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Robert S. Mueller III  
Director

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Linda W. Szumilo

This publication is produced by members of the Law Enforcement Communication Unit, William T. Guyton, Chief.

**Internet Address**

leb@fbiacademy.edu

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Send article submissions to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

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## Introducing FBI Director Robert S. Mueller III

**R**obert S. Mueller III became the director of the Federal Bureau of Investigation on September 4, 2001. Recently, he served as the acting deputy attorney general for the U.S. Department of Justice from January through May 2001. In 1999, the Senate confirmed him as the U.S. attorney for the Northern District of California in San Francisco. Prior to this, Director Mueller took command of the Homicide Section of the U.S. Attorney's Office for the District of Columbia in 1997. He had served there since 1995 as senior litigation counsel.

In 1990, former president Bush named Director Mueller the assistant attorney general in charge of the Criminal Division of the U.S. Department of Justice responsible for developing and supervising the enforcement of federal criminal law. He oversaw the Noriega and Gotti prosecutions and the Pan Am 103 investigation and helped develop the Justice Department's policies on



corporate sentencing guidelines, computer crime investigations, and health care and money laundering prosecutions. Prior to assuming this position, Director Mueller assisted former U.S. attorney general Richard Thornburgh; from 1986 to 1987, he served as a U.S. attorney for the District of Massachusetts.

In addition to his many government positions, Director Mueller also has experience in the private practice of law. He served as an officer in the U.S. Marine Corps for 3 years, including 1 year in the

Third Marine Division in Vietnam. He received the Bronze Star, two U.S. Navy commendation medals, the Purple Heart, and the Vietnamese Cross of Gallantry.

Born on August 7, 1944, Director Mueller received an undergraduate degree from Princeton University, a master's degree from New York University, and a law degree from the University of Virginia. He and his wife are the parents of two daughters. ♦



# ***Project Exile***

## ***Combating Gun Violence in America***

By BRIAN A. MONAHAN, M.S., and TOD W. BURKE, Ph.D.

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**G**un violence presents a myriad of dangers to large cities, suburbs, small towns, and rural areas throughout the United States. Consequently, officials at the local, state, and federal levels of law enforcement have developed a multitude of programs aimed at reducing gun violence. For example, some programs have included an increased police presence in high-crime areas, gun buyback programs, task forces devoted solely to violent crimes, and, in some instances, lawsuits against firearm manufacturers. Several of these programs have proven

moderately successful, as evidenced by a reduction in the overall crime rate in many regions of the United States.<sup>1</sup> Despite the apparent success of such programs, many cities experienced little or no reduction in gun-related crime. In fact, Richmond, Virginia, incurred significant increases in gun-related violence and crime and sought to implement an alternative strategy in the fight to eradicate gun-related crime and violence.

In 1996, gun-related crime was certainly not a new phenomenon to the city of Richmond. The community suffered from annually

escalating rates of homicide and gun violence since the 1980s, with such crime rates reaching nearly epidemic proportions in the latter half of the 1990s. In 1996, 140 murders occurred within the Richmond city limits, 122 of which were committed with a firearm. In 1996, someone was shot or killed in the city approximately every 40 to 45 hours, bringing Richmond to the second highest per capita murder rate in the United States that year.<sup>2</sup>

Richmond officials developed and implemented numerous aggressive and innovative initiatives aimed toward combating handgun

violence and homicides. One in particular, Project Exile, has proven advantageous for the city.

## BACKGROUND

In February 1997, the U.S. Attorney's Office in Richmond unveiled Project Exile—an innovative, expeditious, and aggressive interagency approach to combat gun violence. Rather than creating and enforcing new laws, this program takes advantage of existing federal laws and prosecutes suspects in federal courts, which can prove advantageous because federal courts can apply more stringent bond rules and sentencing guidelines than state courts.

Since the inception of Project Exile, Richmond has seen more than 600 arrests, more than 650 guns seized, and more than 300 armed felons incarcerated as a direct result of the program.<sup>3</sup> An aggressive prosecutive effort has led to an 86 percent conviction rate through trials and plea bargains and to an average prison term of 56 months.<sup>4</sup> Richmond had 72 homicides in 1999—22 fewer than in 1998, a reduction in rate comparable to that of the early 1980s.<sup>5</sup>

Richmond's Project Exile derives its name from the concept that any criminals found in possession of a gun, or convicted of using a gun in the commission of a crime, forfeit their right to remain in the community, thereby exiled from the area.<sup>6</sup> Any criminal found violating the laws applicable to Project Exile faces immediate federal prosecution and conviction, resulting in a mandatory minimum sentence of 5 years. This zero tolerance policy



*Mr. Monahan is a graduate assistant in the Department of Sociology and Criminal Justice at the University of Delaware in Newark.*



*Dr. Burke is an associate professor of criminal justice at Radford University, Radford, Virginia.*

allows the U.S. Attorney's Office to prosecute, in federal court, all felons with guns, as well as anyone using guns in drug trafficking, possessing prohibited weapons (e.g., sawed-off shotguns), or using a gun in domestic violence cases.

## PROGRAM STRUCTURE

Researchers examined the organization of such aggressive and innovative interagency enforcement programs as Project Exile.<sup>7</sup> They found many similar structural elements among the programs recently implemented or under development.

### Targeted Offenders

A broad base of crimes and criminals fall within the legal parameters of Project Exile and similar programs, and jurisdiction is not limited to those cases involving guns and drugs, convicted felons, or individuals with a misdemeanor conviction for domestic violence.

Any person in possession of a gun who is a fugitive from another state, under indictment for a felony, subject to a restraining order, dishonorably discharged, or a drug user or addict falls within the prosecutorial jurisdiction of Project Exile.<sup>8</sup> In addition, any illegal immigrant possessing a gun or any person knowingly possessing a stolen gun or a gun with an altered or missing serial number may face federal prosecution. Proponents estimate that a majority of the perpetrators of gun-related offenses meet one or more of these legal criteria.

### Participating Agencies

A combination of eight federal, state, or local agencies actively take part in the prosecution, enforcement, or administration of Richmond's Project Exile. Other cities using similar programs must take steps to ensure a high degree of interagency cooperation. Various agencies participate in Richmond's

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Project Exile, including the U.S. Attorney's Office, the Bureau of Alcohol, Tobacco, and Firearms (BATF), the U.S. Marshal's Office, the FBI, the Richmond Commonwealth's Attorney's Office, the Richmond Police Department, the Virginia Attorney General, and the Virginia State Police. The cohesion demonstrated thus far by the various agencies helps make Project Exile unique. Interagency cooperation remains somewhat anomalous in today's criminal justice system because many multiagency efforts face conflicts regarding jurisdiction or appropriate methods and procedures.

Successful implementation of a program, such as Project Exile, depends on several factors. Law enforcement personnel must attend extensive training programs concerning applicable laws and other issues central to the program. While stringent legal guidelines comprise the prosecutive backbone of such programs, the deterrence of future gun crime stands as the primary aim. Extensive publicity and citizen education are vital to achieve this, and public outreach has proven an integral contributor to the effectiveness of Richmond's Project Exile. However, providing the necessary training for law enforcement and educating the community can prove costly, thereby making funding an equally vital component of a successful enforcement effort.

### **Training**

The emphasis on expeditious, aggressive, and effective prosecution of armed criminals mandates that all law enforcement officers

remain knowledgeable in the laws and legal issues associated with a program, such as Project Exile. Strict adherence to procedural rules can help avoid dismissals of cases that remain strong otherwise. Thus, the U.S. Attorney's Office conducts several hours of training for police officers on federal firearm statutes, the procedural issues of Project Exile, and Fourth Amendment issues of search and seizure. Furthermore, the Richmond Police Department's academy, in connection with the

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***Officials constantly have called for increased citizen involvement and support in the fight against crime.***

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U.S. Department of Justice, has developed and implemented a new Gun Recovery Initiative (GRI), which includes training, enforcement, and organizational measures.<sup>9</sup> The intent of the GRI is to improve the ability of officers to detect firearm violations and apprehend those who commit such crimes.

The prosecutor's office in Richmond has implemented procedures that expedite the handling of Project Exile cases after a police officer reports a violation. The police department's firearms office is

electronically linked to the BATF so that officers can immediately trace seized firearms.<sup>10</sup> When a police officer discovers a gun, the officer pages a BATF agent, who reviews the circumstances and decides whether a federal statute applies. If the BATF agent concludes that a federal violation has occurred, federal prosecution begins immediately. Although the highly active role of law enforcement plays a significant part in the success of any program similar to Project Exile, the importance of positive publicity and community involvement remains paramount.

### **Public Outreach/Education**

Program administrators must communicate to the community and criminals alike. The action or inaction of the community ultimately can determine the success or failure of a program that relies on citizens to assist in the enforcement efforts. Community members can assist law enforcement by providing eyewitness reports of events and exercising stern vigilance in regard to neighborhood happenings, including tips about illegal activity. Officials constantly have called for increased citizen involvement and support in the fight against crime. If only one citizen on each block reported an illegal gun, it would enhance the efforts of the police at no cost to taxpayers and would help ensure the safety within their community.

Project Exile administrators have used a wide array of methods to inform citizens about important social issues. For example, television and radio commercials,

## Virginia Exile

**O**n July 1, 1999, the Richmond Commonwealth's Attorney's Office introduced Virginia Exile—the state version of the federal Project Exile. The success of Project Exile led state legislators to introduce legislation into the Code of Virginia that incorporated the stringent penalties of the U.S. Federal Code. Virginia Exile, the first statewide program of its kind, was designed and implemented to afford state prosecutors the same tools and resources made available by federal prosecutors in Project Exile. The aim of Virginia Exile, similar to Project Exile, provides a community-based public safety initiative allowing politicians, prosecutors, different levels of law enforcement, local businesses and schools, and community members to work together to effectively reduce crime.

Virginia Exile remains similar to the Richmond-based Project Exile in many ways, including the crimes targeted, funding, and commitment to public outreach and education. The program is designed to primarily combat three crimes—possession of a firearm by a convicted violent felon, possession of a firearm on school property with intent to use it or

brandishing it in a threatening manner, and possession of a firearm while carrying illicit drugs.

Generating and appropriating the necessary financial resources throughout the state, an obstacle not faced by Project Exile officials, proves vital to the success of such a statewide initiative. Virginia has allocated more than \$1 million in grants to provide funds to begin Virginia Exile projects in localities throughout the state. In addition, donations from state and local businesses and citizens will comprise a significant portion of the funding. The financial resources will help provide localities with experienced Exile prosecutors and will make it possible to offer specialized training and overtime pay for Exile-related enforcement efforts. Furthermore, the Virginia Exile Foundation has been established in an attempt to increase funding and public awareness. This foundation is a private, nonprofit organization aimed primarily at developing and implementing statewide advertising and community awareness efforts. Program officials encourage participating localities to develop local counterparts to the statewide foundation.

billboards, and business cards bearing the slogan, "An illegal gun gets you 5 years in federal prison," all have helped to bring Project Exile to the attention of the community. The program also has sponsored radio traffic reports to reach a larger number of listeners during the heightened commuting times. However, the use of city buses for advertising purposes has proved, perhaps, the most innovative means of public outreach used by Project Exile. Program managers had the project's slogan placed on each side of a city bus and had the bus change

routes periodically to ensure that the message would reach as many regions of the city as possible. Project managers expect to expand the outreach effort through the use of additional media and direct contact with community groups.

### Funding

The public outreach and education effort not only has increased community awareness but also has helped generate substantial funding from many individuals and organizations beyond those in the legal and political systems. In particular,

the U.S. Attorney's Office has noted the contributions of several local businesses, organizations, and civic leaders whose efforts and funds proved vital to the success of the initial publicity effort. The diverse collection of individuals and organizations that have provided support for the program indicates the community's strong commitment to Project Exile.

### ADVANTAGES

Proponents of aggressive inter-agency approaches that use and enforce existing federal laws in the

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effort to combat gun violence suggest that such initiatives offer several advantages over the traditional usage of state laws. They contend that using the federal system increases efficiency, fosters interagency cooperation, and requires the same number of employees as the prosecution of firearm crimes in state court.<sup>11</sup> Additionally, city managers nationwide can easily replicate and implement programs similar to Project Exile. Finally, proponents argue that aggressive and efficient programs can eliminate the psychological, emotional, and economic burden that violence and crime place on a community and its residents.

### Increased Efficiency

Some individuals consider the federal system more efficient than state courts primarily because it offers prompt indictments and allows fewer offenders to obtain pretrial release through the use of bonds. Reports show that a felon-in-prison case in state court would take about 1 year to prosecute, during which time most defendants are freed on bond; however, the same case in federal court would take about 70 days, with bond granted in only 20 percent of Project Exile cases.<sup>12</sup>

Violating a federal gun law generally carries a stiffer penalty than that of the state system. For example, a felon convicted in federal courts of possessing a gun, or even ammunition alone, can receive up to 10 years in prison and a \$250,000 fine. In comparison, conviction of the same crime in state courts could result in a sentence of 1 to 5 years. In addition, federal gun

laws require a mandatory minimum of 5 years in prison for this offense, and under Project Exile, prosecutors will not plea bargain to a sentence below the mandatory minimum.<sup>13</sup>

### Interagency Cooperation

Increased cooperation among the participating local, state, and federal authorities constitutes another commonly cited advantage of the program. Proponents argue that interagency alliances are rare in law enforcement and that full coordination between the various agencies

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helps make programs, such as Project Exile, innovative and ensures long-term success. The unique organizational aspects permeate all facets of the program, from investigation to apprehension and prosecution. These aspects include full cooperation between the participating agencies, from the officer on patrol to the federal prosecutor; a simplified reporting system; and coordinated use of innovative and aggressive policing methods.<sup>14</sup>

### Distant Prisons

The federal system offers greater flexibility in regard to the location where convicted offenders will serve their sentences. This can yield a tremendous deterrent effect because some defendants consider serving a jail sentence among friends and acquaintances much less onerous than incarceration in a faraway prison.<sup>15</sup> As a result of the publicity and media saturation that accompanies the public outreach campaign, many criminals realize that they likely will serve any federal sentence in another region of the country. Incidentally, defendants have demonstrated greater concern about where they will serve their sentence, rather than the fact that they will be going to prison.

### Highly Replicable

Since its inception, many states and cities have inquired about Project Exile. It generates interest because state and city managers consider it highly replicable, requiring only the will for implementation. Richmond Project Exile officials contend that with a simplified structure, redesigned operational rules, streamlined forms, and an expedited reporting system, any manager can implement this project in several weeks. Despite the perceived ease of replication, several obstacles can make implementing such a program difficult. For example, managers must avoid “turf consciousness” among the contributing police and prosecutory agencies; they must obtain full investigative and prosecutory commitments from the various agencies; they must develop an active

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citizen organization to provide support; and they must establish cooperative ties with the media to help ensure the success of the public outreach/education component of the program.<sup>16</sup> Still, Richmond's Project Exile has served as a prototype for many cities searching for ways to alleviate the problems of gun-related crime and violence.

In February 2000, Atlanta began operating an antigun initiative, under the name "Face Five," based on Richmond's Project Exile.<sup>17</sup> In addition, programs similar to Project Exile currently exist in Norfolk, Virginia; Rochester, New York; Oakland, California; and Philadelphia, Pennsylvania.<sup>18</sup> In fact, Philadelphia recently received \$1.5 million from the Senate Appropriations Committee to replicate Project Exile and recommended to the U.S. Treasury Secretary that Project Exile be expanded to 150 cities by October 1, 2003.

## DISADVANTAGES

Although the concept of using federal gun laws as the foundation of the enforcement effort to eradicate illegal handguns has many supporters, it also has drawn criticism from some individuals who do not see it as a cure-all for a community's crime problems. Critics agree that such programs can have an enormous impact on the community, but they believe that any reduction in crime is overshadowed by the negative impact the program exerts on minority citizens and the federal judicial system. Members of the political and legal system, from criminals to lawyers to federal judges, contend that

Project Exile has certain inherent flaws and that it is not a panacea for the problems of gun violence that plague Richmond or any other U.S. city. Others critics cite budgetary concerns and the dangers of a "blanket approach" to replicating the program in other cities.

## Racial Bias

Critics argue that Project Exile remains inherently racist, citing the Richmond-based initiative as an example. Because 55 percent of Richmond's urban population is black, critics believe that targeting city violence results in a predominance of black suspects facing federal prosecution. Conversely, suspects from outlying, predominantly

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white counties face only state charges for similar crimes. In one opinion on motions for a Project Exile case, Richmond's three U.S. district judges said that the program is not unconstitutional in regard to race, but that it does have "a disproportionate impact on blacks."<sup>19</sup>

Because jurors for state cases are drawn from a defendant's community and jury pools in Richmond are about 75 percent black, detractors of the program claim that using the federal system forces black defendants to stand before mostly white juries.<sup>20</sup> Project Exile officials contend that neighborhood demographics have little effect because approximately 95 percent of Project Exile defendants plead guilty and do not face a jury.<sup>21</sup>

## Government Intrusion

Critics also argue that using federal courts to adjudicate crimes traditionally handled at the state and local level represents the federal government exercising unnecessary authority. Richmond's three U.S. district judges agree, stating that the program is "a substantial federal incursion into a sovereign state's area of authority and responsibility."<sup>22</sup> The federal judges also argue that such programs increase the burden on already overworked federal courts by forcing them to hear cases that state courts can handle.

The criminal caseload in Richmond's U.S. District Court has risen considerably in recent years—growing from 135 felony cases in 1996 to over 400 felony cases in 1999. Some individuals contend that the majority of the case influx results from Project Exile and that most defendants in these cases require court-appointed lawyers. State officials may attempt to remedy this strain on the federal court docket by adding a federal public defender's office in Richmond.



## Fiscal Impact

The danger of federal intrusion into state matters is not the only concern, as critics also contend that using federal resources places undue strain on taxpayers and the budgets within the judicial system. Critics assert that it costs national taxpayers at least three times more to prosecute suspects federally than it would to prosecute them in state courts.<sup>23</sup> Federal court-appointed attorneys are commonly paid \$2,500 to defend a suspect, whereas their state counterparts receive approximately \$350 to defend the accused.<sup>24</sup>

Other officials remain critical of plans to develop and implement Project Exile-type programs nationwide based solely upon the apparent success of the Richmond-based program citing that law enforcement simply cannot take a “cookie-cutter” approach to combating gun violence. They agree that although Project Exile worked in Richmond and other cities, managers must look at the local situation in every city to decide exactly what will work.<sup>25</sup>

## CONCLUSION

The statistics indicate that, over the past 2 years, Project Exile has played a tremendous role in the reduction of violent crime experienced in Richmond, Virginia. Further, state officials project that a similar state-level program (Virginia Exile) will prove equally effective and that the two programs will complement each other in the fight against gun violence and crime. The cities and states that have implemented programs similar

to Project Exile hope to emulate the success Richmond has achieved in combating gun violence.

More important, strict penalties and stern prosecutions comprise only a portion of the battle to eradicate gun violence. Success requires a sustained commitment on the part of the participating federal, state, and local authorities. The role of the community and its citizens remains equally important and an intensive community effort must exist to ensure ultimate success.

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***This zero tolerance policy allows the U.S. Attorney's Office to prosecute, in federal court, all felons with guns....***

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Measures of the success or failure of programs similar to Project Exile must extend beyond the crime rates and examine the impact on the citizens, communities, and surrounding localities. Project Exile cannot rest on the laurels of success; program officials must recognize and address the criticisms directed toward such programs. City managers should not measure the true success of a crime-fighting initiative solely by comparing statistics and figures from one year to the next; rather, they must predicate a program's measure of success on a constant striving to better

protect and meet the needs of every citizen. ♦

## Endnotes

<sup>1</sup> U.S. Attorney's Office for the Eastern District of Virginia, Richmond Division, “Project Exile Executive Summary”; <http://www.vahv.org/Exile/Rchcntnt.html>; accessed March 23, 2001.

<sup>2</sup> Ibid.

<sup>3</sup> Bob Kemper, “Risk of Federal Prison Deters Virginia's Illegal Gun Carriers: Other States Adopting ‘Exile’ Program Model,” *The (Newark) Star-Ledger*, April 23, 2000, 38; <http://www.tsra.com/ExlStats.htm>; accessed March 26, 2001.

<sup>4</sup> Michael Janofsky, “New Program In Richmond Is Credited For Getting Handguns Off Streets,” *New York Times*, February 10, 1999; <http://www.vahv.org/Exile/NYT/ExNYT210.html>; accessed February 14, 2001.

<sup>5</sup> U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting, *Crime in the United States 1996* (Washington, DC, 1996); <http://www/fbi.gov/ucr/prelim99.pdf.htm>; accessed February 14, 2001.

<sup>6</sup> Supra note 4.

<sup>7</sup> Research conducted by authors in June 1999.

<sup>8</sup> Supra note 1.

<sup>9</sup> Supra note 4.

<sup>10</sup> David Schiller, Untitled, *New York Times*; <http://www.vahv.org/Exile/intro.htm>; accessed February 14, 2001.

<sup>11</sup> Supra note 4.

<sup>12</sup> Supra note 4.

<sup>13</sup> Supra note 4.

<sup>14</sup> Supra note 4.

<sup>15</sup> Supra note 4.

<sup>16</sup> Supra note 4.

<sup>17</sup> “Project Exile In Atlanta,” <http://www.richmond.com/output.cfm?id=2901>; accessed February 14, 2001.

<sup>18</sup> Dominic Perella, “Gun Crackdown Cuts Murder Rate But Has Detractors,” Fox News; [http://www.foxnews.com/news/wires2/0530/n\\_ap\\_0530\\_34.sml](http://www.foxnews.com/news/wires2/0530/n_ap_0530_34.sml); accessed June 1999.

<sup>19</sup> Ibid.

<sup>20</sup> Federal jurors are drawn from a wider area of the state resulting in jury pools consisting of about 80 to 90 percent whites.

<sup>21</sup> Ibid.

<sup>22</sup> Supra note 7.

<sup>23</sup> Supra note 7.

<sup>24</sup> Supra note 18.

<sup>25</sup> Supra note 7.

### **A Call to Duty in the New American Century**

By U.S. Attorney General John Ashcroft

**T**he 20th century was called the American Century. It was a time in which the United States emerged as the leading force for our ideals in the world—the ideals of freedom, of equality before the law, of family, community, and faith. The American Century also was a time in which our nation changed in ways we take for granted today. The automobile made us a more mobile nation. Conflict overseas and our growing strength and prosperity made us an international nation. Computers, the Internet, and the information-technology revolution made us a more interconnected nation.

As our country changed, the challenges we confronted changed as well. Echoing across the American Century were a series of calls to meet these challenges—calls to duty, to service, and to sacrifice. And, each time a new challenge presented itself—each time a call to duty sounded—the men and women of the Federal Bureau of Investigation answered the call.

- When Prohibition ushered in a crime wave of gangsterism, kidnappings, and bank robberies, the people called out for peace, and the Bureau responded.
- When totalitarianism abroad threatened the institutions of democracy at home, the republic called out for security, and the Bureau answered the call.
- When discrimination threatened to turn citizen against citizen and neighbor against neighbor, the country called out for justice, and the Bureau helped open the door of opportunity to all Americans equally.
- And, when terrorism threatened American citizens living and traveling abroad—and then reached within our borders—the nation called out for safety, and the Bureau was there.

In a republic whose law enforcement traditions are rooted in the states, the cities, and the towns, a national crime-fighting organization arose. When it was created in 1908, the FBI counted 34 agents among its ranks. Today, by answering the call to duty, the Bureau has grown to a total working team of over 28,000 special agents, crime lab technicians, and support personnel.

Last year, the dedicated men and women of the FBI were responsible for investigating more than 200 categories of federal crimes and well over 500 specific violations of federal law. You lead the federal government's fight against terrorism. You lead our counterintelligence efforts. You work with the Drug Enforcement Administration to enforce federal drug laws. You are the sole investigative force for criminal violations of federal civil rights laws. Working with the states and localities, you carry the burden of investigating sophisticated organized crime, white-collar crime, cybercrime, violent crime, and crimes against children.

At any given time, the FBI is working on approximately 100,000 cases. Last year, the Bureau issued over 19,000 indictments and secured over 21,000 convictions.

*U.S. Attorney General John Ashcroft delivered this speech to FBI employees on July 16, 2001.*



- In the successful conclusion of an investigation that involved hundreds of agents stationed across the globe, four members of the terrorist organization of Osama Bin Ladin met justice in May. A federal jury found them guilty of 302 counts stemming from the 1998 bombings of the American embassies in Tanzania and Kenya.
- Working with Algerian and Canadian officials, the FBI helped secure the conviction of Ahmed Ressam, the so-called millennium bomber. Ressam was caught attempting to enter the United States from Canada with a car full of explosives in the weeks before New Year's Day 2000.
- In cooperation with Scottish authorities, the men and women of the FBI played an indispensable role in the murder conviction of a Libyan national for the bombing of Pan Am flight 103, an act of cowardice that caused the deaths of 259 passengers and 11 residents of Lockerbie, Scotland.
- A federal jury in Miami convicted five Cuban agents for espionage on behalf of the Cuban government. FBI agents documented a wide-ranging conspiracy, including the spy ring's complicity in the murder of four Cuban-American humanitarians seeking freedom for their former countrymen. The tireless work of FBI agents literally made possible the conviction of these criminals, who were part of the largest spy ring known to have been dismantled in the history of the United States.

All FBI employees deserve to share in the honor and gratitude the American people justly feel for these successful investigations. By heeding the call to duty and sacrifice, the FBI has truly become the foremost law enforcement agency in the world. Perhaps, more important, the three words inscribed

in the FBI's seal—fidelity, bravery, integrity—are deeply embedded in the character of the men and women who work here. You have served America well, and both your country and the world are grateful for your sacrifice.

Today, at the dawning of the 21st century—the New American Century—a new challenge arises. A new call goes out. Carved over the entrance to the Department of Justice is this admonition: “Justice in the life and conduct of the state is possible only as first it resides in the hearts and souls of the citizens.” This inscription serves as a reminder to all of us who work in the Department of Justice. It tells us first that

justice is not the duty of government alone but the work of citizens as well. It also cautions us that when the people lose their faith in the institutions they trust to enforce the law, justice is no longer possible.

Each of us here today is a steward of justice. Each of us has the responsibility to protect the public trust. We have the responsibility, as well, to recognize when the public trust has been shaken.

No American has escaped injury from the espionage to which Robert Hanssen pled

guilty. But, for the men and women of the FBI, the wound is deeper. Together, Americans have felt the shame caused by the treachery of a countryman; the FBI has felt the pain inflicted by the betrayal of a brother.

The problem of the Hanssen case joins the difficulty with the files in the McVeigh case in injuring the public trust. And, these cases harken back to earlier tragedies in Texas and Idaho. In each of these cases, the injury was lessened considerably by the vast majority of men and women in the Bureau who performed their duties with exemplary professionalism and integrity. Men and women like the agents who quietly investigated Robert Hanssen—their colleague and coworker—to reveal his activities and ultimately bring him to justice.

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Still, we are called to a higher standard. Our challenge is not that we have problems. All institutions—even great ones like the Federal Bureau of Investigation—have problems. Our challenge is how we respond to these problems; how we, working together, answer the call to protect the people’s trust, reinforce freedom, and preserve justice.

President Bush’s choice to be the next director of the Federal Bureau of Investigation, Robert Mueller, is a principled and dedicated public servant. He has earned the trust of the presidents he has served, irrespective of their political affiliations. He earned my trust when he served America as acting deputy attorney general. He merits the trust of the American people and he will earn it again as director of the FBI. In the history of this agency, the nation has had 17 presidents and five directors of the FBI. The responsibilities that will fall on Bob Mueller’s shoulders will be great. But, my confidence in him is greater. I know that under his direction, we will triumph over the challenges ahead. And, the great law enforcement tradition of the FBI captured by those three words—fidelity, bravery, and integrity—will live on in the hearts and minds of the American people.

The year after he left the presidency, Teddy Roosevelt traveled abroad, allowing his successor, William Howard Taft, to settle into his new job. On his return from safari in Africa, Teddy Roosevelt stopped in Paris to speak to the students of the Sorbonne on “citizenship in a republic.”

Roosevelt’s speech was actually about character and its indispensable role in successful government. For a democracy to be good, he told the students, its citizens must be good. And, for a nation to be great, he said, its people must be willing to persevere in the face of adversity. What counts, Teddy Roosevelt said, is not the critic, not “the man who points out how the strong man stumbles, or where the doer of good deeds

could have done better.” What counts is the man or woman, said Roosevelt, “who is...in the arena.” The man or woman “whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes short again and again because there is no effort without error and shortcoming.” The man or woman who counts, said Roosevelt, is the man or woman who “actually strives to do the deeds...who knows the great enthusiasms; the great devotions; who spends himself in a worthy cause.”

For a century—the American Century—the men and women of the FBI have devoted themselves to a worthy cause—the cause of freedom. Those who are

here today and those who have gone before have answered the call of a grateful nation. Today, at the start of a new century, that call goes out again. It asks that we strive valiantly to do our duty, to know the great enthusiasms and the great devotions, and to live our lives in the arena.

We are called by those who have served and those who continue to serve America today. By the men and women who fought gangsters in our cities, battled hatred in our towns, and investigated treason

in our capital. Those who combat terrorists on the windswept Scottish highlands and drug traffickers in the jungles of South America; those who enforce justice in the boardrooms, on the Internet, and in the halls of government.

The call of duty beckons us. It issues forth from the patriots who pledged their lives, their fortunes, and their sacred honor to build a nation founded on freedom. It echoes down the Hall of Honor, from the agents who died protecting that freedom: doing their duty, serving America.

Their call is not just a call to action; it is a call to values. For without fidelity, without bravery, without integrity, we cannot succeed. With them, we cannot fail. ♦

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**For a century—the American Century—the men and women of the FBI have devoted themselves to a worthy cause—the cause of freedom.**  
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# A Systems Approach to Organizational Transformation

By BRIAN A. URSINO, M.B.A.



All law enforcement agencies experience varying degrees of change due to such factors as a new administration, new policing methods, or new crime trends. In recent years, however, the Washington State Patrol (WSP) has faced the challenge of implementing multiple changes that have had a significant effect on how the agency operates. Specifically, between 1995 and 1997, a new governor, a new WSP chief, and a new problem-oriented policing philosophy set in motion changes that led the agency to rethink its operational procedures and organizational

structure, in short, how it does business.

The new governor and the state legislature mandated that all state agencies develop and implement a Quality Initiative program (Quality)<sup>1</sup> to enhance public trust in state government and employ strategic plans that would facilitate a transition to performance-based budgeting. At the same time, the new WSP chief adopted a community-based policing philosophy that the agency named Problem-Oriented Public Safety (POPS).<sup>2</sup> Although POPS concentrates on public safety issues and Quality on business practice

processes, both philosophies focus on the customer.

## CHALLENGES

The WSP viewed these change requirements as presenting three main challenges. One involved achieving total integration of the new POPS and Quality philosophies.<sup>3</sup> The second dealt with adopting an entirely new approach to strategic planning. This required district and division commanders to develop strategic plans that support the agency plan and that shift the focus from counting traditional outputs (i.e., duties, such as the number

of traffic stops and arrests made, collisions investigated, and fingerprint cards processed) to measuring meaningful *outcomes* (i.e., results, such as reduced collisions, increased freight mobility, and real-time criminal identification). The third, and most monumental challenge, entailed changing the organizational culture from top to bottom, representing the surest hope of institutionalizing a better way of doing business.

This final challenge supports the theory that those agencies succeeding in implementing change took a systematic approach and reformed the agency infrastructure to support the desired change.<sup>4</sup> Since 1997, the WSP has reviewed and redesigned a significant portion of its system's infrastructure, including a new agency strategic plan (a 5-year plan updated annually) supported by individual district and division plans; new awards program selection criteria; revised sergeant and lieutenant promotional processes; re-engineered training processes; revised job performance appraisal systems; and a new management tool (loosely modeled after one devised by the New York City Police Department), the Strategic Advancement Forum. While all of these efforts helped the WSP face the challenges of implementing multiple changes, the agency viewed two systems as essential to driving the integration of POPS, Quality, and outcome-based performance measurement—its job performance appraisal system (JPA) and Strategic Advancement Forum (SAF).

## JOB PERFORMANCE APPRAISAL

Most performance appraisal systems do not tie *individual* goals and performance to *organizational* goals and performance.<sup>5</sup> Typically, the completed performance appraisal form and interview represent an isolated event focusing on the individual employee's performance, independent of the agency's strategy or direction. Compounding this "disconnect," most appraisals focus on the employee's past performance, independent of the agency's current and future direction. The WSP set out to break this trend.

### JPA Development

On July 1, 2000, the WSP implemented two new JPAs—one for troopers and sergeants and the other for lieutenants. This marked the culmination of an effort that began in January 1998, when the WSP

formed a committee of representatives from key stakeholder groups, including members of the Troopers Association, to ensure that it would address the concerns of all of its personnel. The committee reviewed a wide variety of information—WSP's previous JPA; other agency JPAs; over 2,000 recent publications and court cases concerning JPAs; WSP's strategic plan; and the principles of POPS and Quality—and began developing the new JPA system (form, manual, and process).

After obtaining provisional approval from the executive staff and representatives of affected officers, the WSP piloted the new JPA in two of its eight field districts. After the pilot, district representatives provided input to the committee. The biggest concern was that individual officers would be held accountable for *achievement* of a goal. They are not. Officers are only accountable

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***The WSP designed its new JPA system to guide performance efforts, as much as to appraise performance.***

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*Captain Ursino heads the Washington State Patrol's Criminal Records Division in Olympia.*

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to demonstrate that their individual work effort *supported* the goal. For example, troopers in a particular patrol area may have a goal to reduce collisions by 3 percent on a certain stretch of highway; however, the area experiences a prolonged period of adverse weather conditions that offset their best enforcement and problem-solving efforts and collisions actually increase by 5 percent. As long as the officers' work reports (data) document the weather conditions and demonstrate that the officers focused their efforts in the target area and engaged in problem solving, they would receive a favorable evaluation. With this type of feedback in mind, the committee modified the JPA accordingly and gained final approval from the executive staff and representatives of affected officers for statewide implementation. In May 2000, the WSP launched an extensive training effort. By July 31, every commissioned officer<sup>6</sup> had received training. To take full advantage of this statewide training opportunity, the WSP expanded the JPA training to include strategic planning and performance measurement elements as well.

### The JPA Form

The new JPA form consists of three sections. The first section, a fairly standard evaluation format, consists of both traditional core WSP values (e.g., appearance, courtesy, and integrity) and newer dimensions derived from the agency's strategic plan, POPS, and Quality (e.g., problem-solving skills, partnership cultivation, and

interest/knowledge of citizen concerns). In this section, supervisors rate officers on 29 critical dimensions employing a scale of fails to meet, meets, or exceeds expectations. Raters use behavioral benchmarks within each dimension to guide their evaluations.

The WSP designed the second section to drive the change of focus to the local strategic plan and outcome performance measures, rather than the traditional enforcement approach toward common objectives, such as reducing speed and alcohol-related collisions.<sup>7</sup> Hence, the second section of the JPA form outlines the goals, action plans, and

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**Since 1997,  
the WSP has  
reviewed and  
redesigned a  
significant portion  
of its system's  
infrastructure...**

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performance measures developed by officers in autonomous patrol areas or work units<sup>8</sup> (this also applies to nonfield personnel), as well as any additional expectations of the supervisor. For troopers and sergeants, the third section documents that the supervisor administered a regulation manual knowledge exam on policies that encompass areas concerning officer safety and agency risk management. For

lieutenants, the section consists of a professional growth and development plan.

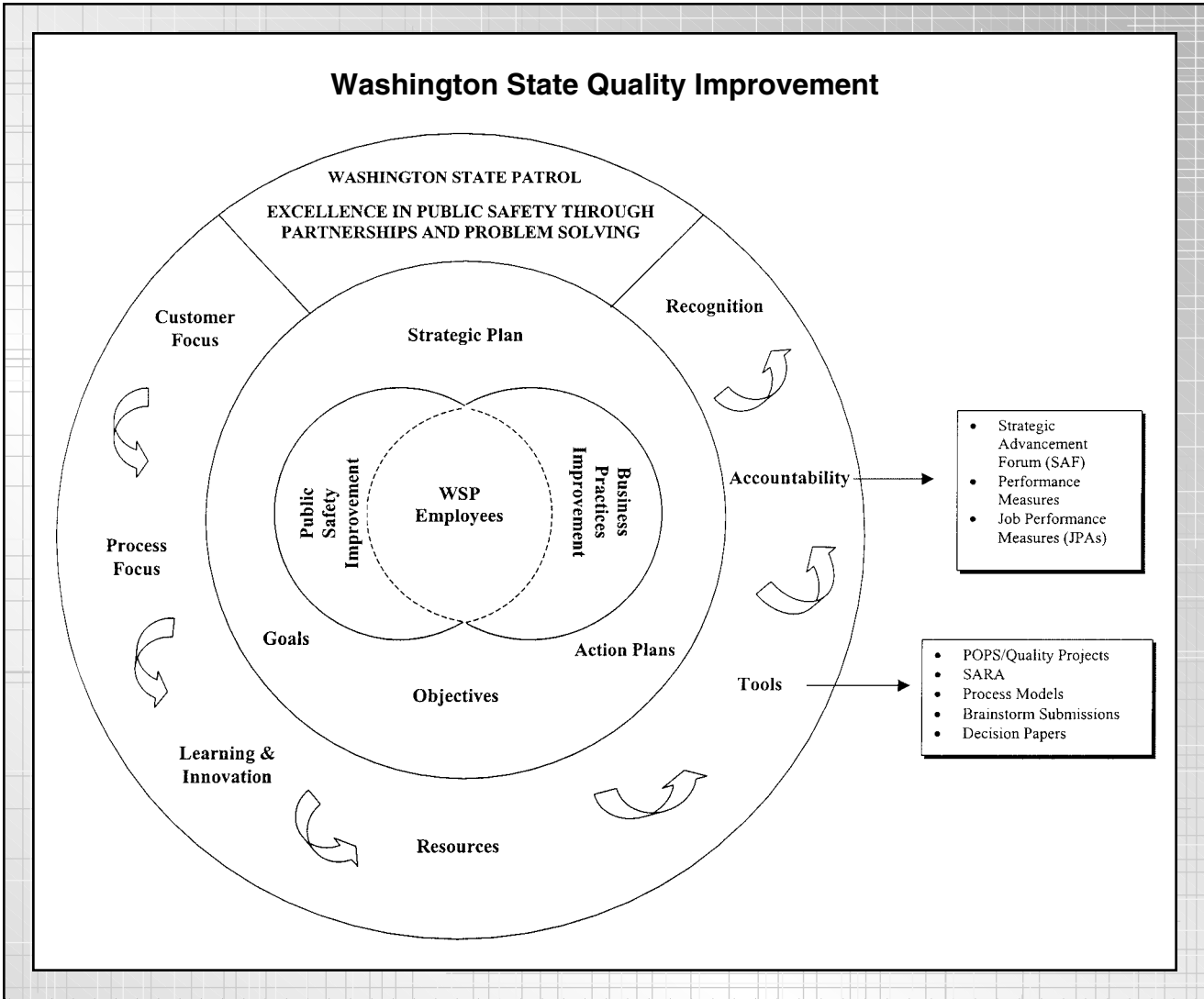
### The JPA Process

The WSP designed its new JPA system to guide performance *efforts*, as much as to *appraise* performance. The system focuses on the process, not on filling out a form. The new system is driving “a different way of doing business” in which officers direct the majority of their “discretionary” time efforts toward specific goals and performance measures of their patrol area. For example, instead of supervisors judging officers mainly by *outputs* (i.e., how many cars did they stop), these managers now judge their officers on *outcomes* (i.e., what activities they engaged in that support the goals of their patrol area).

The old way of doing business (*output* focus) encouraged officers to migrate toward “fishing holes” where abundant violators existed, but where problems with collisions or congestion may not have occurred. Under the new philosophy,<sup>9</sup> supervisors now judge officers more by the amount of time they spend in problem areas and in problem-solving efforts, with full understanding that their “numbers,” or *outputs*, may decrease.

The new JPA runs on a semianual cycle (January through June and July through December). The process begins with the pre-appraisal conference that occurs at the beginning of the appraisal period.

The JPA process is linked closely to the strategic plan, which the agency updates annually. Performance expectations begin with



the local goals and performance measures that already exist; however, individual work units have a great deal of flexibility in developing their action plans, or how they plan to accomplish their goals. For example, if supervisors have a goal with a 10-step action plan designed to support its accomplishment, they may require every trooper to participate in each step, or, more likely, they may employ a group-oriented approach or capitalize on the

individual talents of troopers within their detachment.

During the pre-appraisal conference, supervisors communicate individual expectations to the employee. Depending on the individual being evaluated, the supervisor may add individual expectations focusing on behavioral dimensions outlined in the first section of the JPA form as well.

Supervisors report monthly on their work unit's progress. District

commanders report strategic plan progress on a districtwide basis to headquarters in a standardized monthly command activity report that also requires reports on Quality and POPS activities that occurred during the previous month.

At any time during the 6-month appraisal period, the supervisor administers a standardized knowledge exam provided by the WSP Academy during the first month of the appraisal period. The supervisor



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immediately grades the exam and records the results (pass/fail) in the third section of the JPA form. If officers give any incorrect responses or receive a failing grade, they must undergo retraining at that time to ensure that they return to duty knowing all of the correct answers to critical policy questions.

During the post-appraisal evaluation conference, the supervisor reviews the individual officer's performance data<sup>10</sup> and assigns an appropriate rating. Supervisors should detect performance problems, if any, as they occur because they review work reports on a daily basis. In extreme cases of poor performance, supervisors can implement a job performance improvement plan.

#### **STRATEGIC ADVANCEMENT FORUM**

The WSP realized that the new JPA would help drive change from mid-level managers down to the line level. However, the WSP needed a mechanism to assist district and division commanders to drive and energize the implementation of their strategic plans while providing an accountability link between the command and executive staff levels. The WSP found the solution in a new management tool loosely modeled on one devised by the New York City Police Department (NYPD).<sup>11</sup> Although the WSP does not have the technology or personnel resources of the NYPD, the agency recognized how it could apply the managerial accountability inherent in the NYPD model while building its technology infrastructure to meet increasing data requirements.

#### **SAF Development**

The WSP established a committee to build a model that provided an active, two-way communication and accountability link between its command- and executive-level managers. The agency named its process the Strategic Advancement Forum (SAF) to encapsulate the desired purpose of the process—to report strategic plan progress in an open forum that also allows idea sharing among peer commanders; to provide an arena

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***By implementing a new job performance appraisal system and a new management tool, the agency strove to drive change at every level....***

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for two-way communication between the command and executive staffs; to create an environment where commanders could practice collaborative problem solving, consistent with the POPS philosophy, of obstacles they face; and to enhance accountability and leadership development of agency managers.

#### **The SAF Process**

During a 6-month cycle, each of the agency's five bureaus<sup>12</sup> conducts one SAF. In the course of the SAF, each district or division commander makes a presentation to

the SAF panel consisting of the chief, the assistant chief, and the presenter's bureau commander. The WSP conducted its initial SAF in January 2000 and the second SAF the following September and October. The WSP has scheduled subsequent SAFs to occur on a 6-month cycle in March and September of each year.

The agency provides district/division commanders with a “script” to assist them in preparing for their presentation. The purpose of the script is to clearly communicate the chief's priorities and to drive the district/division commanders' efforts toward facilitating needed organizational transformation within their areas of responsibility. Moreover, by having pre-exposure to a script, district and division commanders can go into the SAF knowing what to expect with minimal fear of being caught off guard. However, the SAF panel follows many responses with some pointed questions that require the commanders to demonstrate their grasp of the issues. The first two SAFs included such questions as the following:

- What have you done to implement your strategic plans?
- Describe what happened (progress in establishing performance measure baselines; goal/objective achievements; and difficulties/obstacles experienced inhibiting success).
- Give examples of what you have done to integrate POPS/Quality concepts into your action plans.

- What performance measures do you have and do they measure *outputs* or *outcomes*?
- What *outcomes* do your *outputs* support?
- Do you have any qualitative (customer-focused) performance measures?

The WSP changes the scripted questions every 6-month cycle. The agency also will broaden the questions from implementation focus to results focus as the new system progresses.

### The SAF Evaluation

The WSP distributed a survey to every district and division commander 2 weeks following the initial SAF. Twenty-four of its 32 commanders (75 percent) responded with some startling feedback, including—

- 75 percent agreed that SAF served as an effective means for reporting their strategic planning implementation efforts;
- 58 percent believed that the SAF actually improved communication between executive and command staffs;
- 62 percent felt that the SAF provided a learning environment; and
- 75 percent adopted the SAF management model within their own district/division.

These figures represent an impressively positive response for a first-time review of a management model that was controversial in its implementation. A compilation of

the narrative comments included on the survey proved especially valuable and allowed the WSP to modify the process protocols between SAF cycles.

### PRELIMINARY RESULTS

While it is too early to have any substantial data on how well the new JPA and SAF systems are operating, the results of internal and external surveys provide evidence of a positive trend. First, the State Department of Personnel administered a WSP employee survey in 1999 and 2000. The 2000 survey ratings were higher in every category, including job satisfaction.



In addition, a statewide citizen survey administered by the Washington State University in late 2000 rated the greater Wenatchee area the highest among the eight WSP districts. This proves significant because Wenatchee served as a pilot district for POPS integration and the revised JPA implementation.

### CONCLUSION

True integration of a new management philosophy requires a

complete organizational transformation. To accomplish this, an agency must adapt its infrastructure to support the philosophies and ideologies being implemented; otherwise, the culture of the agency will not change.

The Washington State Patrol set out to effect multiple changes through a two-pronged approach. By implementing a new job performance appraisal system and a new management tool, the agency strove to drive change at every level of the organization. While the Washington State Patrol recognizes that organizational transformation requires a 5- to 7-year process to fully infiltrate agency culture and become a way of doing business, it has made significant advances toward this goal in the past few years. With this in mind, the agency remains confident that its early successes will continue and even increase in the future. ♦

### Endnotes

<sup>1</sup> In April 1997, the governor directed all state agencies to develop and implement a program to improve the quality, efficiency, and effectiveness of the public services they provide. The mandate was simple—find out what is not working well and fix it. Quality improvements and regulatory reform go hand in hand, with a focus on improving customer service. The WSP encourages its employees to be creative, to have ownership of their work, to be innovative, and to use technology to better serve the citizens of Washington. Toward that end, the WSP has established an internal Quality consultant position. Also, every district and division has a Quality liaison who has received Quality process improvement training, and every WSP employee has received Quality awareness training.

<sup>2</sup> POPS is the WSP's community-based policing philosophy that brings the agency, citizens, and other stakeholder groups together as working partners to address public safety issues. The WSP obtained a grant to hire 72

new troopers to replace the 72 veteran troopers that the agency selected to become POPS troopers. These troopers received 2 weeks of training in the POPS philosophy. Between July 1998 and August 2000, the WSP deployed these troopers throughout the state to initiate POPS projects that focus on priorities established in the strategic plan and to involve their peers in problem-solving efforts. This strategy eventually will result in all troopers receiving training in POPS, achieving WSP's goal of evolving from a split force model (having specialized POPS troopers) to a total integration model (where problem solving becomes a way of doing business for all officers) by the end of 2003.

<sup>3</sup> The integration effort began in 1997, with the goal of total integration by 2003.

<sup>4</sup> Herman Goldstein, *Problem-Oriented Policing* (New York, NY: McGraw Hill, 1990).

<sup>5</sup> Dick Grote, "Public Sector Organizations: Today's Innovative Leaders in Performance Management," *Public Personnel Management* 29, no. 1 (spring 2000).

<sup>6</sup> The WSP has approximately 1,000 commissioned officers statewide.

<sup>7</sup> Although the WSP's primary mission is traffic law enforcement, it also functions in other public safety areas, including investigative, technical, forensic, and fire services.

<sup>8</sup> The WSP covers eight geographic districts within the state. Each district has several autonomous patrol areas that describe each detachment's work area or unit.

<sup>9</sup> One of the ways the WSP is encouraging its employees to accept the POPS philosophy involves teaching them how the SARA (scanning, analysis, response, assessment) problem-solving model also achieves their need to measure outcome performances developed

during the strategic planning process. The response phase in SARA represents the effort of their action plans, or *outputs*, while the assessment phase measures the *outcome* of their efforts (something the WSP traditionally has not measured).

<sup>10</sup> The WSP is developing information systems to give supervisors/managers the ability to access real-time data, as well as officer activity data, by location and time of day.

<sup>11</sup> The author first observed NYPD's CompStat Management model while attending the FBI National Academy in 1999 and further studied the approach during a conference in New York City later that year.

<sup>12</sup> The WSP is organized into five bureaus: Field Operations, Investigative Services, Technical Services, Fire Protection, and Forensic Services Laboratory Bureau.

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**Reputable Conduct: Ethical Issues in Policing and Corrections** by John R. Jones, Prentice Hall Canada Career and Technology, Scarborough, Ontario, Canada, 1998.

Why did a law enforcement officer in a large metropolitan police department brutalize a suspect? Why did it take several days for his colleagues to admit to witnessing the event? Such questions lead officers to ponder their moral duties and obligations, known generally as ethical considerations, as they relate to the law enforcement profession.

Some of the hardest decisions law enforcement officers make during their careers involve ethical issues. As a result, the actions taken to resolve these issues play a vital role in defining officers throughout their careers.

John R. Jones wrote *Reputable Conduct* as a working text on ethics for students pursuing law enforcement careers. As such, the book is well organized and easy to read. It keeps with the author's initial assurance that it is not intended to act as an ethics instructor with boundless knowledge, but rather as a learning aid that facilitates the ethics learning experience. In a light-hearted, yet thorough, review, Jones examines the law enforcement subculture, the ethical dilemmas

facing law enforcement officers, and the ethical decision-making process.

The author begins the book by reviewing the role of the ethics instructor and the purpose of teaching ethics. He then follows with a discussion concerning the philosophical question of whether ethics can be taught.

At the heart of his book, Jones explores the subculture of law enforcement, placing special emphasis on the law enforcement loyalty phenomenon and its effects on law enforcement ethics. He accentuates this controversial topic with anecdotes from his interviews of law enforcement officers.

One highlight of *Reputable Conduct* is the chapter "Tools for Moral Decision Making" in which Jones introduces several practical ideas and suggestions designed to assist law enforcement officers in resolving ethical issues. As illustration, the author provides an ethical decision-making scenario at the end of the chapter that allows the reader to apply the book's ideas and suggestions.

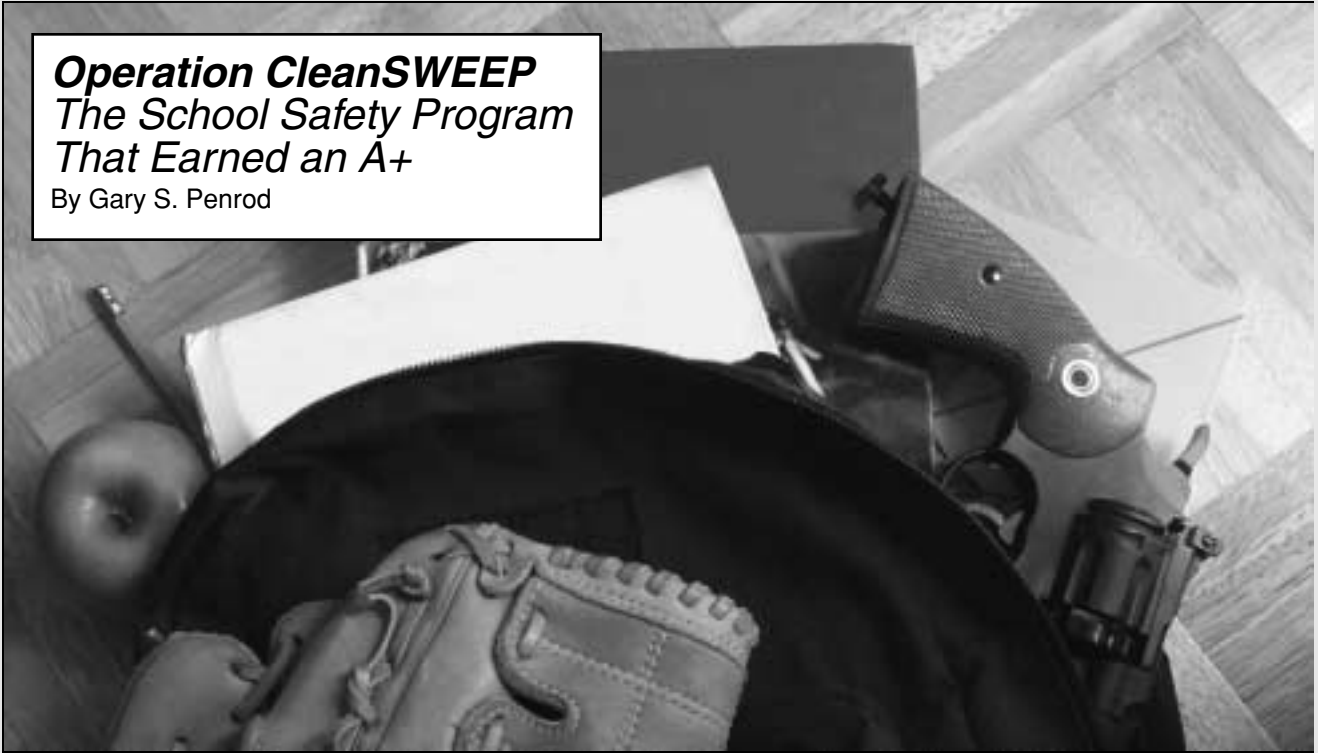
Jones dedicates his final chapters to practical exercises and an examination of the attributes of a reputable law enforcement officer. The practical exercises outline eight ethical dilemmas with challenging follow-up questions. The author then analyzes the ethics-related areas of moral courage, professional conduct, critical thinking, and public trust.

In *Reputable Conduct*, Jones provides a well-researched and thought-provoking text that, through its organization, detail, and graphic examples, is an easy read and a remarkable learning experience. Jones' humor, candid illustrations, and expertise make *Reputable Conduct* an excellent text for both law enforcement students and instructors.

Reviewed by  
Special Agent Stanley B. Burke  
Law Enforcement Ethics Unit  
FBI Academy, Quantico, VA

## **Operation CleanSWEEP** *The School Safety Program That Earned an A+*

By Gary S. Penrod



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**W**hen it comes to school security, the news is both good and bad. The bad news is that nothing can prevent a highly motivated individual from eluding even the best security measures whether at the White House, the courthouse, or the schoolhouse. While this represents the bad news of harsh reality, the good news reveals that, in fact, schools *can* put into place a wide variety of proven, and highly effective, safety procedures and precautions. These security measures—when used in a well-orchestrated manner—can provide a school with a tremendous web of interacting defenses, all of which contribute to making that campus a safer place.

In San Bernardino County, California, an innovative program has succeeded in reducing crime on high school campuses in recent years. A triple partnership program, Operation CleanSWEEP (Success With Education/Enforcement Partnership) includes the office of the superintendent of schools, the sheriff's department, and the court system. This dynamic and dramatically effective program has taken the most

productive elements of other approaches and melded them together to make a three-pronged attack on school crime through juvenile citations, security assessment, and special projects. As a result, many school officials and parents regard Operation CleanSWEEP as the premiere safe-campus program in the area today.<sup>1</sup>

### **NEED FOR THE PROGRAM**

The need for a program to reduce incidents of crime and violence on school campuses in San Bernardino County grew out of concern that youth in the county flouted the law on high school campuses and received neither genuine punishment nor rehabilitative guidance. The practice of suspending or expelling students appeared to incubate bad attitudes in at-risk youths without inculcating either a sense of personal responsibility for the behavior or a sense of how youths' actions would affect their future career goals. Therefore, in 1997, the sheriff's department set out to find a better way. It formed a committee of

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deputies, lawyers, judges, probation officers, and school officials to assess the problem and design a program that could offer safer campuses to San Bernardino County students.

### DESCRIPTION OF THE PROGRAM

Operation CleanSWEEP is a system that, among many different efforts, places students into *other* programs—programs designed to stymie their unacceptable behavior. For many teenagers, this program represents their first encounter with the concept of personal accountability, and it intends to have them feel the sting of a collective societal reprimand for their actions. At the same time, CleanSWEEP seeks to avoid criminalizing offending students (no permanent criminal record exists for cited students). Moreover, by keeping offenders in the classroom, the program avoids disrupting their education and also helps the school not lose attendance funding due to suspended or expelled students.

A single comprehensive program, Operation CleanSWEEP comprises several interlocking, interdependent parts designed to complement each other. Although CleanSWEEP is intended for the public to perceive it as a unified assault on school crime, in reality, it is a jigsaw puzzle of carefully interrelated factors, all designed to achieve the purpose of making life on a school campus more pleasurable and valuable for the average peaceful student. The entire community—parents, school staff, community-based organizations, public service agencies, local government, and civic groups—all support and lend their expertise and assistance.

### How Does It Work?

First, Operation CleanSWEEP takes a “carrot and stick” approach to the issue. In other words, students who violate certain criminal codes<sup>2</sup> on campus face a combination of retributive and rehabilitative measures. They receive both punishment and appropriate

counseling to help them avoid problem behavior in the future. A juvenile citation, or ticket, represents the “stick” of the program. Written by a vice principal or dean, the ticket places offending students in informal juvenile traffic court with their parents.<sup>3</sup> There, students can tell the hearing officer, or “judge,” their side of the story. The judge imposes a disposition, such as dismissed, convicted, or convicted with a suspended sentence. Usually, the judge fines students a dollar amount, ranging from \$30 to \$400. Students may waive these fines, the “carrot” of the program,

*if* they agree to certain sanctions, such as improving attendance or grades, providing community service, and attending diversionary programs, such as anger management or smoking cessation classes, depending on the nature of the offense.

The second part of the program involves the security assessment component, which inspects schools for safety-related problems. Deputies conduct detailed analyses of the facilities, scrutinizing every conceivable

aspect from a safety standpoint. Specifically, deputies look at—

- physical security;
- crisis response and disaster preparedness plans;
- agency relationships and reporting procedures/discipline policies;
- social and cultural observations; and
- staff development.

Also, the deputies distribute questionnaires to staff and students to gather input on safety-related issues and gain a snapshot of the school’s general attitude on the subject of school security. The deputies then package all of this information together and present it to the principal on a confidential basis. Principals can use this information as they see fit, although the sheriff’s department stands ready to work with the school to bring about any changes indicated by the audit, such as erecting fences around

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**Operation  
CleanSWEEP began as  
a concerted bundling  
of retributive and  
rehabilitative elements  
in a school/police  
partnership....**  
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the parking lot, limiting loitering spots, installing lights in crucial areas, or rewriting procedures for handling bomb threats.

Finally, a variety of special projects represents the third element of Operation CleanSWEEP. These comprise an array of speakers, classes, presentations, and promotional events designed to impart the best information possible about personal security. For example, the sheriff's department offers an extensive, and intensive, training session on crisis management that helps schools prepare for emergency situations, including an armed suspect on campus, a student with hostages, potentially violent parents on campus, bomb threats, poison scares, and suicidal students. Developed by a team of counseling professionals and veteran deputies, the plan also has realistic mock hostage scenarios that simulate a takeover of a campus so that both the school administration and department personnel can prepare for a potential crisis. Other events include safety fairs and seminars for parents and school staff members on such topics as gang recognition, conflict resolution, and diversity comprehension. The department tailors the training to meet the needs of each campus and school community.

### Who Pays for It?

Although nourished by several funding streams, including drug-related asset-seizure funds and standard county revenues, Operation CleanSWEEP conducts a continuing effort to research, locate, investigate, and apply for all funding resources for which the program qualifies. The program also works toward securing sponsorships from corporations and private sources. The sheriff's department intends for the program to operate as cost-effectively as possible, realizing that most grants and subsidies supplement, not supplant, original funding sources. Moreover, the savings in terms of deputies spending less time going to school campuses and the overall reduction in crimes perpetrated by students offset many of the expenses.

### BENEFITS OF THE PROGRAM

Operation CleanSWEEP has proven extraordinarily successful in the short time that it has existed. Implemented in September 1997, it originally was designed as a pilot program on only two high school campuses. Due to its success, however, it has spread rapidly to more than 60 campuses. A waiting list of three additional school districts attests to the need for, and popularity of, this kind of program.

Statistics collected by the sheriff's department for the first 2 years of operation from schools participating in CleanSWEEP show a dramatic decline in calls for service and in the number of suspensions and expulsions. For example, calls for service to countywide sheriff's department stations declined between 12 and 57 percent, indicating that fewer crimes occurred on those campuses employing the program. At every CleanSWEEP school, suspensions and expulsions came down (one school experienced a 70 percent drop), meaning that more students filled the classrooms instead of getting into

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**...by keeping offenders  
in the classroom, the  
program avoids  
disrupting their  
education...**

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trouble. Peripheral crime (i.e., crime committed around the campus but not on it) decreased as well.

Besides statistical affirmation, school personnel and parents have applauded the program. At school board meetings, parents and principals have attested to the decline in the number of fights as word of the monetary consequences of doing so spread. Parents have stated that CleanSWEEP made their children more tractable and, in some cases, enabled the parents to finally exercise some measure of control over them. School resource officers have reported that as offenders have gone through the court system and told other students about their experiences, students have begun to realize that the consequences for personal misbehavior are becoming unavoidable. All in all, Operation CleanSWEEP has had a tremendous impact. Not only have measurably fewer fights and acts of disruption and defiance occurred on participating school campuses but educators and students alike feel safer in their learning environment.

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## CONCLUSION

Ensuring that its youngest members receive an adequate education constitutes a noble goal of any cultivated society. An even more important objective involves children obtaining an education in a peaceful and secure environment, free from crime, harassment, and threats of any kind. While school officials attempt to create an atmosphere that fosters student progress, too often school children fall victim to the same criminal element that afflicts the adult population. When this occurs, criminal justice authorities must intervene.

In San Bernardino County, California, the sheriff's department, school authorities, the judicial system, and the community as a whole united in a common assault on juvenile crime. Operation CleanSWEEP began as a concerted bundling of retributive and rehabilitative elements in a school/police partnership to reduce danger and defiance on school campuses. It has shown students who flout the law that the community will hold them accountable for their aberrant behavior. However, instead of merely punishing the violators, the program provides them with the means of learning how to avoid repeating these offenses and encourages them to participate in healthy and productive lifestyle choices. Operation CleanSWEEP shows young offenders that their community values them and wants them to become respected, prosperous citizens. Such programs demonstrate how determined communities can reverse the bad news of school crime and violence into the good news of school security that keeps students safe and able to learn. ♦

### Endnotes

<sup>1</sup> For additional information and help in replicating this program, contact Sheriff's Training Specialist Clark Morrow at the San Bernardino County Sheriff's Department, Public Affairs Division, 909-387-3700.

<sup>2</sup> Examples include disturbing the peace, possessing tobacco or tobacco-related products, petty theft, affixing graffiti, vandalism, and littering.

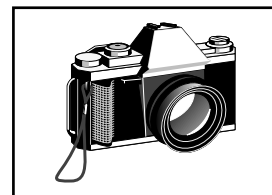
<sup>3</sup> The sheriff's department trains school staff members to recognize the elements of specific penal code violations and to properly complete a citation.

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*Sheriff Penrod heads the San Bernardino County, California, Sheriff's Department.*

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## Wanted: Photographs



**T**he *Bulletin* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in the magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

We can use either black-and-white glossy or color prints or slides, although we prefer prints (5x7 or 8x10). Appropriate credit will be given to contributing photographers when their work appears in the magazine. We suggest that you send duplicate, not original, prints as we do not accept responsibility for prints that may be damaged or lost. Send your photographs to:

Art Director, *FBI Law Enforcement Bulletin*,  
FBI Academy, Madison  
Building, Room 209,  
Quantico, VA 22135.



## *Drugs and Crime*

The *General Counterdrug Intelligence Plan (GCIP)*, a 90-page report from the Office of National Drug Control Policy (ONDCP), presents 73 action items included in the GCIP developed by a White House task force to promote a more integrated and strategically oriented counterdrug intelligence structure. The action items are organized in the following areas: national counterdrug intelligence coordination; national centers; regional, state, and local cooperation; foreign coordination; analytical personnel development and training; and information technology. This task force report also includes five appendices, including descriptions of the methodology used to develop the plan, the White House task authorities, missions of counterdrug intelligence centers, a glossary, and an itemized list of the plan's points of action. When implemented, the GCIP will facilitate the appropriate and timely exchange of information between the intelligence and drug-law enforcement communities. This report was commissioned by the U.S. Attorney General, Director of the CIA, Secretary of the Treasury, and Director of ONDCP and was supported by the Secretaries of the U.S. Departments of Defense, State, and Transportation. This report (NCJ 180750) is available electronically at <http://www.whitehousedrugpolicy.gov> or from the National Criminal Justice Reference Service at 800-851-3420.

## *Victims of Fraud*

*Victims of Fraud and Economic Crime: Results and Recommendations from an OVC Focus Group Meeting*, produced by the National Center for Victims of Crime, Office for Victims of Crime (OVC) summarizes efforts to improve services and support for fraud and economic crime victims. This OVC bulletin documents an April 1998 meeting of the Fraud Victimization Focus Group (sponsored by OVC) that studied the concerns, needs, and issues of the traditionally underserved fraud and economic crime victim population. Historically, these victims have not received the same service and support as victims of violent crime, despite suffering similar harm and damage. The bulletin describes several training ideas, promising practices, recommendations, and an action plan to assist economic crime victims. A section containing sources of additional information (contacts, relevant publications, and Web sites) also is included. To obtain a copy of this report (NCJ 176357), contact the National Criminal Justice Reference Service at 800-851-3420 or access OVC's Web site at <http://www.ojp.usdoj.gov/ovc>.

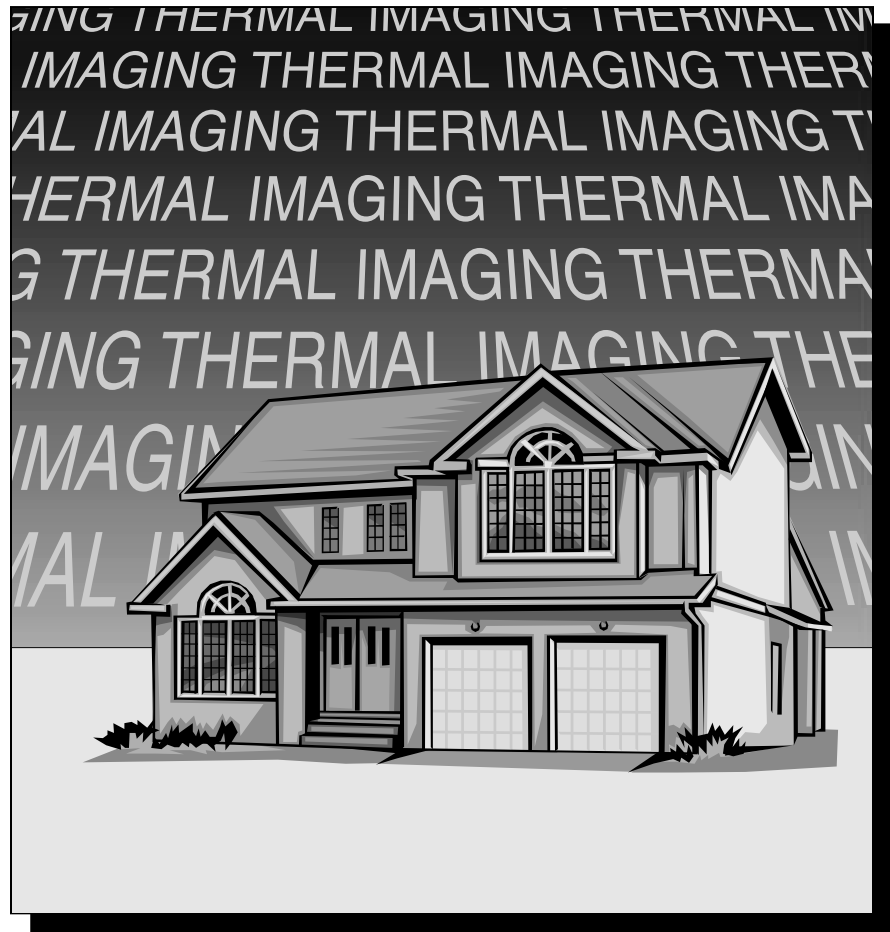
# Kyllo v. United States

## Technology Versus Individual Privacy

By THOMAS D. COLBRIDGE, J.D.

Few issues evoke as much passionate debate as police use of new technologies to combat crime. As noted in a previous article regarding thermal imaging,<sup>1</sup> the introduction of any advanced crime-fighting device into law enforcement's arsenal of weapons raises public concern about the erosion of constitutional rights. The specter of "Big Brother" looms large in the public mind. The debate is an honest one, raising basic issues regarding the proper balance between the personal privacy of individuals and the government's obligation to enforce the law and ensure public safety. Recently, the U.S. Supreme Court decided another skirmish in this ongoing philosophical battle in the case of *Kyllo v. United States*,<sup>2</sup> involving police use of thermal imaging.

This article discusses the Court's holding in the *Kyllo* case and its restrictions on police use of thermal-imaging devices.<sup>3</sup> The article also explores major themes



developed by federal courts when assessing the impact of new police technologies on traditional Fourth Amendment search law.

### FOURTH AMENDMENT SEARCH

The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches.<sup>4</sup> The drafters of the Constitution never defined the concepts of "unreasonable" and "search" as used in the Fourth Amendment. The Supreme Court struggled with these constitutional definitions for many years. Finally, in 1967 in the

famous case of *Katz v. United States*,<sup>5</sup> the Supreme Court formulated the modern definition of a search for purposes of the Constitution. The Court said that a Fourth Amendment search occurs whenever the government intrudes into an individual's reasonable expectation of privacy.<sup>6</sup> Supreme Court Justice Harlan, in a concurring opinion, established a useful two-prong test to determine if a reasonable expectation of privacy exists: 1) Do individuals have an actual (subjective) expectation that their activities will remain private? and 2) Is their subjective expectation of



Special Agent Colbridge is a legal instructor at the FBI Academy.

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**...technology in the hands of the government that reveals intimate details of in-home activities does raise constitutional concerns.**

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privacy one that society is willing to accept as reasonable (objectively reasonable)?<sup>7</sup> If the answer to both questions is yes, then a reasonable expectation of privacy exists, and any governmental invasion of that expectation is a search for Fourth Amendment purposes.

However, the Fourth Amendment does not prohibit all government searches, only unreasonable ones. Assuming the government does conduct a search as defined in *Katz*, is it reasonable or unreasonable? Unlike the question of whether a search has occurred, which can be difficult, the question of the reasonableness of the search is straightforward. If the search is conducted under the authority of a search warrant, or one of the recognized exceptions to the warrant requirement, the search is reasonable for Fourth Amendment purposes.<sup>8</sup>

### **THERMAL-IMAGING TECHNOLOGY**

Thermal imaging is not a new technology. It has been used by both

the military and law enforcement for years. The public is accustomed to seeing thermal images of battlefields on the nightly news and thermal images of the streets on popular police reality television programs.

All objects with a temperature above absolute zero emit infrared radiation, which is invisible to the naked eye. The warmer an object is, the more infrared radiation it emits. The thermal imager detects this infrared radiation and converts it into a black-and-white picture. The hotter areas (i.e., those areas emitting more infrared radiation) appear lighter in the picture; the cooler areas appear darker. The device does not measure the actual temperature of objects, only the relative temperatures of the surfaces of objects scanned. It emits no rays or beams that penetrate the object viewed. Law enforcement has found several uses for the device, including locating bodies, tracking fleeing persons, and detecting possible indoor marijuana-growing operations. Using the thermal imager in the

battle against indoor marijuana growing operations brought Danny Kyllo and the thermal imager to the attention of the U.S. Supreme Court.

### **THE KYLLO CASE**

The facts of the *Kyllo* case are typical of these types of investigations. An agent of the U.S. Bureau of Land Management developed information that Kyllo might be growing marijuana inside his home. Among the information he gathered were the facts that Kyllo's ex-wife, with whom he still was apparently living, was arrested the previous month for delivery and possession of a controlled substance; that Kyllo told a police informant that he could supply marijuana; and that other individuals suspected of drug trafficking lived in the same triplex occupied by Kyllo and his ex-wife. The agent subpoenaed Kyllo's utility records and concluded that his utility use was abnormally high. Finally, at the request of the investigator, a member of the Oregon National Guard scanned Kyllo's home using a thermal imager. The scan was made at approximately three o'clock in the morning from the streets in front of and behind the Kyllo residence. No search warrant authorizing the scan was sought. The scan revealed what investigators believed to be abnormally high amounts of heat coming from Kyllo's home. Investigators concluded that the facts of the case gave them probable cause to believe Kyllo was growing marijuana in his house. Investigators applied for and obtained a warrant to search Kyllo's home, using the results of

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the thermal scan as part of their probable cause. The search revealed marijuana plants, weapons, and drug paraphernalia.

After his indictment for manufacturing marijuana,<sup>9</sup> Kyllo moved to suppress the evidence gathered in his home on several grounds, including the use of the thermal imager without a search warrant. Kyllo argued that targeting his home with a thermal imager was an unreasonable Fourth Amendment search because there was no warrant authorizing it and the government could not justify the lack of a search warrant under one of the warrant exceptions. The trial court denied his motion and Kyllo was convicted. The case was appealed to the U.S. Court of Appeals for the Ninth Circuit.

#### The Circuit Court's View

The U.S. Court of Appeals for the Ninth Circuit heard the *Kyllo* case three times before it reached a final conclusion. The Ninth Circuit's struggle to decide this case is a reflection of the divergence of opinion that had developed in the courts regarding the warrantless thermal scanning of a home. It also is an interesting study of the difficulty that courts have in dealing with the impact of advancing technology on Fourth Amendment privacy issues.

The first time the Ninth Circuit considered Kyllo's appeal, it made no decision regarding the constitutionality of a warrantless scan of a home with a thermal imager. Instead, it sent the case back to the trial court for additional hearings on the capabilities of the thermal

imager.<sup>10</sup> The trial court found that the imager used by police in this case recorded no intimate details of life inside Kyllo's home; did not invade any personal privacy inside the home; could not penetrate walls or windows to reveal human activities or conversations; and recorded only heat escaping from the house.<sup>11</sup> On that basis, the trial court decided that the thermal scan did not invade a reasonable expectation of privacy and, therefore, was not a search within the meaning of the Fourth Amendment. It again refused to suppress the evidence. The case went back to the Ninth Circuit for a second time.

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***...using a thermal imager to surveil a home is a search under the Fourth Amendment, requiring a search warrant....***

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This time, a three-judge panel of the Ninth Circuit decided that the warrantless thermal scan of Kyllo's home was an unconstitutional search.<sup>12</sup> The court adopted the view that using a thermal imager to target a private home is a Fourth Amendment search, requiring probable cause and authorization of a search warrant or one of the exceptions to the warrant requirement.<sup>13</sup> Its decision was clearly a minority view among federal circuit courts at

the time.<sup>14</sup> However, the Ninth Circuit's debate over the issue was not finished. In July 1999, the court withdrew this opinion<sup>15</sup> and decided to reconsider the issue.

On its third and final consideration of this case, the Ninth Circuit reversed itself and held that a thermal scan of a residence is not a search under the Fourth Amendment.<sup>16</sup> It joined the majority of other federal circuit courts<sup>17</sup> in deciding that Kyllo had no actual (subjective) expectation of privacy in the “waste heat”<sup>18</sup> radiating from the surface of his home because he made no effort to conceal the emissions. Even if he could demonstrate an actual expectation of privacy in the escaping heat, the court reasoned that privacy expectation was not objectively reasonable. The court said that the crucial question to be answered in judging the impact of new technologies on privacy issues is whether the technology used to enhance the senses of the police officer is “so revealing of intimate details as to raise constitutional concerns.”<sup>19</sup> This court decided thermal imaging was not so revealing. To resolve the conflicting views among federal circuit courts regarding the constitutionality of residential thermal scans, the U.S. Supreme Court agreed to hear the case.<sup>20</sup>

#### The Supreme Court's View

The Supreme Court disagreed with the majority of the federal circuit courts. In a 5 to 4 decision, it ruled that targeting a home with a thermal imager by police officers is a search under the Fourth Amendment<sup>21</sup> and, therefore, requires

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probable cause and a search warrant unless the government can forego the warrant under one of the Court's recognized exceptions to the warrant requirement.<sup>22</sup>

The majority and dissenting opinions in this case reflect the difficulty courts in general have resolving the tension between individual privacy and governmental use of technology to combat crime. Several themes emerged in the opinion that echoed arguments made in previous rulings involving police use of emerging technologies.

The first theme involves the area that actually was searched. The majority opinion argued that the surveillance in this case was of the interior of a private home. The Court made it clear that the interior of a home indeed is still a castle. It said "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."<sup>23</sup> While the Court often has held that naked-eye surveillance of the exterior of a home and its curtilage by the police is not objectionable as long as police have a lawful vantage point from which to see the home,<sup>24</sup> this case involved more. Using the thermal imager, the majority felt, police were able to explore details of the interior of Kyllo's house that they could not have gotten otherwise without going inside.<sup>25</sup>

The dissent disagreed. It distinguished between technology permitting "through-the-wall surveillance," a search it admitted is presumptively unconstitutional,<sup>26</sup> and "off-the-wall surveillance," a

search it assumed to be constitutional.<sup>27</sup> The thermal imager in this case, according to the dissent, passively measured heat emissions from the exterior surfaces of Kyllo's home. There was no penetration into the interior of the residence by the police or by rays or beams emitted by the imager. The dissent argued that police simply gathered information exposed to the public from the outside of Kyllo's home.

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**...thermal imagers have been rendered superfluous in indoor residential marijuana-growing investigations.**

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A second theme discussed by the Court is the public availability of the technology used. This issue was raised in 1986 in the *Dow Chemical Company*<sup>28</sup> case. In that case, the Supreme Court noted in passing that "[i]t may well be,...that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public...might be constitutionally proscribed absent a warrant."<sup>29</sup> It was significant to the majority in the *Kyllo* case that thermal-imaging technology is not widely available to the general public.<sup>30</sup>

While the dissent did not specifically disagree,<sup>31</sup> it criticized the majority for not providing guidance regarding how much use constitutes general public use. It is difficult to discern from the opinion why public availability is important or how important it actually is. It may be a recognition on the part of the Court that as technology makes its way into everyday life, it becomes more difficult for individuals to claim a reasonable expectation to be shielded from its impact.

A third theme that emerges in this case is the debate over the nature and quality of the information supplied to the police by the thermal imager. The Court framed its discussion of this issue in terms of whether or not the technology enabled police to gather information regarding "intimate details"<sup>32</sup> of human activities in the home. This debate also arose in the *Dow Chemical Company* case. The issue there was the government's use of an aerial mapping camera to photograph a Dow Chemical plant to look for environmental violations. In its opinion, the Court said "[b]ut the photographs here are not so revealing of intimate details as to raise constitutional concerns."<sup>33</sup> The obvious corollary of that statement is that technology in the hands of the government that reveals intimate details of in-home activities does raise constitutional concerns.

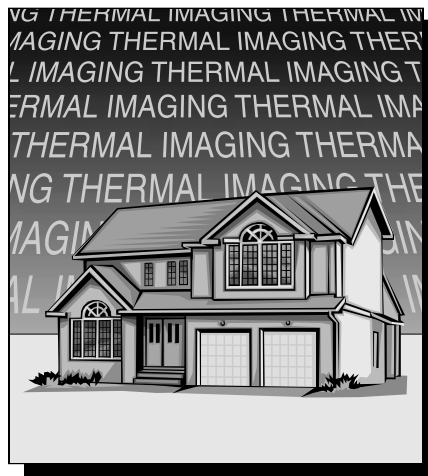
The *Kyllo* majority rejected the government's contention that because the imager used in this case did not provide exacting detail regarding activities inside Kyllo's home, it should not be of constitutional concern. As the majority

opinion put it, “In the home, our cases show *all* details are intimate details because the entire area is held safe from prying government eyes.”<sup>34</sup> The majority reasoned, for example, that the imager used in this case might reveal when a person inside the home regularly took a bath each night. Several previous Supreme Court cases were cited to support this view. In *United States v. Karo*,<sup>35</sup> where government agents simply detected the presence of a can of ether in a private residence by monitoring a beeper placed in the can, the Court found that the agents had conducted an unconstitutional search. In *Arizona v. Hicks*,<sup>36</sup> an officer lawfully inside a home moved a record player to see its serial number. The Court said that was an unlawful search because it went beyond what the officer could see in plain view. In both cases, the information gathered by the police was relatively insignificant, but because it was information about the inside of a home, the majority felt it was intimate enough to warrant protection from the government.

The dissent argued that the thermal scan here provided scant detail regarding the exterior of Kyllo’s home and certainly no information concerning its interior. In the dissent’s view, the only information gathered by police was an indication that some areas of Kyllo’s roof and outside walls were hotter than others. That kind of information, the dissent argued, is unworthy of Fourth Amendment protection because anyone can tell the warmth of a home’s walls and roof by looking at evaporation or

snowmelt patterns on the roof, and because most people do not care if the amount of heat escaping from their homes is made public.<sup>37</sup>

These major themes are important for law enforcement for two reasons. The first reason is practical—the *Kyllo* case will have an immediate impact on the use of thermal imaging in criminal investigations. The second reason is less immediate but more far-reaching. The Supreme Court has given law enforcement important clues regarding the government’s future use of technology to gather criminal evidence.<sup>38</sup>



### Limitations on the Use of the Thermal Imager

The most immediate impact of the *Kyllo* case is the elimination of the thermal imager as an investigative tool in residential indoor marijuana-growing cases. The majority opinion makes it clear that using a thermal imager to surveil a home is a search under the Fourth Amendment, requiring a search warrant

supported by probable cause or justified by one of the search warrant exceptions. If officers have probable cause to believe marijuana is being grown inside a house (or any premises where there is a reasonable expectation of privacy), they will get the warrant and search, not get a warrant and conduct a thermal scan. Consequently, thermal imagers have been rendered superfluous in indoor residential marijuana-growing investigations.

However, the thermal imager still is a valuable tool for use where there is no expectation of privacy or when police are excused from the warrant requirement. For example, using the device to search for fleeing fugitives in an open field, where there is no expectation of privacy, is permissible. In addition, using the thermal imager to target even a private residence still is arguably permissible in emergency situations where the search warrant requirement is excused.<sup>39</sup> For example, if faced with a dangerous barricaded subject or a hostage situation and officers decide an entry is necessary, no warrant would be necessary to thermally scan a premises as long as officers have reasonable suspicion to believe a threat to life exists.<sup>40</sup> Of course, if time permits, officers always should seek a warrant before entering a private area.

### LARGER IMPLICATIONS OF KYLLO

Law enforcement officers have sworn to uphold the Constitution of the United States and of their respective states. The oath includes the obligation to assess their actions in light of ever-changing

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interpretations of the law by the courts. That assessment must include the increasing use of sophisticated technology to ferret out crime.

In *Kyllo*, the Supreme Court provided some guidance to law enforcement regarding when its use of technology unreasonably infringes personal privacy. In light of *Kyllo*, law enforcement officers should ask themselves certain questions before using sophisticated devices in their investigations.

### What Is Being Targeted?

*Kyllo* confirms the familiar proposition that anytime police invade a reasonable expectation of privacy, it is a Fourth Amendment search requiring a warrant or an exception to the warrant requirement. That is true whether the invasion is physical or technological as in the *Kyllo* case. If the target of the technological surveillance is the interior of a home, the Supreme Court has made it clear that there *is* an expectation of privacy, and it *is reasonable*.<sup>41</sup> The same conclusion must be reached where the target of the surveillance is the interior of a commercial building inaccessible to the public. Where the target is the exterior of a premises, there likely is no expectation of privacy as long as police have a lawful vantage point from which to conduct their technological surveillance, and the results of the surveillance reveal nothing regarding the interior of the premises.

Similarly, if the thermal imager is used to search a person (as opposed to search for a person in an area where there is no expectation

of privacy), a reasonable expectation of privacy must be assumed. For example, using a thermal imager, it is theoretically possible to detect the presence of objects concealed under a person's clothing. Such a use of the thermal imager is a Fourth Amendment search and must comply with the constitutional requirements.

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**...the thermal imager is still a valuable tool for use where there is no expectation of privacy or when police are excused from the warrant requirement.**  
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### What Information Is Gathered?

It is clear from the *Kyllo* decision that the Supreme Court is concerned about the collection by the police of what it calls “intimate details” or “private activities occurring in private areas.”<sup>42</sup> The Court did not define what details are intimate and private and what details are not and wants to avoid deciding the issue on a case-by-case basis. Instead, the Court opted for a rule that within the confines of a home, “all details are intimate details”<sup>43</sup> and protected by the Fourth Amendment. Consequently, if officers are considering using a device that will enable them to gather *any* information regarding the interior

of a home (or any area in which there is a reasonable expectation of privacy) from outside, they must comply with the provisions of the Fourth Amendment.

### Is the Device Generally Available to the Public?

As noted above, the Supreme Court often limits its reservations regarding police use of technological devices to those devices not generally available to the public. It did so in its opinion in the *Dow Chemical Company*<sup>44</sup> case and in *Kyllo*.<sup>45</sup> It is unclear how important this consideration is to the Court. The implication seems to be that individuals cannot claim a reasonable expectation of privacy against technological intrusions that are widely known to occur and happen on a regular basis. The Court in *Kyllo* acknowledged that. It said “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example...the technology enabling human flight has exposed to public view (and, hence, we have said, to official observation), uncovered portions of the house and its curtilage that once were private.”<sup>46</sup>

Does that mean if thermal imagers become commonplace the Court will permit police to routinely scan the interior of homes without warrants? Probably not, for two reasons. The Court has long distinguished between police surveillance of the exterior of homes and the interior of homes: “We have said that the Fourth Amendment draws a firm line at the entrance to

the house, (citation omitted). That line, we think, must be not only firm but also bright...."<sup>47</sup> Given the strong language in the *Kyllo* opinion, it is unreasonable for police to assume that governmental intrusions into private areas are permissible simply because everyone is doing it. In addition, private (non-governmental) and commercial use of new technologies does not raise constitutional concerns. The Constitution was written to limit the authority of the government, not private citizens.<sup>48</sup> Consequently, the Supreme Court will not question the use of a thermal imager by an insulation company to demonstrate homeowners' need to insulate their homes, but put the same thermal imager into the hands of the police investigating a crime, and a multitude of weighty legal issues will arise. When assessing the Fourth Amendment implications of using technological devices to gather information about the interior of premises, officers should not rely on the fact that the device is widely available.

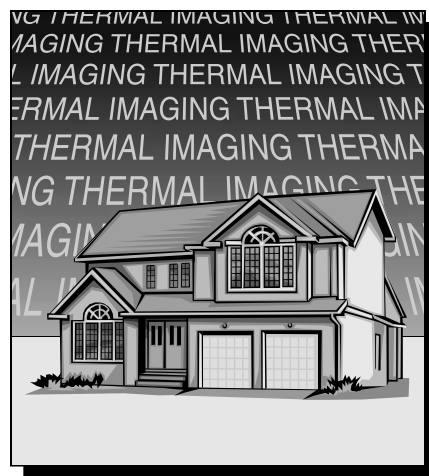
### Why Is the Device Being Used?

Using technology to gather evidence of criminal activity obviously raises Fourth Amendment concerns. However, criminal investigation is not always the goal. Often, technology is employed by the government for the broader purpose of public safety. The most obvious example is the use of X-ray and magnetic screening devices at airports and government office buildings. Courts have long recognized that such warrantless searches are permissible because they are administrative in nature, not criminal,

and are not very intrusive. They serve the valid governmental purpose of securing public safety, rather than gathering evidence of criminal activity.<sup>49</sup> So long as the technological search is narrowly limited to serve only that public safety purpose, it will pass constitutional muster.

### Where and When Is the Device Being Used?

Another factor courts consider when assessing police use of technology is where and when the device is used. If the device is used in public areas, such as airports and



public buildings, where people are aware of its presence, courts generally have fewer constitutional reservations regarding its use. Under those conditions, people can make a choice to enter the screening area or not. If they choose to enter, some courts have reasoned that they have consented to be searched by the device in use.<sup>50</sup> If the device is used in the dead of night, as happened in the *Kyllo* case, consent obviously is impossible.

## CONCLUSION

Historically, modern technology in the hands of the police has raised well-founded fears in the public mind concerning the erosion of privacy rights. The police, however, have an obligation to protect the public safety through whatever constitutional means are available to them. Criminal elements are quick to adopt the latest technological gadgets in order to stay one step ahead of the police. Police quickly must respond in kind. The tension between these two legitimate interests has created some of the most difficult issues faced by U.S. courts.

In *Kyllo v. United States*, the U.S. Supreme Court drew a bright line around the home and announced a rule that warrantless police use of technology stops at the front door. Simply put, the Court stated that if police use technology from outside the home to gather information they could not otherwise obtain without going inside, they have conducted a search within the meaning of the Constitution, which must be supported by a warrant or a recognized exception to the warrant requirement.

While the *Kyllo* case dealt specifically with thermal-imaging technology, it has much larger implications. Law enforcement officers have an obligation to assess all technological devices in their arsenal in light of the lessons delivered in this case. ♦

### Endnotes

<sup>1</sup> Thomas D. Colbridge, "Thermal Imaging: Much Heat but Little Light," *The FBI Law Enforcement Bulletin*, December 1997, 18-24.

<sup>2</sup> 121 S. Ct. 2038 (2001).



<sup>3</sup> While the *Kyllo* case dealt with a thermal imaging device, the legal principles discussed in this article apply equally to the Forward Looking Infrared Radar (FLIR) device, an adaptation of the thermal imager for use on aircraft.

<sup>4</sup> U.S. Const. Amend IV: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated...”

<sup>5</sup> 389 U.S. 347 (1967)

<sup>6</sup> *Id.*

<sup>7</sup> *Supra* note 5 at 361 (J. Harlan, concurring).

<sup>8</sup> *Supra* note 5 at 357. The exceptions to the search warrant requirement recognized by the Supreme Court are the consent search (*Schneekloth v. Bustamonte*, 412 U.S. 218 [1973]); the search incident to arrest (*U.S. v. Robinson*, 414 U.S. 218 [1973]); the emergency search or exigent circumstances search (*Warden v. Hayden*, 387 U.S. 394 [1967]); the motor vehicle search (*Carroll v. U.S.*, 267 U.S. 132 [1925]); the inventory search (*South Dakota v. Opperman*, 428 U.S. 364 [1976]); certain administrative searches of regulated businesses (*New York v. Berger*, 482 U.S. 691 [1987]); and “special needs” searches (*Veronia School District 47J v. Acton*, 515 U.S. 646 [1995]).

<sup>9</sup> 21 U.S.C. 841(a)(1).

<sup>10</sup> *United States v. Kyllo*, 37 F.3d 526 (9th Cir.1994).

<sup>11</sup> *United States v. Kyllo*, No. CR 92-051-FR (D.Or. March 15, 1996).

<sup>12</sup> *United States v. Kyllo*, 140 F.3d 1249 (9th Cir. 1998).

<sup>13</sup> *Id.* at 1255.

<sup>14</sup> The U.S. Court of Appeals for the Tenth Circuit held in 1995 that a thermal scan of a home was a search: *United States v. Cusumano*, 67 F.3d 1497 (10th Cir. 1995), vacated on other grounds, 83 F.3d 1247 (10th Cir. 1996). Two states also had adopted this minority view: *State v. Young*, 867 P.2d 593 (Wash. 1994) and *State v. Siegel*, 934 P.2d 176 (Mont. 1997).

<sup>15</sup> *United States v. Kyllo*, 184 F.3d 1059 (9th Cir. July 29, 1999).

<sup>16</sup> *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999).

<sup>17</sup> See *United States v. Ishmael*, 48 F.3d 850 (5th Cir. 1995); *United States v. Myers*, 46 F.3d 668 (7th Cir. 1995); *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994); *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995).

<sup>18</sup> *Supra* note 16 at 1046.

<sup>19</sup> *Supra* note 16 at 1047 (quoting *Dow Chemical Co. v. United States*, 476 US 227 (1986) at 238).

<sup>20</sup> *Kyllo v. United States*, 530 U.S. 1305 (2000).

<sup>21</sup> *Kyllo v. United States*, 121 S. Ct. 2038 at 2043.

<sup>22</sup> *Supra* note 8 lists the exceptions to the search warrant requirement.

<sup>23</sup> *Kyllo*, 121 S. Ct. at 2043 quoting *Silverman v. United States*, 365 U.S. 505 (1961) at 511.

<sup>24</sup> *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

<sup>25</sup> *Kyllo*, 121 S. Ct. at 2043.

<sup>26</sup> *Kyllo*, 121 S. Ct. at 2048 (J. Stevens, dissenting), citing *Payton v. New York*, 445 U.S. 573 (1980).

“  
...naked-eye  
surveillance of the  
exterior of a home...  
is not objectionable  
as long as police  
have a lawful vantage  
point from which  
to see the home...  
”

<sup>27</sup> *Kyllo*, 121 S. Ct. at 2048, (J. Stevens, dissenting), citing *California v. Ciraolo*, *supra* note 24; *Florida v. Riley*, *supra* note 24; *California v. Greenwood*, 486 U.S. 35 (1988); *Dow Chemical Co. v. United States*, *supra* note 19; and *Air Pollution Variance Board of Colorado v. Western Alfalfa Corporation*, 416 U.S. 861 (1974).

<sup>28</sup> *Supra* note 19.

<sup>29</sup> *Dow Chemical Company*, 476 U.S. at 238 (1986).

<sup>30</sup> *Kyllo*, 121 S. Ct. at 2043.

<sup>31</sup> The dissent did point out in a footnote that thousands of thermal imagers had been manufactured and are available for rental by anyone. See *Kyllo*, 121 S. Ct. at 2050, note 5. (J. Stevens, dissenting).

<sup>32</sup> *Kyllo*, 121 S. Ct. at 2045.

<sup>33</sup> *Dow Chemical Company*, 476 U.S. at 238 (1986).

<sup>34</sup> *Kyllo*, 121 S. Ct. at 2045 (emphasis in original).

<sup>35</sup> 468 U.S. 705 (1984).

<sup>36</sup> 480 U.S. 321 (1987).

<sup>37</sup> *Kyllo*, 121 S. Ct. at 2048 (J. Stevens, dissenting).

<sup>38</sup> Regarding certain technology in development, the Court offered more than clues. In a footnote, the majority specifically named surveillance devices under development and implied they would raise Fourth Amendment concerns. Those technologies are the Radar-Based Through-the-Wall Surveillance System, Handheld Through-the-Wall Surveillance, and a Radar Flashlight enabling officers to detect people through interior building walls. See *Kyllo*, 121 S.Ct. at 2044, footnote 3.

<sup>39</sup> See *United States v. Johnson*, 9 F.3d 506 (6th Cir. 1993).

<sup>40</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Menard*, 95 F.3d 9 (8th Cir. 1996).

<sup>41</sup> *Kyllo*, 121 S. Ct. at 2043. Of course, even inside the home, there is no expectation of privacy regarding matters that individuals choose to expose to the public: *Katz v. United States*, 389 U.S. 347 at 351 (1967), and cases cited at *supra* note 27.

<sup>42</sup> *Kyllo*, 121 S. Ct. at 2045.

<sup>43</sup> *Kyllo*, 121 S. Ct. at 2045.

<sup>44</sup> *Supra* note 29.

<sup>45</sup> *Supra* note 30.

<sup>46</sup> *Kyllo*, 121 S. Ct. at 2043.

<sup>47</sup> *Kyllo*, 121 S. Ct. at 2046, citing *Payton v. New York*, 445 U.S. 573 (1980).

<sup>48</sup> *United States v. Jacobson*, 466 U.S. 109 (1984); *United States v. Knoll*, 16 F.3d 1313 (2nd Cir.), cert. denied 115 S. Ct. 574 (1994).

<sup>49</sup> *United States v. Bulalan*, 156 F. 3rd 963 (9th Cir. 1998); *United States v. John Doe, aka Geronimo Pizzaro-Calderon*, 61 F.3d 107 (1st Cir. 1995); *United States v. \$124,570 U.S. Currency*, 873 U.S. 1240 (9th Cir. 1989).

<sup>50</sup> *United States v. DeAngelo*, 584 F.2d 46 (4th Cir. 1978), cert. denied 440 U.S. 935 (1979); *United States v. Miner*, 484 F.2d 1075 (9th Cir. 1973).

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*Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.*

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# The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.



Officer Barr

While off duty, Officer Jim Barr of the Torrance, California, Police Department was walking his dog at the beach when he heard two young boys calling for help from the water. The youngsters were being carried away from the shore by the riptide. Officer Barr also noticed a man struggling in the water. It was later determined that the man was the father of the two boys and had entered the water in an attempt to rescue them. Without regard for his own safety, Officer Barr quickly dove into the ocean and pulled one boy and the father to the shore and then returned to the water to save the other boy. The brave actions of Officer Barr saved the lives of this family who were visiting from another country.



Sergeant Krajniak

Sergeant Michael J. Krajniak of the White Pigeon Post of the Michigan State Police was dispatched to the scene of a domestic violence complaint. The suspect, who was the victim's estranged husband, had broken into the house and doused gasoline over the victim and throughout the house and held her hostage by threatening to ignite her with a lighter. Trooper Krajniak entered the house, which was filled with gasoline fumes, and attempted to convince the subject to release the victim. After a standoff, Trooper Krajniak noticed flames coming from a bedroom. He immediately entered the bedroom and discovered a pile of clothes on fire, which he quickly stamped out. Afterwards, the subject was arrested and the victim freed. Because of Trooper Krajniak's selfless actions, a fiery outcome was avoided and no one was hurt.



Sergeant Littlefield

Sergeant Harold T. Littlefield of the Zuni, New Mexico, Police Department (now with the Gallup, New Mexico, Police Department) responded to a residential fire call. Upon his arrival, he observed the house filled with smoke and flames coming from the roof. Disregarding his own safety, Sergeant Littlefield entered the burning residence in an attempt to rescue the occupants. While inside trying to rescue other residents, Sergeant Littlefield encountered a male attempting to douse the flames with water and refusing to leave. After removing the other occupants, Sergeant Littlefield returned inside the house to remove the male, but the thick, choking smoke forced him back outside. Fortunately, a few moments later the man emerged from the burning residence unharmed. Although the residence sustained substantial damage, Sergeant Littlefield's valiant actions prevented a loss of life.

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## ***Patch Call***



The patch of the Waterloo, Iowa, Police Department depicts a bright red griffin with a green eye. The griffin is a Greek mythological animal, with the head and wings of an eagle and the body of a lion. The griffin symbolizes vigilance—the department's motto. Members of the department have worn this patch on their uniforms since 1964.



The Harbor Springs, Michigan, Police Department's patch features the seal of the state of Michigan and commemorates that the city earned the "All American City" status in 1976. This award recognizes communities that provide exemplary service to their citizens through volunteerism. This small department is augmented by a volunteer staff of fully trained reserve officers who enable the department to maintain 24-hour coverage of the community.