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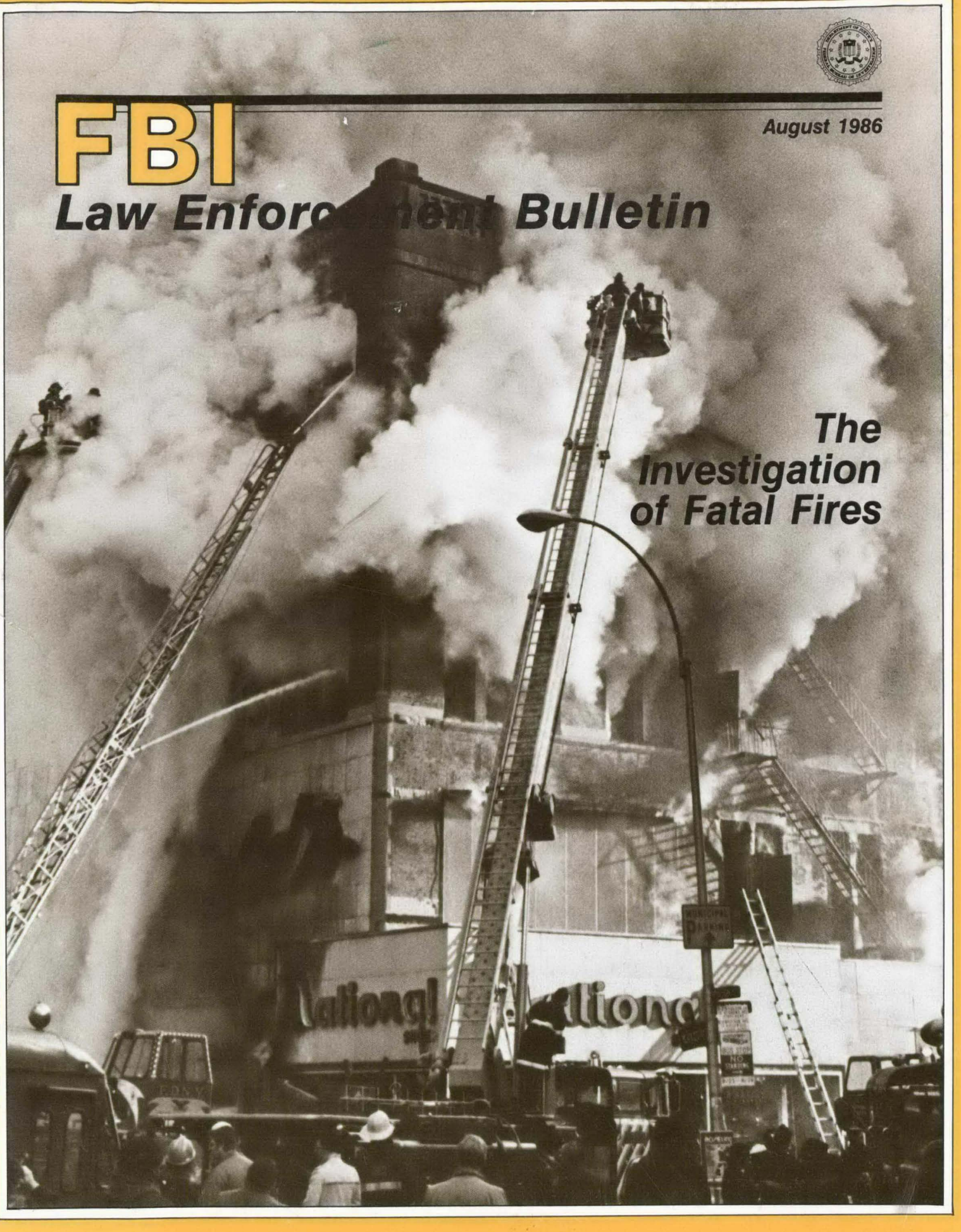
The Investigation of Fatal Fires



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Fire marshals perform a physical examination at the scene of an arson homicide in Manhattan. Photo: C. Benson

The Investigation of Fatal Fires

Views of the Fire Investigator (Part I)

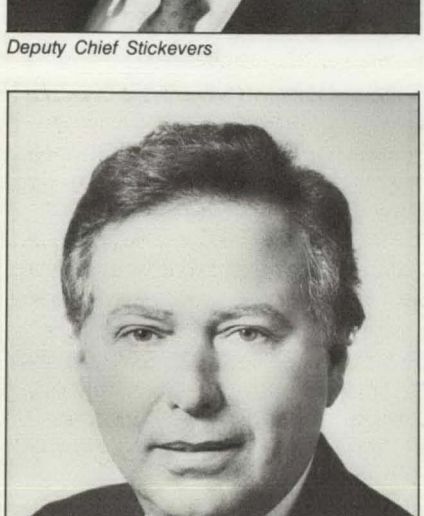
By
JOHN STICKEVERS
Deputy Chief Fire Marshal
New York City Fire Department
New York, NY

What is meant by the term "fatal fire"? Basically, it is any fire, of whatever size, whose direct action causes the death of one or more human beings. However, the connotation, which is the more commonly used meaning, describes any fire, of whatever size, where a dead human body is discovered. This article will provide a broad overview of the methods and means used by the Bureau of Fire Investigation, New York City Fire Department, to establish the basis for conducting a fatal fire investigation.

Fire

While matter can be neither created nor destroyed, it can be altered, and there are many ways in which this alteration can be made. The application of heat is but one of those ways, resulting in a process generically termed "fire." (A working definition of fire is "rapid oxidation, usually accompanied with the evolution of heat and light.") This is a very complex chemical phenomenon that changes the fuel involved in its physical shape and properties and in its chemical makeup.

Deputy Chief Stickevers



Joseph E. Spinnato
Fire Commissioner

Origin

The ability to interpret and make sense of the results of the above phenomenon makes a good fire investigator. It is necessary to reconstruct the fire scene by replacing physical items of debris into their proper locations, and then observe what changes to the structure and its contents were caused by the fire. It is the mental application of the scientific principles of matter and energy, which had to have occurred to produce those changes, that allows us to determine the point at which the fire originated.

Cause

Once the point of origin has been derived, any evidence uncovered is used to determine the cause. A listing of all the possible causes present at the point of origin will evolve and be used to eliminate all nonappropriate causes. For every action there is a reaction, and every cause has an effect. Fire investigators find the former by making a logical interpretation of the latter. This elimination comes about as the result of the knowledge gained through observation and investigation.

This whole deductive process is controlled by the rule which states that in order to have a fire, you must have a fuel source, a heat source, and an event which brings the two together. Through training and experience, a fire investigator understands, recognizes, correlates, and collates each of the foregoing at a fire scene. He decides through deduction, and sometimes inference, that a particular item or event is or is not important, and possibly, the cause of the fire.

There are only two causes for fires—accidental/providential and incendiary. Accidental/providential is inclusive of all heat-producing objects or events created by man or God, but whose use on this occasion did not have as its intent the results it obtained—the fire. Incendiary includes only the man-made, heat-producing objects or contrived events which, on this occasion, were meant to produce the results obtained.

The fire investigator's ability to internalize the subtle differences between the two provides him with information which will enable him to discern a fact pattern and establish the logical and correct solution to the cause of the fire. Hence, a gallon of gasoline inside of a building, ignited by an open flame, could be either an accidental or incendiary cause of the resulting fire. It is not merely the nature of the fuel or the type of heat source combined that mandates the cause; it is the human motivation, or lack of it, which precipitates this event. If all causes except a human-connected one can be eliminated, and it is determined that the fire has intent as one of its components (human motivation), then the case becomes a criminal investigation for arson.

Therefore, fire investigation is a quest not only for a specific heat source of fuel but an exploration into the psychology of those individuals who are involved in the event, in order to uncover any intent, or lack thereof, before a determination can be made as to the cause of a specific fire.

Common Motives

The National Fire Academy lists the following basic motives for people to set fires:

—Frauds for direct gain (insurance) and indirect gain (eliminate competition);
—Pyromania;
—Crime concealment (murder);
—Vanity (security guards for employment or hero wants to save victim);

"A fatal fire investigation is really two separate investigations conducted simultaneously ... for the cause of the fire and the cause of the victim's death."

—Spite/revenge (in work, love, or religion);

—Civil disorders, revolutions, and political activity; and

—Actions of juveniles, adolescents, or children (ranges from gang activities to curiosity).

These motives are not listed in the order of their importance or occurrence, especially in New York City. The frequency of the above-mentioned motives is difficult to ascertain, since the obvious motive for a fire may really mask the underlying and true reason for that fire.

Guidelines for Conducting Fatal Fire Investigations

A fatal fire investigation is really two separate investigations conducted simultaneously. An investigation is conducted for the cause of the fire and the cause of the victim's death. The two investigations cannot be separated from one another, because the cause of one depends on the cause of the other and will affect, and sometimes change, the focus of the entire investigation.

Main Concerns of the Fire Investigator

It is the victim's cause and manner of death which will, at times, dictate the decision to rule an otherwise obvious and apparent accidental fire as one which could only have resulted from incendiary conduct by the human element. Whether the victim was alive or dead at the time of the fire's inception often emerges as the pivotal factor for determining if the fire's cause is accidental or incendiary.

Three questions are raised concerning victims of fatal fires:

1) Was he/she alive or dead at the inception of the fire?
2) Did he/she ingest some substance that impaired judgment to the point that safe exit from the fire scene was not possible?
3) Is the victim, in fact, the person whom we believe he/she to be?

The way and means by which these questions are answered advances a person's continuing education in fatal fire investigation. However, they will remain primarily the responsibility of the medical examiner. When a medical examiner gives a cause of death, any intent by a guilty human agency will be inferred from all the facts which have been ascertained in the case.

Photographs and Sketches

The victim, or the body, should be observed at the scene where it is found. This has always been, and will probably remain, a problem because the bodies are usually moved by firefighters and this usually occurs before the investigators arrive.

If the investigator does arrive prior to the removal of the body, photographs should be taken to show:

1) The scene exactly as it is when the body is discovered;
2) The body as it is uncovered, and the debris that is removed from over it;
3) The body as it is taken out, and the surface on which it was lying; and
4) The underside of the body that was initially hidden from view.

As many photographs should be taken as possible since the scene, body, and evidence will be obliterated or changed in a very short period of time. Several photographs of each item from different angles should be taken, since it is impossible to predict which apparently insignificant item might gain importance and become a critical piece of evidence as the case progresses. In addition to photographs, sketches should be made to depict the surroundings to show the location and position of the body and the location of the camera for each photograph.

Examining the Body

The victim, or the body, is best observed where it is found, but this is not always possible. Even so, the investigator should still examine the body, regardless of where it is located.

Fire fatalities produce two categories of victims—those whose bodies have been burned and those whose bodies are not burned but usually suffer some effect of their surroundings. The extent of destruction to the body limits the ability to arrive at logical conclusions without the assistance of other experts.

Location and Position of the Body

If the body was not removed from the scene by firefighters, it is important to the investigation to determine if the location and position of the body is normal or abnormal; in other words, does the victim belong there (occupant, employee, customer, etc.)? Also, the proper location for the time frame must be considered. For example, was the victim the occupant whose body was found in the kitchen at dinnertime?

Most victims are expected to be found face down because they generally will be attempting to flee the fire. This means they were walking, which is nothing more than a series of falls forward propelled and controlled by the legs.

"Evidence collection in a fatal fire investigation is subject to all the same proscriptions and criteria as evidence in any other fire investigation...."

The body of the victim will usually be found headed toward an exit. If this is not the case, two questions are raised: Was the victim attempting to extinguish the fire or effect a rescue? or could the victim have become disoriented as a result of the smoke, alcohol, or drugs (legal and illegal)?

Manner or Mode of Dress

If the body has been exposed to flames, it may not be possible to determine the manner or mode of dress of the victim. However, if the clothing is intact, the investigator should take note of the type of clothing in relation to the occasion, location, or time frame of the fire (pajamas, sleeping, bedroom, nighttime). Other characteristics to be considered are the size, fit, style, and expense in relation to the measurements and lifestyle of the victim. Or perhaps the victim was dressed abnormally, such as in costume for a ritualistic event or party or in the clothing of the opposite sex.

Signs of Violence

Markings on the body could have occurred prior to or after death and could have been self-inflicted or the result of actions of others or the prevailing circumstances. The investigator should examine the body for any puncture wounds from a bullet, sharp instrument, miscellaneous projectiles from an explosion or falling objects, or signs of blunt force trauma (depressions, fractures, lacerations, bruises).

Another point to consider is the appearance of the victim as a result of change in body chemistry. Lividity is the reddish purple coloration of the skin due to the settling of the body fluids to the lowers portion of the body as the result of gravity. Under normal circumstances, it will commence 1 to 2 hours after death and is completed after 3 to 4 hours.

The stiffening of all the musculature of the body is rigor mortis. Under normal circumstances, it commences from 3 to 5 hours after death and starts in the jaw and progresses downward. After approximately 48 hours, it dissipates, and the body will again appear supple.

Cyanosis results in a bluish-grey ashen appearance caused by a lack of oxygen and may be the result of a heart attack or asphyxia. Other signs of changes in body chemistry the investigator should be aware of are cherry red skin caused by carbon monoxide, cyanide, or immersion in icy water or snow; blisters; and body temperature. When occurring up to 15 minutes after death, blisters will contain the same sera and create marginal reddening to the skin, in much the same manner as when the victim was alive. After death, other blisters containing a different type sera, or air, can appear. The body's temperature drops about 3 to 4 degrees per hour for the first 2 to 3 hours. After that, it drops 1 to 2 degrees per hour until equilibrium is reached with the ambient temperature.

In addition to changes in body chemistry, the outside physical appearance can present clues as to the cause of death. Soot on the skin indicates that the body was present during the fire, while soot around and in breathing passages indicates the victim was alive and breathing during the fire. If the victim is found in a pugilistic position, this can be the result of heat contracting the large muscles and may indicate the victim's presence during the fire.

Injury to the skull can be caused by heat turning the liquids in the head to steam and fracturing the skull internally or causing the skull to explode. However, this condition can also be the result of a high-velocity projectile entering the skull or the exit wound for a large-caliber bullet. Petechial hemorrhages, the bursting of blood vessels in the eyeballs, can usually be the sign of manual strangulation.

The body of the victim should also be examined for any preexisting conditions prior to death. The investigator should note any scars, growths (warts, moles, and tumors), deformities or abnormalities, and use of prosthetic devices. If the victim is female, distension in the abdomen and swelling of the breasts are signs of pregnancy that an autopsy would positively confirm. An x-ray would show fractures to the skull, ribs, arms, legs, or digits.

If possible, prints should be taken of all parts of the body that reproduce prints which can be matched with those on file at any authorized agency of record. If tattoos are visible on the body, or if obscured for some reason, confirmation may be obtained at autopsy by analysis of the lymph gland in the armpit closest to the site. This examination is conducted to discover deposits of ink that may have accumulated there over the years. It may also be possible to determine the color and age of this ink.

All this information will assist the investigator of a fatal fire in determining the identity of the victim, the fact that the victim was dead or alive at the time of the fire, and the cause of death.

Interviewing Witnesses

The interview of witnesses in a fatal fire investigation has a dual focus—to determine the cause of the fire and the cause of the victim's death. Therefore, along with all the others normally interviewed in the course of investigating any fire, those

who can provide the greatest amount of information about the victim should also be questioned. These would include family (husbands, wives, children, parents, and siblings), relatives, friends, neighbors, and coworkers. With regard to friends, neighbors, and coworkers, the length of acquaintance should not affect who is, or is not, interviewed. Those who knew the victim for only a short period of time may provide information crucial to the investigation.

When conducting an interview, the investigator should attempt to gather facts regarding the victim's mental and physical health, if the victim used any type of medication, or if there was the possibility of suicide. Other areas to explore are the social and economic status of the victim. This would include marital status, employment/financial stability, and existence of life insurance (conditions, amount, beneficiary).

The investigator should also question witnesses, family, and acquaintances regarding the actions of the victim before, at the time of, and during the fire. It is important to determine if the victim was acting rationally in comparison to normal behavior patterns, or if the victim was under the influence of drugs or alcohol. Perhaps, the victim may have been doing something that may have caused the fire and/or death, such as using solvents near an open flame or smoking in bed.

Collecting Evidence

Evidence collection in a fatal fire investigation is subject to all the same proscriptions and criteria as evidence in any other fire investigation, except that a portion of the evidence will differ only in what it tends to prove—the identity of the victim and the instrumentalities of his/her death. Therefore, the investigator should seek items that would prove the victim's identity, such as personal papers and letters, photographs, jewelry, clothing, prized personal possessions, and religious artifacts. At the same time, it is important to look for the instrumentalities of death, including firearms, knives, poisons, ligature material, and blunt instruments.

Whatever evidence is collected with regard to the cause of the fire, the victim's identity, or the instrumentalities of death should be sent, if necessary, to the laboratory for analysis. The type of analysis requested would depend on what is being analyzed, the relationship to the case, and the facts intended to be proved.

All facts collected in the investigation to this point are nothing more than words with an indistinct, if not meaningless, explanation of the efforts of the investigator and will remain so until put in the proper order and perspective. When this occurs, preliminary conclusions will be reached regarding the victim's identity, his/her condition at the time of the fire, the cause of death, and reasons for failure to escape.

At this point it is necessary to confer with the medical examiner and request specific examinations at autopsy. These two steps are critical to the final solution of this case. The medical examiner has the expertise to confirm, or refute, preliminary findings. Also he cannot reach any true or sensible conclusion to his portion of the investigation until he is apprised of all the facts surrounding the death and the expert interpretation of these facts. No one, however gifted, can operate in a vacuum and exclude the findings, or opinions, of other equally knowledgeable people in fields pertinent to this type of investigation.

Formulate the Cause of the Fire

To formulate the correct cause of the fire, a review of all information, including that supplied by the medical examiner, is vital. This constitutes the totality of circumstances. Only when those variables which, because of the physical laws of nature, do not fit are excluded will a final, and correct, cause of the fire be determined.

Final Report

After a conclusion to the cause of the fire has been reached, the investigation will either be continued or closed. Circumstances will dictate which path will be followed. Whichever option is chosen, a complete and concise report must be filed. This report will act as the basis for present and future actions in this matter.

Our capability and competence will be measured not only by our ability to uncover pertinent facts and correctly interpret them but also by our ability to articulate all the material necessary to present a logical and cogent argument for arriving at the final conclusion.

Conclusion

A fire investigator attempts to make sense out of chaos. However, by following the steps outlined in this article, the task of completing a fatal fire investigation successfully becomes an achievable goal. FBI

(Continued next month)

A Partnership Against Crime

"The program requires a great deal of energy and commitment from all levels of the police organization, as well as the involved citizenry."

By
DARYL F. GATES
Chief of Police
Los Angeles Police Department
Los Angeles, CA

Policing in the late 1980's and into the 1990's will be greatly different from the policing of two decades ago. One of the major differences, and an area of critical concern to police executives and managers, will be resolving demands for increased service within the constraints of reduced fiscal and personnel resources. Such prospects require today's managers to examine closely strategic alternatives to meet the demands that will be placed on their organizations.

The basic mission of law enforcement is to prevent crime. In the wake of such major tax reduction measures as Proposition 13, enacted in California during 1978, the Los Angeles Police Department, like many governmental agencies, was forced to eliminate or reduce many important but so-called "nonessential" services. One critical area which suffered as a result of post-Proposition 13 budget cuts in Los Angeles was crime prevention.

Historically, the Los Angeles Police Department has been a pioneering agency in the area of crime prevention. Neighborhood Watch has long been a cornerstone program fostering a tremendous educational conduit to the public. Specialized programs such as Business Watch, Senior Citizen Protection, Traffic Safety, Home Security, Community Self-Protection, and Crime Prevention Specialist Volunteer programs have all had meaningful impact on crime. More recently, the Los Angeles Police Department, in conjunction with the Los Angeles Unified School District, pioneered the Drug Abuse Resistance Education (DARE) Program. DARE uses specially trained, uniformed Los Angeles police officers to teach elementary school-aged children the skills necessary to avoid getting started on drugs. Although these programs have proven extremely effective in reducing crime, lack of sufficient funding through the normal budgetary process has prevented the Los Angeles Police Department from providing optimum levels of these vital services.

Realizing indefinite fiscal constraints, the chief of police and top-level police managers conceived a strategy to provide alternate funding for the department's crime prevention programs. The strategy was predicated on the long-standing principle of "people working with police." It centered on the importance of public involvement in working toward the common community goal of preventing crime. The strategy called for the development of a citizen/police organization. This organization, or council, would operate under the complete endorsement of and affiliation with the police department. However, the council would be independent from the department itself.

Chief Gates

The objectives were twofold from the outset. One, the council would act as an effective fundraising mechanism, legally empowered to accept contributions from the community. Two, the council would act as a catalyst in the three-way partnership between the police, the public, and the business community.

Crime Prevention Advisory Council

The starting point for building an effective advisory council began with identifying and selling the idea to those individuals or groups who, if actively in support of the program, would ensure its success. In mid-1984, a founding group or "kitchen cabinet" was formed to explore the possibilities. This "kitchen cabinet" included the chief of police and several key citizens from the community. These key citizens were well-established and trusted supporters of law enforcement. The group held several preliminary meetings to chart a specific course of action.

Fortunately, the Los Angeles area is home to many prominent people from the business community, the sports world, and the entertainment industry. A concerted effort was put forth to gain the support of influential persons within these professions which, in turn, would offer ready-made lines of communication to generate community interest and support for crime prevention projects. Consequently, an ideal vehicle for accomplishing the alternate funding strategy would be the logical result.

A key factor in creating a citizens' advisory council would be in forming a nonprofit, tax-exempt corporation to administer the funds which were raised. This would provide an added tax-savings incentive for group members and citizens so inclined to make the Los Angeles Police Department the beneficiary of their generosity.

A platform was adopted to enroll additional successful individuals to accept the work, responsibility, and personal commitment that would be needed to get the program "off the ground." The platform was based on the belief that professionals with outstanding reputation and name recognition would be able to exert influence with their colleagues, associates, and friends to create a network which would eventually reach the entire spectrum of the community. In short, a "chain" approach would be used to create a council diverse enough to accomplish the many tasks which would be required.

Several motivating factors were discussed, examined, and adopted as integral to the recruitment efforts. One, the members of the council would play a significant role in shaping the composition and direction of crime prevention activities within the city. Two, the working relationship between the police and the community is uniquely interesting and dynamic; therefore, participation in the organization would be especially stimulating. And three, membership in the council would afford a measure of prestige.

Additionally, a set of qualifications was established for target individuals based on the following criteria:

—Commitment of allegiance to the philosophy that the prevention of crime and drug abuse is one of the most important social issues facing our community;

—Impeccable reputation and excellent name recognition within the community;

—Specific capabilities essential to the specific operation of the or-

"The Crime Prevention Advisory Council is one example of how managers can 'do more with less' now and in the future."

ganization (not required of every member), for example, attorneys, accountants, corporate financiers, etc.;

—General qualifications of experience and understanding, as well as access to resources in areas of crucial importance to the strategic goals of the council, e.g., fundraising, direct mail campaigning, publicity, advertising, and mass media;

—The ability to make an appropriate time commitment toward the accomplishment of the council's goals; and

—Prior involvement in crime prevention and/or community service was considered desirable, although not absolutely necessary.

From the very beginning, the concept of a "chain" approach produced overwhelmingly positive results. Key individuals were identified and recommended by the "kitchen cabinet" as being committed to the crime prevention mission. As anticipated, their enthusiasm and participation only had to be enrolled. Also, and of extreme importance, the members of the "kitchen cabinet" committed to lead the way by each personally contributing substantial amounts of "seed" money. In-kind services of lawyers and accountants were immediately donated, and the wheels were set in motion to legally incorporate as the Los Angeles Police Crime Prevention Advisory Council.

The size of the corporate board of directors depended on the number of individuals who could be recruited. From the beginning, recruitment indications exceeded all expectations as the number of highly qualified and interested persons seemed limitless. As a matter of practicality, fewer than five positions would not accommodate the number of exceptional individuals who expressed wholehearted commitment. Ideally, the board would require enough positions to provide a membership with broad and varied backgrounds and viewpoints. Since the Crime Prevention Advisory Council, as envisioned, would be an ongoing enterprise, enough positions would be needed to provide incentive for interested individuals to attain directorship status in the future. Therefore, a 10-member board, all of whom are civilians with the exception of one Los Angeles Police Department staff officer, was established. Bylaw provisions were made for potential expansion to a maximum of 19 board directors.

Once convened, the board itself decided on its own standards of membership performance, when and how to terminate the services of board members who did not meet their obligations, and a plan for its own continuity and succession. As in the initial planning, the board of directors continued to define the specific goals and objectives of the newly formed Crime Prevention Advisory Council. This allowed the board to then draft and adopt articles of incorporation and to petition for tax-exempt status that, when granted, would generate funding.

In order to increase the efficiency and fundraising abilities of the Crime Prevention Advisory Council, the initial "chain" strategy was put into effect by creating an "executive committee." Membership on the executive committee was based on board of director nominations in accordance with the delineated criteria. Seventy-two people, including physicians, top entertainment industry executives, sports world dignitaries, philanthropists, accountants, advertising and publicity experts, mass media executives, and lawyers, were named to the executive committee. This executive committee was then formed into subcommittees to identify methods for fundraising and to identify enhancement programs of special interest or need. The special expertise and/or resources possessed by or available to the individual members were documented for future use.

In late 1984, a general meeting of the entire council was held. Presentations were made by the chief of police, as well as key leadership within the council itself. The goals and objectives of the council were reaffirmed, and the expectations of the executive committee members were clearly delineated. Each executive committee member was expected to "give or get" a minimum level of financial support, specialized services, or resources on a yearly basis.

The Crime Prevention Advisory Council reached fruition by the end of 1984 and launched into 1985 with tremendous success. In the few months following the initial meeting of the entire council, board and executive committee members contributed more than $178,000 in "seed" money for the Los Angeles Police Department's crime prevention programs. During 1984, the council members were responsible for the printing of over 500,000 crime prevention brochures in several languages, many of which reached thousands of visitors during the Summer Olympics held in Los Angeles. More than 400 bus bench advertisements, valued at $15,000 per month, were donated and placed in high visibility locations throughout the city.

In 1985, the council's public awareness activities started with a

huge "grass roots" direct mail promotional campaign which brought valuable crime prevention information into the homes of over 30,000 residents. The council was also responsible for a second massive bus bench campaign stressing "L.A.'s the Place, But Not for Crime," as well as Neighborhood Watch and Anti-Drunk Driving themes.

A large advertising company donated its services to develop a comprehensive advertising campaign in support of the DARE Program. Many other local advertising companies, major corporations, and mass media sources have pledged their support for this campaign.

The council has been responsible for the printing of more than 1 million crime prevention brochures and has obtained valuable equipment for the department, including automobiles, phone answering machines, photo copying machines, etc. Through the council, several major corporations have made sizeable grants to the department. To date, the council has raised nearly $1 million, which does not include the donation of more than $400,000 worth of in-kind services.

The prospects for 1986 are extremely promising. The council is currently planning a major fundraising/entertainment event that would normally cost hundreds of thousands of dollars. In this case, however, very little cost will be incurred, and the entire proceeds, an estimated $750,000, will be given to the department for crime prevention programs. The council will also underwrite the 1986 Anti-Drug Abuse Los Angeles Dodgers Baseball Card Program and has pledged funds to cover a substantial part of the cost of 10 police officers for the DARE Unit.

While the council actively seeks to meet critical short term crime prevention needs, its long-range goal is to establish a significant capital base fund which will enable it to provide substantial funding for the department's yearly crime prevention requirements for decades to come.

Conclusion

Police chief executives will continue to be faced with reductions in funding and increased demands for accountability, information, and services. They will not be able to sit idly by, but must devise new operating styles that effectively deal with increasing demands and concomitant diminishing resources.

There can be no doubt that police efforts to achieve a greater degree of citizen involvement are the single most important means available for dealing with crime. The Crime Prevention Advisory Council is one example of how managers can "do more with less" now and in the future.

This discussion of an actual alternate funding model to enhance crime prevention programs is based on a proven technique. Although substantive issues may vary greatly from one police agency to another, the change process outlined contains definite basic principles, sequence, and structure that can ensure success.

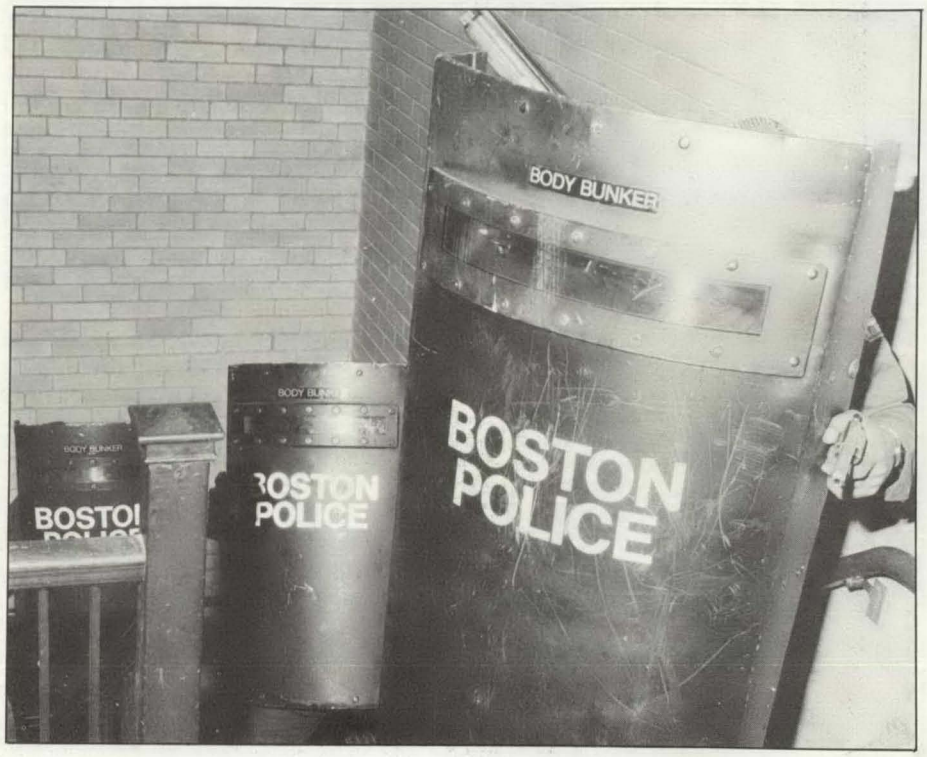
The Crime Prevention Advisory Council has been a major success story. It has proven highly successful not only as a catalyst in the essential "partnership" but also for fostering the kind of community mobilization which is absolutely vital for the Los Angeles Police Department to make meaningful progress toward the accomplishment of its basic mission.

The program requires a great deal of energy and commitment from all levels of the police organization, as well as the involved citizenry. Assertive leadership is necessary to maintain enthusiasm and active participation. It is hoped that this program will serve as the foundation for the implementation of similar programs to take police agencies from the past, through the present, and on into a most challenging future. FBI

Entrance and Apprehension Teams

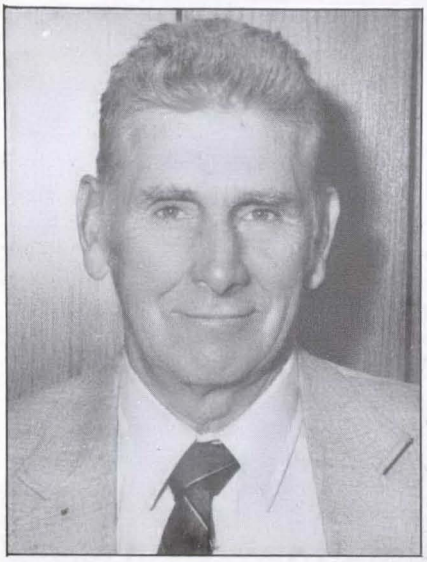
"... [specialized apprehension teams] ... are strictly what they claim to be ... and take no part in prior or subsequent investigations of the incident."

By
LT. DET. JOHN J. DALY
Homicide Unit
Police Department
Boston, MA

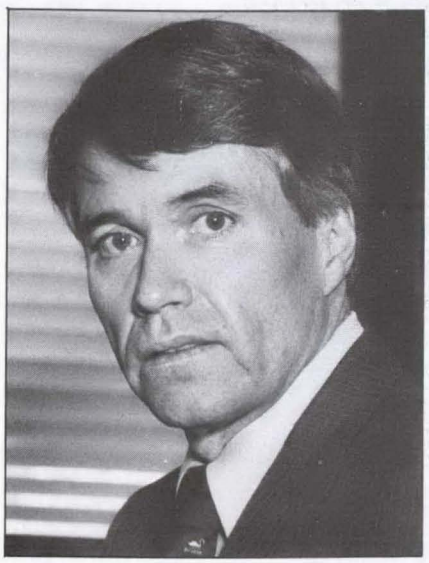


The arrest of armed and dangerous individuals has always been a problem for the police. For the most part, it is done on an "ad hoc" basis by both uniformed and plainclothes officers, usually with a minimum of planning. These types of arrests often cause officers to experience a sense of "macho." Many believe that it is the "bad guy" against the police department. Officers resent any insinuation that they cannot prevail over these individuals. This is an image which is conveyed by movie detectives in situations where they capture and shoot as many as 20 persons singlehandedly. As a result of this image, officers who possess warrants to arrest or search believe that it is imperative that they make the arrest personally. Otherwise, their stature will be lessened in the eyes of other officers and they will suffer a loss of self-esteem. In order to make these arrests or searches, an officer may take unnecessary chances which endanger both himself and his fellow officers, as well as suspects and innocent civilians.

Many times, I have discussed with police officers the tactics of entering a house or building known to be occupied by an armed, dangerous criminal. Since each incident was different, as were the officers involved, our planning would be of the simplest nature. Yet, some officers would actually refuse to wear bulletproof vests, somehow thinking this would reflect on



Detective Daly



Francis M. Roache
Commissioner

their manhood. Invariably, the actual execution of the warrants would be chaotic, and it was just plain luck that no one was injured.

This was the situation in the Boston Police Department until 2 years ago. At that time, the commander of the department's Bureau of Special Operations, with the support and endorsement of the police commissioner, planned and assembled a number of specialized apprehension teams. These five separate teams can operate independently, in concert, or simultaneously. They are trained and equipped to enter any building or structure peacefully or forcefully, if necessary, depending on the situation. The officers on these teams are volunteers who are trained to perform a certain function of the team.

These teams are available on a 24-hour basis to both branches of the department—uniform and detective. They are strictly what they claim to be—"a specialized entrance and apprehension team"—and take no part in prior or subsequent investigations of the incident. As soon as the area is secured and the suspects are placed in custody, the team leaves the scene. Their names do not appear on the arrest forms, nor do they take credit for arrests or seizures. Investigating officers remain in control of their cases, and no conflict develops between the apprehension team and the investigating officers.

The teams generally consist of six officers, one of whom is the team leader. During an entry, two officers, wearing vests, are the "sledge men," who stand on either side of the door to be entered. The sledge officers are familiar with the different types of security devices, locks, and bars and know where to strike a door for the purpose of gaining entry. Behind these officers are three other officers carrying ballistic shields. The middle officer, the first through the door, carries in his weak hand a 4-foot ballistic shield with a view port; the other hand holds his service revolver. Following him are two other officers, each holding 3-foot ballistic shields with view ports in their weak hands and service revolvers in their strong hands. The second and third officers move immediately to opposite sides of the room (one left, one right) and all three sweep the area. They are followed into the area by a sixth officer on the team who is not carrying a shield but is wearing a vest and is armed with a shotgun. Each officer who enters the room has at least two pairs of plastic handcuffs and carries on his belt a 100,000-candlepower lamp.

The three officers who enter first carry two revolvers, one in their hands and a second in a special holster strung on their chests behind the shield. Thus, in the event of an exchange of gunfire, each officer could completely discharge his gun, drop or holster it, and have a fully loaded gun immediately available.

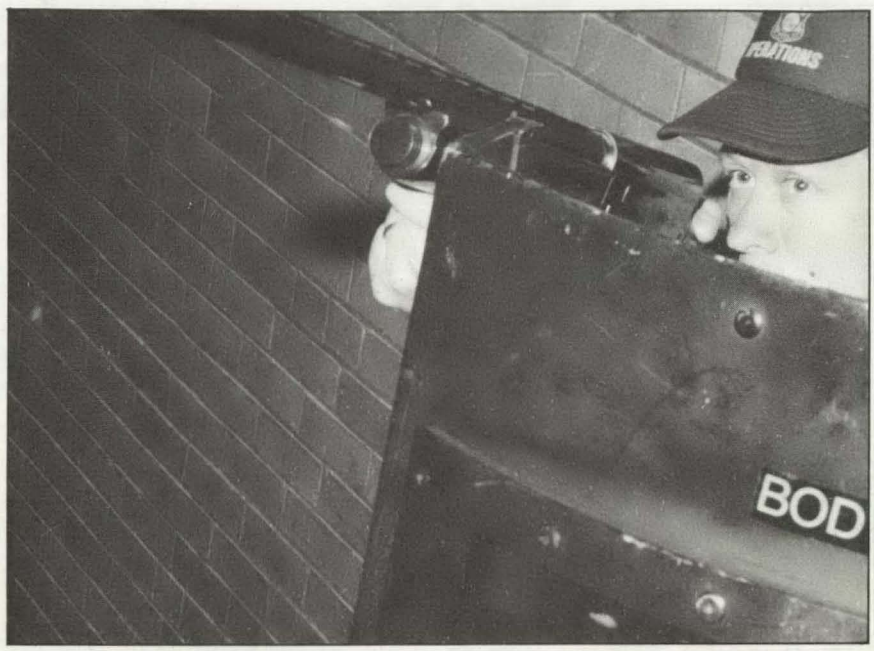
These teams can enter any door in 3 seconds and completely control a room within 10 seconds. Once the premises are secured, the case officers enter and take custody of the prisoners and conduct searches, if necessary.

The shields carried by the officers are called "body bunkers," which weigh about 30 pounds and cost approximately $2,300 each. They are not designed to be carried for a long dis-

tance, but to give officers every protection available. There are, however, similar shields which weigh as little as 9 pounds. The shields will stop a wide range of bullets, and for this reason, officers feel very secure behind them.

Officers involved in these activities need to be provided information on the building they are to enter. They should know the type of construction material used in the building, the exact location of the doors, the types of doors, style of locks, the number of floors in the building, the apartment numbers by floor, house numbers, etc. Members of the team should also have knowledge of how buildings are constructed so that they can take advantage of the weakest areas.

The most recent use of the specialized entrance and apprehension teams provides details of a typical operation. The Homicide Unit needed to use the team with respect to an armed suspect. A call was made to the commander of the Special Operations Bureau, who suggested that members of this team and homicide officers meet at a secluded location an hour before the desired time of entry. This was in order to preserve the confidentiality of the operation. Both units agreed to meet at an isolated city garage at 5:30 a.m. Once there, the team was briefed on the target's name and proclivity. Using a blackboard, investigating officers made a sketch of the location and structure, informing the entrance team of all doors and barricades. At 6:30 a.m., the target location was struck and accessed within the team's 3-second schedule. The premises were secured within 10 seconds. No one was injured, and the operation led to the arrest of an individual wanted for murder. The team promptly left the area, and the detectives continued their investigation.



In this and the vast majority of entrances, no sophisticated equipment was needed. There are times, however, when other equipment is needed to gain entrance. Portable cutting torches are available to breach metal doors and carriers. Carbide-tipped saws and other power tools can cut through any material. Listening devices can be placed on walls to determine the exact physical location of suspect(s) and to determine what is being said or done. In the event of an extraordinary situation, there is an armored vehicle available to the team, which has the capability to penetrate building walls.

The specialized teams arrive at the scene in a small truck equipped with additional armor, weaponry, lighting, and a portable generator. When the teams enter the premises, their equipment is carried in specially constructed, padded suitcases so that the contents are secure.

The concept of entrance and apprehension teams has been thoroughly tested in Boston. They have been used approximately 150 times in every conceivable situation, and in every instance, they have accomplished their objective without an exchange of gunfire or one injury. FBI

The Freedom of Information Act
An Overview for Law Enforcement Professionals

"The FOIA applies to virtually all records compiled by agencies of the Federal Government, but does not govern records in the possession of the Congress, the courts, or the Executive Office of the President."

By
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The Freedom of Information Act (FOIA), 5 U.S.C. § 552, was enacted in 1966 after a decade of public debate. Although public use of the act was relatively rare initially, the FBI alone received over 15,500 requests in 1985, requiring the full-time efforts of over 350 employees to process.

The FOIA applies to virtually all records compiled by agencies of the Federal Government, but does not govern records in the possession of the Congress, the courts, or the Executive Office of the President. All information which does not fall within nine specific exemptions from disclosure is required to be released upon request by any person, institution, association, or corporate entity. It should be noted that while the exemptions authorize withholding of material, they do not prohibit its release. The agency may choose, as a matter of administrative discretion, to release material which could otherwise be protected, unless the disclosure of such material would be prohibited by another statute.[1]

The FOIA specifically excludes from mandatory disclosure material which falls within nine categories, described generally as follows:

1) Classified national security information. This exemption will be discussed in more detail below.
2) Information which is purely internal and of no concern to the general public, or material which, while of some public interest, would, if disclosed, jeopardize an agency's ability to fulfill its statutory obligations. This provision has been successfully employed to protect portions of FBI and other law enforcement agencies' manuals, the disclosure of which would harm law enforcement efforts by revealing standard investigative procedures.
3) Material whose release is restricted or prohibited by another Federal statute, or in certain cases, specific material which another statute permits the agency to withhold in its discretion. For example, Federal income tax return information compiled by the IRS cannot be disclosed to third parties under the FOIA. An agency regulation alone is insufficient to exempt the material from the Freedom of Information Act.
4) Commercial or financial information submitted to the Government by businesses or individuals.

Mr. McIntyre

Such material is exempt if its disclosure would either impair the ability of the Government to obtain similar information in the future or cause substantial competitive harm to the submitter.

5) Material which would be legally privileged from discovery in the course of litigation with the agency. This exemption is used primarily to withhold drafts of documents, recommendations to superiors, and other information which would reveal agency internal deliberative procedures, attorney-client confidences, and litigation strategies.
6) Information which would cause a clearly unwarranted invasion of personal privacy, if released.
7) Investigatory records compiled for law enforcement purposes. This exemption will also be analyzed below.
8) Information regarding bank audits by Federal officials.
9) Geological and geophysical information and data, including maps concerning oil wells.

It should be noted that these exemptions are not mutually exclusive. The same information may be exempt because it is classified national security information (exemption 1), provided by a confidential source during a criminal investigation (exemption 7(D)), the release of which would invade the privacy of some other individual (exemptions 6 and 7(C)). Thus, even if the material fails to fully meet the requirements of one exemption, it may well satisfy the criteria of another exemption.

Even where a page contains exempt information, other information on the page which is not excluded from disclosure must be released if it is reasonably segregable from exempt material. A requester who believes that an agency is withholding information which does not properly fall within the nine enumerated exemptions has a right to file suit in Federal court to compel release of the contested material. To date, well over 2,000 such lawsuits have been adjudicated, and this figure does not include numerous other cases which were filed, but resolved or dropped before the court ruled on the issues.[2] Even so, some questions regarding the proper application of FOIA exemptions remain unresolved, and new issues regularly arise. In a FOIA suit, the judge is not required to defer to the agency's prior determination, except possibly in the case of classified national security information. Rather, the court is obligated to review the material as if it were now being evaluated for withholding for the first time.

Two exemptions are of primary concern to law enforcement agencies. Exemption 1 of the act authorizes the withholding of all documents properly classified for national security purposes. Classification of U.S. records is governed by an Executive Order issued by the President. While these orders may be modified from administration to administration, the basic provisions remain essentially intact. Executive Order 12356, presently in effect, specifically provides that "unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security." Thus, under appropriate circumstances, information supplied to the FBI and other Federal law enforcement agencies by foreign police will be protected under this exemption.

Where a requester files suit in court to compel release of classified in-

formation, the Federal courts are entitled to review the classified material, but only to determine whether the information does, in fact, properly fall within the criteria of the Executive Order in effect at the time the agency determination is made. Neither the party seeking the information nor his attorney are entitled to review the withheld material, and when explanations for withholding are considered too sensitive to be placed in the public record, they are made *in camera.*

In reaching its conclusion, the court is obligated to give great weight to the agency's determination as to what material would, if released, pose a threat to national security. As a practical matter, it is rare for a court to order the release of material which an agency has classified. Indeed, judicial opinions have repeatedly emphasized that this exemption "bars the court from prying loose from the government even the smallest bit of information that is properly classified." Equally significant is judicial recognition that information, which may appear innocuous on its face, may nevertheless qualify for protection if the information, when viewed in its full context, would have an adverse impact on the national security. In this same light, where the very fact that the information requested has been compiled by the Government is sensitive, the Government is entitled to refuse to confirm or deny even the existence of the information. Thus, the FBI routinely refuses to answer inquiries concerning wiretaps installed for national security purposes.

Exemption 7 of the FOIA is specifically designed to protect sensitive law enforcement records. Originally, this provision effectively exempted from disclosure all investigatory files. In 1974, however, in the aftermath of the Watergate scandal, Congress narrowed this exemption to permit nondisclosure of investigatory records only if withholding could be justified by one of six specified types of harm. The provision, in its entirety, now exempts from disclosure:

> "Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." 5 U.S.C. § 552 (b)(7)

As can be seen from the wording of the statute itself, this exemption protects a wide range of law enforcement-related material.

Records compiled in conjunction with civil as well as criminal law enforcement proceedings fall within the meaning of "investigatory records." Also, the exemption is not restricted to investigations of Federal violations, but encompasses the activities of Federal agencies aiding in the enforcement of State and even foreign laws. Although material acquired in connection with an agency's routine monitoring function is not normally considered to be "investigatory," once an agency focuses on specific possible violations, the "investigatory records" threshold is satisfied. Thus, routine oversight by the Drug Enforcement Administration (DEA) of pharmaceutical production would not fall within the confines of exemption 7. Where, however, allegations or evidence of drug manufacturing violations is received by DEA, information obtained as a result of that agency's subsequent investigation into the possible violations would qualify as "investigatory records." This is true even if no actual violations are ever uncovered and no legal enforcement proceedings are ultimately undertaken.

Precisely what constitutes an investigatory record compiled for law enforcement purposes has been the subject of judicial interpretation on a number of occasions. One viewpoint holds that all records compiled by a criminal law enforcement agency in furtherance of its official duties inherently qualify as "compiled for law enforcement purposes." Other courts have adopted a slightly less expansive approach and require a showing of some legitimate connection between an agency's law enforcement function and the specific investigation at issue. Even under the more-narrow interpretation, a law enforcement agency's records will qualify as "investigatory records compiled for law enforcement purposes" so long as an agency is able to identify a possible violation of a specific statute within its enforcement jurisdiction as the basis for its investigation. Of course, this is only the beginning of the inquiry for FOIA purposes. The agency must further demonstrate that its disclosure of the records sought would result in one of the harms set forth in the six subsections on exemption 7.

"... the courts have consistently recognized that the identities of Federal, State, local, and foreign law enforcement officers can be routinely withheld under [exemption 7(C)]."

Exemption 7(A) authorizes the withholding of investigatory records whose release would interfere with law enforcement proceedings. This has been recognized as a broad, but temporary, withholding authorization. Interference can be potential and need not be concretely demonstrated. Once the law enforcement proceedings are completed, however, exemption 7(A) becomes entirely inapplicable. The requester is then free to make a followup request, and the agency will be required to justify withholding under other subsections of exemption 7 or under other FOIA exemptions. Determining when the investigation has concluded is not always simple. An investigation which is dormant (for example, while a fugitive is being sought) remains eligible for exemption 7(A) protection. Finally, while an investigation may be completed with respect to certain individuals, it may remain active as to other suspects.

Exemption 7(B) is aimed at avoiding prejudicial pretrial publicity and was evidently enacted to ensure that the FOIA's disclosure provisions would not conflict with the sixth amendment of the U.S. Constitution, which guarantees defendants a fair trial. Interestingly, the protections provided by the other subsections of exemption 7 appear to have fully accomplished this purpose, as exemption 7(B) has rarely been invoked.

Exemption 7(C), which protects against unwarranted invasions of individuals' privacy, at first glance, appears to duplicate the protection afforded by exemption 6. However, exemption 6 operates only in the face of *clearly* unwarranted invasions of privacy, while exemption 7(C) protects records whose release would produce an unwarranted invasion of privacy. The courts have regarded the omission of the word "clearly" in the exemption 7(C) language as an indication that lesser privacy invasions will suffice for withholding personal information in the context of law enforcement investigations. National, State, or corporate entities are not regarded as having privacy rights, however, and neither exemption 6 nor 7(C) will protect their privacy, except in the case of a corporation which is so small that its activities can be identified exclusively with its owner.

In all cases, in reviewing withholdings under exemption 7(C), the court first identifies the extent and nature of the privacy interests threatened by disclosure and the public interests, if any, which would be served by release. The court then balances the privacy interests against any public interests and will sustain the agency's withholding if it concludes that the individual's privacy interest is of greater magnitude than the public interest. Although the need to engage in this balancing sometimes makes the outcome of exemption 7(C) withholdings unpredictable, the courts have consistently recognized that the identities of Federal, State, local, and foreign law enforcement officers can be routinely withheld under this exemption. Consequently, exemption 7(C) is normally invoked to protect the identities of FBI Agents and other Bureau employees. (Because they hold positions of some public prominence, identities of senior, supervisory law enforcement personnel, such as FBI Special Agents in Charge, are not ordinarily withheld under exemption 7(C), but as will be discussed shortly, such senior officials can always be protected under exemption 7(D) if they act as confidential sources.) Judges have frequently observed that the potential for harassment of law enforcement officers clearly tips the privacy interest in favor of nondisclosure. Only where there are not merely the perennial allegations by criminals of misconduct by law enforcement officers, but specific credible evidence that improprieties actually occurred, have courts occasionally seen fit to release the officials' names.

In the case of third parties who are mentioned in criminal investigatory files, the case law clearly protects such persons when they are investigative targets or associates of targets and no charges are ultimately filed against them. In such cases, Federal law enforcement agencies routinely refuse to even confirm or deny that they have records on such persons and have won the endorsement of the courts for this practice. Even where charges are ultimately brought, much personal information about the subject may remain confidential, unless disclosed in court proceedings. Obviously, any material readily available in the public record, either through court filing or press releases, can lose the protection of this exemption. There are, of course, instances in which both public and privacy interests are great, as in the case of notorious criminals or of public figures, and it is not always easy to predict how a court may ultimately balance these counterveiling interests. But in the vast majority of cases, exemption 7(C) has proven wholly adequate to protect sensitive personal information.

It should further be noted that exemption 7(C) generally protects only living persons on the principle that an individual's right to privacy dies with him. However, in some instances, information of an exceptionally personal nature which could cause extreme distress to surviving family members if disclosed may be withheld. The mere

fact that records are old does not diminish the protections of exemption 7(C), so long as it appears possible that the individuals discussed could still be alive.

For the law enforcement community, exemption 7(D) probably represents the most important of all FOIA exemptions. This exemption protects the identities of all confidential sources, and in the case of national security or criminal law enforcement investigations, protects all information furnished by the confidential source. In enacting this provision, Congress clearly recognized the fundamental role played by sources in efficient law enforcement operations, and the courts have been extremely reluctant to force the disclosure of any material which would in any way reveal confidential sources.

The courts have consistently given an appropriately broad interpretation to the term "confidential source." The phrase is intended to be construed more broadly than "informant" and applies to anyone who gives information to law enforcement authorities with the expectation that it will not be unnecessarily divulged. The interviewing officer need not expressly promise confidentiality to the source. Indeed, in most instances, confidentiality is implied under the surrounding circumstances. For example, it is clear that anyone providing information regarding serious criminal activity does so expecting that the fact that he supplied incriminating information to the police will not be disclosed. While at present there is a somewhat technical dispute as to the specific legal standard which must be met in order for confidentiality to be implied, it seems clear that at least in the context of a criminal investigation, exemption 7(D) protection is appropriate for virtually anyone who provides information.

Similarly, the term "source" has been construed so broadly that it can potentially encompass nearly everyone. Unlike under exemption 7(C), which does not protect corporate or institutional privacy, corporations and institutions *do* qualify for protection as sources. State, local, and foreign law enforcement agencies and their officers (*including* senior supervisory personnel) are all routinely held to be confidential sources. Indeed, because of the working relationship between Federal law enforcement officers and their counterparts at the State, local, and international level, there is a virtual presumption that such police entities will receive source protection. Of course, private citizens and even most government employees can also be sources. Only *Federal* law enforcement officers cannot be sources, because providing information on suspected violations of the law is the specific objective of their official duties. If, however, Federal officers are merely transmitting information which was originally provided by a source, the source's protection is not lost merely because his information passed through Federal law enforcement channels.

To illustrate the actual operation of this distinction, a surveillance report by an FBI Agent of his direct observations of the activities of a suspected violator would not be accorded exemption 7(D) protection (although it might be protected under other exemptions). On the other hand, if the details of the investigative target's activities have been learned through an interview of a private citizen, or have been provided by a non-Federal police organization, the information will be protected under exemption 7(D) when subsequently included in the Agent's investigative report.

The first clause of exemption 7(D) protects only the identities of confidential sources, but extends this protection to both civil and criminal enforcement proceedings. Again, in recognition of the extreme sensitivity of sources' identities, the courts have not hesitated to approve the withholding of any material which could reasonably be expected to lead to their identification. Thus, in instances where only one or a few individuals would have access to the information provided by the source, it is justifiable to withhold all of this material to prevent the inadvertent disclosure of the source's identity.

In the case of a national security or criminal investigation, the second clause of exemption 7(D) protects not only the identity of the source but all source-provided information as well. One of the most recent court decisions on this issue illustrates how sweeping this protection can be. The sole document sought from the FBI by the FOIA requester was a photograph of a public demonstration. Although it was established that the photograph had been provided by a confidential source, it was equally evident that disclosure of the photograph would in no way compromise the source. Anyone of dozens, perhaps hundreds, of people could have taken the picture. Nevertheless, the court unequivocally held that the photograph could be withheld under exemption 7(D) simply on the basis that it had been supplied by a confidential source in connection with an FBI criminal investigation.

It can be seen that once exemption 7(D) applies to a source or source-provided information, its protections are absolute. In contrast to exemption 7(C), in which privacy protection generally terminates at death, a source's identity and information remains protected even after death. The courts

"Where the sensitivity of the material sought is apparent, the courts have frequently expanded the protections of the act's exemptions to effectively preclude disclosure."

have reasoned that such continued protection is essential to allay sources' fears of reprisals against their friends or families after the source's death. Similarly, the disclosure of a source's identity in no way mandates the release of the information the source provided, and conversely, publication of source-provided material does not render withholding of the source's identity indefensible. Moreover, an unauthorized disclosure of information pertaining to sources (i.e., a "leak") does not constitute a waiver of this exemption's protections.

Law enforcement techniques and procedures not known to the general public are exempt from disclosure pursuant to exemption 7(E). In the hearings preceding its enactment, Congress specified that this exemption did not apply to such well-known, routinely used techniques such as fingerprints, lie detectors, or ballistics tests. But even these investigative tools may qualify for protection if they are used in conjunction with other nonpublic techniques or are employed in an unusual fashion. In addition, particular details of well-known techniques are also safeguarded by this exemption. Thus, the specific equipment used in electronic surveillance, the actual questions posed in a lie detector examination, or the particular criteria set forth in hijacker profiles all deserve protection under this exemption. Additionally, a recent court decision has held that the Secret Service properly withheld the weight, specialized equipment, and contract specifications pertaining to two armored limousines purchased for the President. The Court found no basis to distinguish the "protective" techniques employed by the Secret Service to prospectively combat crime from the investigative techniques used after a crime has been committed. Obviously, it would be self-defeating to list here most of the techniques which do fall within the protection of exemption 7(E), but from the previous example, it is evident that all reasonable claims of exemption under this provision are accepted by the courts.

Exemption 7(F) protects information which would endanger the life or physical safety of law enforcement personnel. Typically, this exemption is employed, often in conjunction with exemption 7(C), to safeguard the identities of certain Federal law enforcement officers, particularly undercover agents. As previously noted, the FBI ordinarily excises the names of Agents and employees under exemption 7(C) alone. Where, however, there is a realistic possibility of retaliation, use of exemption 7(E) for Agents' and employees' identities would be entirely appropriate. Since protection of the identities of State, local, and foreign law enforcement officers is already fully ensured through the use of exemption 7(D), exemption 7(F) is not usually invoked to protect non-Federal police. In a somewhat novel approach, the use of this exemption to withhold information concerning the manufacture of homemade weapons was also recently sustained by a court. The court reasoned that such weapons could—and logically would—be used against law enforcement officers if the details of their construction were publicly revealed.

Summary

These latter examples of judicial interpretation of the FOIA, approval of exemption 7(E) to protect Presidential security equipment, and the extension of exemption 7(F) to cover weapons-manufacturing information perhaps best illustrate the attitude of the Federal courts toward the Freedom of Information Act. Where the sensitivity of the material sought is apparent, the courts have frequently expanded the protections of the act's exemptions to effectively preclude disclosure. The FOIA is valuable because it permits the public to gain some insight into the operations of the massive Federal law enforcement community. But certainly the system is not perfect, and national law enforcement agencies would doubtlessly prefer to be relieved of their considerable burden of processing records under the act. In most instances, the broad protections afforded by FOIA exemptions for law enforcement records, coupled with the generally intelligent and responsible review of FOIA withholdings by the courts, have not resulted in legitimate law enforcement operations being hindered by the act. In a limited number of situations, however, disclosure of information through the FOIA could have an adverse effect on law enforcement activities. The Justice Department maintains close contact with the FBI and all Federal law enforcement agencies on these issues and is keenly aware of the hazards which could develop through release of sensitive investigatory information. Presently, Justice is seeking legislative amendments to the FOIA to eliminate any dangers to law enforcement operations which could possibly result from the FOIA's disclosure requirements.

FBI

Footnotes

[1]Stephen P. Riggin, "U.S. Information Access Laws; Are They a Threat to Law Enforcement" *FBI Law Enforcement Bulletin,* vol. 53, No. 7, July 1984, p. 13.

[2]More-detailed information, including case citations, is available through the U.S. Department of Justice publication, *The Freedom of Information Case List,* for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Motorcycle Gang Investigations
A Team Effort

"For law enforcement to continue to be effective in monitoring the activities of motorcycle gangs, personnel within all agencies must become involved."

By
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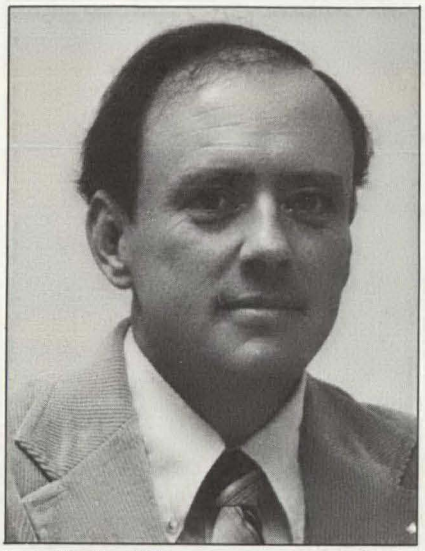
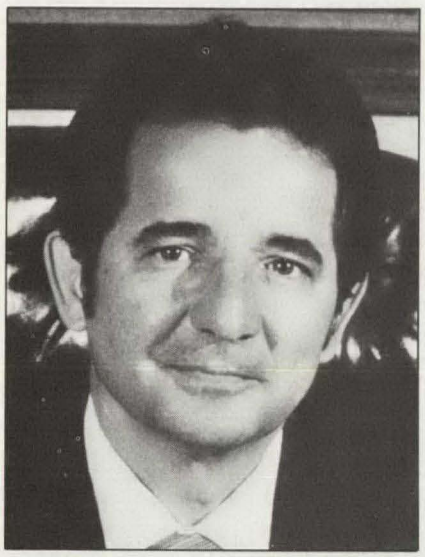
It was 7:45 a.m. on October 15, 1976, when nine law enforcement officers from the Hillsborough County Sheriff's Office and the Tampa, FL, Police Department departed the staging area en route to the clubhouse of the Outlaws motorcycle gang to execute a search warrant. Upon arriving at 8:00 a.m., a police detective, who was the search warrant affiant, approached the front door along with several members of the search team, while others moved to the rear of the house to take up position. All was quiet, except for a few barking dogs. By 8:05 a.m., what was expected to be a routine execution of a search warrant had erupted in gunfire, and three sheriff's deputies lay wounded, one critically. The detective was also critically wounded and remains paralyzed today. Following this incident, law enforcement officers in



Inspector Doughtie



Robert R. Dempsey
Commissioner

Florida reevaluated their approach in dealing with motorcycle gangs.

Since the late 1950's, starting with a movie entitled "The Wild Ones" featuring Marlon Brando, motorcycle gangs have continued to be used as the focal point in the overall plots of movies. These gangs have been portrayed by the movie industry as a group of bunglers and drunks, an image that has come to be accepted by the general population. This, however, is not the case.

Motorcycle gangs began to form in the late 1940's and have grown in numbers since then. These gangs are involved in almost every area of crime known to law enforcement, but are particularly active in narcotics trafficking and prostitution.

Currently, four major motorcycle gangs control the "biker's world" in the United States—the Hells Angels, Outlaws, Pagans, and Bandidos. Both the Hells Angels and the Outlaws are international groups with chapters located in the United States and Canada. Chapters of the Hells Angels also operate in Europe.

In Florida, the Outlaws first set up operation in Ft. Lauderdale in the mid-1960's. They became known in the communities in South Florida overnight, when they nailed a young lady to a tree. Since then, they have ruled the Florida "motorcycle gang world," establishing chapters in Tampa, Orlando, and Jacksonville and waging a continuous battle with rival gangs who come into Florida and trespass on their turf.

In 1974, three members of the Hells Angels came to the Ft. Lauderdale area and were executed for doing so. Each was shot in the back of the head and dumped into a flooded rock pit. It took law enforcement 4 years to solve these murders, and even today, warrants are still outstanding for one Outlaw who was part of the execution team. The mobility of the gangs have enabled members to travel from chapter to chapter throughout the United States and Canada to elude arrest.

Currently, four members of the Outlaws are on "death row" at Raiford State Prison, with many other members being held for life sentences. This pattern of violent behavior has continued through the years, while law enforcement has been unable to effectively close down the gangs' operations.

Law enforcement has continued to attack motorcycle gang crime on a local basis. In many instances, investigations were reactive and little, if any, proactive intelligence was gathered. During the mid-1970's, a small group of investigators took it upon themselves to monitor the activities of motorcycle gangs. Out of necessity, as well as a deep concern for the problems these gangs caused in their communities, these law enforcement officers began exchanging information concerning gang activities. Efforts were made to identify known motorcycle gang members and to find a way to file and exchange this information with law enforcement agencies.

At this time, the Florida Department of Law Enforcement was contacted, and discussions began as to how this exchange of information could be implemented. From this informal "brainstorming" came the *Florida Motorcycle Gang Identification Book.* This identification booklet is distributed to every law enforcement agency in the State of Florida, as well as numerous out-of-state agencies, and copies are also provided to all Federal

U.S. Marshals on a raid at the Jacksonville, FL, Outlaw club house

agencies on request. This document contains photographs and subject data on all motorcycle gang members who have been identified by law enforcement in Florida and has become a valuable tool in motorcycle gang investigation.

The effectiveness of the identification book depends on the participation of all agencies who have had contact with gang members. Agencies must make a special effort to forward the data obtained at time of arrest or contact for placement in the book. The *Florida Motorcycle Gang Identification Book,* which is updated yearly with supplemental reports sent to participating agencies, is a product of a successful "team effort" by all law enforcement agencies in Florida.

As communications on motorcycle gang activities improved among law enforcement agencies, other groups outside the traditional law enforcement community became involved. One such group was the Florida Intelligence Unit, which is an independent group of Florida law enforcement officers involved in gathering intelligence on organized crime groups. This information is then provided to participating police agencies for use in ongoing investigations, as well as proactive intelligence.

The Florida Intelligence Unit is currently comprised of 136 law enforcement agencies within Florida which meet every 4 months for an intelligence exchange. Several committees operate within the unit and specialize in specific crime areas, such as narcotics, organized crime, economic crime, and terrorism. A special committee was developed in the area of motorcycle gang activities approximately 4 years ago and is now 50 members strong. Through efforts such as this, the flow of information concerning motorcycle gangs continues.

The Florida Department of Law Enforcement began in 1982 a new program known as the Florida Intelligence Center (FIC), an on-line automated system service designed to establish and maintain an index containing profile and modus operandi data on suspected or known criminal subjects. Information to this system is provided by 329 municipal, county, State, and Federal agencies, with approximately 3,700 law enforcement representatives eligible to inquire and submit information into the system. A special crime classification has been designed into this system to identify motorcycle gang members and their criminal activities.

Florida law enforcement officers who investigate the criminal activities of motorcycle gangs have found the news media play an important role in keeping the community advised of the gang problem. Through indepth articles printed in several newspapers, the general public has become aware of the problems law enforcement faces while trying to investigate crimes attributed to motorcycle gangs. Several newspapers in the chapter cities have continued to print front-page articles on the Outlaws. This has also been true of local and national television news agencies in their coverage of events which relate to motorcycle gangs. Furthermore, the Florida Governor's Council on Organized Crime has in the past held public hearings on the illegal activities of motorcycle gangs within the State. Numerous gang investigators have provided hours of testimony before the council in hearings open to the public and news media. The law enforcement community and the news media can provide each other a service of equal importance if handled properly through good communication.

"... law enforcement must continue working together to apply the 'team' approach whenever possible to insure that criminal motorcycle gang activities are stopped."

For law enforcement to continue to be effective in monitoring the activities of motorcycle gangs, personnel within all agencies must become involved. Special training in motorcycle gang activities is offered to law enforcement agencies throughout Florida. This training is provided on request by law enforcement personnel who work on gang investigations on a regular basis. The Florida Department of Law Enforcement for the past 5 years has trained approximately 50 officers per month in the area of motorcycle gang investigations. Many of the officers who receive and offer this training do so on their own time, demonstrating that the interest in this crime area continues to grow and makes the training effort worthwhile.

Prosecution of motorcycle gangs has seen the most advances in recent years. Earlier, prosecution of these gangs in the State of Florida was almost entirely reactive. Due to a heavy case load and manpower shortages, time could not be spared for long-range cases. This situation became more difficult in 1979 when the State of Florida enacted racketeering laws styled after the Federal R.I.C.O. statutes. The local State attorneys did not have the time or personnel to become involved in a long-range racketeering case. Furthermore, few assistant State attorneys had an understanding of the new racketeering laws or experience to prosecute this type of involved and complicated case. Although a number of local cases were made against Outlaw members, ranging from murder to indecent exposure, this had little effect on the clubs as a whole. There was always another Outlaw to move into the chapter and take the jailed member's place.

Five years ago, a "statewide" investigation involving law enforcement agencies from every chapter city in Florida was attempted with little success. A racketeering case was put together, but no statewide prosecution could be obtained. The case was "downgraded" to a local case, and each jurisdiction became responsible for the prosecution of the case involving only its chapter city. The impact of a "statewide" prosecution was lost, and the Outlaws in Florida felt no pressure from the effort. In central Florida, an assistant State attorney who was assigned to the case and who had access to police reports, interviews, and lists of witnesses and confidential informants later became the defense attorney for an Outlaw member.

Even when faced with these problems, the law enforcement community continued its effort. Finally, in the early part of 1982, the scene began to improve drastically. The FBI field offices in Tampa and Jacksonville, the Tampa Police Department, the Consolidated Jacksonville Police Department, and the U.S. attorney's office in Tampa, assisted by other law enforcement agencies throughout the State, began working together to put together a Federal prosecution into the criminal activities of the Outlaw motorcycle club in Florida. By means of the Federal Witness Protection Plan and the assistance of U.S. marshals, potential witnesses were transported from city to city as needed. Three separate Federal grand juries were held in both Tampa and Jacksonville, with indictments being received in all three. Charges of white slavery, narcotics trafficking, and violation of Federal racketeering laws were brought against members of the Outlaws not only in Florida but in other areas of the United States. Trials were held in Tampa and Jacksonville, with all indicted being found guilty with the exception of one member. In all, 23 convictions were dealt the Outlaws in Florida, with numerous other warrants pending on members in hiding. Those convicted included high-level club members, such as regional and chapter presidents and other club officers.

This, however, is only the beginning, as efforts will continue to seek further prosecution. The law enforcement community in Florida has taken note of the impact the "Federal Outlaw Case" has had on gang activities and has presented the officers involved with the Law Enforcement Officer of the Year Award for the State of Florida.

The "pendulum" is now starting to swing in favor of law enforcement in Florida in relation to motorcycle gang investigation and prosecution. The Outlaw chapters in Florida are in turmoil with declining membership, loss of leadership, and fear of prosecution. The momentum for this reversal can be attributed to the "team effort" of local, State, and Federal agencies. For this reason, law enforcement must continue working together to apply the "team" approach whenever possible to insure that criminal motorcycle gang activities are stopped. FBI

The Constitutionality of Organizational Limitations on the Associational Freedom of Law Enforcement Employees

"Restrictions on the organizational associations of law enforcement officers are valid if they serve legitimate and substantial law enforcement interests."

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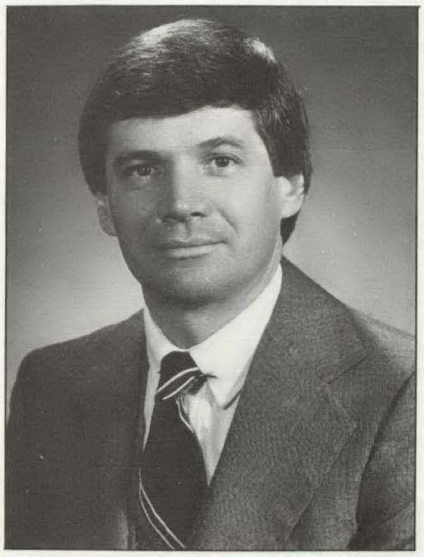
Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Freedom of association, though not explicit in the Constitution, is a judicially recognized right deriving constitutional protection from its nexus with freedom of speech and expression under the first amendment.[1] While courts agree that law enforcement employees enjoy constitutional protection against unreasonable restrictions on their associational freedom, it is often difficult to predict the precise scope of protection in particular situations, because reviewing courts are required in each case to assess both the seriousness of the associational infringement and the validity of governmental interests offered as justification for that particular infringement. This article examines the scope of associational protection afforded law enforcement officers under the first amendment in the context of patronage dismissals, union membership and other organizational affiliations, and personal associations. Because the constitutional standards in this area are still being developed by the courts, the recommendations subsequently offered reflect a careful attempt to balance legitimate managerial prerogatives with employee associational interests.

PATRONAGE DISMISSALS

It is particularly important for sheriffs and other law enforcement administrators to know whether any of their employees can be dismissed solely for reasons of political party affiliation without violating the constitutional freedom of association. The practice of patronage dismissals in law enforcement organizations has spawned litigation revealing differing views regarding the extent to which the first amendment limits the managerial prerogative of law enforcement executives to discharge employees because of their political party associations.

While it has proved problematic for courts to decide whether any law enforcement employees are subject to patronage dismissal, it is an accepted proposition that some public employees have no first amendment protection against politically motivated discharges.[2] For example, the President of the United States may, without offending the first amendment, dismiss



Special Agent Schofield

the Secretary of State for purely political reasons or for any other reason deemed politically expedient. The Supreme Court has decided two cases establishing constitutional parameters that limit patronage dismissals to so-called "political" jobs where partisan affiliation is an appropriate criterion for employment.[3]

Supreme Court Establishes Constitutional Limits

In *Elrod* v. *Burns,*[4] the Supreme Court expanded first amendment protection for public employees by ruling unconstitutional the widespread practice of patronage dismissals except for employees occupying "policymaking" or "confidential" positions. The case involved a suit brought by noncivil service employees of the Cook County, IL, Sheriff's Office who were discharged or threatened with discharge solely because they did not support the Democratic Party. Justice Brennan's opinion begins by identifying two consequences of patronage that he finds costly to first amendment interests. First, it places restraints on associational freedoms by coercing employees to affiliate with a political party not of their choosing.[5] Second, the free functioning of the electoral process suffers because patronage tips the electoral process in favor of the incumbent party and steers support for competing political interests.[6] He concludes that patronage dismissals are unconstitutional unless the government proves they further vital governmental interests by a means that is least restrictive of constitutional interests, and that the benefits gained outweigh the loss of protected rights.[7]

Justice Brennan also rejects the argument that efficiency requires employees of the same political party by observing that inefficiency inevitably results from the wholesale replacement of large numbers of public employees.[8] Patronage appointees are not necessarily more efficient just because they share the political views of the boss, and the prospect of dismissal following an election may actually constitute a disincentive to efficient performance.[9] While conceding a possible gain in governmental effectiveness where employees have an incentive to perform well in order to preserve a superior's incumbency, he characterizes such gains as marginal and notes that efficiency is attainable by the alternative and less drastic means of discharge for cause and increased use of merit evaluations.[10] Justice Brennan also concludes that partisan harmony necessary to ensure that representative government is not undercut by tactics obstructing the implementation of policies sanctioned by the electorate can be accomplished by limiting patronage dismissals to "policymaking" employees who are in a position to thwart the policies of the incumbent party.[11] He restricts the definition of "policymaking" employee to positions with broad responsibilities and concludes that government should bear the burden of proving that a particular job includes the formulation and implementation of broad goals and policy.[12]

In a subsequent decision in *Branti* v. *Finkel,*[13] the Court reaffirms *Elrod's* prohibition of routine patronage dismissals and also articulates a refined standard for determining when a particular job is exempted from that general prohibition.[14] The case involved a suit filed by assistant public defenders in Rockland County, NY, who were threatened with termination solely be-

"... public employee discharge or nonrenewal cases must be judged by balancing an employee's speech and associational rights against the government's right to loyal and effective service."

cause of their political affiliation. The court begins its analysis by reiterating that party affiliation is an acceptable requirement for some public jobs, such as where a State governor replaces immediate assistants who do not share his political beliefs or party commitments.[15] Expressing dissatisfaction with *Elrod's* labeling approach that focused on a "policymaking" status, the Court in *Branti* announced a broader standard that permits patronage dismissals where "... the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[16] Applying that standard to the position of an assistant public defender, the Court held that party affiliation is not a legitimate factor because a public defender's primary responsibility is to individual clients and not to the State or partisan political interests.[17]

The constitutional limitations on patronage dismissals set forth in *Elrod* and *Branti* are consistent with the view that most public employees enjoy substantial first amendment protection. But constitutional protection is properly denied certain public officials who occupy "political" positions, because those employees must assume the risks inherent in "political" life, including the possibility of being dismissed for their political affiliations or beliefs. Judicial deference to the political dictates of the executive branch is properly limited to "political" jobs, because widespread patronage dismissals based on partisan association are threatening to fundamental first amendment values. An affirmative requirement of partisan affiliation is even more inimical to the democratic process than a restriction on employee expression, because it requires specific action to change partisan association which may skew the political process more directly than a rule forbidding employee speech.[18] Lower court application of the *Elrod-Branti* precedent to law enforcement has produced differing opinions concerning whether any positions in law enforcement organizations should be regarded as "political" for purposes of patronage dismissal.

Lower Court Application of the *Elrod-Branti* Rule to Law Enforcement

Three recent cases involving application of the *Elrod-Branti* rule to law enforcement personnel illustrate a judicial reluctance to accept the proposition that partisan affiliation is an appropriate condition of law enforcement employment. In *Jones* v. *Dodson,*[19] the U.S. Court of Appeals for the Fourth Circuit rejected in categorical fashion the argument that partisan harmony was necessary for the position of chief deputy sheriff by stating that partisan affiliation is not an appropriate condition of law enforcement employment:

> "Under the *Branti* test, we do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of power involved, or the customary intimacy of the associations within the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policymaking related to 'partisan political interests' and to involve access to confidential information bearing on partisan political concerns."[20]

Jones involved a suit by two former employees in the Page County, VA, Sheriff's Department—a chief deputy and a dispatcher—who claimed that they were unconstitutionally dismissed because of their political affiliations. The court ruled that the constitutionality of patronage dismissals must be judged by the extent to which the discharged employee engages in policymaking related to partisan political interest and notes that *Branti* flatly rejects any general notion that mutual trust and confidence can only exist between members of the same political party.[21] While *Jones* appears to categorically reject the constitutionality of dismissals based solely on political party affiliation, the court points out that a sheriff is justified in dismissing a deputy for engaging in unprotected political activity or for poor job performance.[22]

In another case involving the nonretention of four deputies by a sheriff who had defeated the incumbent in an election, the U.S. Court of Appeals for the Fifth Circuit ruled in *McBee* v. *Jim Hogg County*[23] that public employee discharge or nonrenewal cases must be judged by balancing an employee's speech and associational rights against the government's right to loyal and effective service.[24] *McBee* is consistent with *Jones* in holding that the discharge of a deputy sheriff, who is otherwise loyal and effective, on the sole ground of political affiliation is unconstitutional; however, discharges for reasons other than partisan affiliation require reviewing courts to engage in a particularized balancing of employee and governmental interests.[25] *McBee* identifies the following factors that are

"... governmental employers are not precluded by the Constitution from prohibiting employees from engaging in certain political activities and conduct when such restrictions serve valid and important governmental interests."

relevant to that balancing process: (1) The degree of the deputy's participation in the election campaign,[26] (2) whether close working relationships are essential to fulfilling the deputy's public responsibilities,[27] and (3) the disruptive effect of the employee's political activities and whether, taken in context, the particular activity could be considered sufficiently hostile, abusive, or insubordinate as to disrupt significantly the continued operation of the department.[28] Importantly, *McBee* recognizes the legitimacy of a sheriff's desire for personal loyalty by stating in the following quotation that the character of a deputy's prior expressions are relevant in deciding the extent of his first amendment rights:

> "[T]he Constitution has not repealed human nature; and it is one thing to work with a subordinate who has expressed a reasoned preference for another superior and quite another to have forced on one's organization an individual who has blackguarded one's honesty and ability up and down the county."[29]

The U.S. Court of Appeals for the Seventh Circuit in *Soderbeck* v. *Burnett County*[30] also confronted the difficult task of applying the *Elrod-Branti* rule to law enforcement personnel. Mrs. Soderbeck had been hired to work in the sheriff's department when her husband was the sheriff; but when her husband was defeated in a subsequent election, the first thing the newly elected sheriff did upon taking office was fire Mrs. Soderbeck. The court highlighted two principles applicable to its decision that Mrs. Soderbeck was unconstitutionally dismissed. First, while employees at the policymaking level of government can generally be fired on political grounds, the narrow definition of a policymaking employee set forth in *Elrod* was superseded by a broader formulation in *Branti,* which allows patronage dismissals when partisan affiliation is an appropriate requirement for the effective performance of the public office involved.[31] As an example, the court notes that if Rosalynn Carter had been President Carter's secretary, President Reagan would not have to keep her on as his secretary, despite the fact a secretary is not ordinarily a policymaking position.[32] Second, if Mrs. Soderbeck functioned as the sheriff's confidential secretary, then she could be constitutionally fired for political reasons, even though a confidential secretary is not a policymaking-level employee.[33] Applying these principles, the court ruled against the sheriff, because there was factual evidence that Mrs. Soderbeck actually functioned more as a bookkeeper than a confidential secretary and had been dismissed solely because she was the wife and presumed ally of the sheriff's political adversary.

It is beyond the scope of this article to discuss in detail the extent to which the Constitution permits law enforcement organizations to prohibit or regulate employee political activity. It is sufficient to note that despite the Court's decisions in *Elrod* and *Branti,* which afford constitutional protection against patronage dismissals based solely on party affiliation, governmental employers are not precluded by the Constitution from prohibiting employees from engaging in certain political activities and conduct when such restrictions serve valid and important governmental interests.[34] For example, because of a compelling need to protect law enforcement organizations from political domination and influence, courts have upheld regulations prohibiting police officers from serving on political committees, working at the polls, raising political funds, running for public office, and engaging in activities designed to promote political causes and advance the fortunes of political candidates.[35]

Policy Considerations

Prior to *Elrod,* patronage dismissals occurred frequently in county sheriff's departments because State laws generally provided for the election every 4 years of a sheriff who was then empowered to appoint a designated number of deputies; other State laws provided that the terms of the employees of the sheriff expired with the end of the sheriff's term, that the deputy sheriff is at least the *alter ego* of the sheriff, and that the sheriff is absolutely liable for the acts of his deputies.[36] As a matter of principle, it can be argued that law enforcement executives should have the power to hire and fire some employees without judicial interference. In that regard, one Federal judge expressed his displeasure over judicial interference with the traditional prerogatives of the elected sheriff as follows:

> "There is something fundamentally wrong with the concept that any federal judge should be telling a newly elected sheriff who his deputies shall be. The average citizen looks on in wonder and questions whether a federal court sitting in judgment should force a sheriff ... to rehire the deputies of his predecessor whose terms of office have expired, leaving the sheriff no right to choose the persons who will work for him for whatever reason he sees fit. A citizen must ask himself why he bothers to vote and elect a sheriff who has campaigned on the promise of

'cleaning house' and who is being sued by those deputies who were an issue in the campaign.... To mandate that a sheriff must accept the deputies that he finds in office simply because they belong to another political party even though he is totally responsible for all their acts is incredible, and beyond the bounds of common sense."[37]

On the other hand, it is arguably an unwise use of executive power to dismiss an experienced and competent law enforcement officer simply for reasons of political party affiliation. The institutional performance of law enforcement organizations may be undermined when employment tenure is made contingent on employee allegiance to a particular political party. It takes time to build the rapport, esprit de corps, and mutual confidence necessary for good teamwork in law enforcement, and employees need continuity in service to develop informants and cultivate other specialized skills. Frequent turnover in personnel not only increases the probability of "rookie mistakes" that pose a risk to public safety, but employee inexperience tends to diminish a needed spirit of cooperation among law enforcement organizations that can exist only when there is mutual confidence in the competence of employees. Partisan influences may also lead to a misuse of authority as employees strive to keep their party in power. Perhaps the public's interest in effective and even-handed law enforcement is best served by law enforcement organizations that are institutionally apolitical, and where employees are free from the potentially corrupting influences associated with political entanglements and compelled partisan affiliation.

Debate on this complex and difficult issue is certain to continue. The recommendations that follow are designed to minimize the risk of liability and protect managerial prerogatives. First, as a general rule, an otherwise competent and efficient employee should not be discharged solely because of a political association or affiliation. Second, employees can be discharged for past political activity that demonstrates a lack of personal loyalty which threatens the effective functioning of the department. Third, until such time as courts reach a more definitive consensus on the constitutionality of patronage dismissals in law enforcement organizations, law enforcement executives should carefully base all adverse personnel actions on performance-based criteria and avoid patronage dismissals except for those positions, if any, where partisan affiliation is demonstrably an appropriate condition for employment.[38] In that regard, law enforcement administrators should carefully document any specific instance where a lack of partisan harmony or personal loyalty has interfered with legitimate law enforcement interests.

ORGANIZATIONAL ASSOCIATIONS

Public employees have a constitutional right to associate with nonpartisan organizations, including labor unions, unless a particular organizational association is shown to be detrimental to governmental interests.[39] Restrictions on the organizational associations of law enforcement officers are valid if they serve legitimate and substantial law enforcement interests. For example, supervisory-level employees may be prohibited from belonging to labor organizations composed of rank-and-file officers because the interests of supervisors and those of the union are often in direct conflict; this poses a significant threat that the loyalties of the supervisors will be divided and that discipline and effectiveness in the department will be impaired.[40]

But other regulations purporting to limit union membership to certain types of unions have been held unconstitutional. In *Mescall* v. *Rochford,*[41] the U.S. Court of Appeals for the Seventh Circuit ruled unconstitutional a rule of the Chicago Police Department which prohibited officers from joining or retaining membership in any labor organization whose membership was not exclusively limited to full-time law enforcement officers. The department argued unsuccessfully that a need for neutrality justified the rule because officer association with an international union which accepts nonpolice officers for membership could result in a potential conflict of interest, and because impartiality in the handling of labor disputes would be threatened in a situation in which a union police officer acts in a labor dispute involving a nonpolice officer affiliate of the international union to which he belongs. The court found the regulation unconstitutionally selective and arbitrary because officers were not prohibited from joining other social, political, and ethnic organizations which conduct parades and demonstrations that would create an even greater conflict of interest than if a nonpolice affiliate of the local union went on strike.[42]

"... disciplinary action based on a personal association must be carefully based on legitimate law enforcement interests."

Despite broad constitutional protection, an officer's associational right to participate in union activities is balanced against, and sometimes overridden by, a department's interest in efficiency. In *Germann* v. *City of Kansas City,*[43] the U.S. Court of Appeals for the Eighth Circuit ruled that the first amendment rights of a fire captain were not violated when his department failed to promote him because of his past union activities. During his tenure as union president, the captain sent a letter to his chief which expressed a degree of personal animosity and also raised a reasonable question regarding the captain's loyalty and respect for the chief. The court concluded that the captain's personal loyalty to the chief was critical to the management structure of the department, and that the chief was therefore justified in believing that the captain's actions as union president rendered him unsuitable for a management-level position in the department.[44]

Courts have also considered the extent to which the constitutional right of association protects a police officer against adverse personnel action based on association with a controversial organization. In *Burns* v. *Pomerleau,*[45] a Federal district court ruled that the decision of the Baltimore City Police Department to exclude an individual from becoming a probationary patrolman solely because of his being a practicing member of a nudist organization was an unconstitutional infringement of freedom of association because the department had not established a nexus between the association and a paramount law enforcement interest.[46] The court ruled that the department failed to present sufficient evidence that the association would render the applicant incapable of effectively carrying out his responsibilities or interfere with legitimate law enforcement activities.[47] Similarly, the New York Court of Appeals ruled that a correction officer was entitled to relief against discipline for alleged membership in the Ku Klux Klan because government officials failed to tender sufficient evidence of detrimental impact on the operation of the correctional facility.[48]

However, an officer's association with a controversial organization such as the Ku Klux Klan is not constitutionally protected if it undermines effective law enforcement. In *McMullen* v. *Carson,*[49] the U.S. Court of Appeals for the 11th Circuit ruled against a clerical employee in the Jacksonville, FL, Sheriff's Office who was fired after being interviewed on a locally televised news broadcast as a recruiter for the Ku Klux Klan. Despite evidence that the employee had performed his duties in exemplary fashion, the court ruled that his dismissal for associating with the Klan was constitutional because the Klan as perceived by the public in the Jacksonville area is a "... violent, criminal, and racist organization dedicated to the sowing of fear and mistrust between white and black Americans."[50] The court recognized the dangerousness to constitutional values of any principle conditioning employment upon a person's association with a constitutionally protected organization and also that the reaction of a community to unpopular views cannot always dictate constitutional protections to employees.[51] Nevertheless, law enforcement employees are subject to greater first amendment restraints than other government employees because of a heightened need for high morale, internal discipline, and public confidence.[52] Accordingly, the court concluded that the sheriff who was faced with an explosive racial situation was constitutionally justified in discharging the employee:

> "... a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties."[53]

PERSONAL ASSOCIATIONS

Many law enforcement organizations have so-called "anti-association" regulations which prohibit officers from associating with certain individuals, such as convicted felons or persons of bad character. In *Morrisette* v. *Dilworth,*[54] the New York Court of Appeals upheld the constitutionality of a regulation of the Suffolk County Police Department forbidding members of the force to associate or fraternize with any person who had ever been convicted of a misdemeanor or felony. Noting that the rule excluded conviction for any offense under the vehicle and traffic laws or a violation of a local ordinance, the court held it was not constitutionally overbroad because it served a valid governmental concern with the integrity of law enforcement.[55]

However, courts disagree over the constitutionality of certain applications of such regulations and the extent to which law enforcement officers are

protected by the freedom of association from adverse personnel action based on their social relationships. For example, in *Baron* v. *Meloni,*[56] a Federal district court upheld the dismissal of a deputy sheriff for his continued association with the wife of a reputed organized crime figure who was under investigation. The court concluded that it was reasonable for the sheriff to believe the deputy was putting himself in a tenuous position which might invite exploitation and bring discredit to the department.[57] But, disciplinary action based on a personal association must be carefully based on legitimate law enforcement interests. In *Dunn* v. *McKinney,*[58] a Federal district court ruled unconstitutional the forced resignation of a deputy sheriff for violating a departmental rule prohibiting deputies from voluntarily maintaining or establishing associations or dealing with known criminals, except in the line of duty. The court ruled the department's "anti-association" rule was unconstitutionally vague and overbroad because it was not specifically confined to personal associations that would clearly impact on legitimate and substantial law enforcement interests.[59] Similarly, in *Wilson* v. *Taylor,*[60] the U.S. Court of Appeals for the 11th Circuit ruled that the dismissal of an officer for dating the adopted daughter of a convicted felon reputed to be a key figure in organized crime was an unconstitutional infringement on the officer's constitutionally protected freedom of association. The court ruled that freedom of association "... has grown to include more than associations which are for the purpose of advancing shared beliefs,"[61] and includes purely social and personal associations, including dating.[62] The court acknowledged, however, that law enforcement organizations may constitutionally restrict an officer's personal associations where it is clearly demonstrated that such restrictions are necessary to promote efficiency or to instill public confidence.[63]

The need for internal discipline and impartiality in law enforcement administration may establish a constitutional basis for law enforcement organizations to prohibit certain personal relationships between employees. For example, in *Shawgo* v. *Spradlin,*[64] the U.S. Court of Appeals for the Fifth Circuit ruled that the Amarillo, TX, Police Department was constitutionally justified in disciplining two officers for off-duty dating and cohabitation and could proscribe a superior officer from sharing an apartment with one of lower rank.[65] Similarly, in *Parsons* v. *County of Del Norte,*[66] the U.S. Court of Appeals for the Ninth Circuit upheld the constitutionality of a no-nepotism rule in a county sheriff's department, which prohibited spouses and members of an immediate family from working as permanent employees in the same department. The court said the no-nepotism rule is rationally related to the legitimate governmental purpose of avoiding conflicts of interest and favoritism.[67]

In view of the somewhat inconsistent results reached in these cases, it is difficult to offer precise legal advice regarding the constitutionality of restricting the organizational or personal associations of law enforcement employees. Until courts further define the constitutional parameters governing employee freedom of association, all personnel decisions affecting associational freedom should be carefully tied to demonstrably legitimate law enforcement interests. In that regard, the following factors are relevant in determining whether a particular association can be constitutionally regulated: (1) The need for public trust, (2) employee morale, (3) a need for personal loyalty in a close working relationship, (4) a potential conflict of interests in operational matters, (5) a potential for favoritism in supervision and management, (6) officer integrity, and (7) the need to minimize corruptive influences.

CONCLUSION

The degree of associational protection afforded by the Constitution to law enforcement officers is determined in hierarchical fashion depending on the importance to democratic self-government of the particular associational interest implicated. Patronage dismissals which penalize employees for their political associations are plainly more injurious to the democratic process than a carefully drawn "anti-association" rule prohibiting officers from associating with convicted felons. Patronage dismissals have repercussions that reach beyond the personal interests of employees and pose a threat of systemic proportions to the political process. Accordingly, the Constitution affords a greater measure of protection against patronage dismissals than infringements of personal relationships.

Law enforcement administrators should seek the advice of competent legal counsel before implementing policies or procedures that impact on employee associational interests. Any adverse personnel action based on an employee's organizational or personal associations should be carefully reviewed to ensure the existence of a documented and legally defensible basis to support the action taken.

FBI

Footnotes

[1]For a discussion of the extent to which the Constitution protects law enforcement employees against disciplinary action based on their speech or expressive activity, *see* Daniel L. Schofield, "The Constitutionality of Organizational Policies Regulating Employee Speech," *FBI Law Enforcement Bulletin*, vol. 54, No. 9, September 1985, pp. 21-31.

[2]*See* Note, "Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection," 85 Colum. L. Rev. 558 (1985).

[3]For citations to other important Supreme Court cases recognizing the existence of a constitutional right of association, *see* Note, *"Roberts v. United States Jaycees:* Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association," 34 Cath. L. Rev. 1055 (1985).

[4]427 U.S. 347 (1976).

[5]*Id.* at 355.

[6]*Id.* at 356.

[7]*Id.* at 362-63.

[8]*Id.* at 366.

[9]*Id.* at 364-66.

[10]*Id.*

[11]*Id.* at 367.

[12]*Id.* at 367-68.

[13]445 U.S. 507 (1980).

[14]*Id.* at 511. Again, as in *Elrod,* the Court limited its decision to patronage dismissals and specifically refused to consider the propriety of other patronage practices, including patronage hiring. *Id.* at 513, n. 7.

[15]The Court offers as another example the position of State election judge which is neither confidential nor policymaking in character, and yet, would qualify for an exception because party membership is essential if the appropriate balance of party representation mandated by State election laws is to be maintained. However, a State university football coach formulates policy, but would not qualify because party affiliation has no bearing on job performance. *Id.* at 518.

[16]*Id.*

[17]*Id.* at 519.

[18]One commentator argues that all adverse personnel actions taken because of an employee's political beliefs are unconstitutional. *See* Note, "First Amendment Limitations on Patronage Employment Practices," 49 U. of Chicago L. Rev. 181 (1982).

[19]727 F.2d 1329 (4th Cir. 1984).

[20]*Id.* at 1338.

[21]*Id.*

[22]*Id.* at 1340.

[23]730 F.2d 1009 (5th Cir. 1984) (en banc).

[24]*Id.* at 1014.

[25]*Id.*

[26]*Id.* at 1016.

[27]*Id.* at 1016-17.

[28]*Id.* at 1017.

[29]*Id.*

[30]752 F.2d 285 (7th Cir. 1985), *cert. denied,* 105 S.Ct. 2360 (1985).

[31]*Id.* at 288.

[32]*Id.*

[33]In that regard, the court stated: "[Y]ou cannot run a government with officials who are forced to keep political enemies as their confidential secretaries."

[34]*Broadrick* v. *Oklahoma*, 93 S.Ct. 2908, 2912 (1973).

[35]*See, Pollard* v. *Board of Police Commissioners,* 665 S.W.2d 333 (Sup. Ct. Mo. 1984), *cert. denied,* 105 S.Ct. 3534 (1985) where a sergeant in the Kansas City, MO, Police Department contributed $1,000 to a political campaign and was terminated for violating a departmental rule which prohibited officers from making political contributions; *see* also, *Reeder* v. *Kansas City Board of Police Commissioners,* 733 F.2d 543 (8th Cir. 1984).

[36]*Whited* v. *Fields,* 581 F.Supp. 1444 (W. D. Va. 1984).

[37]*Id.* at 1449 and 1456.

[38]In that regard, in *Shondel* v. *McDermott,* 775 F.2d 859 (7th Cir. 1985), the court reiterated that the purpose of making the firing of a public employee because of his political beliefs a violation of the first amendment is to ensure that such employees are not deterred from exercising their rights under the first amendment. The expression "policymaking officer" is just a shorthand expression for an employee whose political loyalty is important to the effective operations of government. Thus, a sheriff's confidential secretary, who herself has no policymaking powers, can be fired for lacking political loyalty because such loyalty is important for that kind of job. *Id.* at 864. However, in *Lindahl* v. *Bartolomei,* 618 F.Supp. 981 (N.D. Ind. 1985), the court held that a supervisor in the civil office of a sheriff's department is not a policymaking position that may be changed on political grounds, because political loyalty is not relevant to successful performance. *Id.* at 987.

[39]*See Smith* v. *Arkansas State Highway Employees, Local 1315,* 99 S.Ct. 1826 (1979).

[40]*Vicksburg Firefighters Association* v. *City of Vicksburg, Mississippi,* 761 F.2d 1036 (5th Cir. 1985).

[41]655 F.2d 111 (7th Cir. 1981).

[42]*Id.* at 113-14. A more narrowly drawn provision was reviewed in *Brennan* v. *Koch,* 564 F.Supp. 322 (S.D.N.Y. 1983), where the court upheld a section of a collective bargaining law which denied certification to any labor organization representing members of the police department that also admitted individuals not members of the police force.

[43]776 F.2d 761 (8th Cir. 1985).

[44]*Id.* at 765. A similar result was reached in *Wilton* v. *Mayor and City Council of Baltimore,* 772 F.2d 88 (4th Cir. 1985), where the court ruled that correctional officers who were widely known as union representatives for employees at the city jail were not denied their constitutionally protected freedom of association when they were denied promotion to positions of lieutenant on the basis of their union activity which could have led to a management structure badly compromised by conflicts of allegiances. The court said that the bitterness of labor management relations, though regrettable, cannot logically diminish the legitimacy of the government's concern over supervisor loyalty. *Id.* at 91.

[45]319 F.Supp. 58 (D. Md. 1970).

[46]*Id.* at 66.

[47]*Id.* at 69.

[48]*Curle* v. *Ward,* 389 N.E.2d 1070 (Ct. of App. N.Y. 1979).

[49]754 F.2d 936 (11th Cir. 1985).

[50]*Id.* at 938.

[51]*Id.* at 940.

[52]*Id.* at 938.

[53]*Id.* at 940.

[54]452 N.E.2d 1222 (Ct. of App. N.Y. 1983).

[55]*Id.* at 1224.

[56]602 F.Supp. 614 (W.D.N.Y. 1985).

[57]*Id.* at 618.

[58]622 F.Supp. 259 (D.C. Wyo. 1985).

[59]*Id.* at 262.

[60]733 F.2d 1539 (11th Cir. 1984).

[61]*Id.* at 1543.

[62]*Id.* at 1544.

[63]*Id.* at 1544, n. 3.

[64]701 F.2d 470 (5th Cir. 1983).

[65]*Id.* at 482. In *Puzick* v. *City of Colorado Springs,* 680 P.2d 1283 (Colo. Ct. of App. 1984), the court ruled that the right of association was not violated by the suspension of an officer for a consensual off-duty sexual encounter with a probationary patrolwoman.

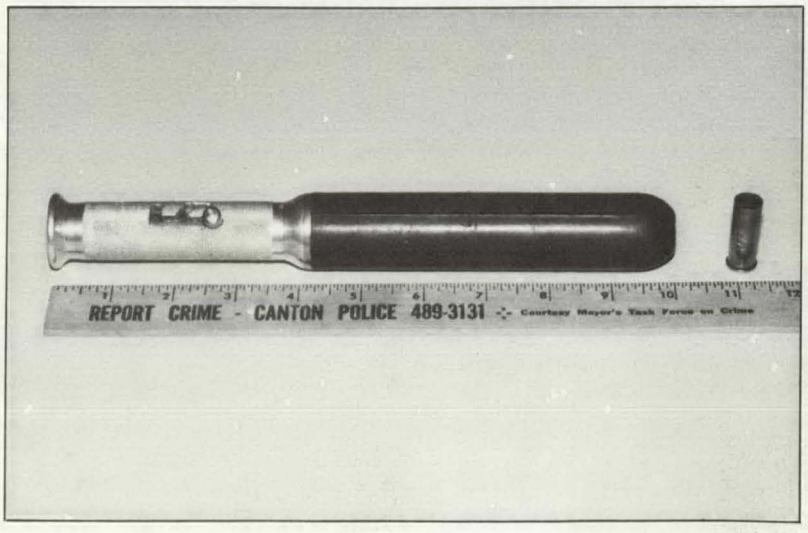
[66]728 F.2d 1234 (9th Cir. 1984).

[67]*Id.* at 1237.

Club Gun

An officer with the Canton, OH, Police Department confiscated this weapon from an individual who accidentally shot himself. The gun measures 10 inches and fires a .44-caliber magnum round of ammunition. The barrel is 6 inches of brass covered with black rubber, and the firing system is turned aluminum with a safety notch. Unusual weapons such as this concealable gun pose a serious threat to law enforcement officers' safety.

(Submitted by Canton, OH, Police Department)



WANTED BY THE FBI

Any person having information which might assist in locating these fugitives is requested to notify immediately the Director of the Federal Bureau of Investigation, U.S. Department of Justice, Washington, DC 20535, or the Special Agent in Charge of the nearest FBI field office, the telephone number of which appears on the first page of most local directories.

Because of the time factor in printing the FBI Law Enforcement Bulletin, there is the possibility that these fugitives have already been apprehended. The nearest office of the FBI will have current information on these fugitives' status.

Photographs taken 1974 and 1975

James William Kilgore,

also known as Charles Adams, Ron Adams, Charles Baker, Charles Barber, George William Dickerson, David Ian Holcomb, James Kilgore, Charles Owen, Charles Owens, Robin Stewart, Gary Lee Waycott, "Paul."

W; born 7-30-47, Portland, OR; 5'10"; 175 lbs; med bld; brn hair; blue eyes; med comp; occ—cook, house painter;
remarks: athletically inclined, plays basketball and golf, reportedly very near sighted and needs glasses most of the time.
Wanted by FBI for UNLAWFUL POSSESSION OF UNREGISTERED BOMB DEVICE.

NCIC Classification:
POCI131315DI67PO1315

Fingerprint Classification:

13 O 23 W IOI 15
I 17 R OOI

I.O. 4803

Social Security
Numbers Used: 553-68-0622; 553-58-0622

FBI No. 448 488 L10

Caution

James William Kilgore, reportedly a member of an extremist group that has claimed credit for numerous bombings including police facilities and vehicles, is being sought for the unlawful possession of an explosive device. He may be accompanied by Kathleen Ann Soliah, Identification Order No. 4804. Both individuals may possess explosives and should be considered armed and dangerous.

Right thumbprint

Photographs taken 1979, 1980, and unknown

Joanne Deborah Chesimard,

also known as Joanne Deborah Byron Chesimard, Joanne Byron, Joan Chesimard, Joanne Debra Chesimard, Joanne Chesterman, Joan Davis, Joanne Davis, Mary Davis, Justine Henderson, Sister Love, Barbara Odoms, Assata Shakur, and others.

N; born 7-16-47 (not supported by birth records), New York, NY; 5'6"; 127–138 lbs; sldr bld; blk (various styles) hair; brn eyes; med comp; occ—tutor, writer;
scars and marks: bullet scars on abdomen, chest, left shoulder and underside of right arm; round scar on left knee;
remarks: has worn tinted prescription glasses in the past; may be dressed in Muslim or men's clothing; reportedly jogs regularly.
Wanted by FBI for INTERSTATE FLIGHT—MURDER.

NCIC Classification:
AAAAAA0711AAAAAA0409

Fingerprint Classification:

7 1 aAa 11
1 aAa

I.O. 4846

Social Security
Number Used: 051-38-5131

FBI No. 11 102 J7

Caution

Chesimard, who is being sought as an escapee from custody, was at the time of escape serving a life sentence for the shooting murder of a New Jersey State trooper. Chesimard, who is reportedly a member of a revolutionary organization which has an extensive history of criminal activity involving violence, should be considered armed, extremely dangerous, and an escape risk.

Left thumbprint

Photographs taken unknown

William Bradford Bishop, Jr.,

also known as Bradford Bishop, Bradford Bishop, Jr. W; born 8-1-36; Pasadena, CA; 6'1"; 180 lbs; med bld; brn hair; brn eyes; med comp; occ-U.S. Government Foreign Service Officer; remarks: is proficient in several languages including Italian and Serbo-Croatian. Wanted by FBI for INTERSTATE FLIGHT-MURDER.

NCIC Classification:
23PI1719161913DIPI16

Fingerprint Classification:

23 L 19 W IOO 16
L 2 U OII

I.O. 4696

Social Security
Number Used: 556-48-3489

FBI No. 497 002 L7

Caution

Bishop is being sought in connection with the bludgeon slayings of five members of his immediate family. Bishop reportedly is under psychiatric care and uses medication for depression. Consider extremely dangerous and having possible suicidal tendencies.

Right index fingerprint

WANTED BY THE FBI

Photographs taken 1973

Dewey Admiral Daniels, Jr.,

also known as James E. Burns, James W. Burns, Admiral Dewey Daniels, Jr., Lee Johnson, Charles Morgan, Gene Smith, George Tipton, Robert Whitson. W; born 4-9-29, Washington County, TN; 5′10′-11″; 190-220 lbs; hvy bld; brn hair; bl-grn eyes; med comp; occ-carpenter's helper, farmer, former police officer, heavy equipment operator, machinist, salesman.
Wanted by FBI for INTERSTATE FLIGHT-ARMED ROBBERY AND FELONIOUS ASSAULT.

NCIC Classification:
DO5407CO14201114CI11

Fingerprint Classification:
4 O 9 R IIO 14
L 18 U OOI

I.O. 4674

Social Security
Number Used: 409-56-5976

FBI No. 178 723 H

Caution

Daniels, a reported judo expert who has been indicated for bank robbery by a Federal grand jury, has been heavily armed in the past and allegedly, with a sawed-off shotgun, fired on and seriously wounded a law enforcement officer. Consider armed and dangerous.

Right ring fingerprint

Photographs taken unknown, 1975, and 1978

Larry Porter Chism,

also known as Calvin Joseph Acosta, Gary Joseph Buomi, Gary Joseph Buoni, Douglas D. Baker, Mark Anthony Baldwin, Larry Chism, Larry P. Chism, James Frederick Hedrick, Jr., Theodore Lee Masson, Earl F. McClain, George McClain, Warren Howell Smith, III, and others.
W; born 12-19-48, Forrest City, AK; 5′10″; 145–155 lbs; med bld; brn hair; brn eyes; lt comp; occ—cashier, clerk-typist, farmer, law student, logger, roofer, salesman, stock clerk;
scars and marks: birthmark on left thigh, long cut scar on one leg, scars on both arms;
remarks: reportedly wears contact lenses or thick-lens glasses; full fluffy hairstyle, dark brown almost black, with full beard and mustache.
Wanted by FBI for INTERSTATE FLIGHT—KIDNAPING, THEFT OF PROPERTY.

NCIC Classification:
18TT08PO1321TT092011

Fingerprint Classification:
18 M 9 T IO 13
L 1 T IO

I.O. 4842

Social Security
Numbers Used: 431-82-5804; 431-82-5894

FBI No. 367 973 N5

Caution

Chism, who is being sought as a prison escapee, was at the time of escape serving a lengthy sentence for armed robbery and kidnaping. Chism, reportedly a heroin addict, is alleged to have escaped custody by overpowering a deputy sheriff and subsequently kidnaping two individuals. Consider Chism armed, dangerous, and an escape risk.

Right index fingerprint

Photographs taken 1976

Rosa Lee Lewallen,

also known as Rosa Lee Allen, C.H. Bennett, Elma Bennett, Mary Helen Bennett, Mary Lee Cheaveze, Mary Lee Roscoe Cheavze, Mrs. Julius Coons, Mrs. Koons, Mrs. John Rose Lewallen, Rosa Lee Lundy, Connie Ann Miller Martin, Rosa Lee Merritt, Mary Lee Roscoe, Mrs. John Rose, and others.
W; born 6-2-33, Chesterfield County, SC; 5′2″–5′6″; 126–147 lbs; hvy bld; reddish blond hair; blue eyes; ruddy comp;
occ—waitress;
scars and marks: vertical scar base of throat to navel, long vertical scar left thigh, scars on inner wrists and inner elbows of both arms, several moles on right cheek of face, discolored right eye;
remarks: suffers heart condition, has had open heart surgery, wears false teeth, hair may be dyed and may wear wig.
Wanted by FBI for INTERSTATE FLIGHT—KIDNAPING.

NCIC Classification:
191707CO061666101802

Fingerprint Classification:
19 L 9 U OIO 6 Ref: 25 9 25
M 1 R OIO 1 2 2

I.O. 4815

Social Security
Numbers Used: 251-89-3229; 251-98-3292; 253-44-2713

FBI No. 310 735 C

Caution

Lewallen, who is being sought as an escapee from custody, was at the time of escape serving a life term following conviction for kidnaping in which the female victim was tied to a tree and left to die. She reportedly has suicidal tendencies and should be considered armed, dangerous, and an escape risk.

Right ring fingerprint

Questionable Pattern

The fingerprint examiner obtained a ridge count of 19 by counting the ridges which are crossed by an imaginary line drawn between delta and core of this loop pattern. The pattern is referenced to an accidental whorl with an outer tracing due to a possible tented arch formation appearing beneath the inner looping ridges.

Change of Address

Not an order form

FBI
Law Enforcement Bulletin

Complete this form and return to:

Director
Federal Bureau of
Investigation
Washington, DC 20535

Name

Title

Address

City State Zip

U.S. Department of Justice
Federal Bureau of Investigation

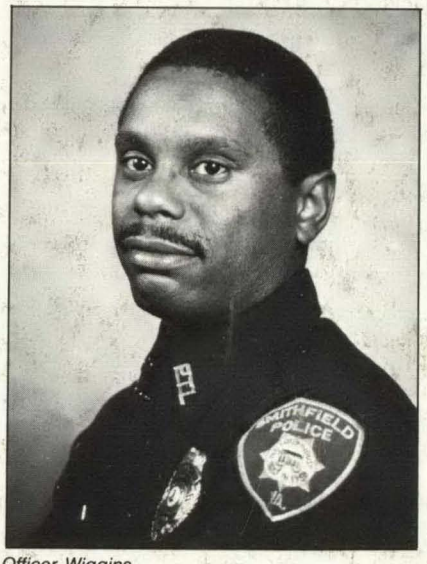
Second Class Mail
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014–5688

Washington, D.C. 20535

Official Business
Penalty for Private Use $300
Address Correction Requested

The Bulletin Notes

While on routine patrol on October 13, 1985, Officer Leonard L. Wiggins of the Smithfield, VA, Police Department observed a parked car which appeared to have smoke coming from it. Two teenagers in the car were not breathing. Officer Wiggins, using CPR, was able to revive one and his backup officer the other. Officer Wiggins' alertness and professional response assured the survival of the young people in the car, and the Bulletin joins his chief in commending this officer.



Officer Wiggins