Written by **Joe Wolverton, II, J.D.** on March 29, 2015

# Federal Judge Rules Municipal Police Can Never Be Considered Soldiers


As reported by the *Washington Post* on March 23, a federal judge dismissed a claim brought by a Nevada man claiming that police violated the Third Amendment by "forcibly occupying [his] home in order to gain a 'tactical advantage' against suspected criminals in a neighboring house."

In the opinion, Judge Andrew Gordon wrote that there were two relevant questions in the case of *Anthony Mitchell v. City of Henderson*. First, "whether municipal police should be considered soliders"; second, "whether the time they spent in the house could be considered quartering."

Gordon ruled that the answer to both questions was "no" — well, mostly.

The judge found that the police officers who took over Mitchell's home were not soldiers and that the Third Amendment was written to protect individuals from "military intrusion into a private home."

In light of his denial of the claim that the police qualified as soldiers, Gordon didn't answer the second relevant question, simply writing that he "suspect[s]" that the time spent by the police occupying Mitchell's home would not qualify as quartering.

While Gordon may have been correct in this ruling, his language is so broad that it may actually set a dangerous precedent. As Ilya Somin explained in the *Washington Post*: "The reasoning is very plausible and quite possibly correct. But it may too readily conclude that 'municipal police' can never be considered soldiers for purposes of the Amendment."

Somin is correct.

First, some background and context.

The Third Amendment reads: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

The tale told by Anthony Mitchell of how he and his family were robbed of these rights is compelling and cautionary.

Mitchell was sitting at home in Henderson, Nevada, on the morning of July 10, 2011, when the phone rang. Officer Christopher Worley of the Henderson Police Department was calling Mitchell to tell him that the police were going to take over his house. In order to gain "tactical advantage" over Mitchell's next door neighbor, Officer Worley reportedly explained, police were going to set up shop in Mitchell's house.

Mitchell was not asked if he would mind such a surrender of his home. The officer was informing Mitchell that they would be commandeering his house. In his legal complaint against the Henderson

Police Department, Mitchell claims that he didn't want to get involved with the police department's operation against his neighbor and accordingly refused to let police occupy his home.

Not surprisingly, Mitchell's refusal didn't sit well with law enforcement. Again, according to Mitchell's complaint, Officer David Cawthorn of the Henderson Police Department, one of the members of the force who were named as defendants in Mitchell's lawsuit, "outlined the defendants' plan in his official report: 'It was determined to move to 367 Evening Side and attempt to contact Mitchell. If Mitchell answered the door he would be asked to leave. If he refused to leave he would be arrested for Obstructing a Police Officer. If Mitchell refused to answer the door, force entry would be made and Mitchell would be arrested.'"

It isn't hard in the these times of police militarization to predict what happened next.

Just before noon, five (or more) officers of the Henderson Police Department "arrayed themselves in front of plaintiff Anthony Mitchell's house and prepared to execute their plan," according to the narrative laid out in Mitchell's lawsuit.

After showing up at Mitchell's door, the officers allegedly "banged forcefully" on his door and demanded that Mitchell and his family open up.

Seconds later, Mitchell claims, "officers … smashed open his front door using a metal ram."

Standing in his living room in shock, Mitchell says that the officers "aimed their weapons" at him and ordered him "to lie down on the floor." Fearing for his life, Mitchell complied.

Mitchell says that while he was prostrate on his front room floor, Henderson Police Department officers shouted "conflicting orders" at him, some commanding him to "crawl" toward the officers, with others demanding that he stay put.

Mitchell's complaint continues the account of this incredible afternoon:

> Confused and terrified, plaintiff Anthony Mitchell remained curled on the floor of his living room, with his hands over his face, and made no movement.
>
> Although plaintiff Anthony Mitchell was lying motionless on the ground and posed no threat, officers, including Officer David Cawthorn, then fired multiple "pepperball" rounds at plaintiff as he lay defenseless on the floor of his living room. Anthony Mitchell was struck at least three times by shots fired from close range, injuring him and causing him severe pain.

Police then took Mitchell in custody and, as they reportedly planned to do, arrested him for obstructing a police officer. After arresting Mitchell, officers searched his home, then proceeded to rearrange furniture and establish the tactical lookout they wanted all along.

As for the notion that the Third Amendment was added to the Constitution to protect from military intrusion, as defined by Judge Gordon, the spirit of that provision seems to look more to the protection of the home, rather than to the identity of the invader.

While there are few cases on point, one Georgetown law professor quoted in a *Wall Street Journal* story describes the Third Amendment as the "Rosetta Stone of the Bill of Rights. "[The] Third Amendment can reveal the structure of the Bill of Rights, and its objects," Professor Nicholas Quinn Rosenkranz wrote as reported by the *Wall Street Journal*. A quote by Joseph Story from his *Commentaries on the Constitution* confirms Rosenkranz's view. "This provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle,

privileged against all civil and military intrusion," Story wrote.

As for the ruling's potentially dangerous distinction between soldiers and police, thanks to billions in federal grants gobbled up by local law enforcement, that line is being blurred beyond recognition. In fact, in light of the overwhelmingly military equipment, training, weapons, and vehicles used by local police, these departments may be becoming exactly the type of force the Founders had in mind in 1791.

In commenting on Blackstone's *Commentaries*, founding era jurist St. George Tucker speaks as if he foresaw our day and the fatal combination of an increasingly militarized police force and the disarmament of civilians: "Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."

The connection between this professional, civilian standing army and the attack on the right of the people to keep and bear arms has been recognized by contemporary liberty-minded scholars, as well.

In his essay "The Right to Keep and Bear Arms under the Second and Fourteenth Amendments: The Framers' Intent and Supreme Court Jurisprudence," Stephen Halbrook writes:

> Noah Webster, the influential federalist whose name still appears on dictionaries, stated: "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed…." Pamphlets on the Constitution of the United States 56 (P. Ford ed. 1888).

In a similar treatise, Joyce Malcolm, a historian specializing in 17th-century English constitutional history, makes the same point:

> Where does this leave the American Second Amendment, with its reference to a well-regulated militia necessary to the security of a free state, and its insistence that the right of the people to keep and bear arms shall not be infringed? I would argue that the Second Amendment mirrors English belief in the individual's right to be armed, the importance of that right to the preservation of liberty, and the preference for a militia over a standing army.

In an essay published in the *Wall Street Journal* last August, Radley Balko presented chilling and convincing evidence of the blurring of the line between cop and soldier:

> Driven by martial rhetoric and the availability of military-style equipment — from bayonets and M-16 rifles to armored personnel carriers — American police forces have often adopted a mind-set previously reserved for the battlefield. The war on drugs and, more recently, post-9/11 antiterrorism efforts have created a new figure on the U.S. scene: the warrior cop — armed to the teeth, ready to deal harshly with targeted wrongdoers, and a growing threat to familiar American liberties.

In light of the foregoing analysis, it may be, as Somin writes, that Judge Gordon was "too quick to conclude that 'no municipal police officer' could ever qualify as such."