Chilling effect: Can N.J. Muslims (or anyone) challenge NYPD, other police in court?

Spencer Platt/Getty ImagesMuslim community leaders hold a news conference on the Newark campus of Rutgers University to address allegations over surveillance of students and other members of the Muslim community by the New York Police Department (NYPD) on February 24.

Did someone once say, "Everything old is new again"? Anyway, that's how I felt as I read about the New York Police Department's program of surveillance of the Muslim community in the metropolitan area in the hunt for potential terrorists.

In the late 1960s, in the wake of urban uprisings in major New Jersey cities, Attorney General Arthur Sills issued a memorandum for all local police and sheriff departments to report on the public activities of civil rights and other protest groups, including "pacifists," in the belief that it might help prevent future riots. A copy of the memorandum fell into the hands of the ACLU.

The ACLU sued in Hudson County, alleging that such surveillance violated the free speech clause of the U.S. Constitution because it would inhibit the constitutionally protected activities of those who became familiar with it. It was generally referred to in legal parlance as a "chilling effect" case.

New Jersey Superior Court Judge Robert Matthews endorsed our "chilling effect" claim and ordered the State Police to destroy any reports pursuant to the Sills memorandum. Matthews wrote: "It is not too difficult to imagine the reluctance of an individual to participate in any kind of protected conduct which seeks publicly to express a particular or unpopular political or social view."

As a result, the national ACLU requested that my newly established Constitutional Litigation Clinic at Rutgers Law School-Newark bring a similar suit against the U.S. military, which, at about the same time, set up a Domestic Intelligence Program to surveil anti-war and civil rights activities (unrelated to the military), in case the military ever had to deploy against civil disturbances. Members of Army Intelligence were ordered to gather publicly available information by attending rallies, clipping newspapers, filming demonstrations and collecting other available information to feed back to the Army's computers at Fort Holabird, Md.

Disaffected intelligence agents who left the service gave the ACLU copies of the Army's dossiers on leaders of the protest groups. The case was Tatum vs. Melvin Laird, U.S. Secretary of Defense.

As our case was being heard in the U.S. Court of Appeals for the District of Columbia, the Senate Subcommittee on Constitutional Rights decided to look into the Army's Domestic Intelligence Program.

The Army sent to testify in defense of the program Assistant U.S. Attorney General William Rehnquist, who, we later learned, actually wrote the original memorandum authorizing the program. Among other things, Rehnquist told the Senate that federal courts had no business hearing the case of Tatum vs. Laird. He said it was not "justiciable."

After the appeals court ruled in our favor and said the federal courts did indeed have jurisdiction to stop the program if it violated the First Amendment, the government asked the Supreme Court for review.

Curiously, Rehnquist got to the Supreme Court first and, when we argued the case, he was one of the nine justices sitting to decide. When we asked that he recuse himself because of his earlier participation in the case on the side of one of the parties, he refused.

The 5-4 decision dismissing the case was signed by Chief Justice Warren Burger, but it sounded just like the testimony of William Rehnquist before the Senate.

Burger wrote that the case was not "justiciable" because "chilling effect" was insufficient injury to allow anyone to challenge the Army in court. The majority opinion said the plaintiffs would have to prove independent injury, such as being fired from a job, or been unconstitutionally bugged or searched. He did not rule that the Army's program was legal.

So here we are again.

Muslims who are accused of no wrongdoing claim police surveillance inhibits many of their activities, that members are afraid to attend meetings or engage in certain prayer activities lest they wind up in the police files.

The question is: Does anyone have the right to go to court to challenge the police — or does the ghost of the late William Rehnquist stand as an impenetrable barrier to such a lawsuit?

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