

Kathryn Johnston and Police System Failure: What Can Congress Do About It?

The Kathryn Johnston case is the tip of an iceberg.

The iceberg is the lack of accountability in the way that police and prosecutors are using informants in drug law enforcement in America. Checks and balances are so lax that in the Kathryn Johnston case police were able, in a couple of hours, to fabricate evidence and obtain an emergency no-knock search warrant based on an imaginary person. We are forced to face the question: How many other warrants are obtained each year based on fabricated informants? If the informant does exist in most cases, what does our justice system require of informants beyond mere existence?



Atlanta Police Chief "gets an earful at a community meeting on the Johnston shooting." *Creative Loafing* cover story 6/27/07: [MeltDown](#)

Congress should take the lessons learned from the Kathryn Johnston tragedy to enact basic safeguards that ensure our criminal justice system will protect the American people and is worthy of their full confidence. Congress should:

- **Clarify Performance Measures.** Clearly define success so law enforcement knows what is expected.
- **Collect Basic Data.** Enable oversight and evaluation by collecting data.
- **Allow the Informant's Reliability to be Tested in Court.** Provide enough information to the judge, the prosecutor and the defense to make an informed decision about the reliability of the informant.

What Happened in the Kathryn Johnston Case?

On the Tuesday before Thanksgiving, Atlanta narcotics officers Gregg Junnier, Jason Smith and Arthur Tesler were under pressure to meet quotas for arrests and warrants.

Officer Smith says that he was alone in the woods at about 2pm when he found some baggies of marijuana and put them in his patrol car. Later, when the officers

searched suspected drug dealer Fabian Sheats and found no drugs, officer Smith planted baggies of marijuana from his patrol car on Mr. Sheats, and the officers threatened to arrest him for the marijuana unless Mr. Sheats gave them information that would lead to another arrest. To get out of going to jail for the drugs that had just been planted on him by the police, Mr. Sheats said that at 933 Neal Street, the home of 92-year-old Kathryn Johnston, they would find a man named "Sam" and a kilogram of cocaine.

At 5pm, the police officers asked their career informant, Alex White, to help them by making an undercover cocaine purchase from "Sam," but Mr. White was not available. So the officers lied on an affidavit and by 6pm they had secured a warrant from the court to conduct a no-knock raid on Kathryn Johnston's home based on false pretenses.

It took the officers less than two minutes to pry off the burglar bars and use a ram to burst into Kathryn Johnston's home without announcing who they were. Just long enough for her to find her rusty .38 revolver to protect herself. A terrified Kathryn Johnston fired one shot at the intruders but missed. The police officers fired 39 shots at Kathryn Johnston, killing her with five or six shots throughout her body and hitting three fellow police officers with "friendly fire." While the 92-year-old woman lay bleeding on the floor, the officers handcuffed her and searched her home only to find no "Sam" and no drugs.

As Kathryn Johnston remained bleeding in handcuffs on the floor, the Atlanta narcotics officers decided to lie to their superiors and to the public, planted three baggies of marijuana in Kathryn Johnston's home, and prepared two bags of crack (which they also illegally possessed) to claim that their informant had purchased them in her home.

The officers asked Mr. White to corroborate their false story, but he refused and instead contacted the press claiming that he feared retaliation from the police for refusing to lie. Three weeks later, officer Junnier was the first to tell the truth. Now two officers have plead guilty to manslaughter and other charges, one officer has criminal charges pending, and eight other officers have been suspended pending the FBI's ongoing investigation. Many feel that these horrors would have never been brought to light if Alex White had not reached out to the press in fear.

The report, [Overkill: The Rise of Paramilitary Police Raids in America](#) by Radley Balko and the Cato Institute's online map, [Botched Paramilitary Police Raids: An Epidemic of "Isolated Incidents"](#), have documented over three hundred similar cases across the United States – evidence that Kathryn Johnston is not an isolated case but rather the inevitable consequence of a flawed method of drug law enforcement.

What can Congress do to stop this from happening again?

Although the federal government was not responsible for the death of Kathryn Johnston, the federal government has had its share of unfortunate cases. As we analyze what went wrong in Atlanta, we find that the federal government's drug law enforcement system has many similar weaknesses which should be corrected before

another avoidable tragedy occurs. The federal government can promote accountability within state and local law enforcement agencies by leading through example, requiring uniform data collection and reporting, and mandating compliance with basic safeguards to qualify for current federal funding streams.

We recommend that, in the name of Kathryn Johnston and to inspire confidence in the integrity of our justice system, Congress enact legislation that will improve the safety of drug law enforcement in the United States.

1. Revamp Performance Measures to Clearly Define Expectations

In the Kathryn Johnston case, the false story about the informant was an instance of "cutting corners" because narcotics officers are under pressure to meet quotas for arrests and warrants.

- Rand Csehy, attorney for officer Gregg Junnier, *2nd Atlanta police officer to plea in shooting death*, by Bill Torpy and Bill Rankin, *The Atlanta Journal-Constitution*, April 24, 2007.

In order to meet any goal, we must have a way to measure progress. Many federal, state and local police agencies currently measure the success of their drug law enforcement efforts by the number of arrests – encouraging more arrests each year than the year before. Unfortunately, this measure has been counter-productive.

- The arrest-numbers outcome measure is not useful because in order to fulfill the goal of arresting more people each year, there must be more drug crime each year. If drug crime went down significantly, then police could not successfully increase their arrest numbers and they would fail to meet expectations.
- The arrest-numbers measure provides an incentive to arrest drug users, rather than the high-level dealer who is responsible for the flow of drugs to the users, because it takes longer to investigate a high-level dealer than a drug user. Therefore, officers increase their arrest numbers by only arresting low-level drug users.
- The rush for arrest numbers motivated the Kathryn Johnston tragedy, the Tulia drug scandal, and many others. When the Tulia arrests were made, the Texas drug task forces' funding was directly related to how high their arrest numbers were – the more arrests the task forces made, the more funding they could obtain.

Drug law enforcement in America is in dire need of effective performance measures.

- The Drug Enforcement Administration (DEA) is not accountable through performance measures. "Since 2003, the DEA has attempted to develop relevant performance measures, most recently through a study funded by the Office of National Drug Control Policy. However, in June 2006 the DEA reported to us that there are no accurate measures of the quantity of drugs

available on a national level and it may be impossible to develop a model that measures the impact of law enforcement activities on drug availability. The DEA stated that it will continue its efforts in this area." (US Department of Justice Office of Inspector General report, [Top Management and Performance Challenges in the Department of Justice – 2006](#), under *Supply and Demand for Drugs*.)

- The Justice Assistance Grant (JAG) Program / Edward Byrne Memorial Justice Assistance Grant (JAG) Program [performance measures](#) for drug law enforcement are solely based on netting higher numbers of arrests, investigations and seizures.
- The DOJ Office of Justice Programs measures success by statistics like enforcement numbers and overall crime rates ([DOJ Office of Justice Programs 2007-2012 Strategic Plan](#))
- Federally funded [COPS programs](#) measure success by tracking overall crime and offender numbers.

The *Threat Model* is a more useful system of measuring drug law enforcement success. The goal is to identify and then systematically disrupt and dismantle large drug trafficking organizations from the top.

- Narcotics police begin by identifying and prioritizing illegal drug trafficking organizations in their jurisdiction, with the most significant threats becoming the highest priority organizations for the agency.
- Drug enforcement officers are then evaluated and rewarded for investigating, disrupting and dismantling the priority organizations.
- The agency that continues to simply arrest large numbers of drug users is redirected to focus efforts on the highest threats, the identified priority targets.

After one year of implementing the *Threat Model* at the Texas Department of Public Safety (DPS), drug arrests went down by 40 percent, yet drug seizures doubled. The 100 percent increase in the amount of drugs seized shows that the narcotics officers were not idle, and that the past pattern of arrest-numbers driven drug law enforcement resulted in a lower quantity of drugs being affected. In the same year, Texas DPS identified the five major drug cartels that they say are responsible for bringing over one-half of the illegal drugs into the United States and made significant progress fracturing these international organizations by disrupting their Texas operations.

We should not continue to use the counter-productive arrest-numbers measure when the *Threat Model* can fundamentally shift our substantial investment in drug law enforcement toward a more successful path.

2. Permit Oversight by Requiring Data Collection and Reporting

Enable Oversight and Evaluation by Collecting Basic Data

While it is prudent to protect the confidentiality of certain features of any informant program, the secrecy that surrounds informants today has become an impediment to accountability. Neither the public nor legislators have access to enough information to know whether police and prosecutors are using informants effectively to protect public safety. For example: Informants help us solve crime, but informants also commit crimes. Should we not be able to compare the crime that informants have helped us prevent to the crimes that informants themselves commit? How else can we know the value of the informant program that is in our law enforcement budgets each year? We should have an opportunity to set policy based on knowledge about what trade-offs are made and how large the informant system has become.

The Uniform Crime Reports (UCR) system is an example of a current system that requires all local, state and federal law enforcement agencies to report basic data to a central location so that it can be compiled and reported to legislators and to the public. Congress should require all law enforcement agencies in the United States to collect and report certain basic data about their use of informants. That information should be collected by an agency that publishes the results to Congress and to the public.

As Professor Alexandra Natapoff has pointed out:

The FBI has requested funds to improve its data collection and monitoring of its confidential informants. It states that “without the personnel necessary to oversee the [monitoring system,] the FBI will be unable to effectively ensure the accuracy, credibility, and reliability of information provided by more than 15,000 [Confidential Human Sources].” If the FBI cannot ensure the reliability of its sources without better data collection and monitoring, then state and local law enforcement agencies such as the Atlanta police department cannot be expected to either, and we will continue to see tragedies like Kathryn Johnston

Aggregate information including the total number of criminal informants, their zip codes, race and gender, their productivity in solving crimes and the crimes they commit, should be reported to the Bureau of Justice Statistics along with other aggregate criminal justice data that appears in the Uniform Crime Reports.

Require Officers to Report Serious Misconduct

In the Kathryn Johnston case, law enforcement officers have confessed to conspiring to violate Ms. Johnston’s rights and to falsifying evidence. Currently, there is no statutory requirement that law enforcement officers report serious misconduct to the appropriate authority.

A law enforcement agent having knowledge that another law enforcement agent has committed a violation of applicable rules of conduct that raises a substantial question as to that agent's honesty, trustworthiness or fitness as an agent in other respects, should be required to inform the appropriate disciplinary authority. Those who do not report this type of serious misconduct should face discipline, including loss of his or her job as a public servant.

Self-regulation of the law enforcement profession requires that members of the profession take effective measures to protect the public when they have knowledge that a serious violation of the rules has occurred. Reporting a violation is especially important where the victim is unlikely to discover the offense absent such a report.

If a law enforcement officer were obliged to report every violation of a rule, the failure to report any violation would be an offense, but such a requirement could prove to be unenforceable. This proposal limits the reporting obligation to offenses that a self-regulating profession must vigorously endeavor to prevent – dishonesty and lack of fitness for office.

3. Allow the Informant's Reliability to be Tested in Court

Protect the Integrity of the Warrant

As in almost all cases across the country wherein law enforcement agents approach judges to secure search warrants based on information provided by informants, police officers in the Kathryn Johnston case obtained a search warrant for her home by making the boilerplate assertion that "an informant of known reliability" gave them information. This boilerplate language does not give the court enough information to make an informed decision about probable cause, especially when the police are requesting an emergency "no-knock" warrant, which will place officers and civilians in a life-threatening situation.

The guarantee of the 4th Amendment to the United States Constitution that "no Warrants shall issue, but upon probable cause" is at the very heart of our criminal justice system. Congress should protect the integrity of the warrant process by enacting a heightened warrant requirement when the warrant is based upon information from an informant. For the same reasons that federal law currently provides heightened requirements when police seek a warrant for certain computer crimes or to obtain a wiretap, the law should require more information in warrants that are based on the word of an informant.

When a law enforcement officer requests a warrant based upon information provided by an informant, the officer should be required to include in his or her affidavit certain basic information that will allow a court to properly scrutinize the application, such as:

- the informant's criminal history,
- how many times the informant has worked as an informant in the past,
- how many past cases based on this informant have been successful and how many have failed,

- any knowledge that the informant has provided false information in the past, and
- how much the informant has been compensated, whether in cash or leniency.

If law enforcement agencies were required to carefully document the history of each informant, then the system would benefit. The facts which support an informant's suitability to serve as an informant would also support his or her reliability in a warrant application, and would be supported further by the successful investigation of that case, the facts of which would then support renewing the informant's suitability with the law enforcement agency the following year. This monitoring system would allow a judge to see what facts support the law enforcement agent's assertion that the informant is reliable in each case and to appropriately consider the question of "probable cause" as our Constitution promises.

Provide Reliability Hearings

If Kathryn Johnston had survived her encounter with the Atlanta police department, she could have been pressured into pleading guilty to possession of drugs under the threat of facing maximum sentences in prison for opting to go to trial. Currently, many wrongful convictions represent instances where an innocent defendant pleads guilty before trial because he or she has no access to information about the alleged informant in the case. Others refuse to plead guilty and exercise their right to trial, but are falsely convicted because the jury accepts the informant's testimony as true. Each time this happens, our justice system loses integrity.

Defendants should have the right to a pretrial reliability hearing to learn about the credibility of the informant who will present evidence in the case. Illinois has adopted this procedure for in-custody informants. As Professor George C. Harris pointed out in his law review article *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 4 (2000), the theory behind pre-trial reliability hearings mirrors the reasoning in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), in which the United States Supreme Court established the necessity for reliability hearings for expert witnesses. There are many similarities between informants and expert witnesses. Like experts, informants are "paid" by one party, so they are more one-sided than typical witnesses. Informant testimony is coached and prepared by government lawyers, making them challenging to cross-examine. Informant stories are hard to corroborate or contradict in cases where their testimony is the central evidence against the defendant. Finally, like experts, informants may have an air of "inside knowledge" about the crime that may sway the jury – an air that is not easily dispelled by cautionary instructions.

For these reasons, the Supreme Court recognized that discovery, cross-examination and jury instructions – the traditional adversarial protections against false testimony – do not guarantee a rigorous jury evaluation of expert testimony. The court must act as a preliminary "gatekeeper" and evaluate the reliability of experts before the jury hears them. For these same reasons, courts should act as gatekeepers and evaluate the reliability of informants before they can testify at trial. This would permit fuller disclosure of the deals that informants make with the government, allow more thorough testing of the truthfulness of informants, and reduce opportunities for

abuse. It would also acknowledge that even well-meaning police and prosecutors may need help in ascertaining the reliability of their criminal sources.

The reliability hearing would permit the court to examine the informant's incentives to lie, his history of escaping punishment through informing, the existence, or lack, of corroboration, and the government's efforts to check the informant's story. The reliability hearing should be available in any case, pre-plea as well as pre-trial, in which a compensated informant is the source of inculpatory evidence. In cases that are not on track for trial, the confidentiality of the informant can be protected by sealing the reliability hearing, as courts do today in sensitive cases.

Require Corroboration

In the Kathryn Johnston case, the officers were able to fabricate the existence of an informant in part because they knew that even if the case went to trial they would never be required to corroborate, or validate through a second source, information allegedly obtained from the informant. Under current law in many states, criminal defendants cannot be convicted solely on the word of an accomplice to the crime. Because accomplices are inherently unreliable they must be validated by a second source. Informants are, in theory, more unreliable than accomplices because they do not have to admit their own guilt in order to testify. Yet, in the federal system and in most states, a defendant can be convicted solely on the word of one informant or snitch.

Informants should be corroborated in every case by a second source just as accomplices are. In 2001, Texas passed a law requiring corroboration of all informant testimony in order to secure a drug conviction. [H.B. 2351 in the 77th Texas Legislature](#), reads in relevant part :

A defendant may not be convicted of an offense under [the Controlled Substances Act] on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient for the purposes of this article if the corroboration only shows the commission of the offense.

Representative Shelia Jackson-Lee of Texas has introduced a bill that would apply to all state and local agencies that receive federal funding from the Department of Justice. The *No More Tulias: Drug Law Enforcement Evidentiary Standards Improvement Act of 2007*, H.R. 253, was introduced in the 110th Congress, 1st Session, and referred to the Committee on the Judiciary. Representative Jackson-Lee's bill would require corroboration of any informant or law enforcement officer's testimony. It reads in pertinent part:

A State shall not receive any amount that would otherwise be allocated to that State from any law enforcement assistance program of the Department of Justice, unless the State (1) does not fund any antidrug task forces for that fiscal year; or (2) has in effect throughout the State laws that ensure that a

person is not convicted of a drug offense unless the fact that a drug offense was committed, and the fact that the person committed that offense, are each supported by evidence other than the eyewitness testimony of a law enforcement officer or an individual acting on behalf of a law enforcement officer.

As Representative Jackson-Lee's H.R. 253 points out:

Texas's 'corroboration' law was passed thanks to a coalition of Christian conservatives and civil rights activists. During floor debate, conservative Texas legislators pointed out that Mosaic law requires corroboration: 'One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.' Deuteronomy 19:15. Jesus concurred with the corroboration rule: 'If thy brother shall trespass against thee, go and tell him his fault between thee and him alone. . . . But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.' Matthew 18:15-16.

Texas's 'corroboration' law had an immediate positive impact. Once prosecutors needed more than just the word of one person to convict someone of a drug offense they began scrutinizing law enforcement tactics. This new scrutiny led to the uncovering of massive corruption and civil rights abuse by the Dallas police force. In what became known nationally as the 'Sheetrock' scandal, Dallas police officers and undercover informants were found to have set up dozens of innocent people, mostly Mexican immigrants, by planting fake drugs on them consisting of chalk-like material used in Sheetrock and other brands of wallboard. The revelations led to the dismissal of over 40 cases (although some of those arrested were already deported). In April 2005, a former Dallas narcotics detective was sentenced to five years in prison for his role in the scheme. Charges against others are pending.

Many regional antidrug task forces receive up to 75 percent of their funding from the Byrne grant program. As such, the United States Government is accountable for corruption and civil rights abuses inherent in their operation.

Congress should require corroboration of informant testimony in every drug case. Many law enforcement agencies claim to already require corroboration as a precautionary measure, but all should be required to be equally cautious because lives are at stake.

Allow Judicial Review of the Informant's Value

Currently in the federal system, the only way that a criminal defendant can reduce a long statutory mandatory minimum sentence is to become an informant, yet it is in the prosecutor's sole discretion whether or not the informant will have access to this benefit. A defendant can put his life on the line by fully cooperating with the government and revealing all of the sensitive criminal information that he knows, just to have the prosecutor refuse to allow the court to consider reducing his mandatory

minimum sentence. The prosecutor stands as the exclusive and unilateral gatekeeper to judicial review – it is in her sole discretion whether or not to allow the court to consider the evidence.

Judges should be permitted to decide whether an informant is valuable enough to justify a departure from the mandatory minimum sentence. The statutes and the sentencing guidelines, 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, and Fed. R. Crim. P. 35, should be modified so that courts, rather than prosecutors, can decide the value of our informants.

Require Compliance to Qualify for Federal Assistance

All federal drug law enforcement efforts should be required by statute to implement the safeguards outlined herein. The main federal agencies that participate in drug law enforcement are: the U.S. Department of Justice (DOJ), the U.S. Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and the U.S. Internal Revenue Service (IRS). These federal agencies have various terms to describe the people who we identify herein as “informants,” but all of the safeguards described herein should apply to people who are acting on behalf of law enforcement agencies but who are not employees of the agency, whether the person is described by the agency as a “confidential informant,” “cooperating witness,” “confidential source,” or any other name.

State and local drug law enforcement efforts depend on several types of assistance from the federal government: (1) direct funding, (2) gifts and appropriation of equipment and other assets, and (3) assistance from federal personnel in joint task force type operations. These benefits to state and local law enforcement flow through various federal agencies: DOJ, DEA, FBI, ICE, CBP, IRS, as well as the U.S. Department of Homeland Security (DHS) and the U.S. Department of Defense (DOD).

Currently, all of these benefits are conferred on state and local law enforcement agencies with virtually no strings attached. To obtain certain DOJ funds, like HIDTA funds, recipients must currently submit a “Certificate of Compliance” to show that they meet certain criteria like deconfliction, but other federal funding streams, like the JAG funds, remain exempt from even these minimal compliance requirements. Further, stories have surfaced about joint drug enforcement operations where the federal and local enforcement agents will “forum shop,” or choose whether to make the cases federal or state cases based on which rules are the most permissive.

The public safety measures described herein should apply to all drug law enforcement in which the federal government is involved at any level. Congress should require state and local law enforcement agencies to certify compliance with all of the accountability measures outlined herein in order to qualify for direct funding, equipment or other assets, or assistance from federal agents in joint efforts. To continue to contribute federal resources to state and local law enforcement agencies after the scandalous patterns and practices have come to light in Atlanta and in so many other cities, without requiring them to change, would be irresponsible public policy.