



## Watchmen or Warfighters? *A Conservative Proposal for Limiting Military-Grade Weapons Sent to States*

by Derek Cohen, Greg Glod, and Michael Haugen

### Key Points

- \$1.86 billion worth of materiel has been distributed nationally since the program's inception.
- \$124.91 million worth of materiel has been distributed to Texas.
- The legislature should institute reforms that increase both transparency and accountability.

### Introduction

Under the Department of Defense's (DOD) 1033 Program, surplus or out-of-date materiel is transferred to various law enforcement departments nationwide to supplant the need for state and local spending. Unfortunately, as seen with most government functions, there has been an element of "mission creep" facilitated by the procurement program nationally, and Texas is no exception. A school district with 742 enrolled students received marksman-grade armaments and related laser range-finding equipment. A prominent university received a vehicle designed to withstand an improvised explosive device detonation. A county's environmental compliance division received four 5.56 mm rifles for every sworn officer. Of course, this is in addition to the well provisioned municipality and county jurisdictions that also cover the area.

The program is also seen as contributing to the larger militarization of civilian law enforcement—a growing concern across the political spectrum. In routinely outfitting in and deploying military-grade weaponry, law enforcement grows to see its role akin to that of a warfighter rather than a peace officer (Kraska). This is especially concerning when departments stockpile weaponry to fulfill a need that largely has yet to manifest itself.

Thus far, the program has seen the disbursement of \$1.86 billion worth of material nationally, and \$124.91 million to Texas. Municipal police agencies are the largest beneficiary, followed by county sheriffs. Several K-12 and higher education police departments have also taken advantage of the program.

### The 1033 Program

The National Defense Authorization Act (NDAA) for FY 1989 statutorily granted the secretary of defense the authority to make "available any equipment (including associate supplies or spare parts), base facility, or research facility of the Department of Defense to any federal, state, or local civilian law enforcement official for law enforcement purposes" ([Else 1](#)).

The NDAA for FY 1990 and 1991 granted the secretary of defense statutory authority to transfer small arms and ammunition that were determined to be suitable for agencies in counter-drug activities and were in excess of the needs of the Department of Defense. The act required the secretary of defense to carry out the property transfers in conjunction with the attorney general and director of the National Drug Control Policy ([Else 2](#); 5).

The program was intended to terminate in 1997; however, Congress made it permanent that year (2). The 1997 version of the statute is similar to previous iterations, but contains a few changes. Pertinent to this research was the addition of language allowing small arms and ammunition to be given to law enforcement agencies (LEA) for any law enforcement activities. The prior iteration only allowed small arms and ammunitions that were suitable for counter-drug activities. However, preference is still given to counter-drug and now counter-terrorism activities. This prioritization

allows any type of military weaponry to be given to LEAs, including to independent school districts (ISD) (National Defense Authorization Act FY 1990-91; 1997).

In November 2015, several changes were made to the statute in an attempt to provide some oversight over the program. First, the receiving LEA must certify that it has put into place protocols for the appropriate use and supervision, as well as for the evaluation of the effectiveness of the use, of “controlled property,” meaning property given a demilitarization code. This includes auditing and accountability policies. Second, the LEA must certify that it provides annual training to personnel on the maintenance, sustainment, and appropriate use of controlled property. Third, the secretary of defense must create a website that includes a current inventory of controlled property transferred and all pending requests for transfers (10 U.S.C. §2576a).

### **Process**

The 1033 Program is part of a larger process utilized by the DOD. The DOD initially identifies property that it needs to dispose of because it is either obsolete, not repairable, or in excess to their requirements. Once identified, the DOD and special program recipients (including LEAs) get priority over federal civilian agencies, state governments, and the public ([GAO](#)).

The program itself is administered by the Law Enforcement Support Office (LESO) of the Defense Logistics Agency (DLA). LEAs must initially apply through their state’s coordinator ([Else, 3](#)). If accepted, LEAs must designate a “screener” who attends a mandatory training class before any requests can be approved ([DPS](#)).

A website (Reutilization, Transfer, Donation or RDT business portal) lists all available equipment for LEAs to request. Additional forms are necessary for weapons, aircraft, tactical vehicles, and miscellaneous restricted property (DPS). For example, the weapons application has a small box titled “Justification” ([LESO](#)). However, pursuant to the statute, no justification is necessary other than it being for a “law enforcement activity” (10 U.S.C. §2567a). It is not clear whether these items are on the RDT portal or must be requested by the LEA without knowledge of their availability, as the RDT portal is only available to participating LEAs. Ultimately, it’s the LESO determination whether the LEA gets the property. ([DPS](#)).

LEAs must submit an annual form of all property received and can be suspended for non-compliance and/or abuse of the program ([Else, 3](#)). However, reports have shown that budget shortages and lack of staff have made it difficult to keep track of the property. In fact, the program was temporarily suspended in 2012 so that each LEA could provide records for an audit after it was discovered that some LEAs were abusing the program. For example, the Pinal County Sheriff’s Office in Arizona was redistributing the equipment to non-police government agencies and was planning on selling some of the equipment off ([Associated Press National Investigative Team](#)).

In 2014, in Rising Star, Texas, Chief of Police Jason Kelcy was indicted for selling, trading, and pawning several items acquired through the 1033 Program, including an M14 machine gun ([U.S. Attorney’s Office, Northern District of Texas](#)).

These transactions happen largely outside of public scrutiny. While local newspapers may cover larger disbursements made to agencies, the vast majority are reflected only in the Defense Logistics Agency (DLA) Office of Disposition Services’ Freedom of Information Act library. Regularly, DLA employees update the bulk data for all 1033 disbursements since the program’s inception. It was from this data dump that both national and Texas-specific data was extracted.

Additionally, each disbursement was hand coded into broad classifications of items and agencies. For items, these groups include:

- Firearms (including firearm parts and additions)
- Body armor (including protective equipment)
- Vehicles
- Combat-specific vehicles
- Uniforms, clothing, and backpacks
- Electronics/HVAC
- Tools and personal equipment
- Warfighting gear (e.g., camouflaged radar scattering netting)
- Other

The agencies were broken down into seven broad categories relative to their jurisdiction. These categories are:

- Municipal (police, marshals, public safety departments)
- County (sheriff, constables)
- District attorney’s offices
- School districts (K-12 ISDs)
- Higher education institutions (universities, community colleges)
- State agencies (including multi-jurisdiction local task forces)
- Federal agencies

**Legality**

The United States has long held that the use of the armed forces to enforce the laws of the United States, or as a *posse comitatus*,<sup>†</sup> should be limited to times expressly authorized by Congress ([Matthews, 23; 10 U.S.C. §375](#)). For example, the National Guard is able to be deployed in order to quell domestic violence ([10 U.S.C. §§ 331-334](#)). The Posse Comitatus Act is intended to prevent citizens from being subject to regulations, proscriptions, or compulsions imposed by military authority (*U.S. v. McArthur*). But the types of weaponry now available to civilian law enforcement through the 1033 Program make LEAs practically indistinguishable from military forces, and appears to conflict with this Act.

However, courts have generally (although very few cases on the issue exist) held that the Posse Comitatus Act only precludes direct active use of the military and not the use of the equipment by civilian law enforcement. In other words, the act is tied to the personnel, not their weaponry ([U.S. v. Red Feather](#); [U.S. v. Jaramillo](#)).

These cases do not hold national precedent and the issue has not been the subject of a U.S. Supreme Court or federal appellate court ruling. Even if there is a disagreement between the initial intent of the Posse Comitatus Act and the modern-day application of the 1033 Program, it has been statutorily proscribed and would therefore likely pass judicial muster at the Supreme Court level based on the plain reading of the law.

**1033 Disbursements in Texas**

As of March 31, 2016, the equivalent of \$1.86 billion has been disbursed nationwide under the DOD’s 1033 Program. Texas agencies have been the second largest beneficiary of the program, receiving \$124.91 million in value across 19,586 disbursements. This is an underestimate of overall value received, as many high-value items (e.g., boats, trailers, all-terrain vehicles, and laptop computers) have been reported with a \$0.00 value. This estimate also includes the \$17.89 million worth of items repurposed to federal outposts wholly within the state, reporting the total sent to Texas state, county, and municipal agencies at \$107.01 million of items where values were reported.

	Municipal/Police	County/Sheriff	School District	Higher Ed	State Agencies	Federal Agencies	District Attorneys
Firearms	\$ 2,410,762.93	\$ 741,185.55	\$ 89,000.23	\$ 18,530.72	\$ 31,926.81	\$ 9,243,787.84	\$ 1,560.00
Body Armor/Protective	\$ 19,985.00	\$ 1,292.48	\$ 15.47	\$ -	\$ -	\$ 2,320.40	\$ -
Vehicles	\$ 20,868,538.30	\$ 10,937,041.90	\$ 471,068.18	\$ 396,152.00	\$ 532,789.96	\$ 2,732,539.24	\$ -
Uniforms/Clothing/Gear	\$ 172,485.06	\$ 7,056.95	\$ -	\$ -	\$ -	\$ 73,481.95	\$ -
Electronics	\$ 4,257,873.19	\$ 1,194,941.82	\$ 76,284.65	\$ 44,810.00	\$ 1,178,863.46	\$ 1,316,622.56	\$ -
Furniture	\$ 243,165.19	\$ 68,710.85	\$ -	\$ 7,786.40	\$ -	\$ 189,229.57	\$ -
Tools/Equipment	\$ 826,146.18	\$ 440,054.25	\$ 13,584.00	\$ 278.05	\$ -	\$ 1,208,747.80	\$ -
Combat Vehicles	\$ 28,152,019.06	\$ 20,506,842.47	\$ -	\$ 1,466,000.00	\$ 2,887,000.00	\$ -	\$ -
Warfighting Materiel	\$ 125,300.00	\$ 160,202.88	\$ 1,591.00	\$ 30,000.00	\$ 30,000.00	\$ 69,134.00	\$ -
Other	\$ 5,885,694.86	\$ 2,569,511.75	\$ 56,170.29	\$ 1,554.73	\$ 93,467.92	\$ 3,059,850.26	\$ -
<b>Total</b>	<b>\$ 62,961,969.77</b>	<b>\$ 36,626,840.90</b>	<b>\$ 707,713.82</b>	<b>\$ 1,965,111.90</b>	<b>\$ 4,754,048.15</b>	<b>\$ 17,895,713.62</b>	<b>\$ 1,560.00</b>

Table 1: Estimated Value of All Disbursements

<sup>†</sup> The power or force of the country. The entire population of a country above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, pursuing and arresting felons, etc. Posse comitatus historically referred to the English authority of sheriff to summon the country’s population to assist him to keep peace (Else, 1).

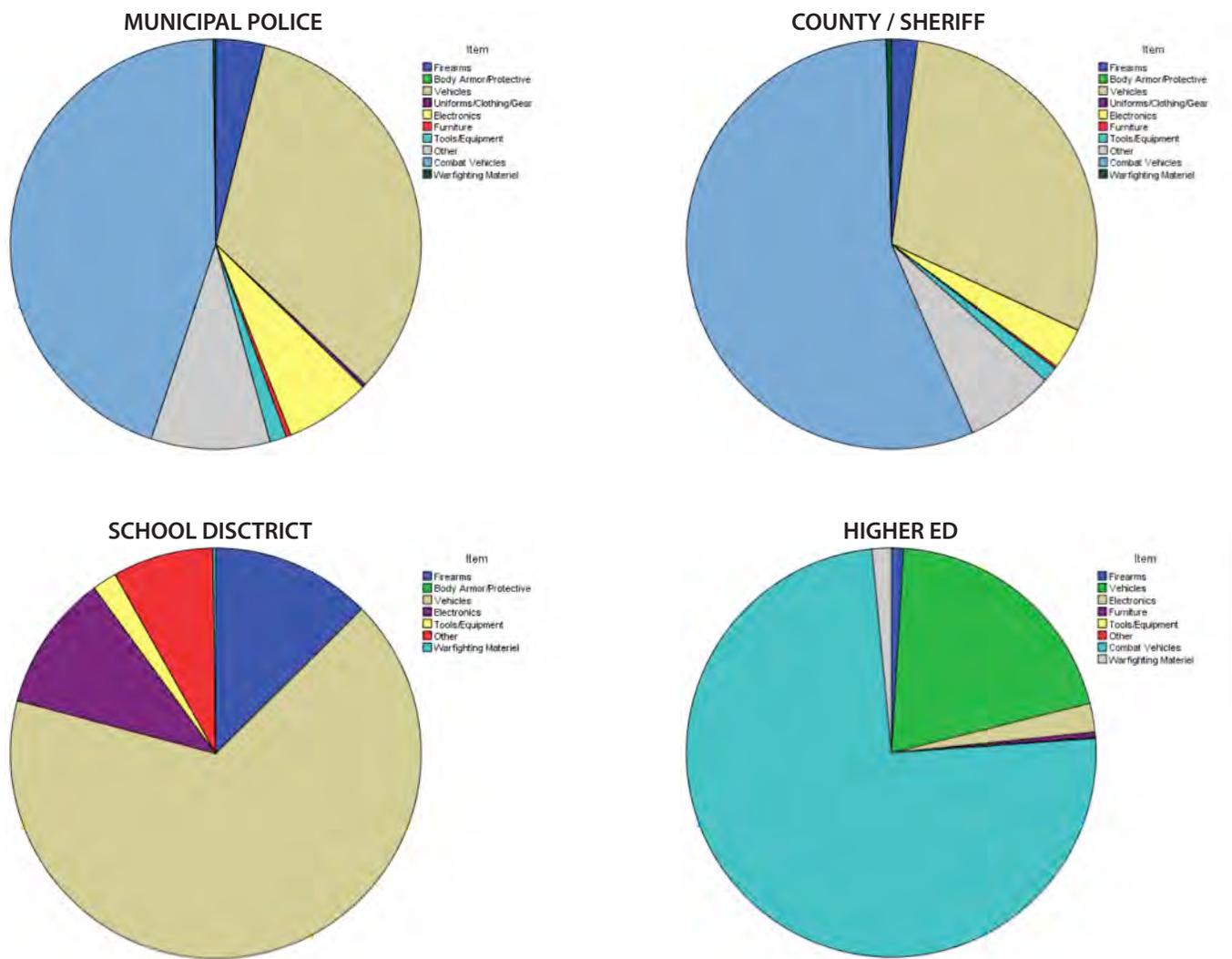
The modal disbursement in terms of value for local and state agencies was combat vehicles, the vast majority of which were mine-resistant, ambush-protected vehicles (MRAP; 75 of them were disbursed to Texas agencies at the median cost of \$733,000) and fast-attack vehicles.

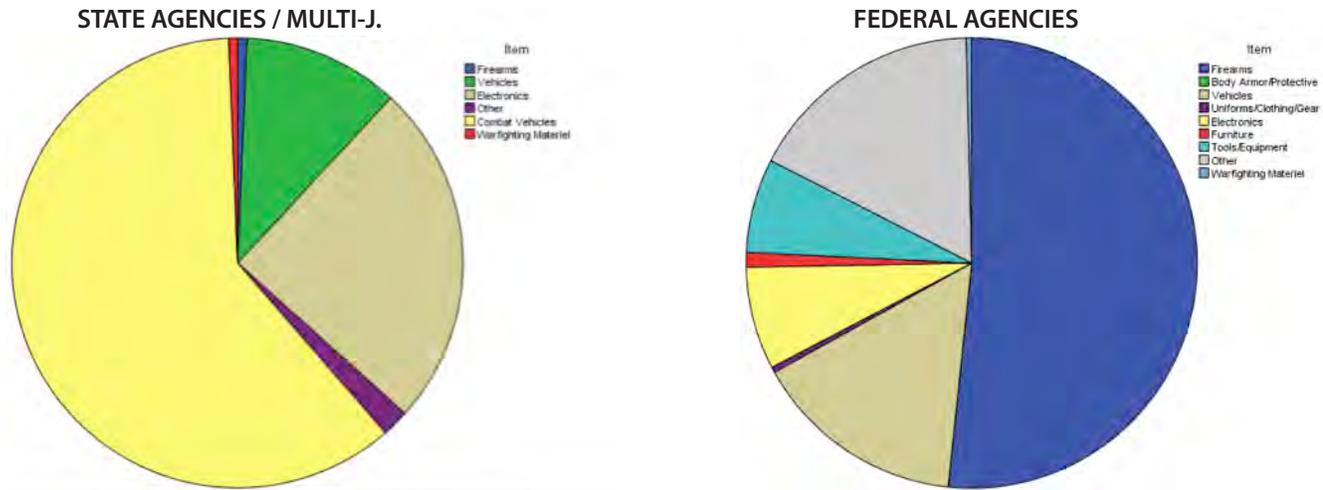
School districts, which are permitted by Texas law to deploy their own peace officers independent of the county or municipality, received over \$700,000 in 1033 items, including nearly \$90,000 in firearms. Of this, school districts received 74 5.56 mm rifles, 17 7.62 mm rifles, and 14 .45-caliber pistols, and an assortment of night vision and laser range finders.

Institutions of higher education—also permitted to establish and maintain a police department—were the largest recipients percentage-wise of combat vehicles, with the University of Texas at Austin and Texas Southern University each receiving an MRAP, and Weatherford College receiving an armored truck.

**Percentage of Disbursements, By Value**

These graphs illustrate what percentage each category of disbursement comprises for this type of agency.





### Firearm-Specific Disbursements

Firearms are the most common single item disbursed under 1033, with over 20 percent (4,061) of all disbursements to Texas being either a rifle chambered for 5.56 or 7.62 mm rounds, a .45-caliber pistol, or a 12-gauge riot shotgun. It's instructive at this point to provide a short background in the sort of firearms that local, county, and state LEAs are able to acquire and deploy under this program. While many of such firearms—e.g., pistols, revolvers, and shotguns—are largely identical to their civilian counterparts in both form and function, there are significant differences to be found among surplus military rifles and the types available commercially. For this reason, and because the acquisition of handguns under the program has been uncontroversial due to their historical ubiquity among LEAs, this section will focus on the two rifle calibers.

As much of the controversy surrounding the 1033 Program centers on the deployment of military rifles into a civilian population, and because there remains a persistent misconception in the general public surrounding such “high-powered” rifles, it's important to take a moment to establish a sense of perspective in this definition. Doing so should allow for a more critical and informed discussion surrounding the necessity and wisdom of LEAs deploying such weapons into the field for civilian applications.

The 5.56 mm round, fired by the M16/M4 family of tactical rifles, has a much faster muzzle velocity than does the 7.62 mm projectile. This alone does not provide a bullet with its power. Instead, the bullet's mass confers a significant portion of its “stopping power” as well, and this bears out when comparing the muzzle energy of the nearly three times heavier 7.62 mm round (2,648 foot-pounds), with that of the 5.56 mm round (1,306 foot-pounds). To put this comparison into more relatable terms, the 7.62 mm round, which is qualitatively identical to a .308, is a very common bullet that's used for hunting medium-to-large game ([Benedikt](#)). A 5.56 mm (.223 caliber) round, on the other hand, is often inadequate—and, in some states, illegal—to use on larger game, due to its relative lack of stopping power ([Stag Arms](#)).

Demonstrating the energies these rounds are capable of imparting into an object isn't necessarily to render one more or less acceptable for use in civilian populations. Rather, it's to simply communicate that given the common perception among the public that rifles such as an M16 or AR15 are “high-powered,” there exists another, more powerful rifle that certain rural and school district-related LEAs are acquiring—potentially with little to no specialized training in the platform—that, within a hunting context, is used against far larger targets than a human being. This is a relevant characteristic of these rifles that ought to be taken into account when subjecting such acquisitions to public scrutiny.

As of March 31, 2016, 2,552 5.56 mm rifles have been disbursed to Texas, alongside 845 7.62 mm rifles.

## Recent Reforms and Recommendations

On January 16, 2015, President Obama issued an executive order establishing the Law Enforcement Equipment Working Group (Working Group), tasked with providing recommendations for actions President Obama could take to reform the 1033 Program ([Executive Order 13688](#)). The Working Group's recommendations were released in May 2015. Amongst other things, the Working Group recommended certain items prohibited from being transferred, including:

- Grenade launchers
- Bayonets
- Certain camouflage uniforms
- Higher caliber ammunition
- Weaponized and tracked armored vehicles

The Working Group also recommended LEAs implement written policies on appropriate use of military equipment, supervision of use, and the effectiveness of the equipment for its intended use. Additionally, training requirements, which were not implemented, were recommended, along with more stringent standards for justifying equipment, and a requirement that a “civilian governing body” review and approve the LEA's acquisition of the equipment<sup>†</sup> ([Law Enforcement Equipment Working Group 2015a, 36-42](#)).

Additionally, K-12 schools can no longer receive items on the “controlled equipment list,” including armored/tactical vehicles, certain specialized firearms, explosives, and/or riot gear(s).

A federal executive order is not the proper method for reform. First, because it is an executive order, it lacks permanency due to an absence of congressional approval. Additionally, all prohibited items already given to LEAs must be transferred back to the DOD. By statute, however, any costs incurred subsequent to the transfer of the property are borne by the LEA, meaning they will have to pay to return the equipment (10 U.S.C. §2567a). A mine-resistant vehicle, for example, could cost thousands to return. Third, states should set their own policies for oversight, training, and transparency that work for their particular jurisdictions, rather than blanket requirements from the federal government.

According to an update provided by the Department of Justice's Office of Justice Programs, Bureau of Justice Assistance in October 2015, the recommendations were set to take effect at the beginning of fiscal year 2016 ([Law Enforcement Equipment Working Group 2015b](#)). Scant information is available to determine whether all, some, or none of the recommendations have been implemented and in what capacity.

### ***Recommendation 1: States should establish their own transparency standards***

While the data dump currently provided by the DLA is a strong step towards transparency, it is cumbersome and difficult to navigate. Further, absent an intermediate knowledge of Microsoft Excel, users may lack the understanding to filter and aggregate the raw data into something more usable. To combat this, Texas can establish internal reporting requirements for accredited LEAs whereby they remit 1033 disbursement information to a central state authority—for example, the office of the attorney general or the Texas Commission on Law Enforcement (TCOLE)—for archiving and publication.

### ***Recommendation 2: Limit disbursements to nontraditional LEAs***

Parallel to the expansion of criminal and regulatory law, local law enforcement rosters grew by an additional 34 percent from 1987 to 2013 ([Reaves, 2015](#)). Greater still is the rampant growth in police agencies wholly controlled by school districts, growing 113 percent from 1996 to 2008 ([Reaves and Goldberg, 1998](#); [Reaves, 2011](#)). Nationally, these district agencies have received some dubious disbursements (e.g., the Los Angeles Unified School District received three grenade launchers and an MRAP; see [Ceasar](#)), and Texas is no exception. For example, one district in south Texas received 10 7.62 mm rifles, 25 5.56 mm rifles, eight sets of night vision goggles, six trucks, and two golf carts, among other items.

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<sup>†</sup> Governing body is defined as an organization that has “direct budgetary oversight or fiscal/financial control over the requesting LEA” (Law Enforcement Equipment Working Group 2015a, 26).

While materiel like the trucks may serve a valuable purpose for the district as a whole, certainly a school-based police department does not need them to fulfill its basic mission competencies. Further, it is burdensome to an already inefficient public education system to ensure that the officers have the requisite training necessary to adequately deploy these weapon systems, considering complimentary coverage provided by both the county, and in many cases, the city law enforcement agencies. Both the state of Texas and the federal government should act to limit disbursements to schools, district attorneys, and other nontraditional law enforcement agencies.

***Recommendation 3: Provide state-level officials with “veto authority” for disbursements***

In order to enforce Recommendation 2 and to allow representatives of the public to intercede before they are committed to the ongoing upkeep of items they may not wish, the Texas governor, attorney general, or TCOLE should be empowered to veto disbursements. For example, in receiving an MRAP, the University of Texas at Austin’s police department commits each taxpayer in the state to underwriting the maintenance and training costs associated with operating an armored fighting vehicle.

This maintenance cost is not trivial. Just including below-sustainment labor, spare parts, and oil and gas, MRAPs are estimated to cost between \$48,311 to \$131,474 for full-time operation, per unit ([Chia](#)). This is to say nothing of the myriad of difficulties associated with sourcing the necessary parts ([Lipscomb](#)). Taxpayers should be protected from being committed to funding the maintenance of hardware that is not within the general mission parameters of the agency. ★

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