels, even those whose cargoes are not bound for the United States. *United States v. Medjuck*, 48 F.2d 1107 (9th Cir. 1995) (no violation of Posse Comitatus Act since use of Navy personnel in search and seizure of hashish laden ship bound for Canada was expressly authorized by Congress in the Maritime Drug Law Enforcement Act).

Later amendments to the Posse Comitatus Act include a 1987 requirement that the Secretary of Defense conduct an annual briefing for local law enforcement personnel in each state regarding the "information, technical support, and equipment and facilities available to civilian law enforcement from the Department of Defense." 10 U.S.C. § 380 [Enhancement of Cooperation With Civilian Law Enforcement Officials]. This section also requires that the Department of Defense make available to these law enforcement officials a comprehensive list of all the "suitable" military equipment available.

In addition, Congress specifically amended the Act in 1993 to provide procedures for states (and local agencies) to purchase "law enforcement equipment suitable for counter-drug activities" through the Department of Defense. 10 U.S.C. § 381. What these amendments have meant in terms of the real world is the proliferation of local police use of the type of equipment described in the first section of this article (flash-bang grenades, assault rifles, armored personnel carriers), all the accoutrements of war.

The National Guard Counter-Drug Activities Act

Local police use of such military weapons as well as military-trained advisors increased exponentially in 1989 when then-President George Bush outlined a national strategy that more than doubled federal assistance to state and local law enforcement agencies to cope with what was (and is) considered a "massive drug problem." Tudor & Garrard, "The Military and the War on Drugs," 1994 Air Force Law Review 267, 269. To supplement this effort, Congress determined to essentially deputize each state's Army and Air Force National Guard to participate fully in "drug interdiction and counter-drug activities." 32 U.S.C. § 112 [National Guard Counter-Drug Statute].

Under the National Guard Counter-Drug Statute, a state is authorized to order into service a full-time National Guard force for the sole purpose of "carrying out drug interdiction and counter-drug activities." 32 U.S.C. § 112(b) [Use of Personnel Performing Full-Time National Guard Duty]. The state is entitled to significant federal assistance to allow it to do so and to pay for all expenses for employment of full-time troops as well as to pay for the maintenance, purchase and operation of whatever equipment is necessary for the sole purpose of "drug interdiction and counter-drug activities." 32 U.S.C. § 112(a) [Funding Assistance]. All that is required is for

a state governor to yearly submit a "drug interdiction and counter-drug activities plan" that guarantees in part that the use of National Guard personnel in this capacity does not interfere with their federal military training or duties, and that the state's attorney general certify that the activities proposed are consistent with that state's law. 32 U.S.C. § 112(c) [Plan Requirements]. Significantly, the statute contains the following authorization to allow the direct participation of National Guard troops in law enforcement functions:

Nothing in this section shall be construed as a limitation on the authority of any unit of the National Guard of a State, when such unit is not in Federal service, to perform law enforcement functions authorized to be performed by the National Guard by the laws of the State concerned.

32 U.S.C. § 112(h) [Statutory Construction]. The term "drug interdiction and counter-drug activities" is defined as "the use of National Guard personnel in drug interdiction and counter-drug law enforcement activities authorized by the law of the State and requested by the Governor of the State." 32 U.S.C. § 112(i) [Definitions].

Courts have interpreted this statute so broadly that in those states with "Counter-Drug Activities Plans," National Guard troops have virtually been given a green light to participate in every conceivable manner in drug investigations, arrests, searches and seizures. Such participation for the most part means military-type maneuvers done at the direction of local police. *United States v. Clark*, 31 F.2d 831, 837 (9th Cir. 1994) (approving use of four Alaska National Guard troopers to "secure" perimeter of property and "provide cover" at front and rear entrances where state patrol directed troopers).

For example, local police routinely call on the National Guard to participate in investigations of suspected marijuana grow operations. *United States v. Avery*, 128 F.3d 966 (6th Cir. 1997) (raid of underground grow operation conducted by county sheriff, Kentucky National Guard and Kentucky State Police Special Response Team); *Breidenbach v. Bolish*, 126 F.3d 1288 (10th Cir. 1997) (execution of search warrants by county sheriff deputies and Colorado National Guard); *United States v. Van Damme*, 823 F. Supp. 1552 (D. Mont. 1993) (National Guard helicopter conducted surveillance at request of Missoula County Sheriff's Office). In one case arising out of such an investigation in 1991, an entire squad of National Guardsmen "took up positions" in the woods near a farm to conduct surveillance. *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993). When one of the troopers was ordered to take position closer to the farm house, he reported back to his commander that he had seen what he thought was a marijuana plant. This led to helicopter surveillance that included both National Guard troops and state police. After the execution of a search warrant led to the discovery of more plants, the defendant was arrested and subsequently raised

the propriety of the National Guard camping on his property and seizing evidence.

In upholding the conviction and sentence, the Third Circuit looked not only at the Posse Comitatus Act but also analyzed the extent of National Guard activities permitted under 32 U.S.C. § 112(d). It noted that the National Guard violated no Pennsylvania state laws by their actions and that the statute made no distinction (as the Wounded Knee cases had) between a "passive" or "support" role and "direct involvement" such as the evidence seizure role that the National Guard troops had played in the case. *Benish*, 5 F.3d at 26 ("there is no indication in the statute itself or anywhere else that such a line was intended").

Another court not only followed the *Benish* court's reasoning, but went further to say that state law placed no limits on that state governor's powers to use the National Guard "to execute the laws." *Wallace v. State*, 933 P.2d 1157, 1161 (Alaska App. 1997) (approving local police department's use of Alaska National Guard to execute search warrants). Further, the *Wallace* court held that the defendant was not entitled to discovery from the prosecution of the "Alaska National Guard Counter-Drug Plan" on relevance grounds and that, in any event, there was no requirement in either state or federal statutes that the governor do anything more than "generally authorize" the plan, leaving implementation and supervision up to local police. *Id.* See also *State v. Valdobinos*, 858 P.2d 199, 204 (Wash. 1993) (no need for governor to personally authorize plan where powers are exercised through an intermediary).

Another state court upheld a local police department's use of National Guard troopers to execute a search warrant where the National Guard members were "at all relevant times under the control of, and supervised by, local police authorities." *State v. Valdobinos*, 858 P.2d at 204 (upholding defendants' convictions for cocaine delivery and conspiracy). The defendants had raised the possibility that use of the National Guard violated a State Constitution requirement that the "military must at all times be subordinate to civil authority." *Id.* citing Wash.Const. art. 1, § 18.

Equipment that was developed by military for use during war is now being used almost exclusively by National Guard troops during drug searches and investigations. For example, the "thermal imaging device" was developed by the U.S. Army for use during wartime as a way of locating "enemy vehicles by sensing differences in thermal emissions." *United States v. Casanova*, 835 F. Supp. 702, 704 (N.D.N.Y. 1993). The thermal imager is now used in drug investigations to measure differences in thermal emissions coming from a structure to determine whether they are consistent with a marijuana grow operation. Its use is "facilitated by the active involvement of the National Guard in drug investigations." *Casanova*, 835 F. Supp. at 704 (search warrant applica-

tion not defective where thermal imager showed basement "hotter" than higher floors).

Recently, a state National Guard's warrantless use of a thermal imager to scan a home in order to detect a marijuana grow operation has been held to violate the Fourth Amendment. *United States v. Kyllo*, 140 F.3d 1249 (9th Cir. 1998) (reversing denial of motion to suppress where Oregon National Guard sergeant operated device and remanded for further consideration). In so doing, the Ninth Circuit agreed with another federal circuit that the thermal imager impermissibly allows the government to monitor domestic activities that generate a significant amount of heat. *Kyllo*, 140 F.3d at 1254, agreeing with *United States v. Cusumano*, 67 F.3d 1497, 1504 (10th Cir. 1995), *vacated on other grounds*, 83 F.3d 1247 (10th Cir. 1996). *But see United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995) (no expectation of privacy in "waste heat"); *United States v. Myers*, 46 F.3d 668 (7th Cir. 1995) (same); *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994) (same).

Conclusion

The Posse Comitatus Act stands for the principle that in a democracy, the military is designed to wage war and the civilian police are charged with enforcing the law. Peter Kraska, *Militarization of the Drug War: A Sign of the Times*, in *Altered States of Mind: Critical Observations of the Drug War* 159-206 (1993). That military equipment has become a routinized part of the "drug war" is a small measure of the current trend toward militarization of local police. The creeping erosion of that principle can also be seen in the proliferation of SWAT and SRT teams. In many U.S. cities, the police are now soldiers by proxy.

In May 1992, an entire division of the California Army National Guard patrolled the streets of Los Angeles after the governor called them into service during the chaos following the Rodney King verdicts. For the next few weeks, these military trained troops essentially waged combat operations in an American city in peacetime. Greg Seigle, "Civil Wars: Police Praise Guard's L.A. Performance," *Army Times*, May 18, 1992 at p. 12.

In the six years since then, local police have themselves in many areas of the country begun to assume the role of military troops, with the full backing of the U.S. Congress, millions of dollars worth of equipment and scores of military "advisors" and equipment "operators." No doubt the huge transfer of military equipment and advisors to local police SWAT and multi-jurisdictional drug teams is fueled by a massive military structure that, not coincidentally since the collapse of the Soviet Union in 1992, has limited interests overseas. Kurt Schlichter, "Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations," 26 *Loyola of Los Angeles Law Review* 1291, 1293 (1993).

The challenge to litigators faced with civil rights claims arising out of massive, militarized police raids is a daunting one. As the North Carolina Court of Appeals noted in the "Operation Read-Rock" case, "[t]here is an absolute dearth of case law regarding this type of mass search and seizure." *Barnett v. Karpinos*, 460 S.E.2d 208 (N.C. App. 1995) (upholding Section 1983 claims of 100 African Americans detained). Although much of the difficulty stems from trying to apply individualized search and seizure rules to cases raising bigger social issues, searches and seizures using military equipment and advisors are in many, if not most, circumstances inherently unreasonable under the Fourth Amendment. *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 812 (8th Cir. 1986) (upholding Wounded Knee civil rights claims). Rigorous litigation is needed to keep the current situation that exists in many communities from deteriorating into *de facto* martial law, exactly the situation that The Posse Comitatus Act was originally enacted to prevent.

Case Updates

In the Supreme Court

The Supreme Court granted certiorari on two separate civil rights cases where law enforcement officials allowed the news media to accompany them on the execution of a search warrant. The first case, *Hanlon v. Berger*, is a Ninth Circuit case and involves federal law enforcement officials. The second case, *Wilson v. Lane* is from the Fourth Circuit. In *Hanlon* the Ninth Circuit ruled that the federal officials were not entitled to qualified immunity from a *Bivens* action alleging that they had violated the plaintiffs' Fourth Amendment rights when they allowed a media crew to film the execution of a warrant and the search of the plaintiffs' apartment.

In *Wilson* the Fourth Circuit held that it was not clearly established in 1992 that federal and local law enforcement officials could not allow the news media to accompany them on the execution of a search warrant and they were therefore entitled to qualified immunity from a law suit brought by a couple who were photographed under "humiliating" circumstances during the search of their home. The police were executing an arrest warrant for the plaintiffs' son. The Supreme Court granted review to resolve the issue of whether the law enforcement officials violated the Fourth Amendment by allowing the news media to go with them and record the execution of the warrants and if so were the officers nonetheless entitled to qualified immunity. *See* 67 U.S.L.W. 3315 (11-10-98).

In *O'Sullivan v. Boerckel*, 119 S. Ct. 443 (1998), the Court granted certiorari in a case where the Seventh Circuit ruled that in light of the "peculiarities" of Illinois procedural rules that discouraged prisoners from raising every possible issue when seeking direct review of their

convictions before the state supreme court, the petitioner was not barred from seeking federal habeas corpus relief on issues that were not raised in his petition for leave to appeal to the state supreme court. The question presented for review was: "May an individual who is in custody pursuant to a state criminal conviction pursue claims in a federal habeas petition if those claims were not raised on direct appeal in a petition for discretionary review to the state's highest court." 67 U.S.L.W. at 3330.

Certiorari was also granted in *Snyder v. Trepagnier*, 67 U.S.L.W. 3449 (1-19-99), a police shooting and municipal liability case from the Fifth Circuit. In *Snyder* the trial court held that factual issues existed regarding the circumstances surrounding the shooting of the plaintiff and therefore the matter had to be submitted to the jury to resolve. The jury found that although the defendant police officer used excessive force when he shot the unarmed, fleeing plaintiff, he was nonetheless entitled to immunity because he reasonably believed that the plaintiff was armed and that his actions would not violate the plaintiff's constitutional rights.

Additionally, it was held below that the plaintiff failed to establish that his shooting was the "plainly obvious consequence" of the city's decision to hire the defendant officer, or that there was a "culture of recklessness" in the police department sufficient to satisfy the Fifth Circuit's requirement that in municipal liability cases, the evidence must rise to the level of "extraordinary factual circumstances" in order to impose liability on the city. The court below also held that the evidence failed to establish a "code of silence" in the police department sufficient to impose liability and that in order to establish a municipality's deliberate indifference the plaintiff had to present more than the opinion of an expert witness. *Id.* at 3449. Certiorari was granted to resolve whether the jury's finding that the defendant used excessive force to arrest the plaintiff precluded a finding that he was nonetheless entitled to qualified immunity, and on the issue of whether a reviewing court can "reconcile apparent inconsistencies in special jury verdicts" by determining from the record as a whole that the verdicts are reasonable even where there were defects in the special interrogatories submitted to the jury. *Id.*

In *Knowles v. Iowa*, 119 S. Ct. 484 (1998), the Supreme Court addressed the issue of how far the police can go in searching a vehicle that was stopped for speeding and where, although Iowa law permitted the officer to arrest the motorist for speeding, the officer only issued the driver a citation prior to conducting a search of the car. The petitioner, Patrick Knowles, was stopped in Newton, Iowa for driving 43 miles per hour in a 25 mile an hour zone. Although Iowa law permitted the officer to arrest Knowles he issued him a citation for speeding instead and then proceeded to conduct a search of the vehicle. Under the front seat the officer retrieved a "pot" pipe and a bag of marijuana. Knowles was then