Terrorism, Patriotism, and Dilemmas of Law Enforcement

The events of September 11, 2001, changed America; they will have a long-term impact on American policing and the implications and policies resulting from September 11 will not be without controversy. Some people claimed American intelligence failed, while President Bush publicly chastised the Immigration and Naturalization Service (INS). In New Jersey the state police developed a joint intelligence operation with federal law enforcement, while in Seattle, city officials initially ordered local police not to assist the FBI with interviews of Middle Eastern people. In short, there was no standard operating model for law enforcement on September 11 and the role of state and local police agencies varies today. The purpose of this chapter is to introduce the scope of the problem facing American law enforcement, the dilemmas confronting policy, and the background behind controversies involving intelligence policies.

After reading this chapter, you should be able to

1. Summarize some of the intelligence-gathering opportunities state and local law enforcement officers had with the September 11 terrorists prior to the suicide attacks.
2. Describe the impact of September 11 on routine law enforcement roles.
3. Explain organizational hesitations about using state and local law enforcement officers as the “eyes and ears” for national defense intelligence.
4. Summarize the USA Patriot Act.
5. List the types of potential terrorist threats facing American law enforcement.
6. Define the “intelligence dilemma” for state and local law enforcement.
7. Define major concepts surrounding law enforcement’s potential role in homeland security.

THE DAY AMERICA’S WORLD CHANGED

When Ziad Jarrah returned to the United Arab Emirates (UAE) from Afghanistan in the fall of 2000, he was under police surveillance. UAE police officers, maintaining routine observation on suspected al Qaeda terrorists, found their attention drawn to Jarrah. Because of his frequent business trips to Pakistan and Afghanistan, Jarrah became an intelligence concern. A shadow war of terrorism lurks throughout the Persian Gulf, and when confronted with suspicious intelligence information, law enforcement officers in the Arabian peninsula are usually quick to take action. Investigators decided to bring Jarrah in for questioning in late January 2001.

After initial questioning, the Lebanese-born suspect appeared to have logical reasons for his frequent visits. Some officers, no doubt, wanted to detain him based on his patterns of travel, but the police did not have enough information to warrant arrest. They let him go with the hope of gaining further evidence. Jarrah had other ideas. Following a pattern common in al Qaeda sleeper cells, Jarrah fled the country as soon as he was released. He skipped to Germany and eventually came to the United States, where he obtained a driver’s license listing a Virginia address. UAE intelligence agencies alerted German intelligence, and the Germans alerted their counterparts in the United States. On the evening of September 9, 2001 Jarrah sped down a Maryland interstate highway in a rented car.

Just as darkness fell, the radar sensor in Trooper Joseph Catalano’s Maryland State Police cruiser clocked Jarrah’s speeding car. A veteran professional, Catalano confirmed the speed, moved behind the vehicle, and pulled Jarrah over. Trooper Catalano had quite a bit of information at his disposal—information that all good police officers utilize when making a stop—but he did not know that American intelligence agencies had received a warning about some type of attack. He was not aware that the intelligence services of two countries were forwarding warnings to the United States about suspicious activities from Osama bin Laden. He had no way of knowing (Biemer, 1-9-02, p.A-6).

A videotape in the state police cruiser gave the details of the stop. The focus was fuzzy, but Catalano could be seen approaching the car and returning with a citation. Jarrah was polite and cooperative. Colonel David Mitchell, commander of the Maryland State Police, would later say, “There were no circumstances to question the gentleman more than we did.” Catalano would reiterate his commander’s assessment saying there were “no red flags at all. It was a routine traffic stop.” Their conclusions were quite correct. There were no systems in place to share national intelligence with state and local police. In short, there was no reason to detain Jarrah (Biemer, 1-9-02, p.A-6).

Two weeks later a group of sullen law enforcement intelligence officers sat at a training facility in Spokane, Washington. A command officer from the Washington State Patrol spoke to the group, the frustration in his voice echoing through the training facility. He had been staying at a motel in Portland, Maine, he told the group. Checking out early in the morning of September 11, he believed he might have encountered one of the other hotel guests, Mohammed Atta. Unfortunately, he did not know what Atta looked like or that American intelligence officers had alerted the Federal Bureau of Investigation about Atta’s activities. He was a suspected terrorist and the intelligence community was interested in him. Harried by a variety of laws, internal regulations, and bureaucratic rivalries, the selected federal agents who worked the case were unable to share their concerns with state and local law enforcement. They searched for Atta by themselves.

“If only someone had shared intelligence with me,” the Washington state trooper lamented. “I think I saw him.” Atta left the hotel for a suicide mission with no reason to fear the presence of a state police intelligence commander.

While Jarrah and Atta prepared to fly hijacked airliners on suicide missions, Ramzi Binalshibb waited in Hamburg, Germany. He had tried to enter the United States, but immigration authorities had enough information to block his attempts. Binalshibb lived in Hamburg as a student while forming a radical group of Salafist students in a Hamburg apartment with his friend Mohammed Atta. The Germans were keeping an eye on him. They alerted the American intelligence community, and Binalshibb could not escape the radar. He applied for flight school in Florida and listed a home address in Virginia, but his attempts to enter the United States were thwarted (Finn and Masters, 11-16-01, p.A39).

After Jarrah and Atta killed thousands of people by flying civilian airliners into buildings, Binalshibb left Germany for Afghanistan. The New York Times and
The Washington Post ran articles speculating that Binalshibh was one of the September 11 hijackers (New York Times, 11-27-01; Finn and Masters, 11-16-01, p. A39; Washington Post, 11-20-01, p. A12; and Masters, 11-30-01, p. A14). All of the planes had five hijackers except one, and investigative reporters surmised that Binalshibh was the missing twentieth hijacker. American intelligence had similar suspicions but had no way to inform local law enforcement. The police would learn of Binalshibh, however, not from the defense establishment or the Central Intelligence Agency, but through the Wall Street Journal. A reporter found tapes of Binalshibh and four other terrorists announcing their intention to commit istihda, suicidal martyrdom. The Journal shared its information through news stories. For once, state and local law enforcement had an identifiable suspect.

According to terrorism analyst James Stinson (2002), agencies were receiving warnings of terrorist attacks prior to the September 11 suicide flights. French intelligence alerted American officials of Al Qaeda operations in the United States. This led to the federal arrest of Zacarias Moussaoui in St. Paul, Minnesota, on August 17, 2001. Later that same month, Egyptian and Pakistani intelligence warned the United States that Osama bin Laden had gone underground (Tyler and MacFarquhar, 6-4-02). He appeared to be planning some type of strike against America. These reports were echoed in the Indian news media. In late August and early September, Stinson says, bin Laden's international operatives were told to return to Afghanistan by September 10. Watch lists of suspected terrorists were circulated to airlines, but law enforcement was out of the loop. If the intelligence community was scrambling in the early hours of September 11, law enforcement agencies went about their business as usual. There seemed to be no reason to do otherwise (see Flynn, 2002).

Routine Patrol on September 11

On the morning of September 11, 2001, law enforcement officers carried out their duties in normal fashion. All across the country local and state police officers pieced together drug raids, murder investigations, disorderly dogs, lost children, family fights, and a variety of serious and nonserious crimes into a patchwork cops call "routine." Morning shifts went home and day shifts reported for briefings. Many rookies enjoyed Tuesday as the first day of their "weekend" while chiefs and sheriffs prepared for staff meetings and budget reports. Some officers arrived for court testimony. September 11 was just another Tuesday. It was routine.

All of that changed shortly after 8:30 A.M. The first of two air planes smashed into one of the towers of the World Trade Center in New York City. As news spread through the electronic media the country seemed to come to a halt. Some people believed that a pilot had gone off course and that a terrible tragedy had occurred. Others remembered World War II when a miscalculation on an American bomber sent a B-24 smashing into the Empire State Building. To many people, it seemed like a navigational error. Those who studied terrorism knew better. When the second plane flew into the Trade Center, it confirmed the worst suspicions of counterterrorist socialists. The whole world was watching by the time the towers collapsed.

EYES AND EARS?

Although there are more than 600,000 law enforcement officers in the United States and thousands of state and local police departments, their formal role is unclear. In many other countries, the role of the police is codified by law or tradition, but in the United States, law enforcement's role in times of national crisis is not readily defined. Of course, totalitarian governments utilize their police agencies to collect information on political opposition and suppress it, but Western democracies have shied away from such actions, and the United States leads the pack. Historically, the American police have never had a cohesive role in national policy (see Walker, 1977 and Fogelson, 1977).

Other Western democracies have developed more formalized role definitions, especially when national security is threatened. Peter Manning (1977, pp. 111-116) argues that this develops from structural contradictions in American policing. America's police have no occupational mandate, whereas the police in the United Kingdom are formally charged to participate in national defense in times of crisis. The Ontario Provincial Police in Canada revert to military functions when traditional police roles are not sufficient to control emergencies. Police in France and Germany traditionally maintain a more military posture than their American counterparts. Some law enforcement administrators think it would be wise to convert the American police to a more military posture in times of national emergency.

The September 11 tragedies have been described as an intelligence failure, but the issues go deeper than this for policing (Rosenbaum, 6-19-02). The question becomes, what role, if any, should law enforcement play in intelligence gathering? The 600,000 American law enforcement officers could become the eyes and ears of intelligence agencies, the first line in homeland defense. If this is to become the case, intelligence agencies need to develop methods for sharing information, and law enforcement agencies should develop a mind-set that allows police officials to process and act on information (Law Enforcement News, 10-15-01). Most street police officers, however,
have little incentive to think beyond the immediate need for fresh information, and they cannot picture a role for themselves in national defense (Lindsay and Singer, 5–8–02).

The federal government expanded the intelligence-gathering powers of federal agencies after September 11, and this will inevitably impact state and local law enforcement. The equation is fairly simple. If federal law enforcement agencies are to be included in intelligence gathering, and if all levels of law enforcement are seeking to work more closely, then some of the activities in local police departments will be related to intelligence gathering. A report from the Kennedy School of Government (Kayem and Howitt, 2001) suggests these procedures and activities be initiated from the “bottom up.” That is, they should begin with local jurisdictions. Local jurisdictions, especially in rural areas,
BOX 1.3 Close-Up: The War on Drugs as an Intelligence Model?

The War on Drugs has produced a national police intelligence-gathering and dissemination system. Combined federal, state, and local law enforcement agencies operate in conjunction with one another to gather intelligence and conduct operations.

Proponents hail this process as a model of sharing resources and intelligence. They point to cooperation among agencies and investigative information-sharing systems as the answer to the intelligence problem (National Drug Intelligence Center, 2002). At the national level, drug intelligence reports are synthesized and disseminated to state and local agencies. On the surface, these multi-jurisdictional efforts seem to be an effective tool in countering drug traffickers.

Opponents have a differing view. Many police administrators believe the systems are not effective and they refuse to participate (Herman, 12-3-01). Other people outside law enforcement look at the intelligence network and claim it to be both a failure and an assault on the Fourth Amendment. Proponents of this position state that the war on drugs is ineffective, and the real loser in the process is civil liberty. Critics feel drug intelligence merely labels certain people or groups without making a dent in drug traffic.

Do you feel one side is correct? If so, why? Can the proponents of multi-jurisdictional task forces claim they are winning the war on drugs? Do critics of drug enforcement have viable, workable alternatives? Do parallels exist for problems with terrorism?

POLICE ORGANIZATION AND THE USA PATRIOT ACT

Kayyem and Howitt (2001) believe national security must be coordinated throughout the country, but methods should be developed to fit jurisdictions. If the federal government designs a “one size fits all” policy to protect the country against terrorism, each jurisdiction will experience weaknesses as it tries to blend its needs with a centrally mandated system. Kayyem, Howitt, and their colleagues urge joint planning among agencies in law enforcement, health (including mental health), emergency services, and private industry on the local level. They believe general plans designed by local officials will serve as a guide during a crisis. Planning is a general response to a local problem, and it is a local responsibility.

There are those who disagree with this approach. Attorney General Ashcroft has aggressively expanded the role of the federal government by creating and expanding terrorist task forces. Secretary of Defense Donald Rumsfeld warns of attacks utilizing weapons of mass destruction and advocates proper centralized preparation (Shenon and Stout, 5-21-02). FBI Director Robert Mueller states that suicide bombing will inevitably come to the United States and the problem may be beyond the scope of local law enforcement (Shenon, 5-21-02).

FOREIGN AND DOMESTIC TERRORISM

Many people argue terrorist actions have so much potential destructive power, they demand a centralized federal response.

The debate over centralization and localization will continue, but whether changes come from above or they originate with local jurisdictions, changes in law enforcement are coming. Agencies will have a role in responding to terrorism either locally or federally.

Harvard political scientist Samuel L. Huntington (1996) argues conflict in the post–Cold War era will be defined as a clash of civilizations. According to Huntington’s thesis, nationalism and ideology no longer dominate international relations. Conflict will come, Huntington believes, when competing cultures come into contact with one another and one of the groups feels threatened. At first glance the September 11 terrorist attacks appear as if Christianity and Islam are locked in battle; yet there may be more to the situation. American law enforcement faces the problem of terrorism, and while potential conflict between the Middle East and the West may loom on the horizon, the problem of terrorism stretches beyond the Middle East. Even Islamic governments are faced with the problem of violent religious extremism, and American law enforcement has been forced to respond to militant Christian movements.

Religious terrorism is not the result of the relations among various creeds alone. Peter Berger (1980) argues religious clashes in the modern world develop when new forms of knowledge challenge established traditions. People cope with changes by one of three methods: abandoning tradition, making accommodations, or rejecting new ideas and defending old ones. Militants in any faith tradition can exercise the last option and offer violent resistance to change. Benjamin Barber (1996, p. 34) adds that physical survival is often at stake in these confrontations. It is not simply a clash of civilizations, Barber believes. Modernized nations have accumulated wealth and power while much of the traditional world struggles for survival. These issues are at the base of religious conflict, not part of the belief system of a particular faith.

According to Bruce Hoffman (1998, pp. 45–86), terrorism developed in three distinct phases since the second World War. The first involved anti-coalinational violence, while the second phase focused on revolutionary ideological and nationalist terrorism. This type of terror generally reigned from approximately 1960 to 1985. The third trend in terrorism emerged in the late 1980s and early 1990s as fundamental religious groups held sway of terrorist ideologies. Other movements began using ideology as a surrogate religion. The problem is much greater than a confrontation between Islam and Christianity, and America’s law enforcement problems extend beyond the policing of violent Islamic groups.

Religious fundamentalism has changed the nature of terrorism, according to Hoffman (1995). Religious fundamentalists are more violent than their political counterparts, they see death as a sacramental act, and they are not afraid to create massive casualties in the name of their deity or cause. The real
danger in this trend is that religious terrorists and their surrogates may use weapons of mass destruction or other devices to cause megadeath. Political terrorists seek political victories. Blinded ideologues, such as religious fanatics, fight for a religious ideal. They do not seek workable, compromising political solutions to problems.

To be sure, some violent strains of Islam present a problem for American law enforcement, but they present problems for Islamic governments, too (see Kepel, 2002). The reason state and local police agencies exhibit growing concern for terrorism and domestic security is that fanatical ideologues present a real threat to communities. These threats do not simply come from militant Muslims, they come from a variety of sources, including Christianity. The 1995 Oklahoma City bombing and the 1998 attempt to set off a bomb at a military base in Texas came from Christian extremists. It is important to briefly discuss the nature of all these threats.

Militant Islamic violence is difficult to understand and it has been sensationalized by America's electronic media. Popular American news programming is dominated by “news analysis” where reporters discuss issues with each other, shout down opposing views, and offer insulting one-line clichés when interviewing decision-makers and those affected by a problem. Unfortunately, this “infotainment-telescoter,” a term coined by Benjamin Barber (1996, pp. 76–83), is the major source of political information for most Americans. If you spend a few hours watching such programming, you could easily leave believing Islam is a religion breeding hatred and violence. In reality, it breeds about as much hatred as any other religion.

Accordingly, it is necessary for law enforcement to focus on one form of Islam, the militant political strain involved in terrorism. Militant Islam can be summarized as a violent religious movement seeking to place the entire world under Islamic law. This style of Islam has been championed by militant secular intellectuals like Sayyid Qutb and religious scholars such as the Ayatollah Khomeini. Militant lay interpretations of Islam form the basis of al Qaeda’s theology, while Khomeini’s sophisticated theological writings provide the underpinnings for Iran’s Islamicist government and the Shi’ite terrorist group, Hezbollah. St. Andrew’s Magnus Ranstorp (1998) argues mainstream forms of Islam will win out over Osama bin Ladin’s revolutionary brand of religion because militant theology is weak. Many intelligence analysts believe pragmatism will destroy the more theologically correct arguments from scholars like (Varadarajan, 5–3–02). Yet, militant versions will remain (see Kelsay, 1993 and Shay, 2002).

There are other forms of religious violence apart from militant Islam. Violent Christian religion provides justification for a number of potential terrorist acts. The Christian Identity movement claims Jews are descendants of the devil, nonwhite people evolved from animals, and Caucasians are created in the image of God. Some Identity ministers call for the destruction of Jews and nonwhites (see Barkun, 1997). Freewheeling fundamentalists, a variety of violent Christian interpretations of politics, frequently call for violent resistance to federal authority. Nordic Christians and pure Odinists, call upon a pantheon of Norse gods to protect the white race. Creatorists separate themselves from Christian churches all together and call for racial holy war (White, 2003).

There are other violent religious movements in the United States. Cults segregate themselves from the community. They may internalize violence, such as the mass suicide of the Heaven’s Gate cult in San Diego, or they may externalize their actions like the Aum Shinrikyo poison gas attack in Tokyo. Other groups may form around a single violent theme. The Nation of Yahweh, an offshoot of Black Hebrew Israelism, demonized whites and called for their destruction. Certain segments of American-created Islam also demonize whites. Militant Jewish organizations have stood behind terrorism against Arabs or any group threatening Judaism. These issues are not the product of any one religion, but the result of extremist branches of religion calling for violence.

BOX 1.4 Close-Up: The Tokyo Subway Attacks—1995

In the early 1990s Shoko Asahara began drawing young Japanese professionals to a religious compound on Japan’s main island. A mystic in search of supreme truth, Asahara preached a strange brand of Buddhism and Hinduism inside a group he called Aum Shinrikyo. He eventually included other faiths in his strange cult, convincing many of his followers he was a messiah.

The world is corrupt, Asahara told his followers, and it must be purified through destruction. Only violent tribulation would allow Asahara’s chosen followers to emerge and understand the supreme truth. As a result, Asahara’s cultic followers began to develop weapons. They were searching for an instrument to produce megadeath. When an attorney sought to expose the cult, Aum Shinrikyo members killed him along with his family. Asahara disciplined members who threatened to leave and brainwash others. Finally, the cult produced a weapon for Amedegdon, a poison gas called sarin. Cult members tested the gas by dispersing it from a truck one night.

Unsatisfied with the result, they decided to release it in a confined space. On March 20, 1995 several members of the cult released packets of the gas in subway cars merging at Tokyo’s central station. Fortunately, the sarin was not as effective as it could have been. Twelve people died and over 5,000 were injured (see Brackett, 1996).

This incident brings many questions:

- Should the police have been empowered to investigate a religious organization?
- Was the religion destructive by its own nature or did it result from violent extremism?
- Did these terrorists behave according to the model posited by Hoffman?
- Did their actions differ from traditional crime?
- What type of information, if any, should police gather about a group like Aum Shinrikyo before they engage in violence?
- Does religious terrorism pose the same type of threat as political terrorism?
When potential enemies are demonized and degraded, it is often a prescription for violence (see Berlet, 1998).

Single issues may result in such passions that religions or surrogate religions call people to violence. Abortion providers have been subjected to increasing violence since the 1980s. In the past decade clinics have been bombèd, buildings set on fire, and clinic workers have been murdered. Violent ecological and animal rights activists have generally limited their activities to the destruction of property, but some have called for interpersonal violence. These single issues take on religious significance. For example, many violent antiabortion extremists justify their actions with Christian scriptures. Violent ecologists use their limited interpretation of ecological responsibility as a surrogate religion.

Most violent extremists are narrow-minded people who seek to forcibly impose their will on others. If Bruce Hoffman's thesis is correct, such terrorists have been acting with a theological imperative during the past few years. While religion is not a matter of national security, religious violence is. Religious terrorists serve a cause with the utmost zeal, not to enrich themselves from the proceeds of criminal activity, but to destroy in the name of a deity. Since they operate outside the law, there is a high probability they will encounter the police. This brings a problem. State and local law enforcement in the United States is designed to counter crime. Agencies have little experience in studying violent religious sects and terrorist ideologies. The dilemma posed by terrorism is that the police may be forced back into the business of gathering intelligence.

**THE DILEMMA DEFINED**

As you consider the issues associated with the possible expansion of localized intelligence operations, the central dilemma should start to emerge. State and local police collect criminal intelligence, not information regarding national security. They collect information when they have reasonable suspicion to believe people are involved in crimes. While some people may argue about the type of criminal intelligence the police gather, no one questions their right to gather information about criminal activity (see Commission on Accreditation for Law Enforcement Agencies, 1990; Walker, 1992; and Radelet and Carter, 2000).

The dilemma emerges because terrorism moves the police into a new intelligence realm. Criminals engage in crime for economic gain or psychological gratification. Terrorists are political actors using crime to strike their enemies. This causes terrorists to encounter the police, but not from the standpoint of traditional criminals. To gather counterterrorist intelligence, the police are forced to collect political information. If state and local law enforcement agencies are included in national defense, they will collect information having no relation to criminal investigations. No matter which position you might support, this is a dilemma for American democracy. The police are not designed to collect political information (Schmitt, 4-29-02).

While lacking a defined role, the police in America have traditionally been associated with crime control. They respond to crime, prevent crime, and may develop from something as simple as reading a newspaper. Counterintelligence focuses on techniques used to discover or disrupt people trying to gather information about intelligence operations.

Sometimes terrorism is a slippery term. Brent Smith, one of criminal justice's foremost scholars on the subject, says it should not be so nebulous, while Alex Schmid, a noted Dutch researcher, provides the most comprehensive definition by giving a typology of many different definitions. This book errs on the side of simplicity. Terrorism is violence or threatened violence used against innocent people or symbols to change behavior by producing fear. Many people will disagree with this definition and others may like it. The important thing is to understand that terrorism is socially defined in the United States. It means different things at different times. In terms of discussions in this book, terrorism is a threat to national security beyond the traditional meaning of a military attack.

There are terms government officials tend to use when discussing terrorism and responses to it. Generally, anti-terrorism refers to protective measures while counterterrorism involves military or police force against a terrorist organization. Many times, like the use of "intelligence" and "information," the terms are used interchangeably. The federal government also uses three terms to describe America's reactions to terrorism. Interdiction means eliminating a threat before terrorists can strike. Crisis management refers to managing an incident while it is happening, and consequence management means restoring normality after the incident. Some people, including governmental decision-makers, think (continued)
we should not make a distinction between crisis and consequence management.

There are a variety of common terms used when discussing response. First responders, involve any type of police, fire, or medical personnel who respond to a terrorist act. First responders are usually trained to respond to massive casualties and property damage. Weapons of mass destruction include: biological agents (bioterrorism), chemical agents (chemical terrorism), and nuclear or radiological devices (nuclear terrorism). The fertilizer bomb in the 1995 Oklahoma City bombing and the hijacked airplanes of September 11 demonstrate that relatively common features of everyday life can become weapons causing mass destruction. Cyberterrorism refers to the use of computers in a terrorist attack or an attack on a computer network. Critical infrastructure protection is designed to safeguard support networks of information, transportation, communication, goods, and services.

It is necessary to have a cursory understanding of law enforcement on the federal level to discuss the functions of state and local law enforcement. There are several agencies in the federal government with special agents who have law enforcement powers. The Department of Justice and the Treasury Department have the best known agencies (the Federal Bureau of Investigation; the U.S. Marshals Service; the Bureau of Alcohol, Tobacco, and Firearms; and the Secret Service), but many cabinet level departments also have law enforcement officers. The attorney general heads the Department of Justice. United States attorneys serve in nearly one hundred districts across the country to prosecute crimes for the attorney general. The FBI is the investigative arm of the Department of Justice, but its investigative power cuts across all other cabinet departments. The FBI is the lead agency for dealing with domestic terrorism. Under Presidents Clinton and Bush it has been increasingly used internationally. The director of the FBI reports to the attorney general.

In conjunction with the attorney general, the FBI gets involved in several facets of anti-terrorism and counterterrorism. Anti-Terrorism Task Forces (ATTFs) are assigned in most U.S. Attorney districts. Officially, they coordinate training and case preparation in anti-terrorism cases. Joint Terrorism Task Forces (JTTFs) combine local, state, and federal police officers in counterterrorist operations, including intelligence gathering. The attorney general created ATTFs after September 11. JTTFs started in Chicago nearly three decades ago when local, state, and federal officers developed a method for working together on terrorist cases.

engage in social-maintenance tasks, such as traffic control, inside local communities. Although not a formal role, the preoccupation with responding to and preventing crime has become the de facto purpose of American law enforcement. Local communities and states have empowered agencies to keep records to assist them in anticrime efforts, but a bevy of federal, state, and local laws, as well as a number of civil rights groups, have imposed limits on the type of information the police may gather and retain. Any move to include the police in an intelligence-gathering system alters the expectations local com-

There are problems posed by domestic and international terrorism, and the role for state and local law enforcement remains unclear. On the one hand, state and local law enforcement agencies are in a unique position to collect and analyze information from their communities. They can become the eyes and ears of domestic intelligence. On the other hand, when the police have participated in national defense in the past, abuses have taken place. The primary question is, Is there a role for homeland security for state and local police? The secondary questions becomes, Do the police and the public want law enforcement to assume this role (Best, 2001)?

There are no easy answers to these questions.
Intelligence Rivalries and Civil Liberties

R
embering civil disturbances from the Vietnam War era, Chief James Ahern (1972) concludes that the president of the United States sometimes "speaks" from a patrol car. If his assessment is correct, it would seem the post-September 11 era of policing is one of the times presidential authority leaves the White House for routine police patrol. The president's decisions about intelligence gathering will affect local police departments, and this will raise a host of issues concerning intelligence gathering and civil liberties. In the previous chapter, you were introduced to the dilemma of law enforcement intelligence gathering. This chapter will take you deeper into the issue by examining potential problems involved when national defense policies are linked with state and local law enforcement issues. If the police become deeply involved in homeland security, the process will require a new philosophy of intelligence and law enforcement cooperation and the reinterpretation of existing laws. These issues, in turn, will take place in an environment where new procedures are defined and refined by court interpretations. Policymakers will eventually define the law enforcement role in homeland defense, but once it is established, the interaction with intelligence agencies and courts may well change the original intentions.

After reading this chapter, you should be able to

1. Define the debate between the intelligence and law enforcement communities.
2. Outline the constitutional issues associated with homeland security.

3. List the amendments in the Bill of Rights limiting law enforcement powers and summarize the Fourteenth Amendment.
4. Define reasonable suspicion, probable cause, and guilt beyond a reasonable doubt.
5. Describe the implications of the Patriot Act for civil liberties.
6. Discuss practical aspects for and against increasing police intelligence operations.
7. Describe the difference between wiretaps with Title III searches under the Omnibus Crime Act and searches under the Foreign Intelligence Security Act.
8. List arguments for increasing and limiting executive powers under the Constitution.

INTELLIGENCE VERSUS LAW ENFORCEMENT

On the surface it seems simple: Defense and intelligence communities gather information concerning possible terrorist activities in the United States. The FBI is charged as the lead agency in domestic terrorism, and it has communication links with the defense and intelligence bureaus as well as liaisons with the Department of State, which is the lead agency for international terrorism. The FBI, in turn, is also loosely linked to all of America's law enforcement agencies, and although it does not have electronic communications with many departments, it can contact local administrators. It would seem that intelligence could be readily shared on a need-to-know basis.

Under the surface, however, a complex network of interagency rivalries, laws, security clearance issues, and turf protection reduces the possibility of shared information. There is no system to sift, sanitize, and disseminate information to local law enforcement. For their part, American police executives are fiercely autonomous, and law enforcement agencies and intelligence bureaus rarely trust one another (Swanson, Territo, and Taylor, 2001, pp. 196–197). The process is inefficient, but such decentralization of power is designed to protect democracy.

Two personal encounters symbolize the dilemma about intelligence sharing. The first comes from a colleague of mine who was deeply immersed in the intelligence community. In the past we presented papers together at conferences and arranged discussions on methods to disseminate defense information. We attended both academic conferences and semi-closed military discussions. Despite our mutual respect, my friend could never get over the fact that my background was in law enforcement. He continually chided me for law enforcement's concern with procedures, legality, and conventions, and he was convinced that American law enforcement was responsible for the failure of defense intelligence.

"You guys will never understand it," he once said to me. "You're too busy looking for bad guys and following the laws. Handle murderers, traffic, and
A similar feeling about intelligence. In his world, information that could not be used at trial was worthless. Both stories illustrate the very real problems with intelligence gathering. Intelligence agencies collect information that is used to defend the country, and the police collect information for prosecution (Best, 2001).

On a different level, these two encounters represent another tension. The police collect evidence within court-recognized standards for investigations. For example, a police officer can investigate only after the officer has reasonable suspicion of a person's involvement with a crime. Arrests are based on a higher standard. An officer must have probable cause indicating a specific suspect committed a specific crime. The court convicts only if it believes the suspect is guilty beyond a reasonable doubt. Intelligence agencies are not held to investigative standards for evidence. Their job is to gather as much information as possible, evaluate its reliability, and utilize it in national defense. The real difference between intelligence gathering and law enforcement is not based on bureaucratic rivalries about differing missions, but differences based on the constitutional use of government power.

HOMELAND SECURITY: CONSTITUTIONAL ISSUES

Organizational conflict between the intelligence and law enforcement communities is a managerial issue, but it also impacts the Constitution. When police agencies gather information about organizations and people, they do so as an extension of the executive branch of government. Any effort to expand executive power will impact the other branches of government.

The United States Constitution separates the powers of the three branches of government: executive, legislative, and judicial. These powers are separated in the criminal justice system, too, as elected bodies of lawmakers (legislative branch) pass laws, courts (judicial branch) rule on them, and the police (executive branch) enforce them. The constitutional separation of powers will impact every area of homeland security.

A quick overview of constitutional issues illustrates points where homeland defense policies and the Constitution intersect. The main body of the Constitution separates powers and prescribes duties for each branch of government. It reserves powers not explicitly given to the federal government to the states, and through the posse comitatus, forbids the use of military power to enforce civilian law. The Bill of Rights also comes into play by protecting free speech and assembly (First Amendment), preventing the government from illegal search and seizure (Fourth Amendment), and preventing self-incrimination (Fifth Amendment). The Sixth Amendment helps to protect these rights by ensuring that suspects have access to an attorney. The most important amendment for law enforcement after the Bill of Rights was added to the Constitution after the Civil War: The Fourteenth Amendment ensures that suspects...
cannot lose their rights except by the due process of law. The interpretation of the Constitution and its amendments have protected American liberties for more than two centuries.

The Constitution guides America in war and peace as well as in the nebulous times in between. Terrorism represents a new kind of enemy, one who will not strike by hitting military or industrial might. For example, look at the September 11 attacks. America's new adversaries used terrorists trained in military-style camps to attack civilian targets and military forces engaged in peace time activities. As you saw in the last chapter, local police officers encountered many of these attackers prior to September 11, but they had no tools to detain or question them. If state and local police are given powers to take part in homeland security, they will be expected to do so under constitutional constraints (see del Carmen, 1991, pp. 73-176).

National Public Radio (12-6-01) broadcast a special report focusing on constitutional issues in December 2001, and matters quickly lined up along party lines. Attorney General John Ashcroft called for the right to deport suspected terrorists in secret hearings and Defense Secretary Donald Rumsfeld gave orders to detain accused al Qaeda terrorists without trial. Two of the detainees were American citizens. Critics argued such actions endangered the rights of Americans (NPR, 12-6-01 and Seelye, 6-23-02).

Former Senate Judiciary Committee Chair Patrick Leahy (D-Vermont) said the executive orders coming from the Bush administration were disconcerting. According to Senator Leahy, President Bush's anti-terrorist proposals threatened the system of checks and balances. They gave the executive branch of government too much power. Attorney General John Ashcroft disagreed with Senator Leahy's conclusions. The attorney general argued that the proposed guidelines were solely for the purpose of protecting the country from terrorists. This constitutional theme runs through discussions of homeland security. One group is skeptical of increased executive power, while the other sees it as the logical alternative to protect the country.

At this point, it might be helpful to reconsider the USA Patriot Act. In the last chapter you were asked to examine the organizational aspects of the law. When looking at civil liberties, several other issues come to the forefront. Civil rights attorney Nancy Chang (2001) criticizes the Patriot Act on the basis of democracy. It was rushed through the House and Senate, she says, with no public hearings and no time for public debate. There were no conference or committee reports. Rather than examining security needs, the legislation came in the emotional tide of September 11. The most important aspect, she finds, is the increased ability of the government to look into the affairs of its own citizens. By allowing the government to blur the distinction between defense intelligence and criminal evidence, the Patriot Act tramples on reasonable expectations of privacy.

Others argue the Patriot Act is an unreasonable attack on electronic communication (Electronic Frontier Foundation, 2001). According to this line of thought, the government overreacted to September 11. Technological societies are open to attack by subnational groups or even deranged individuals, and directives affect the flow of information from communities?
- Police departments enforce criminal law. How might these directives affect the police mission?
- Terrorism threatens the United States in several ways. Do these measures focus too narrowly on a single international threat? How would you feel if all people in favor of protecting the environment were interviewed for any knowledge they might have about ecoterrorism?

**Constitutional Aspects of Justice Department Powers**

- Police interviews are based on reasonable suspicion. Did the order to interview Middle Eastern males violate constitutional guidelines for police interviews?
- Individuals have a right to privacy. Did the actions of the federal government violate this right?
- As interpreted by employment and civil rights laws, organizations are not allowed to discriminate against people on the basis of race, religion, or national origin. Did the federal government violate this principle in the wake of September 11?

**Practical Aspects of Justice Department Powers**

- Police agencies depend on information. How might these protection requires thoughtful, reflective analysis and reaction. Instead, Congress rushed legislation amending fifteen different statutes. The law gives federal law enforcement the right to monitor Internet searches and to keep tabs on individual queries. The government is allowed to contact roving wiretaps without probable cause in the hope of obtaining information. For many, the provision in Title II forcing Internet service providers to give information to federal law enforcement agencies is not acceptable.
Yet not everyone believes the Patriot Act represents an attack on individual rights. For example, two senators with strong civil liberties records think criticism of the USA Patriot Act is premature (Straub, 5-1-02). Senator Dianne Feinstein (D-California) believes we cannot rush to judgment. Time will tell how it is utilized in the real world, she states. It may be necessary to revisit the law, but first we need to see how it is implemented. Senator Charles Schuman (D-New York) states the law is balanced. It limits personal freedom while reasonably enhancing security. Both senators believe it is necessary to balance civil liberties with social protection.

Championed by the Bush administration, the Patriot Act is a lightning rod in the debate pitting national security against civil liberties. Technological societies are vulnerable to technological attack, regardless of ideology. Whether this involves individuals engaged in a killing spree, criminal gangs, or terrorist conspiracies, a technological society is open to attack. The more sophisticated the attackers become, the greater the chances are for multiple deaths. September 11 exacerbated the issue, but America was vulnerable prior to the hijackings and it remains vulnerable today. Supporters claim the Patriot Act and other governmental actions are necessary for security. Critics believe security cannot come at the unreasonable expense of civil liberties. This debate continues and the courts have yet to rule on the issues.

A PRACTICAL ARGUMENT FOR INTELLIGENCE OPERATIONS

There were many indications that the United States might be attacked in the decade prior to September 11. German intelligence sources signaled a warning prior to the first World Trade Center bombing in 1993. Progressive strikes by al Qaeda indicated that the lethality of terrorism was increasing. The judge who sentenced the first Trade Center bombers of 1993 stated that he was disturbed by the amount of hatred he saw in the suspects. Information seized in 1993 was ignored for a year because the prosecutors and investigators could not translate Arabic. When original notes were finally translated, they revealed further terrorist plots. Steven Emerson (2002) uncovered networks of jihadist organizations operating in the United States; he points to fund-raising visits by Abdullah Azzam, the cleric who inspired Osama bin Laden to form al Qaeda. Even arrest records in New York, Boston, and Chicago could have provided valuable information to terrorist sleeper cells. Instead, state and local law enforcement unconsciously ignored the information it collected as intelligence agencies dichotomized national security intelligence and information used in criminal investigations.

Domestic terrorism was another matter. Information about domestic groups began appearing in state and local agencies after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995. Although the Christian patriot movement had been operating since the early 1980s, all of American law enforcement seemed to stand up and take notice after Oklahoma City. Other agencies realized that cults, gangs, and criminal groups demanded increased intelligence activities and a willingness to share information among law enforcement departments. The 1993 Branch Davidian standoff in Waco, Texas reinforced this notion, while a massacre of high school students and one teacher at Columbine High School in Littleton, Colorado, also brought a call to action. Some agencies began to focus on indicators in the communities that would show that a religious cult was active or that school violence was likely to take place. If such indicators could be developed and monitored, law enforcement might have the chance to stop an event before it happened. This idea was hardly innovative. It was a combination of good police work, applying information gathered in community policing, and sharing information. The same logic did not apply to terrorism.

The issue of Weapons of Mass Destruction (WMD) illustrates the point. After the incidents at Waco, Oklahoma City, and Columbine, some policymakers began to think that international terrorists could wreak more havoc than their domestic counterparts. This seemed to be especially true in the realm of chemical, biological, and nuclear weapons. Fire departments and state emergency service agencies received millions of dollars in federal aid to prepare for the worst. By 1996 the groups were up and running. Preparations focused on response. Fire departments developed plans for sealing off contaminated areas while hospitals dealt with treatment. The decline in the medical infrastructure became evident as health administrators realized they had few resources for dealing with biological terrorism. This realization brought more money. Everything seemed to be aimed at responding to a WMD incident and bringing the situation under control.

While these preparations were taking place, very little attention was focused on another possible solution. If law enforcement intelligence capabilities were increased; if cooperation among law enforcement agencies increased; if law enforcement agencies developed systems to share information; if national intelligence agencies could establish secure links with law enforcement agencies; if law enforcement’s role in national defense was recognized; it might be possible to strike at organizations that would use WMD prior to their employment. Such an approach would require a shift in the way Americans viewed police officers and the way police officers viewed their jobs (see Law Enforcement News, 10-15-01 and Riordan and Zegart, 7-5-02).

A PRACTICAL ARGUMENT AGAINST INTELLIGENCE OPERATIONS

When looking at the victims of September 11, arguments against any defensive measures seem to shrink to absurdity. Yet, when the heat of the moment is over, long-term issues arise from reactions to an immediate problem. The first issue in intelligence gathering focuses not so much on the police but on the sheer
The volume of information. Senator Robert Graham (D-Florida) was especially critical of both the CIA and the FBI prior to beginning hearings about intelligence gathering. He blamed George Tenet of the CIA and the FBI's Robert Mueller for failing to gather, analyze, and share information (Cloud, 4-15-02). Regardless, when all bureaucratic rivalries are considered as well as the inadequacy of human intelligence systems, the simple fact is there is too much information. Information is useless unless it is analyzed, and if the police add to the volume of information without evaluating it, their efforts will be in vain. The key to intelligence gathering information and organizing it. Information is not valuable unless agencies know what it means (Thornburgh, 6-29-02).

There are other issues. Conservatives and law enforcement executives have expressed concerns about involving state and local police agencies in federal drug enforcement administrators were concerned with the federal request for another reason: By enlisting immigration laws, local police officers would erode their base of information. Law enforcement can only operate against crime when people are willing to share information. If immigrants feel local officers are investigating them at each contact, they will be reluctant to report crime or turn to the police for help.

Civil libertarians and others believe the police have a right to collect information related to crimes. When law enforcement has reasonable suspicion to believe an investigation is warranted, criminal intelligence may be gathered. The rub comes with national defense intelligence, and a recent case with surveillance cameras in Washington, D.C., demonstrates the point (Clymer, 6-19-02).

Prior to the 2002 Fourth of July celebrations, city officials in Washington, D.C., examined the possibility of combining the district's television monitoring cameras with surveillance systems in the district's school and subway systems. It would expand the Metropolitan Police Department's ability to observe and respond to potential problems. Some citizens were willing to embrace the concept not only for public safety, but for narcotics enforcement and protection from terrorism as well. This drew the attention of critics. No doubt surveillance capabilities would be expanded, but should all citizens fall under the electric eye? One city official said the television system was a means of spying on average people every time they went outside or stood at their own window (Clymer, 6-19-02).

Finally, relatively recent experiences with police intelligence gathering is not full of pleasant memories. When civil libertarians point to concerns about police intelligence activities, they are not dealing with abstract concepts. For example, the FBI's Counterintelligence Program (COINTELPRO) operated from 1956 to 1971. Often working in conjunction with state and local intelli-
INCREASING EXECUTIVE POWERS UNDER THE CONSTITUTION

Several constitutional scholars have examined the issue of increasing executive powers to combat terrorism. Professor Lewis Katz (11-24-01) believed in limited government prior to September 11, but he rethought his position in the wake of the attacks. His concerns center on diminishing American rights, and he finds an analogy in drug enforcement. America launched its war on drugs and soon discovered it could not thwart drug traffickers under constitutional rules of evidence. As a result, police power has been growing since 1971, Katz argues, and citizen protection under the Fourth Amendment has been decreasing.

While leery of government, Katz says the real test of the Fourth Amendment is reasonableness. In normal times, police officers can be held to a higher standard of behavior than in times of emergency. September 11 constituted an emergency. It was not unreasonable to interview Middle Eastern immigrants, Katz concludes, nor was it unreasonable to increase electronic-surveillance powers. A long-time opponent of a national identification system, Katz says such a system would not be unconstitutional, provided citizens were not ordered to produce identification without reasonable suspicion. Actions taken to prevent another September 11, he argues, do not violate the Fourth Amendment when they are reasonable.

Katz does believe some government actions are unreasonable. Eavesdropping on attorney-client conversations, for example, violates the Sixth Amendment, a suspect’s right to counsel. Military tribunals deny the presumption of innocence. He argues that we cannot sacrifice the very liberties we are fighting to preserve. Katz’s argument indicates that the balance of power is a dynamic entity vacillating according to circumstances. In other words, there is no blanket policy of reasonableness, and care must be taken to balance security with civil liberties.

Professor Sherry Colb (10-10-01) of Rutgers University’s School of Law also applies a doctrine of reasonableness. Examining the issue of racial profiling, Colb concedes that the American police are facing a new enemy. Racial profiling has not helped the police control drugs, she argues, and it violates the due process clause of the Fourteenth Amendment. Yet, the scope of September 11 calls previous assumptions about profiling into question. As police agencies assemble profiles of terrorists, one of the characteristics may be race.

Colb believes any profiling system, including one having race as a factor, will yield many more false stops than apprehensions. The reason is that there are only a small number of terrorists in any group regardless of their profile. The population of people matching the profile is greater than the population of terrorists in the profile group. By the same token, a number of terrorists may fall within a particular ethnic group and the urgency of September 11 may require action. If a terrorist profile develops and it includes race as one of the characteristics, Professor Colb suggests, some opponents of racial profiling may find they endorse it for counterterrorism.

The Bush administration moved quickly in the wake of September 11 (Van Natta, 3-30-02). Wanting to do everything possible to catch terrorists, the Department of Justice scrapped the restrictions it placed on agents after COINTELPRO. Issuing new guidelines, it freed the FBI from the requirement to rely on reasonable suspicion before launching an inquiry. Unless the courts rule otherwise or legislative bodies intervene, agents are free to search for indicators of illegal activity in open-source information, including the Internet. They can monitor chat rooms or engage in data mining. Agents can go undercover in political or religious organizations to search for threats to security. No longer required to seek centralized approval, local FBI offices would be empowered to launch inquiries based on their own information and initiative.

New guidelines, executive orders, and military tribunals have created strange twists in the criminal justice system. Reporter Katherine Seelye (6-23-02) examines the summer of 2002 when two foreign-born terrorist suspects were arrested based on probable cause and sent to trial. At the same time, two American citizens, Yasser Esam Hawdi and Jose Padilla, were held by military force without representation. Hawdi was fighting for al Qaeda when captured in Afghanistan in November 2001, and Padilla was arrested on May 8, 2002, for his alleged involvement in a plot to detonate a dirty nuclear bomb in the United States. Hawdi and Padilla, who would have been criminally charged prior to September 11, were detained much like prisoners of war, while two alleged terrorists arrested on American soil were afforded the rights of criminal suspects.

Ruth Wedgwood (6-14-02, A12), a former federal prosecutor who teaches law at Yale and Johns Hopkins, offers an explanation of the irony between Americans being detained militarily and foreigners being held under civilian arrest. She says al Qaeda attacked civilian targets, gaining an advantage in the American criminal justice system. Al Qaeda, Wedgwood says, has learned it is best to recruit American citizens for operations because citizens are not subject to arbitrary arrest. Pointing to Jose Padilla, Wedgwood states that his arrest represents a conundrum between reconciling public safety and the law. The issues surface in the difference between intelligence operations and law enforcement administration. In short, she says, going to trial means exposing intelligence sources for the sake of a criminal conviction.

Wedgwood presents the logic of the two situations. Common sense dictates that the detention of terrorists does not follow the pattern of criminal arrests. Terrorists are detained because no writ, no law, and no court order will stop them from attacking. They must be physically restrained, Wedgwood says. The purpose of detention, she argues, is not to engage in excessive punishment, but to keep terrorists from returning to society. She admits that the situation presents a nation ruled by law with a public dilemma.

Wedgwood argues that indefinite detention by executive order is not the most suitable alternative. Terrorists could be given a military hearing to determine if they continue to represent a threat. A panel of judges might rule on the danger of releasing suspected terrorists from custody. The Constitution is not a suicide pact, she says, citing a famous court decision. Common sense demands a reasonable solution to the apparent dichotomy between freedom and security.
E.V. Konotorovich (6-18-02, p.A16) is not as concerned about executive orders as Wedgewood. The stakes are so high, he argues, that the United States must make all reasonable efforts to stop the next attack. Torture is out of the question in the United States, but drugs are a viable alternative. Police are allowed to do body cavity searches for contraband in prison, Konotorovich argues, and the September 11 attacks make such searches pale in the face of massive terrorism. Drugs should not be used for prosecution, he says, but they are acceptable for gaining information. The threat is real, and legal arguments against obtaining information are illusory. When al Qaeda has captured Americans, they have been quickly executed. Konotorovich believes Americans must take decisive actions against such terrorists.

LIMITING EXECUTIVE POWERS UNDER THE CONSTITUTION

Professor Susan Herman (12-3-01) of Brooklyn Law School vehemently urges a different approach to anti-terrorism, believing the Patriot Act to be a law that throws the balance of powers principle out of kilter. She asserts that Congress has relinquished its power to the presidency, and it failed to provide any room for judicial review. Congress, Herman argues, has chosen to fight terrorism by providing funding to the Bush administration, while simultaneously giving up its powers for control. Proposals coming from the administration complement congressional actions by increasing the executive power to take actions without judicial review. For Herman, the beginnings of the “war on terrorism” translates to a “war on the balance of powers.”

Professor Herman’s argument is based in constitutional law. She compares the USA Patriot Act with two previous sweeping pieces of legislation, the 1968 Crime Control and Safe Streets Act, and the 1978 Foreign Intelligence Surveillance Act (FISA). Both laws provide guidelines for domestic surveillance. Title III of the Safe Streets Act mandates judicial review of police surveillance. Under Title III, criminal evidence cannot be gathered without prior approval from a federal court, and when a judge reviews a request for surveillance in secrecy, the police must prove wiretaps or other means of electronic eavesdropping will lead to probable cause. FISA surveillance differs from Title III warrants. Under FISA, various forms of eavesdropping can be used to gather intelligence. A special judicial review is required before surveillance can be initiated, and any evidence gathered during the investigation cannot be used in a criminal prosecution.

The constitutional concern voiced by Herman partially focuses on judicial review. The courts have not been as vigilant in protecting individual rights during intelligence cases as they are in criminal trials. For example, she cites the record of FISA surveillance requests. Between 1978 and 2001 federal law enforcement officers applied for 4,275 FISA warrants. They were all granted. In fairness to the judicial reviewers, you should remember that evidence gleaned from these warrants is not used in criminal prosecutions, but this is not the issue bothering Professor Herman. She compares FISA warrants to the type of surveillance proposed under the Patriot Act and concludes that the Patriot Act allows the government to watch its own citizens with similar rules. There is no guarantee such surveillance will exclude evidence used in criminal prosecutions.

The other part of Professor Herman’s argument focuses on the relationship between executive and legislative powers, and she feels the Patriot Act concentrates too much power in the executive branch. The act gives the attorney general power to detain and deport aliens with less judicial review than was required prior to September 11, and the attorney general is only required to have reason to believe the action is necessary. Courts, she states, would require a much higher standard of proof. The Patriot Act also gives the attorney general and the secretary of state the power to designate certain associations as terrorist groups, and they may take actions against people and organizations associated with these groups. Herman believes Congress has failed to aggressively seek a role in the Patriot Act. By increasing executive powers, the Constitution is threatened. Her primary fear, she concludes, is that increased executive powers will be used to mask an attack on civil liberties.
The American Civil Liberties Union (ACLU, 3-20-02) voices other concerns with civil liberties. Citing increased executive powers to detain immigrants, the ACLU charges the attorney general with trying to “gut” immigration courts. The ACLU expresses two concerns. First, after September 11 the attorney general ordered the detention of several hundred immigrants. He refused to openly charge most of the detainees and refused to make the list known for several months. In addition, Attorney General Ashcroft sought to have the rules for detaining and deporting immigrants streamlined. He wanted to make the process more efficient by decreasing the amount of judicial review involved in immigration and naturalization cases. These issues incensed the ACLU.

 Tightening immigration laws, the ACLU argues, is a smoke screen for increasing executive powers at the expense of individual rights. The ACLU believes the attorney general will rely on political issues rather than the rules of evidence when deciding which cases to prosecute. By streamlining immigration courts, there will be no judicial body to oversee executive decisions. The ACLU also believes President Bush will appoint judges sympathetic to Attorney General Ashcroft’s views. This process undermines civil liberties, the ACLU says, at the expense of the Constitution.

To demonstrate the point, the ACLU points to the post–September 11 case of Ali Maqari. Married to a member of the armed forces, Maqari was driving his wife to Fort Campbell, Kentucky, when he was detained for questioning by federal agents and detained without probable cause to believe he had committed a crime. He was held for eight weeks without formal charges, according to the ACLU. After being granted a hearing, a court ruled that the government’s position was unjustified. Maqari was released. Without effective judicial review, the ACLU says, he may not have been released. Coming to grips with terrorism should not involve scrapping personal freedom contained in the Constitution.

Any attempt to utilize state and local law enforcement in intelligence-gathering operations will have constitutional implications. The police may be used in homeland security, but there are passionate and logical positions against this and equally powerful arguments supporting it. Regardless, even when the executive branch proposes a course of action, police operations will be influenced by court decisions. Local law enforcement’s role in homeland defense cannot be developed in a constitutional vacuum.