



Talking about Local Surveillance and Immigration Enforcement

Why impose legislative limits on local law enforcement agencies?

Summary

- BORDC’s proposed reforms are straightforward.
- Limits on local law enforcement authorities enhance public safety.
- Protections against profiling are necessary to protect vulnerable communities, and require at least transparency—and, ideally, consequences—to deter and remedy violations.
- Local limits on intelligence collection are necessary to restore constitutional rights.
- Local immigration enforcement harms the community and the nation.
- Local limits on law enforcement authorities functionally protect several communities plagued by formally separate problems.

BORDC’s proposed reforms are straightforward.

BORDC’s [proposed reforms](#) include essentially four elements:

1. **Transparency:** a requirement that local police record, track, analyze and disclose aggregate data about the demographics of people stopped, searched, arrested, charged, and subjected to force.
2. **Accountability:** a private right of action in state court to seek injunctive relief or damages, as well as attorneys’ fees, as a remedy for biased policing indicated by statistical evidence.
3. **Constitutional rights:** a series of simple requirements to reiterate longstanding Fourth Amendment protections eroded by the post 9/11 domestic spying regime.
4. **Local autonomy:** limits on cooperation by local authorities with federal counterparts relating to immigration enforcement and intelligence collection.

Limits on local law enforcement authorities enhance public safety.

Federal mandates, such as immigration enforcement or intelligence collection, distract local law enforcement agencies and divert scarce resources from their core public safety mission. Time that law enforcement agents spend scrutinizing law-abiding behavior or enforcing federal regulations outside their areas of expertise could instead be used to investigate and prevent crime.

Increasingly pervasive surveillance does not actually enhance security, but in fact undermines it. The reason why authorities failed to catch the “underwear bomber” of Christmas 2009 before his flight was that reports of his intentions—from the man’s own family—were lost among the reams of information that was likely far less important. If our law enforcement agencies are searching for needles, adding hay to the stack does not help.

Profiling according to race, religion, or country of origin wastes taxpayer dollars by scrutinizing law-abiding people rather than focusing investigative attention on real criminal activity. As demonstrated by the Christmas 2009 “underwear bomber” and “Jihad Jane,” profiles based on race and ethnicity fail to include all potential threats. Nor can religious profiling suffice, as demonstrated by Joseph Stack and Timothy McVeigh. To catch criminals or threats to national security, law enforcement agencies must focus their resources on investigating individuals whose *behavior* indicates potential criminal activity.

Requiring local law enforcement agencies to perform immigration enforcement and collect domestic intelligence undermines the community trust necessary for effective investigations. For instance, witnesses of crimes are demonstrably less willing to report criminal activity or share information with police when they fear they will be questioned about their immigration status or coerced into serving as government informants.

Requiring that police have probable cause to justify a search leaves ample room to investigate real threats, while at the same time protecting law-abiding individuals from unreasonable intrusions, and protecting our free society from the fear of arbitrary scrutiny by the state.

Local limits on intelligence collection are necessary to restore constitutional rights.

***Secrecy vs. Transparency:* Much of the federal surveillance regime remains cloaked in secrecy, precluding the operation of checks and balances.** Neither Congress nor the public knows the contours of the warrantless wiretapping scheme, which was ruled unconstitutional by the only court to ever review it on the merits, before Congress later authorized it. And the FBI’s standards governing the infiltration of activist groups and religious institutions—a core feature of its notorious COINTELPRO abuses from the 1970s—remain redacted in its most recently disclosed policies.

***The Local Role in the Federal Scheme:* Much of the domestic surveillance regime relies on state and local law enforcement agencies.** Federal law enforcement agencies employ a small fraction of the nearly one million local law enforcement agents around the country. While a city cannot constrain federal officials, limits on local officials can have a relatively greater impact on the ground, while also sending an important signal to Washington.

Measures to curb some abuses by local law enforcement agencies have been proposed in Congress, but have not yet been enacted. The JUSTICE Act aimed to curb abuses of the USA PATRIOT Act, but was rejected in favor of a reauthorization of the PATRIOT Act in early 2010. The End Racial Profiling Act, which has been introduced successively in several sessions of Congress, has yet to be introduced. Nor has Congress addressed comprehensive immigration reform.

In addition to our constitutional separation of powers among three branches of government, our government is also defined by a separation between federal and state institutions. **Our Constitution carefully guards the sovereignty of states, which, along with municipalities, play a crucial role in defending constitutional rights.**

Fourth Amendment vs. Unreasonable Searches and Seizures: Because the Fourth Amendment prohibits unreasonable searches and seizures, pervasive surveillance has long been held unconstitutional—but the federal government continues to pursue it nonetheless. Increasingly, state and local law enforcement agencies have joined the intelligence collection arena, whether through independent efforts or those coordinated through interagency fusion centers or Joint Terrorism Task Forces (JTTFs).

Chilling Effects on Constitutionally Protected Speech: The expectation of government infiltration and surveillance deeply chills individual activism and the ability of Americans of all walks of life to practice their First Amendment rights. **Because they discourage speech and advocacy, profiling and political surveillance pose a grave threat to our civil society and all the various causes that Americans might organize to support.**

Non-violent activist groups around the country have suffered infiltration and monitoring by covert government agents. **As demonstrated during COINTELPRO (when the FBI monitored and harassed Dr. Martin Luther King Jr.) and prior eras of government surveillance (when authorities investigated figures including Albert Einstein), invasive investigative powers often grow politicized.** Contemporary examples abound of unjustified undercover infiltration by police agencies across the country, but without transparency, the full range of abuses remains unknown.

Groups across the ideological spectrum have been unfairly maligned by the intelligence establishment. The Missouri Information and Analysis Center (MIAC) issued a report in 2009 identifying libertarian supporters of Ron Paul as potential threats to national security. In the same month, the North Central Texas Fusion Center issued a bulletin calling for scrutiny of the constitutionally-protected lobbying activities of the nation’s most diverse coalition of anti-war activists, as well as the largest Muslim civil rights organization.

Political profiling vs. democracy: The harms of political profiling extend beyond intrusions on the rights of particular individuals and groups. The basis for the First Amendment lies largely in privacy’s public dimension: the preservation of space for robust speech and unfettered dissent. By chilling the exercise of freedoms of association and speech, surveillance threatens the very structure of our civil society.

Local immigration enforcement harms the community and the nation.

Violations of immigration laws are civil infractions, rather than criminal offenses. Enforcement of such minor offenses should not take precedence over investigating and solving crimes.

Enforcing federal immigration law at the local level undermines the trust of vulnerable communities, and thereby public safety. Witnesses of crime are less willing to share information with police when they fear they will be questioned about their immigration status. **Even conservative think tanks such as the Goldwater Institute and chiefs of police around the country have concluded that local immigration enforcement undermines public safety.**

Local enforcement of federal immigration law has created a humanitarian and economic crisis, tearing apart working families, and imposing immense costs on businesses. Moreover, immigrants from troubled parts of the world are among our country's most effective ambassadors to their countries of origin.

Local protections against profiling are necessary to protect vulnerable communities.

Profiling affects all communities of color, which share an interest in curtailing it. Local efforts to enforce federal immigration laws have led to profiling of Latino Americans at the same time that various communities of color, including African Americans and Native Americans, remain subject to disproportionate scrutiny in drug enforcement. Muslim, Arab, and South Asian Americans have increasingly encountered profiling by counterterrorism efforts, which essentially cast suspicion on the basis of association.

Profiling casts guilt on the basis of association, which is constitutionally prohibited by the First Amendment's Free Exercise Clause, the Fourteenth Amendment's Equal Protection clause, the Fifth Amendment's Due Process Clause, and the Sixth Amendment right to trial.

Federal agencies have adopted profiling as a law enforcement strategy while publicly disclaiming it. The Department of Justice issued guidance in 2003 prohibiting racial profiling. However, the guidance allowed vast loopholes for national security and border integrity, and also failed to include any enforcement mechanism. Moreover, the FBI's most recent regulations include a "domain assessment" authority that calls for surveying communities nationwide and identifying ethnic enclaves.

Constitutional remedies to address discrimination were dramatically curtailed by *Washington v. Davis*, which in 1976 held that in order to establish a constitutional violation, a plaintiff must show not only a disparate impact according to a protected classification (e.g., race, religion, country of origin), but also an intent to discriminate. Establishing discriminatory intent is essentially impossible as an evidentiary matter—which is why **measures creating a disparate impact standard are doctrinally significant.**

Local protections against profiling require at least transparency—and ideally consequences—to deter and remedy violations.

The "driving while black" cases addressing racial profiling in the war on drugs often required that police agencies begin compiling demographic data about the individuals stopped, searched, and arrested, in order to establish whether profiling is actually happening. **Measures requiring data collection merely ensure transparency and can support a law enforcement agency's claims that its agents do not profile according to race, country of origin, or religion.**

Limits on police behavior can be easily disregarded unless violating the law carries consequences.

A city council can authorize a civil action in state court for individuals subjected to profiling, while requiring data collection and reporting necessary to establish an evidentiary trail—or enable effective legislative oversight. By authorizing damages for potential violations, a local legislature can ensure that agencies will share incentives to comply with the rights it creates.

Limits on local law enforcement authorities functionally protect several communities plagued by formally separate problems.

By raising rights above the federal floor, **local efforts to limit and focus law enforcement authorities can create political space for reforms that remain stalled at the federal level, such as the End Racial Profiling Act (ERPA), or overdue reforms to the PATRIOT Act.**

Limits on law enforcement address what may seem like several distinct areas: immigration enforcement, intelligence collection, and racial profiling. While these issues have historically concerned largely separate communities, they each concern violations of civil rights by local police agencies.

By functionally addressing each of these formally separate issues at once, **proposed reforms offer a vehicle for broad coalition-building among civil rights, immigrant rights, and civil liberties advocates at the local level—and leadership opportunities for officeholders seeking support from those communities.**