



Forum

The Right Fight

Opening the Debate

Daniel Richman: Since September 11, two questions have dominated the discussions of how to prevent terrorist attacks. First, how do we ensure that the government has the authority it needs to gather, share, and use information about potential terrorist activities? Second, how do we ensure that this authority is not abused?

Responding

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Reply: Daniel Richman

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No question about American law enforcement has drawn more attention, before and after September 11, 2001, than how to reconcile domestic intelligence-gathering, and public-safety measures more generally, with our democratic ideals. Too often, though, the problem of democratic policing has been reduced to a question about the proper contours of judicial supervision. Are systematic checks on law enforcement by an independent judiciary required for the maintenance of a free society? Or do limits on policing, imposed by unelected judges, interfere by their very nature with the core democratic project of collective self-governance?

David A. Sklansky

Among the many virtues of Daniel Richman's splendid essay is the reminder it provides that there are ways to make anti-terrorism policing more democratic other than adjusting the bounds of judicial oversight. Richman is right to stress the importance of internal, structural checks on law enforcement, particularly those imposed by resource constraints, bureaucratic competition, and decentralization. He is right, moreover, to deny that civil liberties and democratic accountability must always come at the expense of security. And he makes a convincing case that a sound version of law-enforcement federalism—the proper form of cooperation between local police agencies and their federal counterparts—could make the fight against terrorism both more effective and more compatible with our democratic aspirations. If I differ with him, it is mainly on a practical question: what should conscientious local authorities do when this happy prospect seems, for the moment, out of reach?

Half a century ago, there was broad agreement that local control of policing made Americans safer both from crime and from government overreaching. Law-enforcement federalism in the United States was something close to orthodoxy, endorsed by everyone from the justices of the Supreme Court to J. Edgar Hoover. Then came Bull Connor's fire hoses, the riots of 1967, and the Chicago Convention. By the 1970s hardly anyone thought local police departments were friendlier to American democracy than the federal government—the stunning excesses of Hoover's FBI notwithstanding.

Richman is right that local police departments have changed for the better since then. The most important change may not be the one he identifies, the rise of “community policing”—a phrase that can mean, and has meant, almost anything, except for subjecting police departments to meaningful mechanisms of democratic control. As or more important may be the entry of large numbers of minority and female officers into an occupation that, as late as 1970, was overwhelmingly white and almost exclusively male. One could say in 1970 the same thing that Richman says today: local police departments could not afford to slight the concerns of minority groups. But they did. That is less apt to happen today, not just because theories of police management have improved, but because the concerns in question have been brought inside the department, both in the rank-and-file and, increasingly, throughout the chain of command.

The improvement should not be exaggerated. Precisely because local police departments slighted their relations with minority communities for so long and so spectacularly—despite their strong institutional interests in doing otherwise—it would be a mistake to assume that those same interests will now make them consistent defenders of civil liberties, or uniformly more sensitive to minority concerns than federal law-enforcement agencies. (The ranks of federal investigative agencies have grown more diverse, too.) The remarkable spectacle, over the past three years, of local police departments standing between minority groups and federal anti-terrorism efforts may say less about changed structural dynamics of law enforcement than it does about the extremism brought the Department of Justice by a particular attorney general and a particular president.

But that spectacle also made clear, as Richman rightly insists, that local police departments are not always less friendly than federal law-enforcement agencies to civil liberties and minority rights. This means, in turn, that each level of law enforcement can serve usefully as a check against excesses by the other. The Department of Justice can continue to employ criminal prosecutions and “pattern and practice” suits to guard against civil-rights violations by local police—even if, over the past four years, neither tool has seen much use. And local law-enforcement agencies, as they have done recently, can help to discourage federal anti-terrorism initiatives from running roughshod over the interests of minority groups.

Richman urges local authorities interested in playing this beneficial role to “step up to the plate.” They should stop passing “empty resolutions of condemnation,” he suggests, and instead concentrate on helping to shape the emerging national intelligence network from within. The difficulty with this advice is that it assumes minimally responsible leadership at the federal level. It assumes that federal authorities, recognizing the importance of maintaining good relations with local law enforcement, will listen to and strive to accommodate concerns raised at the municipal level. Unfortunately, there has been little evidence since 9/11 of that kind of listening. The objections, for example, that local authorities raised to the sweep interviews of Middle Eastern men in late 2001 appear to have gone unheard by the Justice Department. Far from learning from its experience, the Department told itself that the interviews had helped to build closer ties between law enforcement and immigrant communities. Half a year after the first wave of interviews, moreover, the General Accounting Office found that DOJ “did not know what the status of the project was” and “had no specific plans for conducting a comprehensive assessment of the lessons learned from the project.”

Episodes like this teach the same broad lesson as the myopia displayed by so many local police departments in the 1960s: no more than any other bureaucracy, law enforcement agencies do not always act in enlightened response to their long-term institutional interests. We have had a Justice Department for the past four years that has shown itself, repeatedly, to be less focused on results than on ideology. With a pitcher like that on the mound, there is something to be said for staying in the dugout.