



FORUM

Electronic Surveillance, the Fourth Amendment, and the NYPD’s “Muslim Surveillance Program”

Annie Akbar

In a letter to James Madison after the French Revolution had begun, Thomas Jefferson wrote, “The earth belongs always to the living generation... Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.” Here, Jefferson is advocating for a periodic revision of the Constitution, one in which the citizenry rethinks its guiding document in light of the circumstances of a new era. When comparing our age to that of our Founding Fathers, it is not difficult to understand Jefferson’s sentiment. The advancement of our society, especially in terms of technology, has significantly affected the ways in which civil rights (and their infringement) appear. This is especially true when examining electronic surveillance and its implications for Americans’ constitutional liberties. For example, in Hassan v. City of New York (2015), the United States Court of Appeals for the Third Circuit held that, under the First and Fourteenth Amendments, the New York City Police Department’s “Muslim Surveillance Program,” in which electronic surveillance was used to “infiltrate and monitor Muslim life in and around New York City,” was unlawful. While this decision undoubtedly finds legitimacy in the aforementioned amendments, I contend that applying a modern interpretation of the Fourth Amendment—one rooted in “living constitutionalism,” or the idea that “constitutional law

can and should evolve in response to changing circumstances and values”—can also prove the program’s illegality.

In *Hassan v. City of New York* (2015), lead plaintiff Syed Faraj Hassan and others associated with Islam testified that, since January 2002, the New York City Police Department (NYPD) used what was informally known as the “Muslim Surveillance Program” (also called “the Program”) to monitor the lives of Muslims and their businesses, mosques, organizations, and schools in New York City and neighboring cities and states. The Court of Appeals found that the plaintiffs—“persons associated with Islam who claimed to be targets of police surveillance program”—had standing to sue in federal court to “vindicate their religious-liberty and equal-protection rights” and that their claims were justified under the First and Fourteenth Amendments. It is clear why the Program, which “targeted Muslim American communities in New York, New Jersey, and beyond,” would violate the First and Fourteenth Amendments. However, employing the Fourth Amendment to assess the Program’s “sprawling and secretive human mapping and suspicionless surveillance program” may provide an additional legal foundation for the decision.

The Fourth Amendment affirms that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” In short, the Fourth Amendment outlaws unreasonable searches and seizures. The NYPD’s participation in the Program, though, constitutes an unreasonable search and seizure of data on Muslims in the greater New York area via electronic surveillance.

The plaintiffs in Hassan argued that the NYPD monitored Muslims in several ways, such as by taking pictures, shooting videos, and gathering license plate information of mosque attendees. Officers also pointed surveillance cameras at mosques, which they could then control remotely. Furthermore, the plaintiffs asserted that the NYPD would send undercover cops into mosques, student organizations, businesses, and neighborhoods that it characterized as “heavily Muslim” to listen in on sermons and conversations before reporting back to their department. These surveillance methods were not solely concentrated in New York City—they extended into New Jersey, Connecticut, Pennsylvania, and other areas of New York state. In addition, the NYPD collected information on the locations of religious schools, the religious affiliations of certain public establishments, the number of businesses operated or visited by Muslims, and the names of people involved with Muslim Student Associations (MSAs) in the area. The NYPD also “compile[d] databases of new Muslim converts who [took] Arabic names, as well as Muslims [who took] names that [were] perceived to be ‘Western.’”

The plaintiffs declared that the intelligence gathered by the NYPD through the Program was compiled into many reports. Such reports included information on Newark's Muslim population, over 20 precinct maps of Newark showing the locations of mosques and Muslim businesses and the ethnic composition of the Muslim population, and "analytical report[s] on every mosque within 100 miles of New York City."

From this, it is obvious that the NYPD's program was meant to target Muslims and their daily activities, indicating religious discrimination that the Court of Appeals affirmed in its ruling. However, I assert that the Program's electronic surveillance to collect an expansive collection of data by itself is sufficient to warrant a contravention of the Fourth Amendment.

Regarding the Fourth Amendment, the Court of Appeals utilizes Justice Scalia's point in *Whren v. United States* (1996) about selective enforcement of the law: "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." While I agree with the appellate court's reasoning, I believe that the Program's methods of collecting people's information, regardless of their religion, can be considered a Fourth Amendment infraction.

But first, does electronic surveillance even fall under the jurisdiction of the Fourth Amendment? In *Katz v. U.S.* (1967), a case involving electronic surveillance, the Supreme Court held that the Fourth Amendment protects "any place where an individual maintains a reasonable expectation of privacy." In his concurring opinion, Justice Harlan stated that "a person has a legitimate expectation of privacy if he honestly and genuinely believes the location under surveillance is private." Due to the separation of church and state found in the Constitution, places of worship are commonly regarded as private institutions—institutions in which a person "has a reasonable expectation of privacy." Under this ruling, the Fourth Amendment prohibits unreasonable searches and seizures involving data collection through electronic surveillance—precisely the sort of search and seizure in which the NYPD engaged.

Now that this has been established, I will use the Fourth Amendment to provide further support for the decision in *Hassan*. According to the federal courts, the Fourth Amendment prohibits unreasonable searches and seizures by the government (and government agencies like police departments), but only those that are perceived as unreasonable from a legal standpoint. This is referred to as the reasonability requirement. Judges are to consider the main factors when determining whether or not a search was reasonable: the search's infringement on a person's

Fourth Amendment rights and compelling interests that may allow for such an infringement. For an interest to be compelling, the government must use the “strict scrutiny test” to show that the interest is “important enough that it justifies infringing on a fundamental right, and [that its] infringement on rights is done in ‘the least restrictive’ or most careful way possible.” However, in *Hassan*, the Court of Appeals held that the “municipality’s assurance that police surveillance was justified by national-security and public-safety concerns did not satisfy its burden of producing evidence to overcome heightened scrutiny’s presumption of violation of equal protection.” Because the NYPD failed to prove that electronically surveilling Muslims was a compelling interest, the “Muslim Surveillance Program” fails to fulfill the reasonability requirement. Moreover, “least restrictive means” refers to a method that places “the least possible restriction on personal liberty and the exercise of rights.” While public safety and thus crime prevention are certainly compelling interests, the NYPD’s surveillance program is clearly not the least restrictive means possible to achieve its desired ends. This is due to its surveillance of basically all Muslims in the greater New York area, rather than just those on watchlists or things of that nature.

Though Fourth Amendment jurisprudence is beginning to incorporate electronic surveillance threats to privacy, an obstacle to this development may arise from originalists who disagree with applying the Fourth Amendment to this issue. These individuals proclaim that the “original meaning of search seems to be the ordinary meaning at the time [of the Fourth Amendment’s adoption] of ‘looking over or through’ or ‘examining by inspection’” and that an unreasonable search is only one that “violate[s] the common law rules for searches at the time of the Fourth Amendment.” However, taking into account the privacy and “search and seizures” problems that are related to electronic surveillance is crucial to upholding the protections of the Fourth Amendment. According to the Brennan Center for Justice, as cell phones, watches, cars, and other electronic devices become “smarter,” they “create detailed records about our private lives, potentially revealing not only where we have been but also our political viewpoints, consumer preferences, people with whom we have interacted, and more.” This information can be used by “law enforcement for use in investigations and prosecutions, and much of it is currently available without a warrant.” Thus, establishing legal limits to such electronic collection of data is a worthwhile endeavor to maintain the sanctity of our rights.

The idea of electronic surveillance and its potential infringement of people’s Fourth Amendment rights is one that warrants attention because, as technology continues to progress in terms of its abilities, so will the means by which data is

collected. Without implementing proper legal restrictions on the use of data collection, the privacy of American citizens under the Fourth Amendment may be in danger.