



American-Arab Anti-Discrimination Committee

May 24, 2016

VIA PRIORITY MAIL

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

**Amended Testimony of the American-Arab Anti-Discrimination Committee to Strengthen
the Proposed Handschu Settlement Agreement**

Dear Honorable Charles S. Haight, Jr.:

I am writing to you on behalf of the American-Arab Anti-Discrimination Committee (ADC), the country's largest Arab-American organization. ADC is a non-secular, non-profit grassroots organization. Founded in 1980 by U.S. Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide, including New York. ADC respectfully takes this opportunity to submit the following written statement to the Honorable Charles S. Haight, Jr., Senior United States District Judge for consideration to strengthen 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). ADC appreciates the opportunity to share its views with the Court on this important matter.¹

ADC is committed to protecting civil rights, promoting mutual understanding, and preserving the Arab cultural heritage. ADC has protected the Arab-American community for over thirty-five years against civil rights violations, discrimination, racism, and stereotyping. ADC has standing commitment to open government, and government transparency and accountability. ADC opposes surveillance, racial and religious profiling, and interference with Constitutional rights, particularly the First Amendment, Fourth Amendment, and Fourteenth Amendment.

¹ ADC registered to comment in the Handschu Settlement Agreement on March 30, 2016. ADC sent initial comments to the Court on April 18, 2016.



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As part of this effort, ADC has dedicated resources to individual legal complaints, legislative action, and policy initiatives to increase protections for all citizens subject to surveillance programs and authorities. For example, ADC and coalition partners were able to secure limits on bulk collection of metadata and the inclusion of an *amici curie* in the Foreign Intelligence Surveillance Court under the USA Freedom Act. The *amici curiae*, an independent special advocate, who will provide advice on privacy, civil rights and liberties implications to the court in particular cases. See ADC Surveillance Policy (2016). ADC also provided oral and written testimony to the Privacy and Civil Liberties Oversight Board on implementation of surveillance activities and tactics that disproportionately target the Arab and Muslim American communities. See ADC Comments & Recommendations to the Privacy and Civil Liberties Oversight Board’s Review of Executive Order 12333 (Jan. 12, 2015); ADC Comments & Recommendations to the Privacy and Civil Liberties Oversight Board’s Mid-term and Long-term Agenda (Aug., 29, 2014). ADC has also submitted comments to rulemaking by the Federal Bureau of Investigations, Office of Director of National Intelligence, and U.S. Department of Homeland Security to secure privacy, civil liberty, and substantive Due Process protections.

Immediately after 9/11, ADC received a drastic increase in complaints related to placement of informants in mosques and community institutions, strong-arming individuals and community members into becoming informants, and police monitoring. These incidents continued to increase following the release of the 9/11 Commission recommendations. Ultimately, these recommendations provided that it was appropriate to violate the constitutional rights of Muslims and Arabs in the name of national security, without commission of a crime and/or legal probable cause. ADC has documented reports of warrantless search and seizures, placement of informants, and entrapment through coercive tactics that could impact a person’s immigration status. Additionally, there were numerous incidents of “padding” unrelated non-violent criminal charges such as traffic violations, and selective enforcement and/or arbitrary charges of jaywalking, public disturbance, and nuisance among others. See ADC-Research Institute, Report on Hate Crimes & Discrimination Against Arab Americans: The Post-September 11 Backlash (2002); ADC-Research Institute, Report on Hate Crimes and Discrimination Against Arab Americans (2007); ADC-Research Institute, The 2010 ADC Legal



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Report: Legal Advocacy & Policy Review (2010). ADC has reported abuse and misuse of surveillance authorities for “parallel construction” cases throughout the United States and in New York. See Request to the United States Commission on Civil Rights, *Request to Investigate Disproportionate Impacts of “Parallel Construction” on Communities of Color* (Oct. 23, 2015). For example, data collection and information obtained pursuant to a terrorist related investigation has been used in family and immigration cases. See John Shiffman & Kristina Cooke, *Exclusive: U.S. directs agents to cover up program used to investigate Americans*, REUTERS, Aug. 5, 2013.

In respect to the 2011 revelations of NYPD surveillance of Muslim and those perceived to be Muslim, including Arabs, Sikhs, and South Asians, ADC made an immediate request to the U.S. Department of Justice to investigate. ADC actively continues to work with the U.S. Department of Justice-Office of Civil Rights to provide key recommendations on civil rights protections, best practices, training, civil engagement, and oversight and transparency. ADC also submitted credible documentation and reports to the U.S. Commission on Civil Rights on its report on racial and religious profiling post 9/11 in Arab and Muslim communities. See U.S. Commission on Civil Rights, *Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11* (2014). Recently, ADC joined and contributed to the Hassan v. City of New York case as *amici curie* with the Asian American Legal Defense Fund. The amicus brief addressed the Constitutionality of NYPD surveillance of Muslim communities based solely on their religious beliefs. See Brief in Support of Appellants by *Amici Curiae* The Asian American Legal Defense and Education Fund & Seventeen Other Non-Governmental Organizations Supporting Civil Rights for American Muslims, Hassan v. City of New York, No. 14-1688, July 10, 2014.

ADC firmly believes that the Plaintiffs have demonstrated NYPD’s violation of the “Handschu Guidelines” (Guidelines). The NYPD has systematically and repeatedly violated the Handschu Guidelines by specifically targeting and profiling against Muslims and/or those perceived to be Muslim. Based on this, ADC firmly believes the Modified Handschu Guidelines need to be strengthened to actually prevent systematic abuse and surveillance of our communities by the NYPD.



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1. Protection of Constitutional Rights

The proposed Modified Handschu Guidelines provides the following, “Under the Amended Modified Handschu Guidelines, there will be an explicit commitment against investigations in which race, religion or ethnicity is a substantial or motivating factor.” While in theory this is a step in the right direction, the wording in the proposed settlement is a concerning.

First, ADC strongly urges the Court to have the “commitment against investigations” include national origin. While the NYPD has targeted Arab communities as part of its mass surveillance of Muslim communities, the NYPD surveillance program has had a disproportionate impact on Arab communities from particular countries whom reside in New York City. Additionally, the Arab American community is a diverse community, encompassing 22 countries including many North African countries. Furthermore, the U.S. Department of Justice revised its Anti-Racial Profiling Guidance in 2014 to include national origin. See U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation or Gender Identity*, Dec. 2014. The targeting by national origin has been used as an underhanded method to identify actual and/or perceived individual’s religious beliefs to make assessments in law enforcement decisions. Law enforcement profiling based on national origin has also been used as a way to evade prohibitions against racial profiling, as well as use as a smoke screen to ethnic profiling because employing stereotypes.

Second, an “explicit commitment” seems insufficient where the Constitution prohibits the NYPD from engaging in such illegal surveillance activities in the first place. ADC strongly encourages the NYPD be prohibited from investigating where race, religion, ethnicity, or national origin is a substantial or motivating factor. Prior actions including the underlying case demonstrate that the law has not prevented the NYPD from engaging in racial and religious profiling. The NYPD is not above the law, and must conduct investigations in compliance with the law, meeting the legal thresholds. ADC also strongly encourages the Court to require NYPD to appropriately and in compliance with privacy standards destroy all data collected under the NYPD surveillance and monitoring program, this includes but not limited to incidental data, metadata, intelligence files, and products of the data collection such as the mapping of American Muslims and Arabs in New York City, and the surrounding Tri-State area.

Third, an explicit commitment seems insufficient where there are no guidelines and/or steps of how this commitment will be implemented throughout the NYPD and a prescribed



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timeline. ADC strongly encourages the NYPD be required to implement this commitment with a total overhaul of their training, training materials, and investigation policies, practices and procedures. The NYPD must implement new training, training materials, and investigation policies, practices and procedures within six (6) months of the enforcement of this settlement to substantively reflect this commitment. ADC strongly encourages that NYPD staff, officers, employees, contractors, and consultants be required to annually undergo training with collaboration of the Arab, Muslim, Sikh, South Asian stakeholders in the New York and New Jersey area so that law enforcement can properly provide culturally competent services to our communities. ADC also has concerns on the use of the Handschu settlement as a defense to future litigation to vindicate the rights of private parties.

Lastly, the ADC welcomes the removal of the report entitled Radicalization in the West from the NYPD website. However, ADC strongly encourages the Court to also order the removal of any and all content, training, materials, documentation, policies and practices and information that either was based, derived, and/or relied upon as a source this Report.

2. Creation of a “Handschu Committee” and Civilian Representative Position

ADC firmly supports the creation of a “Handschu Committee” (Committee) including the “Civilian Representative” position, which will be charged with reviewing all ongoing investigations involving political and religious activity, on a monthly basis. This is a vital first step in building trust between the Arab and Muslim communities, and law enforcement, as well as providing a semi-independent mechanism to provide some oversight.

The proposed agreement provides that a “Civilian Representative” appointed by the Mayor will be able to attend monthly intelligence briefings and have access to the investigative statements justifying each proposed opening, pending, and closing investigation. The “Civilian Representative” is allowed to raise objections to systematic and repeated violations of the Guidelines at monthly intelligence Committee meetings, the Police Commissioner, and to the Court. However, ADC strongly encourages the Court to consider the inclusion of the Committee’s and Civilian Representative’s power to accept and present for consideration individual grievances from individual’s interactions with NYPD at the monthly intelligence meetings to address and/or demonstrate a pattern of practices and/or procedures that may lead to



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a violation of the Guidelines. ADC believes this is a vital power for the “Civilian Representative,” in order to fulfill the overarching purpose of the Committee, to protect individual’s constitutional rights and prevent violation of the Guidelines. This power would allow NYPD in collaboration with the Committee and Civilian Representative to efficiently correct issues as they arise and before they become a systemic problem.

ADC would also like to raise a serious concern regarding the temporary nature of the “Civilian Representative” position. It is alarming that the Mayor would have the power to abolish this position after only five (5) short years, when considering the depth and pervasive surveillance tactics of the NYPD on Muslim and Arab communities. It is well documented that for nearly two (2) decades, the NYPD engaged in racial profiling against African and Latino Americans. See New York Civil Liberties Union, Report: Stop-and-Frisk During the Bloomberg Administration 2002-2013 (2014). It is clear that NYPD profiling is bigger than just written policies or commitments in legal documents, and has been engrained in the NYPD psyche. We must now overhaul the entire NYPD culture where the rights of minority communities including Arabs and Muslims are considered dispensable. It is problematic that this settlement suggests that five (5) years of an independent, unaffiliated NYPD, civilian representation can root out and/or substantively address the NYPD’s culture of profiling.

ADC strongly encourages that both the Committee and Civilian Representative become a permanent committee and position, with a five (5) year renewable term. With the continuous development of technology, and balancing national security with civil rights and liberties, the need for permanent Committee and Civilian Representative is an ongoing necessity. Furthermore, the fact that New York City was able to successfully abolish the Handschu Authority in 2003 citing terrorism concerns, serves as a grave warning that at any time after the five (5) year term, New York City and the Mayor will not hesitate to phase out the Civilian Representative under the guise of national security. See Handschu v. Special Servs. Div., 273 F. Supp.2d 327 (S.D.N.Y. 2003).

3. Investigation Restraints

The proposed Modified Handschu Guidelines provide that “undercover police officers and confidential informants may be used when taking into account all of the circumstance of the investigation, including the need for the information and the seriousness of the threat, it has been

determined that the information sought could not be reasonably obtained in a timely and effective way by a less intrusive means.”

First, the wording in this proposal is concerning for purposes of settlement interpretation and consequently practical application by the NYPD. The settlement should make it explicit that the determination that “the information sought in the investigation could not be reasonably obtained in a timely and effective way by a less intrusive means” is a requirement. The current settlement proposed uses the word “require” but then is followed by the word “may.” ADC strongly urges the court to articulate the “explicit requirement” language in the settlement as properly intended. ADC suggests the following:

“The Amended Modified Handschu Guidelines requires that the NYPD, where undercover police officers and confidential informants are used, take into account all of the circumstance of the investigation, including the need for the information and the seriousness of the threat and has determined that the information sought could not be reasonably obtained in a timely and effective way by a less intrusive means.”

Second, the proposed language would require the NYPD, prior to deployment of undercover officers or confidential informants, to actually make a determination that “the information sought in the investigation could not be reasonably obtained in a timely and effective way by a less intrusive means.” This is a crucial change based on countless reports of police using coercive tactics to acquire confidential informants. This conduct divides our communities and causes their criminalization. It becomes a cycle, where a person would have never have committed a crime, except for the confidential informant leading and urging them to commit said crime.

Additionally, this represents a step forward in curbing infringements on Constitutional Rights to freedom of speech, privacy, and freedom from search and seizure. However, there is an underlying issue of enforcement, as well as the “reasonable” threshold too low and recommend the higher threshold of “clear and convincing evidence” to actually prevent abuse and misuse. This will require demonstrated proof that all other mechanisms and options have been exhausted.

The proposed Modified Handschu Guidelines provided the following, “The Amended Handschu Guidelines will require that the choice of investigative techniques should take account of the potential effect of the investigation on political or religious activity of individuals, groups or organizations and the potential effect on persons who, although not a target of the



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investigation, are affected by or subject to the particular investigative technique.” This change is crucial because it imposes a limit on surveillance based on overbroad and over-inclusive factors that may be applied in a discriminatory manner. As well as encouraging NYPD to exercise restraint in defining political speech, peaceful political opposition, and First Amendment protected rights, as “at-risk” for violent extremism. This signifies a good step in moving away from policing ideas, thoughts, and beliefs.

Under the proposed settlement, predicate information for preliminary inquiries must be articulable and factual” indicating criminal activity. ADC welcomes and supports the inclusion of this legal standard for preliminary inquiries into the proposed settlement. However, ADC wants to make clear that the use of a confidential informant’s information and/or their statement alone does not satisfy this threshold. There must be significant corroborating information as to verify that the information is true and accurate in order for an investigation to proceed. Additionally, the “Reasonable indication of unlawful activity” standard for opening an investigation should be raised to “specific evidence of unlawful activity.” “Unlawful activity” should exclude minor crimes such as misdemeanors and lesser charges, especially protest-related charges like disorderly conduct, offenses related to civil disobedience, jaywalking or minor traffic infractions.

In conclusion and consideration of the above, the American-Arab Anti-Discrimination Committee believes that the proposed Handschu Settlement terms need to be strengthened to ensure that: 1) the Constitutional rights of New York City residents are upheld; 2) NYPD as a law enforcement agency has some oversight over its actions, policies, and practices; and 3) the NYPD is accountable if it fails to comply with the law.

Respectfully submitted,

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