

United States District Court, S.D. New York.

## **HANDSCHU V. SPECIAL SERVICES DIVISION, (S.D.N.Y. 2003)**

**71 Civ. 2203 (CSH) (S.D.N.Y. Jan 02, 2003)**

BARBARA HANDSCHU, RALPH DIGIA, ALEX McKEIVER, SHABA OM, CURTIS: M. POWELL, ABBIE HOFFMAN, MARK A. SEGAL, MICHAEL ZUMOFF, KENNETH THOMAS, ROBERT RUSCH, ANETTE T. RUBENSTEIN, MICHEY SHERIDAN, JOE SUCHER, STEVEN FISCHLER, HOWARD BLATT and ELLIE BENZONE, on behalf of themselves and all others similarly situated, Plaintiffs, REV. CALVIN BUTTS, SONNY CARSON, C. VERNON MASON, MICHAEL WARREN, Intervenors, SPECIAL SERVICES DIVISION, a/k/a BUREAU OF SPECIAL SERVICES, WILLIAM H.T. SMITH, ARTHUR GRUBERT, MICHAEL WILLIS, WILLIAM KNAPP, PATRICK MURPHY, POLICE DEPARTMENT OF THE CITY OF NEW YORK, JOHN V. LINDSAY and various unknown employees of the Police Department acting as under-cover operators and informers, Defendants.

71 Civ. 2203 (CSH)

United States District Court, S.D. New York.

January 2, 2003

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### **MEMORANDUM OPINION AND ORDER**

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CHARLES S. HAIGHT, JR., Senior United States District Judge

The question presently before the Court is whether a Deputy Commissioner of the New York City Police Department ("NYPD") should be deposed by counsel for the plaintiff class before the Court hears final oral argument on the NYPD's pending motion to modify restrictions and limitations placed upon its investigative and intelligence-gathering activities as part of a settlement of the class action agreed to in 1985.

That question arises upon the NYPD's motion pursuant to Rule 30, Fed.R.Civ.P., for a protective order directing that a deposition of David Cohen, the NYPD Deputy Commissioner for Intelligence, noticed by class counsel under the discovery rules, not be held.

### **I. BACKGROUND**

This class action under 42 U.S.C. § 1983 was commenced in 1971 by individual plaintiffs alleging on behalf of themselves and others that the NYPD unlawfully conducted surveillance and other investigatory activities against them and the political action groups to which they belonged.<sup>1</sup> After extensive discovery, the parties proposed a settlement agreement and submitted it to this Court for approval. The agreement was comprised of two parts, the first being a stipulation of settlement which provided for discontinuance of the class action with prejudice upon defendants' adoption of specified Guidelines, and the second being the Guidelines themselves (commonly referred to as the "Handschu Guidelines"). Despite the

objections of certain class members, who regarded the reforms as insufficient, this Court approved the settlement, made its terms a decree of the Court, and the Handschu Guidelines became operative. See [605 F. Supp. 1384](#) (S.D.N.Y. 1985). The Second Circuit affirmed. [787 F.2d 828](#) (2d Cir. 1986).

1. The above caption recites the names of the original parties. The names of certain New York City officials, such as the mayor and the police commissioner, have changed over time. Since the present motion is brought by and on behalf of the NYPD, represented by the office of the Corporation Counsel of the City of New York, I will refer to the defendants collectively as "the NYPD."

The NYPD now moves to modify the Handschu Guidelines in such a way as to remove many of the restrictions and limitations they place upon police investigative and intelligence-gathering activities. These modifications are said to be necessitated by the changed circumstances arising out of terrorist acts in New York City and elsewhere, including the events of 9/11.

The NYPD's motion was supported by a 23-page, 86-paragraph declaration dated September 12, 2002, and executed by David Cohen, the NYPD Deputy Commissioner for Intelligence. Cohen joined the NYPD with that rank in February 2002, after having served for 35 years in the federal Central Intelligence Agency ("CIA"), attaining the ranks of Deputy Director for Operations and Deputy Director of the CIA's Directorate of Intelligence.

Class counsel, who oppose any modification of the Handschu Guidelines, wish to depose Cohen with respect to his declaration. The NYPD resists having Cohen deposed. The Court conducted a hearing on December 13, 2002, to consider the dispute, and heard arguments from class counsel and the Corporation Counsel which amplified their prior letter briefs. This

opinion resolves the question of whether Cohen should be deposed at this time. I reach no other issue.

There is no gainsaying the central role Cohen plays in the NYPD's motion. Cohen's September 12 declaration and his 4-page, 9-paragraph reply declaration dated November 26, 2002, together with the briefs of counsel, comprise the entirety of the NYPD's submissions.<sup>2</sup> So there is a surface appeal to class counsel's insistence that they should be able to depose Cohen.

2. The Corporation Counsel had asked the Court to consider in *camera* and *ex parte* an additional factual declaration from Cohen. Class counsel objected to the Court giving consideration in determining the merits of the NYPD's motion to a factual submission which they could not examine and accordingly upon which they could not comment. The Court held a hearing on December 3, 2002, to consider the NYPD's request, and invited the parties to consider the matter further after reflecting upon some cases to which the Court directed their attention. In a letter dated December 11, 2002, from Gail Donoghue, the Special Assistant to the Corporation Counsel in charge of this matter, the Court was advised that the NYPD withdrew its request to submit an additional *in camera* and *ex parte* declaration by Cohen.

However, one purpose of the December 13 hearing was to clarify what sort of questions class counsel wished to put to Cohen during a deposition. In aid of that purpose, and focusing upon Cohen's September 12 declaration, I asked Jethro Eisenstein, Esq., one of the class counsel, to specify "[w]hat examples, what incidents, do you want to ask him about? I want you to identify for me by paragraph number each of the examples that underlies this suggested deposition." Tr. 12.<sup>3</sup> Mr. Eisenstein responded: "33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47. All of them." *Id.*

3.

¶ 32 of the Cohen declaration stated, in an introductory fashion: "The following examples of putatively lawful activity engaged in by terrorist conspirators provide a chilling backdrop to the discussion of our need to maximize the NYPD's ability to gather facts and make vital connections through intelligence analysis."

It will be useful have the contents of those paragraphs from the Cohen declaration appear in their entirety as a part of this opinion. Accordingly copies are attached as Appendix A.

Attempting further to discern class counsel's intentions, I followed up on that list of numbered paragraphs by asking Mr. Eisenstein "just what sort of questions you would put to Commissioner Cohen and what sort of answers you would expect that he would be required to give you." Id. Mr. Eisenstein responded:

Let's just start with 33. There are references to Sheikh Omar Abdel Rahman, and the suggestion is that his activities shielded the actions of terrorists and that the investigation of such actions was thwarted by the Handschu guidelines. That is what I am understanding Commissioner Cohen to be saying by the proffer of this material, Judge, and what we want to ask about is, for example, isn't it a fact that when the Sheikh was in fact arrested, indicted, and charged, it was based on information from an FBI informant who was in place in relation to the activities and the group he was associated with, complicated information about that, and was the NYPD at any point interested in the activities of the people surrounding him? Some of them are in Jersey City so that may not be the best example because that is outside Jersey City [sic; transcript should probably read "New York City"]. But if they were interested did they make an attempt to investigate, what information interested them in investigating, and why did they think the Handschu guidelines barred them from investigation?"

Tr. 12-13. Enlarging upon that theme, counsel argued that it was "critical" from their point of view to assess

whether any of these situations are ones in which the New York City Police Department had an interest, what was the basis of that interest, and why was it, given the basis of that interest in investigating, that the Handschu guidelines barred the investigation from going forward.

Tr. 13. Later in the hearing, Mr. Eisenstein made it plain that class counsel desire a deposition in order to test Cohen's credibility as a fact witness:

And there are two alternatives, Judge. One is that they have sufficiently made out their case by Deputy Commissioner Cohen saying you got to trust me, or it is subject to the traditional means by which facts asserted are tested in this and all courts, and that is by cross-examination and by exploration of the facts asserted.

Tr. 28.

The NYPD challenges the relevance of this desired discovery. That is a legitimate inquiry, since Rule 26(a)(1), Fed.R.Civ.P., limits the scope of discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action," and requires that the information sought be admissible at trial or "reasonably calculated to lead to the discovery of admissible evidence."

Specifically, Deputy Commissioner Cohen states in his reply declaration that while ¶¶ 32-42 of his first declaration "gave examples of how terrorist supporters have taken advantage of the restrictions on the investigation of political activity at both the federal and local levels to build a terrorist infrastructure, . . . [s]o far as is known to the NYPD, the information in those paragraphs was developed only after acts of terror had taken place, beginning with the World Trade Center bombing in 1993 It or "after 9-11." In other words, "[t]he criminal predicate for these investiga-

tions was the terrorist act. The paragraphs in my declaration reflect the benefit of hindsight." Cohen Reply Declaration at ¶ 4. Based upon that perspective, Gail Donoghue, Esq., the Special Assistant to the Corporation Counsel representing the NYPD, argued that

[t]o the extent that Commissioner Cohen has established in his reply declaration that these are historical facts which emerged after the acts of terror, I don't see what he can add by way of deposition to that, other than to speculate as to what might have been known at that time by the relevant authorities and then to opine on whether there would have been an investigation, could have been one, should have been one, and whether Handschu would have blocked such an investigation.

Tr. 19. The NYPD contends that such hypothetical speculation by Cohen would be irrelevant, as not probative of the underlying issues, and also might require the assertion of evidentiary privileges, such as "law enforcement privilege and national and public security privileges to the extent that it would reflect the thought processes of the chief officer for intelligence for the City of New York," *Id.* To that possibility, class counsel responded that "if there are questions that impact on privileged areas, all the deponent has to say is time out, we're going to the judge, and the deposition must be suspended." Tr. 25.

Since the December 13 hearing, Deputy Commissioner Cohen's first declaration has generated a lively and ongoing peripheral controversy. Specifically, in ¶ 43 of his declaration Cohen said that "[t]he Alavi Foundation is a non-profit charitable organization ostensibly run by an independent board of directors but totally controlled by the government of Iran," which "funds a variety of anti-American causes, including the four Islamic education centers it owns in New York, Maryland, Texas and California," as well as mosques "which support Hezbollah and Hamas." The Alavi Foundation, angered by this description and challenging its accuracy, retained the New York firm

of Patterson, Belknap, Webb Tyler ("Patterson, Belknap"), which wrote a detailed 11-page letter of factual assertions and denials, accompanied by attachments, to the Court "to correct the record."<sup>4</sup> That letter prompted two letters from Corporation Counsel, which provoked a further letter from Patterson, Belknap, to which Corporation Counsel is presently drafting a further response.<sup>5</sup> Class counsel, who have received copies of these broadsides, urge the Court from the sidelines that the Alavi Foundation's challenge to the factual accuracy of Cohen's descriptions of it "provides additional reasons for the deposition of Commissioner Cohen," since "[t]he reliability of Deputy Commissioner Cohen's factual assertions are, thus, of central importance in the determination of the defendants' application."<sup>6</sup> One can readily imagine that, having worked through the earlier examples in Cohen's declaration, class counsel would come during the second week of the desired deposition to the matter of the Alavi Foundation, and throw a cross-examiner's bombs at Cohen obtained from the arsenal of the Patterson, Belknap letters.

4. Patterson, Belknap letter dated December 16, 2002, at 2.

5. See Donoghue letters dated December 17 and 20, 2001, and Patterson, Belknap letter dated December 23, 2001. Ms. Donoghue asked for and obtained from the Court leave to respond to the December 23 letter by the end of the present week because the people she had to contact were away on holiday. I will receive that letter and docket it with all the rest, but for the reasons stated in text I need not consider it in order to resolve the present question of whether Deputy Commissioner Cohen should be deposed.

6. Eisenstein letter dated December 18, 2002 at 1-2.

## II. DISCUSSION

### A. Standard of Review

Whether to allow discovery or hold an evidentiary hearing in the context of a motion to modify a consent decree or settlement agreement is committed to the discretion of the trial judge, whose ruling will be reversed only for abuse of that discretion.

The inquiry is fact-intensive. See *King v. Greenblat*, [149 F.3d 9](#) (1st Cir. 1998) (on motion to modify consent decrees entered in institutional reform litigation, "a trial court is vested with broad discretion in granting or denying discovery. . . . [I]t does not follow from the fact that a judge allowed discovery and evidentiary hearing in one case that a denial of discovery in a different case is an abuse of discretion."). Compare *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, [797 F. Supp. 1174, 1182](#) (S.D.N.Y. 1992) (Conner, J.) (district court, granting motion to vacate consent decree setting minority employment goal for newspaper delivery industry, stated that an evidentiary hearing "is neither required nor necessary" where there is a sufficient record "which this Court may explore in order to decide whether vacation of the Decree is appropriate" and nonmoving party's arguments "are not relevant to defendants' application for vacation of the Consent Decree."), *aff'd. on other grounds*, [13 F.3d 33](#) (2d Cir. 1993), with *United States v. Motorola, Inc.*, 1999 WL 631259, No. Civ. 94-2331 (D.D.C. Feb. 16, 1999) at \*1-3 ("The sole issue before the Court at this time is whether it should summarily deny Nextel's motion to vacate the consent decree or whether it should allow Nextel to factually develop its case through discovery and an evidentiary hearing . . . While the Court finds that the facts before it present a very close case, it concludes that there are questions of fact that must be addressed before the Court can determine that Nextel actually anticipated the changes [T]he Court will not dismiss Nextel's motion to vacate the consent decree without an evidentiary hearing.").

### B. The Decisive Issue

Since relevance to the underlying issues in the litigation furnishes the principal limitation upon discovery, it is necessary to identify those issues.

In the case at bar, guidance is furnished by the Supreme Court's seminal decision in *Rufo v. Inmates of the Suffolk County Jail*, [502 U.S. 367, 393](#) (1992). In *Rufo* the Court articulated a two-pronged test with respect to the modification of consent decrees:

Under the flexible standard we adopt today, a party must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.

Counsel for the parties at bar properly recognize that these are the two showings the NYPD must make to obtain a Court-ordered modification of the Handschu Guidelines.

While I defer a ruling on the point until final argument, it seems fair to say that the NYPD's satisfaction of the first *Rufo* prong is not disputed. Thus class counsel write in their brief at 11:

In the context of the present motion the defendants have shown that there are changed circumstances; a glance at the daily newspaper would corroborate that. But as argued above, the proposed modification is not shown to be tailored to the circumstances.

The second of these sentences is a reference to the second prong of the *Rufo* test. Thus the present question of whether or not Deputy Commissioner Cohen should be disposed depends in significant measure upon the probative value the testimony class counsel wish to elicit would have upon the underlying question of whether the NYPD's requested modification of the Handschu Guidelines are suitably tailored to the changed circumstance" manifested by unprecedented acts of domestic terrorism.

### 3. The Nature of the Evidence Furnished by Deputy Commissioner Cohen

We have seen that class counsel regard Cohen as a fact witness, the "reliability" (or credibility) of whose factual assertions should be subjected to the traditional test of cross-examination. However, the law recognizes two kinds of witnesses: fact witnesses and expert witnesses. While at a trial both fact and expert witnesses are subject to cross-examination, there are significant differences between them, with respect to both what they can say and the manner in which the fact-finder evaluates what they say.

The law draws a distinction between fact and opinion testimony. Fact testimony,, juries are routinely instructed by trial judges, must be based upon what the witness saw, heard, smelled, or felt; knowledge acquired, in other words, by the operation of the witness' own senses.

The law also allows witnesses to express opinions, but distinguishes between lay and expert opinion testimony. That distinction, distilled from centuries of common law experience, is spelled out in the Federal Rules of Evidence. Rule 701, captioned "Opinion Testimony by Lay Witnesses," provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Rule 702, captioned "Testimony by Experts," provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to

understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill or experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The instructions trial judges give juries about how to evaluate the credibility of a fact witness differ from those with respect to the credibility of an expert witness. Judge Sand's useful compendium treats these subjects in different sections. Compare 4 L. Sand, et al., *Modern Federal Jury Instructions* (Lexis Pub. 2001) ¶ 76.01 ("Witness Credibility"), with ¶ 76-9 ("Expert Witnesses — Generally"). The Witness Credibility charge instructs the jurors that they "should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life," and includes a number of questions and considerations that the jurors should apply in appraising the credibility of a fact witness. These relate to demeanor, opportunity to see or hear, strength of recollection, reasonableness of the testimony, and many other factors. The Expert Witness charge explains to the jurors that "[e]xpert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts," and instructs the jurors that "[i]n weighing the expert's testimony, you may consider the expert's qualifications, his opinions, his reasons for testifying, as well as the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony."

I recite these familiar distinctions between fact and expert witnesses because it seems to me that Deputy Commissioner Cohen's testimony (presently in the form of his two declarations), while falling with some degree into both categories, is *au fond* that of an expert

witness rather than a fact witness. Because that is so, Mr. Eisenstein's perception, quoted *supra*, that Cohen is saying "you got to trust me" with respect to "facts as-asserted" misses the mark. It is inherent in the nature of an expert witness' testimony that he is asking the fact-finder to "trust," that is to say, accept the opinion he is qualified to express.

In this case, Cohen is expressing his opinion, based upon 35 prior years of experience in the CIA and his service as NYPD Deputy Commissioner since February 2002, that the Handschu Guidelines in their present form restrict to an unacceptable degree the NYPD's ability to obtain and communicate intelligence about domestic terrorism and the manner in which that terrorism is conducted. Cohen's first declaration bases that opinion primarily upon (1) a series of events occurring in the 1990's, 2000, and 2001, culminating in 9/11, see ¶¶ 8-14, paragraphs whose factual descriptions of these events do not appear to be challenged; and (2) the Al Qaeda Manual, located by the Manchester, England police during the search of an al Qaeda member's home, see ¶¶ 18-23. Excerpts from the Manual in translation are attached to Cohen's declaration as an exhibit; its authenticity does not appear to be challenged. It is only after the Cohen declaration covers these subjects that it lists the examples" in ¶¶ 33-47 upon which class counsel wish to depose him.

In these circumstances, and in the exercise of my discretion, I will grant the NYPD's motion for a protective order. Deputy Commissioner Cohen will not be deposed at this time. Class counsel's notice of deposition will be vacated.<sup>7</sup> I will state my reasons.

7. The notice of deposition also called for Cohen to produce various documents generated by the Handschu Authority. At the December 13 hearing, counsel for the NYPD expressed a willingness to provide class counsel with copies of those documents, which are public in nature. Tr. 21. The Court expects the NYPD to do so, if class counsel still wish to receive them.

A fair reading of Deputy Commissioner Cohen's first declaration shows that he did not place primary, or even particularly significant, reliance upon the ¶¶ 33-47 "examples." Had Cohen known nothing of those matters, had these paragraphs been omitted entirely from his declaration, there is no reason to suppose that Cohen would have reached a different opinion about the need to modify the Handschu Guidelines, given recent undisputed events and the chilling contents of the Al Qaeda Manual. These considerations are primary; the ¶¶ 33-47 material is secondary.

It follows that deposing Cohen on the factual accuracy of the contents of ¶¶ 33-47 of his first declaration will not be of material assistance to the Court in deciding whether or not to accept Cohen's opinion that the Handschu Guidelines should be modified; nor would such a deposition assist the Court in deciding the core question in the case, namely, whether the proposed modifications of the Handschu Guidelines are suitably tailored to the present, changed security circumstances. This is another way of saying that the accuracy or inaccuracy of these paragraphs are not relevant to underlying issues, or at least of such slight relevance as to tip the balance against deposing Cohen with respect to them. *Compare* Rule 403, Fed.R.Evid.

A balancing of relevance with other considerations is appropriate because it is plain that the desired deposition would lead counsel and the Court immediately into peripheral factual disputes, generate numerous invocations by the NYPD of testimonial privilege which class counsel would contest and the Court would have to adjudicate, and quite possibly in all likelihood arouse the ire and provoke the attempted intervention of additional third parties such as the Alavi Foundation, whose counsel's efforts to "correct the record" constitute the first manifestation of a metastasizing litigation. I would not shrink from these labors, nor permit Cohen and the NYPD to evade them, if I thought that at the end of the day — or, more probably, at the end of many days — the evidence elicited by this deposition would bear significantly upon the

Court's decision whether or not to modify the Handschu Guidelines. However, for the reasons stated, I conclude that the probative value of the deposition, minimal if it exists at all,<sup>8</sup> is clearly outweighed by its inevitable distractions. Therefore I grant the NYPD's motion for a protective order and vacate the notice of Cohen's deposition.

8. In that regard, I agree with Corporation Counsel that Cohen's answers to what police activities the Handschu Guidelines might or might not have permitted or forbade in hypothetical fact situations would have no probative value whatsoever. I appreciate that class counsel probably would not start off a deposition by putting a hypothetical situation to Cohen, but it seems plain enough that whatever answers Cohen gave could easily trigger follow-up questions that would carry the deposition deep into hypothetical waters.

The parties should note that I make this ruling on the record as it presently stands, and in the context of the deposition as noticed by class counsel and its intended purpose as described by them. I do not foreclose the possibility that Deputy Commissioner Cohen may have to testify before the Court decides the NYPD's motion to modify the Handschu Guidelines. I will suggest one possible area.

The NYPD, to obtain the modification it asks for, has the burden of showing that it is "suitably tailored to the changed circumstance." *Rufo*, [502 U.S. at 393](#). If one applies the *Rufo* Court's invocation of the honorable and ancient craft of clothes tailoring, it is apparent that the NYPD is asking this Court for an alteration (or "modification") of the Handschu Guidelines which is the functional equivalent of altering a full dress formal evening suit resplendent with white tie and tails into a pair of gym shorts. The modified Handschu Guidelines, as proposed by the NYPD, fit on two pages, double-spaced. They may be contrasted in that regard with the recently revised United States Attorney General's Guidelines on General Crimes,

Racketeering Enterprise and Terrorism Enterprise Investigations, promulgated by Attorney General John Ashcroft on May 30, 2002, appended to the reply declaration of Ms. Donoghue. These Guidelines, binding upon the Federal Bureau of Investigation ("FBI"), consist of 25 single-spaced pages (including a one-page "Preamble"). Sections IH.B, IV, V, and VI, dealing respectively with "Terrorism Enterprise Investigations," "Investigative Techniques," "Dissemination and Maintenance of Information," and "Counterterrorism Activities and Other Authorizations" (which include the principal focuses of the present Handschu Guidelines), begin on page 15 and run through page 24. I have not parsed the new FBI Guidelines. But Attorney General Ashcroft and FBI Director Robert Mueller do not come quickly to mind as individuals who are soft on terrorism; and the question that arises is whether the FBI Guidelines impose restrictions or limitations upon the FBI's anti-terrorist activities that the modified Handschu Guidelines would not impose upon the NYPD. If (I stress the conjunction because I have not yet compared the substance of the two sets of guidelines) that is the case, then the related question is whether the proposed Handschu Guideline modification is "suitably tailored" to present-day terrorism, or goes too far. That is a question upon which Deputy Commissioner Cohen's testimony might be useful to the Court.

However, this potential question, which I presently do no more than raise and certainly do not even begin to answer, will be explored at the oral argument on the NYPD's motion to modify the Handschu Guidelines, the next event in the case. The desirability of any post-argument testimony by Cohen may be evaluated then.

### III. CONCLUSION

For the foregoing reasons, the NYPD's motion for a protective order is granted and the notice given by the plaintiff class to depose Deputy Commissioner David Cohen is vacated.

At the December 13 hearing, class counsel expressed a desire to "reserve the right" to submit additional materials "that have come to our attention separate and apart from what we are talking about today," Tr. 25. If class counsel wish to submit additional materials, they must file and serve it not later than January 15, 2003. Counsel for the NYPD may file and serve any response on or before January 24, 2003. The case will be called for oral argument at 10:30 a.m. on January 29, 2003, in Room 17C, 500 Pearl Street.

It is SO ORDERED.

## APPENDIX A

32. In the last decade, we have seen how the mosque and Islamic Institutes have been used to shield the work of terrorists from law enforcement scrutiny by taking advantage of restrictions on the investigation of First Amendment activity. The following examples of putatively lawful activity engaged in by terrorist conspirators provide a chilling backdrop to the discussion of our need to maximize the NYPD's ability to gather facts and make vital connections through intelligence analysis.

33. It is now well known that the 1993 World Trade Center bombing was planned at a Jersey City mosque where the extremist Sheik Omar Abdul Rahman (the blind sheik) often virulently denounced the U.S. At the time of the bombing, the imam of the Jersey City mosque was Muhammad Al Hanooti. Al Hanooti wrote a letter of recommendation in 1980 for Muhammed A. Salameh, the driver of the Ryder van that delivered the bomb to the garage of the World Trade Center in 1993. When Salameh rented the Ryder van, he used the address of the Jersey City Islamic Center.

34. Rahman left Egypt under pressure because of his involvement in terrorist activities. Shortly after his arrival in the U.S., he became imam of the Al-Farouq mosque in Brooklyn, preached often at the Islamic

Community Center (Abu Bakr El-Seddique mosque), also in Brooklyn, and controlled the Alkifah Relief Center there. In 1997, the Al-Farouq mosque received \$1.4 million dollars from the Alavi Foundation, a U.S. charitable organization controlled by the Iranian government.

35. The Alkifah Relief Center was founded by Osama Bin Laden and diverted vast sums of money to terrorist activities and training camps in Afghanistan. Mahmud Abouhalima had a key role in the management of Alkifah and was a frequent driver of Rahman. In 1995, Abouhalima was convicted for his involvement in the 1993 World Trade Center bombing. To finance his terrorist activity, Abouhalima ran a phony coupon redemption center in Brooklyn.

36. It was from the Abu-Bakr El-Seddique mosque in Brooklyn that Rahman and others planned a cataclysmic day of terror in which a bomb was to explode at each of the United Nations, the George Washington Bridge, the Lincoln and Holland tunnels and 26 Federal Plaza. Rahman was ultimately convicted for his role in the bomb plot. Terrorist manuals on Alkifah letterhead were admitted into evidence at the trial.

37. In 1995, Al Hanooti was named as an unindicted co-conspirator in the bomb plot by former U.S. Attorney Mary Jo White. At that time he had become the imam of the largest mosque in the Albany area. In 1993, Al Hanooti raised 6 million dollars for the support of Hamas in Israel which was funneled through the Holy Land Foundation. Al Hanooti denies any involvement in the bombing or raising funds to support Hamas.

38. The Holy Land Foundation has been outlawed in Israel as a fund raising tool of Hamas. Although the U.S. branch of the Foundation denies raising money for Hamas, IRS records show that the single largest contribution between 1989 and 1994 was from a Virginia businessman named Mousa Abu Marzook who has since emerged as a Hamas political leader. Marzook was jailed in New York after Israel arrested two

men based in the U.S. who claimed Marzook had given them \$300,000 in cash and wire transfers to set up a terrorist cell on the West Bank. The FBI has frozen the funds of the Holy Land Foundation in the U.S. and designated it as an organization which financially supports terrorism.

39. Another individual connected with the Alkifah Relief Center, Fawwaz Abu Damra, was the imam of the Al Farouq mosque prior to Rahman's arrival. He left that mosque and became the imam of the Islamic Center of Cleveland from which he raised money for a radical Palestinian organization. In a nationally televised video he is seen praising the murder of elderly Israelis and calling Jews the sons of pigs and monkeys. Damra since apologized for the remarks but admitted that he raises money for the Palestinians through the Holy Land Foundation.

40. The Islamic Center of Tucson has been associated with several known terrorists. It was led in 1984-85 by Wa'el Hamza Jalaidan, who is believed to be Bin Laden's chief of logistics and one of the founders of Al Qaeda. The Center was founded in 1971 by students at the University of Arizona and its new mosque was paid for, in part, by the Saudi government.

41. Wadih El Hage, Bin Laden's personal secretary, was a member of the center while living in Arizona in the late 1980s. El Hage is serving a life prison sentence for the 1998 bombing of two U.S. embassies in Africa.

42. The Islamic Center of Tucson has hosted conferences for the Islamic Association of Palestine, an organization presently under Treasury Department scrutiny, and has raised money for the Holy Land Foundation.

43. The Alavi Foundation is a non-profit charitable organization ostensibly run by an independent board of directors but totally controlled by the government of Iran. The foundation has assets of about \$100,000,000 in the U.S. and an annual income of between \$10-15 million. The foundation funds a vari-

ety of anti-American causes, including the four Islamic education centers it owns in New York, Maryland, Texas and California. The Maryland center is headed by Mohammad Al Asi, an American convert to Islam who, during the Kuwait crisis, called on Muslims to strike against American interests in the Middle East. Mosques funded by Alavi have organizations which support Hezbollah and Hamas.

44. The Islamic Society of North America has headquarters in Plainfield, Indiana but embraces various groups including the fundamentalist Muslim Brotherhood and Hamas. The vice-president of the Islamic Society is Imam Siraj Wahaj, the spiritual leader of the Masjid Al Taqwa, another Brooklyn mosque. He also sits on the board of advisers of its financial wing.

45. Siraj Wahaj was the first Muslim to deliver the daily prayer in the U.S. House of Representatives. On that occasion he recited from the Koran and appealed to the Almighty to guide American leaders and grant them righteousness and wisdom.

46. A little over a year later, however, addressing an audience of New Jersey Muslims, the same Wahaj articulated a different vision. He urged Muslims to be more clever politically, so they could take over the United States and replace its constitutional government with a caliphate. In 1995, Wahaj served as a character witness for Omar Abdel Rahman in the 1993 bomb plot trial at which Rahman was convicted.

47. The disparity between Wahaj's words in Congress and his words when addressing New Jersey Muslims, illustrates the problem facing those who must prevent future terrorist attacks when a public message in the First Amendment context raises questions that warrant law enforcement awareness and scrutiny.

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