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FOR JUSTICE

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March 24, 2016

**By Email**

The Honorable Charles S. Haight, Jr.  
Senior United States District Judge  
United States District Court for the Southern District of New York  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007

**Testimony of the Brennan Center for Justice at New York University School of Law in  
Support of the Proposed Handschu Settlement Agreement**

At the Court's invitation, the Brennan Center for Justice at New York University School of Law ("Brennan Center") offers the following testimony in support of the proposed settlement agreement in Handschu v. Special Services Division, 71 Civ. 2203 (CSH), and the related case of Raza v. City of New York, 13 Civ. 3448 (PKC) (JO). The Brennan Center appreciates the opportunity to share its views with the Court on this important matter.

The Brennan Center is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including the intersection of national security and civil liberties. The Center's Liberty and National Security Program seeks to ensure that our nation's commitment to national security respects constitutional values and the rule of law

through in-depth research, innovative policy recommendations, litigation, and public advocacy. The Brennan Center is particularly concerned with the effects that surveillance programs targeting Muslim communities have on privacy, First Amendment freedoms, and the Equal Protection Clause.

As part of this effort, the Center has researched and published a series of reports on how law enforcement and intelligence agencies collect, share, and retain information about Americans for national security purposes. Three of these reports examine the practices of the New York City Police Department (“NYPD”) at issue in this case. See Michael Price, *National Security and Local Police* (2013); Faiza Patel & Andrew Sullivan, *A Proposal for an NYPD Inspector General* (2012); Faiza Patel, *Rethinking Radicalization* (2011).

Beginning in 2007, the Brennan Center received complaints of aggressive intelligence activities in Muslim neighborhoods in New York City. At the same time, the NYPD released a report titled *Radicalization in the West*, which claimed the ability to identify would-be terrorists by keeping tabs on whether young Muslim men started praying, grew beards, or stopped smoking and drinking. The Brennan Center worked with American Muslim communities to push back on this flawed narrative and debunk this conveyor-belt theory of radicalization as unscientific, ineffective, and discriminatory. See Patel, *Rethinking Radicalization* at 1; see also Muslim American Civil Liberties Coalition (MACLC), *Counterterrorism Policy: MACLC’s Critique of the NYPD’s Report on Homegrown Radicalism* 8-10, 15 (2008).

It was not until 2011, however, that the full extent of the NYPD’s Muslim surveillance program came into relief. A series of Pulitzer-Prize winning Associated Press reports suggested that the NYPD had subjected American Muslim communities to widespread surveillance on the basis of their religion. In response, the Brennan Center called for the creation of an independent

oversight body with broad authority to oversee the NYPD's operations and a mandate to protect civil liberties and civil rights. See Patel & Sullivan, A Proposal for an NYPD Inspector General at 20; see also Price, National Security and Local Police at 40. The Center partnered with a diverse coalition of New Yorkers to advocate for this important reform, which resulted in passage of the Community Safety Act, (Local Law No. 71 [2013] of City of N.Y., codified as Administrative Code of City of N.Y. § 14-151), and the creation of the Office of the Inspector General for the NYPD.

Most recently, the Brennan Center filed an *amicus* brief with the Third Circuit Court of Appeals in Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015). The Center pointed to the NYPD's long history of targeting disfavored groups for surveillance based on First Amendment-protected activity as well as the Department's recent surveillance of Muslims based on crude and scientifically unsound stereotypes of Islam. The court found that Muslim plaintiffs in New Jersey have standing to bring claims against the NYPD for violations of the Equal Protection Clause of the Fourteenth Amendment as well as the Free Exercise and Establishment Clauses of the First Amendment due to the Department's surveillance activities in New Jersey. Id. at 309.

In keeping with this focus on NYPD oversight and accountability, the Brennan Center has closely followed developments in the Handschu and Raza cases. We are therefore pleased to offer the Court our assessment of the proposed settlement agreement, drawing on years of research, advocacy, and work with Muslim communities impacted by NYPD surveillance activities. The Brennan Center believes that the proposed terms include meaningful changes to the rules governing NYPD investigations of political and religious activities ("The Handschu Guidelines"), and for the following reasons, we respectfully urge this Court to approve them.

## **1. Creation of a “Handschu Committee” and Civilian Representative**

The proposed settlement creates a “Handschu Committee” responsible for reviewing all ongoing investigations involving political and religious activity, on a monthly basis. This is the most substantial improvement to the Handschu Guidelines in the agreement, and the Brennan Center endorses it wholeheartedly.

The original Handschu Guidelines, approved by the court in 1985, established the “Handschu Authority,” a three-member body responsible for authorizing intelligence investigations that involved political activity. The Authority included one civilian and served as an important check against investigations lacking “specific information” that the targets were involved in criminal conduct. Handschu v. Special Servs. Div., 605 F. Supp. 1384, 1409-1410 (S.D.N.Y. 1985), aff’d, 787 F.2d 828 (2d Cir. 1986). But in 2003, citing terrorism concerns, the City successfully moved to abolish the Authority’s approval function and loosen the rules for NYPD intelligence investigations. Handschu v. Special Servs. Div., 273 F.Supp.2d 327 (S.D.N.Y. 2003).

The proposed agreement envisions a welcome return of civilian oversight: The Handschu Committee would include a “Civilian Representative” appointed by the Mayor who is entitled to attend monthly intelligence briefings and have access to the investigative statements justifying each proposed opening, extension, or closing of an investigation. During these meetings, the Civilian Representative may ask questions and offer opinions. Most importantly, the Representative must record objections to any investigation that violates the Handschu Guidelines and bring such an investigation to the attention of the Police Commissioner. The Commissioner, in turn, is required to “inquire into the investigation and report the findings of the inquiry to the Civilian Representative.” And finally, if the Civilian Representative becomes aware of

systematic and repeated violations of the Guidelines, he or she is required to bring them to the attention of this Court and provide notice to counsel in this case.

We recognize that this structure is significantly different from the original Handschu model. Most importantly, unlike the original Handschu Authority, the new Handschu Committee serves a monitoring rather than an authorizing function. We believe this change is offset by the “whistleblower” role assigned to the Civilian Representative: she must report violations of the Handschu Guidelines to the Police Commissioner and, if necessary, to the Court and class counsel. This should give the Civilian Representative sufficient leverage to help prevent the kind of abuses that led to litigation in the first place. At the same time, the NYPD retains the discretion and the ultimate authority to decide what operations are necessary for accomplishing its mission.

We are, however, concerned that the proposed settlement would allow the Mayor to phase out the Civilian Representative after five years, particularly since the proposed settlement permits certain investigations to carry on for three or five years. The Brennan Center is of the view that robust civilian participation in oversight can only strengthen the NYPD by providing a neutral, unbiased opinion on its adherence to rules that are meant to safeguard critical Constitutional rights.

## **2. Threshold for Investigative Activity**

Under the current version of the Handschu Guidelines, low-level investigative functions like “Checking of Leads” or “Preliminary Inquiries” require the NYPD to have some information indicating the possibility of unlawful activity. Under the proposed settlement agreement, that rule would remain unchanged for Checking of Leads, but the requirements would increase for

Preliminary Inquires. The new rules require that any predicate information also be “articulable and factual.”

The addition of this language to the Handschu Guidelines is a positive step. Requiring law enforcement officers to articulate specific facts supporting their suspicion that criminal activity is afoot imposes rigor on police and guards against the use of bias or stereotypes. See Terry v. Ohio, 392 U.S. 1, 21 (1968) (“Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches ...”); see also Price, National Security and Local Police at 14-16. The Center is concerned, however, that this predicate information need not be “verified as true or accurate” in order for an investigation to proceed. While some leeway may be necessary for investigators to determine the validity of a tip, the Brennan Center respectfully encourages this Court to clarify that the NYPD may not conduct investigations based on patently incorrect information. To this end, the Brennan Center wholly supports the NYPD’s agreement to remove *Radicalization in the West* from its website. This Court is also requested to ensure that the NYPD has a clear understanding that investigations may not be based on the religious affiliation or stereotypes about Muslims.

### **3. Investigation Duration**

The current Handschu Guidelines govern the permissible duration of investigations involving First Amendment activities. Checking of Leads, for example, must be “prompt and extremely limited.” Preliminary Investigations can last for six months, followed by unlimited three-month renewals. Full Investigations and Terrorism Enterprise Investigations may be authorized initially for one year, but are eligible for unlimited one-year extensions.

The proposed settlement does not change these investigative timelines. It does, however, attach a “presumptive duration” to each of them. Under the proposed scheme, Preliminary

Inquiries would last 18 months; Full Investigations would last three years; and Terrorism Enterprise Investigations would last five year – presumptively. The Deputy Commissioner for Intelligence retains sole discretion to override these parameters. Nonetheless, they provide observable benchmarks to assess whether a particular investigation has gone on too long without hindering law enforcement efforts. For this reason, the Brennan Center supports these proposed modifications to the Handschu Guidelines.

#### **4. Choice of Investigative Technique**

The proposed settlement includes two important changes to the way the NYPD conducts authorized investigations. Under the existing rules, the Department can use any lawful investigative technique permitted by the Handschu Guidelines, including the “use of confidential informants, undercover activities and operations, eavesdropping and video surveillance ..., pen registers and trap and trace devices, consensual electronic monitoring, and searches and seizures.” The proposed agreement leaves these tactical decisions to the discretion of the NYPD, but it also requires the Department to consider “the potential effect on the political or religious activity of individuals, group or organizations and the potential effect on persons who, although not a target of the investigation are affected by or subject to the technique.” This is no minor change. It alters the surveillance calculus and has the potential to help guard against the use of overbroad tactics. In particular, it may discourage techniques that would subject all members of a mosque, community organization, or student group to unnecessary surveillance if an individual is the only intended target.

The settlement would also change the rules for undercover operations, which have sown distrust and alienated the very communities that the NYPD looks to for cooperation. See Muslim American Civil Liberties Coalition et al., Mapping Muslims: NYPD Spying and Its Impact on

American Muslims 37 (2013). Under the proposed agreement, an undercover officer or confidential informant could be deployed for an initial 90 days instead of 120. Moreover, the NYPD must first determine that “the information sought in the investigation could not be reasonably obtained in a timely and effective way by a less intrusive means.” This “less intrusive means” requirement has the potential to reduce the NYPD’s overreliance on undercover officers and informants. In this light, the Brennan Center supports this modification to the Handschu Guidelines.

## **5. Data Retention**

The settlement agreement is silent on a potentially critical issue: data retention. Under existing rules, the NYPD may not retain intelligence information that does not relate to unlawful activity. Yet the NYPD does not appear have any policies or procedures in place to purge information from its files, such as the records created by the so-called “Demographics Unit,” which was disbanded in 2014. See Galati Dep. 127:8-129:7 June 28, 2012; see also Matt Apuzzo & Joseph Goldstein, New York Drops Unit That Spied on Muslims, N.Y. Times, Apr. 16, 2014, at A1.

The proposed settlement does not contain an explicit mechanism for deleting intelligence files on innocent New Yorkers and their political or religious activities. This Center therefore respectfully requests this Court to inquire as to the NYPD’s rules or procedures to audit its cache of intelligence files and purge those that may not be lawfully kept.

## **6. Protection of Constitutional Rights**

Finally, the proposed settlement agreement would add two policy statements to the Handschu Guidelines that explicitly protect religious freedom. The first statement provides for “the right to be free from investigation in which race, religion, or ethnicity is a substantial or



motivating factor.” The second statement declares that investigations should not “intrude upon rights of expression or association in a manner that discriminates on the basis of race, religion or ethnicity, where such discrimination is a substantial or motivating factor for the investigation.” The Brennan Center strongly supports these changes to clarify that the NYPD must base its investigation on facts, not religion.

Although the NYPD maintains that it already follows these standards as a matter of internal policy, their inclusion in the Handschu Guidelines would give them the force of law and prevent the Department from changing its policy at will. Additionally, they would provide important standards for the Handschu Committee, the Civilian Representative, and this Court to evaluate NYPD investigative activities. Likewise, other oversight bodies, including the NYPD Inspector General, would be able to rely on them as well.

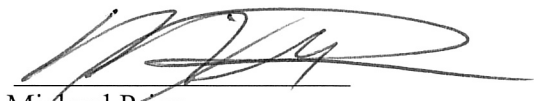
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In sum, the Brennan Center believes that the proposed settlement agreement includes concrete rules and mechanisms that are designed to ensure that the NYPD retains sufficient flexibility to fulfill its public safety mandate while ensuring that its surveillance operations respect Constitutional rights. It should be approved by this Court.

Respectfully submitted,



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