

ISSUE BRIEF

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Federalism Allows Law Enforcement to Determine Counterterrorism Policies That Work Best

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With an increase in the national response to terrorism, many people believe the principle of federalism has little utility today or that states do not have much to contribute in counterterrorism policy or activity. When it comes to domestic security, however, federalism is more relevant than ever, and the states have a vital role to play in counterterrorism. Local law enforcement agencies have the flexibility and authority to design counterterrorism programs that best fit their respective jurisdictions. With that flexibility and authority, our cities are more secure.

One-Size-Fits-All Usually Fits Few Well. The 10th Amendment of the U.S. Constitution simply states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,

or to the people.” Those 28 words confirm that states possess the ability to tailor policies that best address the issues they confront. Because of the various demographic differences among the states, a one-size-fits-all policy may not work or may not work most effectively and efficiently in a particular state.

When the federal government nationalizes an inherently state or local issue, it ensures that whatever policy it produces will fail to solve the problems. We know from the welfare reforms in the 1990s that a policy solution in one state may not work well in another state, which demonstrated the importance of states maintaining the flexibility and authority to tackle issues as they see fit. A robust policy competition among the states will enable America to find out what works and what does not. Domestic counterterrorism policy is no different.

Each Community Presents Unique Challenges Requiring Unique Solutions. America, thankfully, does not have a national police force. The Federal Bureau of Investigation (FBI) has authority over federal crimes, including terrorism, and exercises its authority by investigating and arresting suspected terrorists. With only

15,000 agents for the entire United States, the FBI lacks the resources to protect every American city. Because of this inherent limitation, outside of constitutional and legislative protections, America’s law enforcement community is not covered by a one-size-fits-all policy on how best to protect U.S. cities.

State and local law enforcement entities are not displaced by federal authorities (except in some very narrow areas of national control) and instead retain their inherent sovereign authority to design counterterrorism programs that are tailored to the needs of each community. These needs are typically defined by demographics, risk assessments, community norms, and other factors unique to each jurisdiction. The ideal outcome for Americans is one where there is strong cooperation and true partnering between the FBI and other federal law enforcement agencies and state and local law enforcement entities. We are getting closer to that ideal with each passing year.

The NYPD Example. Recently, the New York Police Department (NYPD) received potentially unfair negative media coverage about its counterterrorism policies, specifically its Muslim surveillance program. The focus of criticism involves

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the NYPD's surveillance of Muslim college students, restaurants, and mosques throughout the northeast United States. The NYPD insists that its policies and practices adhere to the 1985 *Handschu v. Special Services Division* guidelines, as modified via judicial approval in 2002 after the September 11, 2001, terrorist attacks. Recent events in France may bolster the NYPD's case on the importance of conducting surveillance of individuals based on leads.

In *Handschu*, the court held that the NYPD's surveillance of political activity had violated the First Amendment's free speech clause. The decision resulted in a set of guidelines that regulated the NYPD's programs covering political activity. To engage in surveillance, the 1985 guidelines required a warrant based on suspicion of criminal activity and prohibited certain activities absent unlawful conduct. In 2002, a federal judge modified the *Handschu* guidelines to reflect the new realities arising from the terrorist threat.

In response to the criticism, New York City Mayor Michael Bloomberg stated: "They are permitted to travel beyond the borders of NYC to investigate cases. They can look at websites [and] they can watch television to detect unlawful activities or where there might be unlawful activities to get leads. We don't target individuals based on race or religion. We follow leads and we are consistent, I think, with the guidelines resulting from the *Handschu* federal court decision." In a speech at Fordham Law School, NYPD Commissioner Ray Kelly indicated that the NYPD surveillance program has helped stop more than a dozen terrorist plots against New York City, despite the fact that "no other police department in the country is bound by these rules, which

restrict police powers granted under the Constitution."

Time will tell if the NYPD adhered to the *Handschu* guidelines. The point here is that a dual sovereignty has provided the NYPD and its leaders with the flexibility and authority to develop policies specific to the enormous challenges faced in New York City, which is America's most at-risk city with the highest population density and countless vulnerabilities. No other American city must confront the terrorist threats that New York City faces.

On the Other Coast. Across the country in Los Angeles, the policies implemented by the NYPD may not work. Los Angeles faces a different set of challenges, so the Los Angeles Police Department (LAPD) may choose to utilize different methods for securing its city.

For example, under the leadership of Deputy Chief Michael Downing, the commanding officer of the Counterterrorism and Special Operations Bureau, the LAPD launched a Liaison Section to serve as the face of the LAPD to the various Muslim communities. Because of the community norms in Los Angeles and the importance the LAPD has placed on developing strong relationships with its Muslim communities, the Liaison Section is specifically walled off from the intelligence and investigation elements at the LAPD.

Officers in the Liaison Section routinely spend time among the Muslim population, including at restaurants, mosques, and even private celebratory events. The relationships developed through this outreach program are genuine and stronger because of the compartmentalization policy. When an event occurs that causes conflict, LAPD Liaison Section officers can serve as honest

brokers to reduce or eliminate any tensions.

If an LAPD investigation results in counterterrorism actions within a particular part of the Muslim community, the Liaison Section officers can seriously state they did not have any knowledge of the investigation and did not provide any information to the investigators. Again, this critical fact leads to a far more positive and productive environment in Los Angeles.

These two examples present two different approaches to the same issue. Without a federalist approach, the nationalization of domestic counterterrorism policies by the FBI would result—as does every other nationalized program—in a one-size-fits-all policy that would be less effective and, therefore, a less secure America.

Forbearance Is Okay. With all of the media and civil liberties attention being given to the NYPD and its surveillance policy, pressure will build on Congress to do something—hold a hearing or pass a law. State or local oversight entities, including the courts, will review what has actually occurred in New York City and either affirm the work done or require changes to the policy. Either way, Congress should exercise forbearance and respect the constitutional right of those state or local entities to do their jobs.

Federalism Is Alive and Well
Despite the belief that state and local involvement in law enforcement is no longer relevant or useful, it is being used responsibly across America by state and local entities. These entities must have the flexibility and authority to design policies based on each entity's particular demographics and needs. These unique approaches will help

counterterrorism officials identify best practices and implement better programs. More critically, federalism will keep us safer.

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