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Reversing Reform: The *Handschu* Settlement in Post-September 11 New York City

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REVERSING REFORM: THE *HANDSCHU* SETTLEMENT IN POST-SEPTEMBER 11 NEW YORK CITY

*Jerrold L. Steigman**

Tappin' my phone, they never leave me alone
I'm even lethal when I'm unarmed
'Cause I'm louder than a bomb

—Public Enemy[1]

INTRODUCTION

Since September 11, 2001, messages from the government and mainstream press have been full of reminders that the world has changed.[2] Mass hysteria has affected markets, government and society. The United States government rushed through legislation aimed at deterring further terrorist attacks and protecting the country, and rounded up suspects based on ethnicity. The words "September 11" became synonymous with somber reflection and demanded an etiquette that instantly developed. A satirical newspaper wondered if irony was dead.[3]

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[1] Public Enemy, *Louder Than a Bomb*, *on* IT TAKES A NATION OF MILLIONS TO HOLD US BACK (DefJam Recordings 1988).

[2] David Cole, *National Security State*, THE NATION, Dec. 17, 2001, at 4 ("It is already a cliche that the attacks of September 11 'changed everything.'").

[3] *Report: Gen X Irony, Cynicism May be Permanently Obsolete*, THE ONION, Sept. 26, 2001, at 2.

Reference to September 11 by government officials became proof enough that the relationship between people and government must change, the only question remaining being, by how much? Questioning the prudence or necessity of policies proposing to radically alter the powers of government was dismissed as unpatriotic or helpful to terrorists. People's fears were commodified and manipulated. Against this backdrop, the rules governing police investigations of political activists in New York City came under attack.

The consent decree in *Handschu v. Special Services Division*, which included what is referred to as the *Handschu* Settlement and which was agreed to in 1985 by New York City residents and the New York City Police Department (NYPD), governs police investigations of groups or individuals that engage in various forms of political activity.[4] In September 2002, the NYPD and the City of New York—defendants in the *Handschu* case—sought and obtained modification of the consent decree.[5]

This note focuses on the mechanics of the *Handschu* Settlement and the arguments for and against modification. Part I summarizes the law regarding modification of consent decrees. Part II reviews the consent decree entered into in *Handschu*,[6] the

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[4] Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986). *See* Tom Perrotta, *Police Ask Court to View Secret Papers*, N.Y.L.J., Nov. 6, 2002, at 1 (reporting that "Handschu" is Barbara Handschu, an attorney from Buffalo, N.Y., the first named plaintiff in this class action).

[5] Defs.' Mem. of Law in Supp. of Mot. to Modify the Consent Decree Presently In Effect in this Action [hereinafter Defs.' Mem. of Law], Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985); Kevin Flynn & Jacob H. Fries, *Police Ask to Change the Rules and Ease Restrictions on Political Investigations*, N.Y. TIMES, Sept. 26, 2002, at A18.

[6] *Handschu*, 605 F. Supp. 1384. *See* Paul Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735 (1984) (discussing the settlement agreement, which at that time still was not finalized or entered as an order in the court). Professor Chevigny was lead counsel for the plaintiffs in the *Handschu* case, and his discussion reviewed public and judicial reactions to local police surveillance in cities and states around the country. *Id.* at 738-39. *See also* Eric Lardiere, Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 U.C.L.A. L.

background of the decree, relevant terms of the decree and subsequent litigation. Part II also describes the modifications sought by the defendants as well as the court's decision to modify the decree.[7] Part III analyzes the defendants' motion and the district court decision, illustrating possible results of modification by considering the outcome of a similar case.[8] Part III discusses whether the defendants' assertion that the threat of terrorism required modification of the decree is supportable. The note concludes by arguing that contrary to the assessment that terrorism required modification, circumstances have not changed with respect to the facts or the law in a way that warrants modification.[9] The city we currently live in might be different than before September 11 because of the supposed newly discovered realization that the city is vulnerable to attack.[10] The NYPD legitimately wants to prevent possible future terrorist attacks. But one thing is certain: before the *Handschu* plaintiffs obtained the consent decree with the NYPD, the NYPD abused constitutional rights when it conducted investigations based on individuals' protected speech and political affiliations. The police targeted critics of the government and social justice activists because of what they thought. The decree helped to curb that abuse, at least creating a deterrent to abuse and a mechanism for people to learn of and put a halt to unfair and unfounded

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REV. 976 (1983) (exploring government surveillance of political activity and considering the manner in which citizens can sue to enjoin the government from conducting these activities).

[7] Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003).

[8] Alliance to End Repression v. City of Chicago, 237 F.3d 799 (7th Cir. 2001) (modifying a similar consent decree for reasons that are posited by the NYC defendants in *Handschu*). *See infra* Part III.C.

[9] *See infra* Part III (arguing that modification is not warranted because the NYPD gives no persuasive argument for reinstating unchecked monitoring of political actors).

[10] The words "vulnerable to attack" are used with caution. For an explication of recent trends in speech about war, citizenship and enemies, see Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575, 1586-90 (2002) (commenting that recent political developments have tended to return racist and marginalizing thinking to common usage).

investigations. Nothing about terrorism or September 11 changed the necessity for oversight of police action in this regard. It is certainly a stressful time in our history. New York City residents should be skeptical of government enthusiasm for eliminating oversight in these stressful times. Indeed, the current state of affairs may actually increase the need for oversight. Without the decree in place, a known risk is created—the risk that police abuses will occur and go unrelieved in the absence of oversight.

I. CONSENT DECREES: PURPOSE, POLICY, ENFORCEMENT AND MODIFICATION

Consent decrees, or consent orders, are settlement agreements between litigants and have the same force as court orders.[11] When a court approves a decree, it "places its imprimatur upon a solemn compact between the parties," committing "the full power of the judiciary to implement effectively the obligations undertaken in the decree."[12] Commentators note that consent decrees are not a radical concept; rather, they are a creative way to use the courts to obtain justice not forthcoming elsewhere.[13]

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[11] Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986) (defining a consent decree as "an agreement of the parties in settlement of litigation . . . which the court approves and embodies in an order").

[12] *Id.* at 726.

[13] *See* Theodore Eisenberg & Stephen C. Yeazall, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that institutional reform litigation is not as radical a concept as other critics have noted and that the biggest changes that such litigation brings are new entitlements); *see also* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983) (pointing out that federal judges are in a very difficult position when presiding over decrees, given their lack of expertise and inability to be effective managers, but not concluding that structural injunctions should not be pursued); Margo Schlanger, *The Courts: Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) (arguing that concentration on the federal judge when considering institutional reform litigation impoverishes the debate on reform, as many other factors put

A. Reform Litigation and Consent Decrees

The earliest cases that created the foundation for reform litigation were school desegregation cases,[14] but later cases have included a wide range of public entities.[15] Parties have used consent decrees to enforce the constitutional and statutory rights and freedoms of citizens facing all types of government actions and intrusions.[16] Consent decrees are most controversial when the

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pressure on any area of social movement).

[14] *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977) (establishing that courts, in order to facilitate the desegregation process, demand in their orders more stringent requirements than might have been available had the case been fully litigated and not ended in a settlement); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) (requiring a unitary school system under a district court-approved desegregation plan and reiterating approval of broad federal equitable power where local authority defaults on its obligations).

[15] *See, e.g.*, Spallone v. United States, 493 U.S. 265 (1990) (discussing aspects of contempt actions brought to enforce consent order in Yonkers, a community particularly reluctant to obey the strictures of the twenty-year-old agreement between citizens and the local government that required an end to discriminatory public housing administration); United States v. Paradise, 480 U.S. 149 (1987) (ordering one-for-one black state trooper hiring regime on Alabama Department of Public Safety due to its years of recalcitrance in the hiring or promotion of blacks); United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002) (upholding agreement between the federal government and Los Angeles to discontinue practice of depriving individuals of constitutional rights "through the use of excessive force, false arrests and improper searches and seizures"); Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001) (upholding an agreement between bus riders and city authority to end discriminatory practice in providing bus services); Glover v. Johnson, 138 F.3d 229 (6th Cir. 1998) (issuing an order to establish satisfactory educational programs and allow inmates access to courts); Juan F. v. Weicker, 37 F.3d 874 (2d Cir. 1994) (upholding an agreement between neglected or abandoned children and the State of Connecticut to fix the constitutionally-violative administration of child welfare); French v. Owens, 777 F.2d 1250 (7th Cir. 1985) (upholding an injunction against intolerable prison conditions in Indiana facilities); United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970) (same).

[16] *See, e.g.*, Holland v. N.J. Dep't of Corr., 246 F.3d 267 (3d Cir. 2001) (prohibiting by consent decree race and gender discrimination and harassment of employees of New Jersey Department of Corrections); Watson v. Ray, 192

plaintiffs are citizens (or the federal government) and the defendant a state or municipal agency.[17] Such decrees raise issues of appropriate remedies[18] and how those remedies should be

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F.3d 1153 (8th Cir. 1999) (requiring by consent decree between Iowa State Penitentiary inmates and state officials, certain minimum prison conditions); Alexander v. Britt, 89 F.3d 194 (4th Cir. 1996) (requiring by consent decree between North Carolina citizen program applicants and the state's administrators of welfare and Medicaid programs, that the administrators process claims with certain timeliness); Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985) (establishing ability of parties to enforce consent decrees through contempt actions and requiring the U.S. Department of Health and Human Services to provide certain benefits to aliens); Chairs v. Burgess, 25 F. Supp.2d 1333 (N.D. Ala. 1998) (establishing a consent decree between Alabama jail inmates and corrections officials prohibiting overcrowding in jails and requiring timely transfers of inmates to prisons); United States v. City of Philadelphia, 499 F. Supp. 1196 (E.D. Pa. 1980) (restraining by consent decree gender discrimination in Philadelphia Police Department); Doe v. Dinkins, 192 A.D.2d 270 (1st Dep't 1993) (establishing the so-called "Callahan consent decree" requiring New York City to provide shelter for any qualified homeless man).

[17] Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (concluding that the separation of powers doctrine ought to inform a court's exercise of equitable powers in institutional reform litigation). Professor Nagel recognized, on the other hand, that the Supreme Court stated the opposite in *Elrod v. Burns*, 427 U.S. 347 (1976), and the "extreme pressures that can exist for using the federal courts as substitutes [for legislative and executive action]." *Id.* at 664. He was concerned that fundamental democratic values were going to be sacrificed "in order to vindicate particular constitutional rights," *id.* at 664, and thus courts ought to defer to judgments of state executive and legislative actors. *Id.* at 719. *See also* Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796 (1988) (arguing that the federal courts' powers over state administrative agencies raise significant federalism concerns); Tamia Perry, Note, *In the Interest of Justice: The Impact of Court-Ordered Reform on the City of New York*, 42 N.Y.L. SCH. L. REV. 1239 (1991) (considering the impact on the autonomy of New York City government actors from the imposition of federal orders).

[18] *See* Colin S. Diver, *Special Project-The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978) (detailing the problems facing the creation of remedies and discussing how to represent the interests of the parties).

constructed and applied when the plaintiffs represent a class.[19]

Consent decrees are entered into in the pursuit of institutional reform.[20] They are sometimes necessary to force government agencies to achieve their mandates within constitutional bounds.[21] Plaintiffs generally seek declaratory relief that a particular practice violates their rights in some way. They also seek injunctive relief, which, if obtained, serves to order the agency to do or stop doing something.[22] Consent decrees are attractive to defendants because defendants can contribute to the expedited outcome of the case.[23] Consent decrees are attractive to plaintiffs because rights are vindicated and the federal courts oversee implementation in the event that agencies refuse to abide by the law.[24] Consent decrees are also attractive to plaintiffs because they provide relief that may not be available through litigation.

Of course, consent decrees are not a panacea. Parties are sometimes reluctant to abide by the terms of a decree.[25] Moreover, as judicial instruments, the decrees are susceptible to

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[19] *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 198 DUKE L.J. 887 (1984) (questioning how the agreements reached in Title VII consent decrees can be fair to all people involved when such cases include people who are not parties).

[20] *See, e.g.*, Diver, *supra* note 18, at 809-12 (discussing the remedial process when the settlements have been negotiated as in most consent orders).

[21] Horowitz, *supra* note 13, at 1266-67 (recognizing courts as actors in reform).

[22] *See generally* Anderson, *supra* note 11 (discussing in detail all elements that should be present in a workable consent decree and reviewing case studies of three consent decrees); Horowitz, *supra* note 13, at 1266-67 (discussing the structural injunctions imposed on the courts through reform litigation.

[23] Anderson, *supra* note 11, at 726.

[24] *Id.*

[25] *See, e.g.*, Karla Grossenbacher, Note, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227 (1992) (discussing *Spallone v. United States* and arguing that given the ability to pursue options to enforce the decrees, federal judges ought to act forcibly to ensure that the relief is actually forthcoming); Eric A. Rosand, Note, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J.L. & SOC. PROBS. 83 (1994) (discussing the necessity of parties to continuously sue to enforce the consent decrees they have obtained).

manipulation.[26] The fact that a settlement has not been litigated extensively is not necessarily evidence that the settlement performed its task.[27] Lack of litigation could also be due to factors impeding the capacity of either party to get to court,[28] or it could mean that the parties addressed all the subsequent issues of implementation outside the courtroom.[29]

B. Judicial Intervention and Modification of Consent Decrees

The Federal Rules of Civil Procedure authorize courts to modify consent decrees.[30] Specifically, Rule 60(b)(5) provides that on motion the court can relieve a party from a final judgment or order if "it is no longer equitable that the judgment should have prospective application."[31] Courts can also provide relief for "any other reason justifying relief from the operation of the judgment."[32] Historically, the Supreme Court recognized that

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[26] *See, e.g.*, Julie K. Rademaker, *Note*, *Alliance to End Repression v. City of Chicago: Judicial Abandonment of Consent Decree Principles*, 80 NW. U.L. REV. 1675 (1986) (arguing that the interpretation of the consent order in that case ignored fundamental aspects of the original agreement).

[27] *See* Anderson, *supra* note 11, at 727 (noting that lack of litigation could result from the court prodding the parties along without resort to formal judicial measures).

[28] *Id.* at 728 (noting alternatively that the absence of written opinions might be the consequence of a defendant evading enforcement or the plaintiffs losing interest).

[29] *Id.* (recognizing that "[e]ach decree involves its own unique circumstances and a reader should not judge the success of a decree merely by whether it generates court opinions"); *see also* Horowitz, *supra* note 13, at 1302 (noting that courts prefer that parties handle subsequent issues without judicial oversight).

[30] *See* FED. R. CIV. P. 60 (allowing for modification of court orders by motion for relief from a judgment or order pursuant to the Federal Rules of Civil Procedure).

[31] FED. R. CIV. P. 60(b)(5). *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237-39 (1997) (allowing relief from judgment under rule 60(b)(5) where the Supreme Court found establishment clause law had significantly changed).

[32] FED. R. CIV. P. 60(b)(6). *See, e.g.*, Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863, 863 n.11 (1988) (recognizing federal court authority to relieve a party from judgment in the extraordinary

even where the order is by consent, a "court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned into, through changing circumstances, an instrument of wrong."[33] The Court also cautioned that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead" a court to modify the agreement.[34] According to the Court, a new statute altering the rights of the parties is one circumstance that can require the modification of a consent decree.[35] At least one lower court noted that Rule 60(b) assumes the propriety of the order and refers instead to "some change in conditions that makes continued enforcement inequitable."[36]

The leading case governing modification of consent decrees in institutional reform litigation is *Rufo v. Inmates of Suffolk County Jail*.[37] In *Rufo*, the Supreme Court ruled that courts

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circumstance where the district judge presiding over a dispute had a fiduciary interest in an interested party).

[33] United States v. Swift & Co., 286 U.S. 106, 114-15 (1932) (holding that a prospective decree is always subject to adaptation as necessary). In *Swift*, modification was not allowed because the evidence showed that the defendant corporation would return to its abuse of power as a meat packing monopoly. *Id.* at 117. Meat packing corporations sought to modify the consent decree to allow them to sell groceries as well as meat, but cited no changes that warranted modification. *Id.* at 116.

[34] *Id.* at 119.

[35] Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright, 364 U.S. 642, 651-652 (1961) (citing *Swift* for the proposition that courts have the power to modify consent decrees). Employees and corporation had agreed on a specific price to not establish a union shop. *Id.* at 644. The statute governing employment of railroad workers was amended, allowing for unions. *Id.* The petitioners moved for modification of the consent decree but the district court denied the motion and the Sixth Circuit affirmed. *Id.* at 646. The Supreme Court reversed, recognizing that the parties could not require enforcement of rights that the statute no longer offered. *Id.* at 652.

[36] Schildhaus v. Moe, 335 F.2d 529, 530 (2d Cir. 1964) (holding that plaintiff tax objector was entitled to maintenance of order as issued where facts had not changed). The court in *Schildhaus* observed that Rule 60(b) was not intended to be a substitute for an appeal from an erroneous judgment. *Id.* at 531.

[37] 502 U.S. 367 (1992) (establishing the test for modification of consent

should no longer hold the proponent of modification to the stringent grievous wrong standard when determining whether modification is warranted.[38] The consent decree in *Rufo* arose out of a complaint by inmates in the Suffolk County Jail in Boston, Massachusetts.[39] The plaintiffs alleged, and the district court found, unconstitutional conditions in the jail.[40]

Seventeen years after the original decree, the defendants sought modification.[41] The request was denied by the district court,[42] and the First Circuit upheld the denial.[43] The Supreme Court then reversed the decision and lowered the modification threshold, holding that the "party seeking modification of a consent decree must establish that a significant change in the facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance."[44]

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decrees in institutional reform litigation). The consent decree between the inmates and the Suffolk County sheriff "permanently enjoined the government" from double-celling inmates. *Rufo*, 502 U.S. at 373. *See also* Benjamin v. Jacobson, 172 F.3d 144, 161-62 (2d Cir. 1999) (*en banc*) (noting that the proposition laid out in *Swift* and *System Federation No. 91* is well established, and that modification authority still extends to consent decrees); David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239, 1275-76 (1993) (recognizing that the Court changed the *Swift* test and that the *Rufo* standard for modification rests on the fact that institutional reform cases are fact specific, and therefore flexibility in modification is warranted when facts have changed).

[38] *See Rufo*, 502 U.S. at 393.

[39] *See* Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974).

[40] *Id.* at 686 (holding that the pretrial detainment facility at issue "unnecessarily and unreasonably infringes upon [the inmates'] most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy").

[41] *See* Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561 (D. Mass. 1990).

[42] *Id.* at 566.

[43] *See* Inmates of Suffolk County Jail v. Kearney, 915 F.2d 1557 (1st Cir. 1990).

[44] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393 (1992).

Further, the modification must neither create nor perpetuate a constitutional violation[45] and should not seek the constitutional floor.[46] The *Rufo* Court prescribed consideration of whether the primary purpose of the consent decree had been achieved.[47] The Court did not, however, hold that satisfaction of the primary purpose is a necessary precursor to modification.[48]

The flexible test outlined in *Rufo* did not shift the burden; defendants still must prove that facts and law have changed to warrant modification.[49] Plaintiffs do not, after *Rufo*, have the burden of showing that those circumstances have *not* changed.[50] The Court noted that a change in the law as a result of decisions clarifying the law can only constitute "a change in the circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law."[51] Lamentably, the Court's opinion provides very little guidance to determine whether and how the law has changed.[52]

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[45] *Id.* at 391 (noting that petitioners, to prevail on this prong, would have to show that double-celling of pretrial detainees at the Suffolk County Jail was constitutional).

[46] *Id.* The Court noted that because the district court had determined that conditions at the jail were unconstitutional, and that because the parties had settled on particular relief, a modification that removed all the protections above what had been determined as constitutional was prohibited. *Id.*

[47] *Id.* at 382. *But see* Levine, *supra* note 37, at 1268-69 (arguing that the determination of the primary purpose, unless such a primary purpose is explicitly laid out by the parties, is very difficult and leaves the door open for appellate review).

[48] *Rufo*, 502 U.S. at 382.

[49] Levine, *supra* note 37, at 1269-70.

[50] *Id.* Had that occurred, only defendants would have the benefit of the flexible test. *Id.*

[51] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 390 (1992) (recognizing that the sheriff would have to establish that the parties mistakenly believed that single-celling of pretrial detainees was mandated by the Constitution to warrant modification).

[52] Levine, *supra* note 37, at 1273-75 (noting that a determination of whether the law has changed for purposes of modification could depend on whether the defendants had committed to abiding by their constitutional obligations or committed to abiding by an injunction not required by the Constitution).

II. THE *HANDSCHU* SETTLEMENT

The events leading up to the *Handschu* Settlement consisted of abusive police practices sufficiently shocking to compel plaintiffs to sue.[53] The plaintiffs extracted some major concessions from the NYPD in the shape of promises by the police to conduct their activities within certain parameters and created a mechanism for individuals to determine whether their rights had been violated.[54] The limited subsequent litigation of the settlement suggests its effectiveness at establishing oversight and promoting deterrence.[55] Defendants moved to modify the settlement in September 2002 to remove its principal protections, and the district court granted the modification request.[56]

A. Arriving at Handschu

In the 1960s the NYPD stepped up surveillance and other investigatory efforts to include "more undercover and other surveillance of 'groups that because of their conduct or rhetoric may pose a threat to life, property, or governmental administration'; of 'malcontents'; and 'of groups or individuals whose purpose is the disruption of governmental activities for the peace and harmony of the community.'"[57] Police officials

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[53] *See infra* Part II.A (discussing background of the decree).

[54] *See infra* Part II.A (describing terms of the settlement).

[55] *See infra* Part II.B (discussing subsequent litigation). That is, when police acted outside the settlement, the plaintiffs went to court and obtained judgments that their rights had been violated, even though they could not get the court to hold the defendants in contempt.

[56] Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 3643, at *14 (S.D.N.Y. Mar. 12, 2003) (accepting the NYPD's additions to the patrol guide). *See also* Tom Perrotta, *Police Win Battle to Remove Restrictions on Surveillance*, N.Y.L.J., Feb. 13, 2003, at 2 (reporting that the district court had agreed to the modifications sought by the defendants); *infra* Part II.B (listing defendants' arguments and discussing the district court's decision).

[57] Aff. of New York City Police Commissioner Patrick V. Murphy [hereinafter Murphy Aff.], *quoted in* Handschu v. Special Servs. Div., 605 F. Supp. 1384, 1396 (S.D.N.Y. 1985). *See also* Chevigny, *supra* note 6, at 735-

conceded that their activities included intelligence gathering "not limited to investigations of crime, but related to any activity likely to result in 'a serious police problem.'"[58] For example, a two-year investigation of one citizen, which yielded a single, unregistered and subsequently suppressed handgun, comprised, according to the court, countless unconscionable violations of the individual's rights and a terrific waste of city resources.[59]

A class of plaintiffs composed of various political groups

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36 (noting that political surveillance, which had existed as early as 1904 with the NYPD's "Italian Squad," became more active in the 1960s). One reason for the increased activity was that the police had more work to deal with an increase in "demands for reform and radical change." *Id.* at 736. Another was public interest in knowing who and what were causing social upheaval of the times. *Id.* Federal funding was made available to local law enforcement to assist in surveillance efforts. *Id.*

[58] Murphy Aff., *supra* note 57, *quoted in Handschu*, 605 F. Supp. at 1396 (acknowledging police investigations of radicals and protesters included use of "infiltration and informers, and telephone wiretapping, electronic eavesdropping, surreptitious recording of conversations, covert photography of individuals attending demonstrations, and recording speeches at demonstrations"). The police also would issue false press credentials to its officers and would "routinely furnish information about individuals signing petitions or attending meetings" to the state bar. *Id.* The case does not define a "serious police problem." *Id.* A reasonable place to look for a definition might be where the police focused their resources. *See, e.g.*, People v. Collier, 376 N.Y.S.2d. 954, 955 (Sup. Ct. 1975) (discussing investigation of a Lower East Side community activist). Vietnam War protesters were targets, Murphy Aff., *supra* note 57, *quoted in Handschu*, 605 F. Supp. at 1396, as were Black Panthers, *Handschu*, 605 F. Supp. at 1397.

[59] *See* People v. Collier, 376 N.Y.S.2d. at 958-59 (detailing the circumstances of a particular wide-ranging investigation, while laying out the activities of an undercover New York City Police detective over two years). The court described how the detective was assigned to spy on the defendant and followed this model citizen to a steady procession of school board meetings, local hospital meetings, anti-drug campaign work and other general community activism. *Id.* at 961-63. Part of the detective's disguise included holding himself out to be unemployed; the defendant actually tried to get the detective work at various times, including letting him babysit for spending cash. *Id.* at 967. The detective produced hundreds of memos on the defendant and submitted them to his superiors in the Bureau of Special Services. *Id.* at 959. The trial court condemned this outrageous investigation at great length. *Id.* at 979-88.

filed a lawsuit in the District Court for the Southern District of New York against the mayor and police commissioner of the City of New York and other police officials.[60] The complaint charged that the infiltration and maintenance of information about the plaintiff class violated plaintiffs' First Amendment and other constitutional rights.[61] Plaintiffs further alleged that the Intelligence Division of the NYPD engaged in summary punishment to deter plaintiffs from lawful association and political activity[62] and that the activities of the NYPD had a chilling effect on the exercise of the plaintiffs' constitutional rights of speech, assembly and association.[63]

The plaintiff class and the NYPD agreed to a settlement, which resulted in a consent decree, whereby the police would conduct investigations of political actors only within certain

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[60] Handschu v. Special Servs. Div., 349 F. Supp. 766 (S.D.N.Y. 1972) (establishing plaintiff class of various political groups on behalf of themselves and all residents of New York City that were or may in the future may become targets of political surveillance by the NYPD).

[61] *See Handschu*, 349 F. Supp. at 768 (denying defendants' motion to dismiss). This action was brought by Professor Chevigny and others. *Id.* at 766. Plaintiffs alleged that seven specific categories of practices and conduct of the Security and Investigation Section were unconstitutional. *Id.* The categories were: use of informers, infiltration, interrogation, overt surveillance, summary punishment, intelligence gathering and electronic surveillance. *Id.* at 768. The plaintiffs sought declaratory and injunctive relief. *Id.* at 767. One of the original plaintiffs was Shaba Om, a member of the "Panther 21." *Handschu*, 605 F. Supp. at 1384. The police had infiltrated the Black Panthers and charged them with a plot to blow up department stores and police stations, but the jury acquitted the Black Panthers on all counts after determining police agents had "manipulated the defendants with ideas and encouragement and then greatly exaggerated their misdeeds to police superiors." *See* Chisun Lee, *The NYPD Wants to Watch You: Nation's Largest Law Enforcement Agency Vies for Total Spying Power*, VILLAGE VOICE, Dec. 18-24, 2002, at 33 (discussing the background of *Handschu*).

[62] *Handschu*, 349 F. Supp. at 768.

[63] *Id.* Police agents at public gatherings, for example, could create an "atmosphere of fear and intimidation." Chevigny, *supra* note 6, at 737. This fear and intimidation would be compounded by the knowledge that the police were collecting names and building dossiers. *Id.*

limits.[64] The settlement established an 'Authority' (the Authority) to oversee the activities of the Public Security Section (PSS) of the Intelligence Division.[65] The majority decisions of the Authority were binding on the PSS.[66] The NYPD could not engage in any investigation of political activity, which the settlement defined as "the exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions."[67] The settlement authorized the PSS to commence an investigation only after the NYPD established "specific information"[68] that "a person or group engaged in political activity is engaged in, about to engage in, or threatened to engage in conduct which constitutes a

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[64] Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986).

[65] *Handschu*, 605 F. Supp. at 1417-24 ("*Handschu* Settlement"), § III. Further references to the settlement will be to section number in annexed pages 1417-24 to the district court opinion. The three members of the Authority were the First Deputy Commissioner of the Police Department, the Deputy Commissioner for Legal Affairs, and a civilian member appointed by the mayor for a term revocable at will. *Id.* § III. The Public Security Section (PSS) was the then current incarnation of the Special Services Division, named in the original complaint. *Handschu*, 349 F. Supp. at 767. These names, 'PSS,' 'Intelligence Division,' and 'NYPD,' as well as 'police,' are used interchangeably.

[66] *Handschu*, 349 F. Supp. at 767. The membership of the Authority has been criticized because the input of the civilian member can be nullified, as majority decisions are binding. *Handschu*, 605 F. Supp. at 1410 (agreeing that the civilian member cannot be automatically assumed to be a "booby"). *See also* David Berry, Note, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. CAL. L. REV. 207, 232 (1982) (arguing, *inter alia*, that settlements, including the *Handschu* Settlement, are inadequate to protect constitutional rights and citing the lack of independent oversight as one factor exemplary of the inadequacy). *But see* Chevigny, *supra* note 6, at 765-66 (maintaining that the civilian member is a good and necessary part of the Authority, defending the composition of the Authority with the observation that settlements are the products of negotiations, and conceding that it would be best, obviously, to have an independent review board with the ability to conduct inquiries).

[67] *Handschu* Settlement, *supra* note 65, § II.A.

[68] *Id.* § IV.C.

crime."[69] Prior to any criminal investigative efforts, the PSS had to submit to the Authority an "Investigation Statement" specifying the factual predicate.[70] Approved investigations could be conducted for thirty days, with possible extensions.[71] If the commanding officer of the Intelligence Division desired to use undercover personnel in an investigation, the officer had to first apply for approval showing good cause for the investigation and that the use of undercover personnel was essential.[72]

Information obtained during investigations of individuals, groups or organizations could be collected or maintained only in conformity with the settlement.[73] Information "from publicly available sources" could not be maintained with the PSS.[74] Officers were only allowed to collect certain, general information about a planned non-criminal event "in order to preserve the peace, deploy manpower for control of crowds and protect the right[s] of individuals to freedom of speech and assembly."[75] Specifically, the PSS could not retain information that an individual had signed a particular petition, that an individual's name appeared on a particular mailing list, that an individual financially supported a particular political group or the group's aims, or that an individual had published anything that could be said to expound a particular political view.[76] Information collected pursuant to the settlement guidelines "[could] be distributed only to law enforcement agencies or government

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[69] *Id.* § IV.C.

[70] *Id.* § IV.C(1). If the PSS showed good cause, it could initiate the investigation and apply for approval within forty-eight hours. *Id.* The factual predicate is the specific information of criminal activity or threatened criminal activity. *Id.*

[71] *Id.* § IV.C(6)(b).

[72] *Id.* § IV.C(6).

[73] *Handschu* Settlement, *supra* note 65, § VI.A. To be in conformity with the settlement, the approvals must have been sought and obtained. *Id.*

[74] *Id.* The settlement does not define publicly available sources. *Id.*

[75] *Id.* § IV.B The information allowed to be collected in such an 'Event Planning Inquiry' pertains to general information about the event. *Id.*

[76] *Id.* § VI.B(1)-(4).

agencies conducting security clearance procedures"[77] and could not be disseminated "unless the requesting agency agree[d] in writing to conform strictly with the provisions" of the settlement.[78] The settlement prohibited developing a file on an individual or group based solely on that individual's or group's "political, religious, sexual or economic preference."[79]

Additionally, the settlement created a mechanism for citizens who believed they were the subjects of surveillance to obtain confirmation of the surveillance from the Authority via an inquiry.[80] If the target of an investigation confirmed that surveillance was conducted, the target could request that the Authority inquire of the PSS to determine whether the investigation was conducted in accordance with the settlement.[81] If the Authority determined that the investigation violated the settlement, the Authority would then determine the disposition of the gathered material and submit a report to the police commissioner, who was required to initiate appropriate disciplinary measures.[82] The activities of the PSS were reviewed annually by the commanding officer of the Intelligence Division and submitted to the Authority.[83] The report included an accounting of the past year's investigations, which had to be turned over to the police commissioner and submitted to the mayor.[84]

The Second Circuit upheld the settlement in the face of strong

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[77] *Id.* § VII.A.

[78] *Id.* § VII.D.

[79] *Handschu* Settlement, *supra* note 65, § VI.C.

[80] *Id.* § V.A. There is no indication in the settlement how the Authority conducts its inquiry. *Id.*

[81] *Id.*

[82] *Id.* § V.B. *See also* Berry, *supra* note 66, at 232 (critiquing the *Handschu* Settlement and noting that disciplinary measures are no substitute for real punishment of violations).

[83] *Handschu* Settlement, *supra* note 65, § VIII.

[84] *Id.* §§ IX.A-B. There is no indication in the settlement what the mayor is to do with the report. *Id.* There is also no mention of any public reporting requirement. *Id.*

objections.[85] Those who objected were concerned that settling would inhibit public awareness of police abuse and that the NYPD would not be held accountable for past wrongs visited upon New York City residents.[86] That is, past illegal activities of the NYPD would not be adjudicated, and the settlement incorporated no admissions of wrongdoing by the NYPD.[87] Objectors also feared that the settlement would prevent New Yorkers from benefiting from constitutional principles that might arise after the settlement had been approved.[88] The objectors were concerned that if the law changed in the future to incorporate, for example, stronger First Amendment protections, the settlement would stifle the change's application to the plaintiff class of New York residents.[89]

The district court noted that the desire to have the defendants admit their wrongs was understandable but was inconsistent with the nature of settlements.[90] To allay the objectors' fears, the court acknowledged the settlement's flexibility, writing that "if future cases declare constitutionally guaranteed rights and privileges which do not presently exist, the Guidelines are automatically amended *pro tanto*."[91] Discussing the wording of the *Handschu*

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[85] Handschu v. Special Servs. Div., 787 F.2d 828, 831 (2d Cir. 1986). The objectors complained that they did not have notice of the settlement, but the court considered the uproar among the groups as evidence that the due process requirements of notice were met. *Handschu*, 787 F.2d at 832-33. The objectors also did not consider the settlement agreement fair and reasonable, but the court thought otherwise, concluding that the plaintiffs had obtained "very respectable" concessions from the NYPD. *Id.* at 834; *see also Handschu*, 605 F. Supp. 1397-99.

[86] *Handschu*, 605 F. Supp. at 1398 (noting objectors' concerns); Chevigny, *supra* note 6, at 761-65 (addressing objectors concerns).

[87] *Handschu*, 605 F. Supp. at 1399.

[88] *Id.* at 1405.

[89] *Id.*

[90] *Id.* The court recognized the objectors' "passionate desire . . . that whatever illegalities the NYPD perpetrated in earlier years be exposed to the light of day by a full plenary record. It is easy enough to understand that desire in human terms. But it is absolutely inconsistent with the salutary purpose of class action settlements." *Id.*

[91] *Id.* at 1406 (internal citations removed). "*Pro tanto*" means that the

Settlement, Judge Haight remarked:

> If, as defendants' counsel profess, the NYPD has abandoned any prior abuses and now views constitutional principles with pure and undistilled enthusiasm, no words of restraint are necessary; the millenium [sic] is at hand. If, as objectors apparently believe, the NYPD is mendacious, untrustworthy, and unalterably committed to continuing constitutional violations, no words are sufficient to avoid future controversy. I think it likely the real world lies somewhere between these two poles.[92]

B. Litigation of the Settlement

Subsequent litigation of the *Handschu* Settlement revealed that the real world did indeed lie somewhere between the poles. From 1989 to 1990, the plaintiffs litigated the settlement three times, using the mechanisms of the settlement to invoke their rights.[93] Defendants sought to modify the settlement in September 2002 and render the mechanisms much less useful.[94] Modification was granted, and plaintiffs apparently are not planning an appeal.[95]

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settlement would have incorporated whatever constitutional protections might have arisen. *See* BLACK'S LAW DICTIONARY 1222 (6th ed. 1990).

[92] *Handschu*, 605 F. Supp. at 1409-10. The court was discussing the wording of the settlement with respect to how much of a showing the police would need to make in order to get approval to use informers on an investigation. *Id.*

[93] *See* Handschu v. Special Servs. Div., 131 F.R.D. 50 (S.D.N.Y. 1990); Handschu v. Special Servs. Div., 838 F. Supp. 81 (S.D.N.Y. 1989); Handschu v. Special Servs. Div., 737 F. Supp. 1289 (S.D.N.Y. 1989).

[94] Defs.' Mem. of Law, *supra* note 5, at 5.

[95] Handschu v. Special Servs. Div., 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003). *See New Police Guidelines Go into Effect*, N.Y.L.J., Mar. 26, 2003, at 1 (noting that civil liberties lawyers recently said they would not oppose the ruling).

1. Invoking Handschu

In 1989 the plaintiffs made two separate motions to hold the defendants in contempt; the court refused both.[96] In the first, plaintiffs alleged that police surveillance of black activists and a radio station violated the settlement.[97] The court found that monitoring the station violated the settlement but did not hold defendants in contempt, noting that some ambiguities were inevitable when guidelines such as those in *Handschu* are put in place.[98] In the second, the plaintiffs alleged that the defendants had purposefully destroyed records plaintiffs wished to discover.[99] The court did not consider the destruction of records "deliberate sabotage" and appointed a document retrieval expert.[100] The expert's job was to facilitate retrieval of the documents that the defendants claimed were not produced due to administrative difficulties.[101]

The *Handschu* Settlement was also litigated in 1990,[102] when plaintiffs sought to access notes created by an investigation conducted by undercover police agents.[103] The agents had attended meetings of the New York City Civil Rights Coalition (the Coalition), a citizen group "formed . . . to explore the problem of racial bigotry in New York City."[104] The Authority

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[96] *Handschu*, 737 F. Supp. at 1308-09; *Handschu*, 838 F. Supp. at 81.

[97] *Handschu*, 737 F. Supp. at 1291. The activists were the "New York 8" who were charged but acquitted of conspiracy to free two prisoners. *Id.* at 1304. The police were listening to and taping WLIB to be alerted to "announcements of demonstrations and meetings of interest . . . [,] commentaries by community leaders relating to police activities . . . and comments of members of the New York 8." *Id.* at 1295.

[98] *Id.* at 1308.

[99] Handschu v. Special Servs. Div., 838 F. Supp. 81 (S.D.N.Y. 1989).

[100] *Id.*

[101] *Id.*

[102] Handschu v. Special Servs. Div., 131 F.R.D. 50 (S.D.N.Y. 1990) (granting a motion by the New York City Civil Rights Coalition to compel discovery on its claim that the defendants were violating the settlement by spying on the Coalition's activity).

[103] *Id.* at 51.

[104] *Id.* This group was formed after the Howard Beach incident. *Id.*; *see*

had previously supplied the Coalition with limited information indicating the investigation had taken place and that some information was obtained in violation of the settlement.[105] Judge Haight ordered discovery, stressing that this type of discovery order exemplified the type authorized by the settlement.[106]

2. Unsettling Handschu

In September 2002, the defendants requested modification of the decree to "eliminate the restrictions on the investigation of 'political activity.'"[107] Defendants' contended that the settlement was no longer equitable in light of changes in "factual circumstances."[108] They cited a string of attacks on United States military and civilian targets for the proposition that the NYPD "had no conception of the challenge it would face in protecting the City and its people from international terrorism" when it

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also PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 58 (1991). In 1986, three black men were beaten by a group of white teenagers in the predominantly white community of Howard Beach in Queens. *Id.* One of the victims fled the group and, in attempting to escape across a highway, was hit by a car and killed. *Id.* What ensued in the public and press was an ugly, racist display founded on an implicit notion that the presence of the men in that neighborhood itself was threatening to the community and the beatings thus warranted. *Id.* at 58-59. For a full account of the incident and aftermath, *see generally id.* at 58-61.

[105] *Handschu*, 131 F.R.D. at 51.

[106] *Id.* at 52.

[107] Defs.' Mem. of Law, *supra* note 5, at 5. The NYPD, following its September 2002 modification motion, asked the district court to review sealed testimony of Intelligence Commissioner David Cohen. Tom Perrotta, *Police Ask Court to View Secret Papers: City Seeks Modification of Surveillance Rule*, N.Y.L.J., Nov. 6, 2002, at 1. This testimony was supplemental to that contained in the motion and apparently based upon confidential information the public release of which would have compromised an ongoing investigation. *Id.* The police filed additional papers that denied that the modifications sought constituted a post-September 11 power grab. Tom Perrotta, *Police Defend Bid to Relax Spying Rules*, N.Y.L.J., Nov. 27, 2002, at 1. The police further alleged that the safety of New Yorkers would be jeopardized by continued adherence to the settlement agreement. *Id.*

[108] *Id.*

agreed to the settlement in 1985.[109] Defendants also stated that a "terrorist infiltration of America" had occurred,[110] that the "present terrorist threat requires the concerted compilation and exchange of data," and that the settlement precluded the NYPD from these functions.[111]

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[109] *Id.* at 12. Specifically, the defendants cited:

> The bombing of military bases in Saudi Arabia; the killing of nineteen U.S. airmen in the 1996 Khobar Towers bombing; the October 2000 attack on the battleship Cole in Yemen; the assault on United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania in August 1998; the World Trade Center bombing of 1993; and the September 11th destruction of the World Trade Center and accompanying attacks on the Pentagon.

Id.

[110] *Id.* at 13. It should be noted here that the terms "terrorist" or "terrorism" ought to be cautiously invoked because they are ambiguous. *See, e.g.*, United States v. Graham, 275 F.3d 490, 524-44 (6th Cir. 2001) (Cohn, J., dissenting) (analyzing, in detail, the legislative history of one of the federal definitions of terrorism and the difficulties agreeing on what constitutes terrorism); United States v. Goba, 220 F. Supp. 2d 182, 188 (W.D.N.Y. 2002) (analyzing the definition of terrorism from 8 U.S.C. § 1182 (2002), 18 U.S.C. § 2339(B) (2002) and 22 U.S.C. § 2656(f) (2002)). *See also* 22 U.S.C. § 2656f(d) (defining terrorism for the U.S. Department of Defense as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience"). The definitions are ambiguous because sometimes what objectively appears to be terrorism is not so designated; conversely, the term can be used very broadly. *Compare* William Blum, *American Empire for Dummies: A Talk Given in Boulder Colorado*, ZNET, *at* http://www.zmag.org/content (Oct. 21, 2002) (discussing American intervention in other nation's affairs that would fit this definition, among them the squashing of "dissident movements" throughout Latin America in the 1950s through the 1980s, the 1989 invasion of Panama, intervention in Nicaraguan elections, the bombings of Iraq and Yugoslavia, and the support for Cuban terrorist Orlando Bosch), *with* Mitchell Plitnik, *Terror and History*, ZNET, *at* http//:www.zmag.org/Znet.html (Nov. 6, 2002) (demonstrating the use of the word terror to describe the Washington D.C. sniper). An everyday definition is preferable; for the purposes of analysis this note defines "terrorism" as a violent act in support of or for the purpose of furthering particular political goals.

[111] Defs.' Mem. of Law, *supra* note 5, at 17.

According to the defendants, the settlement was too restrictive.[112] Their motion requested a reduction in the role of the Authority so that its sole function would be to review records to determine whether constitutional violations had occurred.[113] Specifically, the defendants claimed the "criminal activity requirement" prohibited defendants from investigating the legal preparatory activities of terrorist operatives.[114] Defendants argued that "in the case of terrorism, to wait for an indication of crime before investigating is to wait far too long."[115] This inability to investigate lawful activities restricted the "development of intelligence and the sharing of that intelligence."[116]

In response, plaintiffs did not deny that circumstances had changed in New York City.[117] Instead, they posited in their brief and at oral argument that the settlement would not interfere with terrorism investigations.[118] They also contended that the terrorism of September 11 did not involve protected political activity.[119]

Judge Haight analyzed the request for modification under the

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[112] *Id.* at 14.

[113] *Id.* at 5; Defs.' Notice of Motion, Annexed Decl. of Gail Donoghue, at 2, Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003).

[114] Defs.' Mem. of Law, *supra* note 5, at 5.

[115] Defs.' Notice of Mot., Annexed Decl. of Deputy Commissioner for Intelligence David Cohen [hereinafter Cohen Decl.], at 15, *Handschu*, 2003 U.S. Dist. LEXIS 2134.

[116] Defs.' Mem. of Law, *supra* note 5, at 14.

[117] *Handschu*, 2003 U.S. Dist. LEXIS 2134, *28; *see also* Lee, *supra* note 61, at 32 (reporting that plaintiffs "acknowledge[d] that September 11 was uniquely tragic but deny that it created a reason to grant police free access to lawful people's private information").

[118] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *29-30 (quoting plaintiffs' brief that "[t]he Handschu Guidelines do not restrict the investigation and prevention of terrorism. They have no bearing on police action except when an investigation focuses on a group or person engaged in political activity").

[119] *Id.* at *30 (quoting plaintiffs' brief that "[t]he Guidelines would not have interfered with the investigation of the September 11th hijackers because they were involved in no protected political activity, in New York or anywhere else.").

test articulated by the Supreme Court in *Rufo*.[120] He first considered whether defendants made a threshold showing of a change in facts or law requiring revision.[121] He noted:

> There is no disputing Deputy Commissioner Cohen's assertion that since the formulation of the *Handschu* Guidelines in 1985, 'the world has undergone remarkable changes, . . . not only in terms of new threats we face but also in the ways we communicate and the technology we now use, and are used by those who seek to harm us.'[122]

Judge Haight stated that "these fundamental changes in the threats to public security are perfectly apparent to every individual with any awareness of what is happening in the world."[123] Thus the court determined that changed circumstances warranted modification.[124]

Judge Haight disposed of the plaintiffs' argument by noting that he could not "accept its implicit assumption: that terrorists would *never* in furtherance of their unlawful purposes participate in 'lawful political, religious, educational or social activities.'"[125] He supported this by pointing to the defendants' assertion that one of the individuals convicted in the 1993 World Trade Center bombing was an imam[126] and concluded that "the *Handschu* Guidelines may impose restrictions upon the NYPD's ability to investigate terrorism."[127] Judge Haight noted that the plaintiffs did not offer evidence to rebut the defendants' contentions.[128] He therefore found no basis to doubt the contentions that, in general,

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[120] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *26.

[121] *Id.*

[122] *Id.* at *27.

[123] *Id.* at *28.

[124] *Id.* at *40.

[125] *Id.* at *33. In other words, terrorists would never participate in activities that the settlement was supposed to protect. *Id.*

[126] *Id.* An imam is an Islamic religious leader. *See* Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 54 (2002). Exercise of religion is protected by the constitution. U.S. CONST. amend I.

[127] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *35.

[128] *Id.*

the criminal activity requirement and the limits on collection and retention of information restricted police ability to investigate terrorism.[129]

Judge Haight next considered whether the requested modification was suitably tailored to the changed circumstances.[130] He determined that the modified *Handschu* guidelines suggested by the defendants did not create or perpetuate a constitutional violation because it maintained the police policy of conforming to "constitutionally guaranteed rights and privileges."[131]

Judge Haight also noted that it was within his discretion to determine how closely modification could approach the constitutional floor.[132] He balanced the "cost or risk to the public" of not modifying the settlement "to allow the NYPD to combat terrorism" against the cost to the "values protected by the First Amendment."[133] According to Judge Haight, the modifications came very close to the constitutional floor but were "justified by the unprecedented current public dangers of terrorism."[134] He agreed with the defendants that maintaining the Authority, even with its newly limited role, kept the modification sufficiently above the constitutional floor to satisfy *Rufo*.[135] The NYPD's promise to incorporate the substance of the FBI Guidelines into the police patrol guide bolstered this conclusion.[136] Thus, Judge Haight found that modification was

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[129] *Id.* at *37-38.

[130] *Id.* at *40.

[131] *Id.* at *41-42.

[132] *Id.* at *45.

[133] *Id.* at *45-47 (quoting Alliance to End Repression v. City of Chicago and the United States Department of Justice, 742 F.2d 1007, 1016 (7th Cir. 1984) (*en banc*)).

[134] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *47.

[135] *Id.* at *51.

[136] *Id.* at *21-23. *See* Att'y General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations [hereinafter FBI Guidelines], *at* http://www.usdoj.gov:80/olp/generalcrimes2.pdf (May 30, 2002) (amending guidelines that had been in place since the 1980s to include more explicit references to conducting investigations of terrorism).

required and suitably tailored to the change in circumstances.[137]

In doing so, the court noted a third *Rufo* command: to "give significant weight to the views of the local government officials who must implement any modifications" because those officials "have primary responsibility for elucidating, assessing, and solving the problems of institutional reform."[138] Judge Haight assigned significant weight to the opinions of NYPD officials.[139] He then quoted Judge Posner's invocation of the specter of terrorism in *Alliance to End Repression v. City of Chicago*,[140] writing:

> [M]indful of the crucial importance of preserving both individual freedoms and public safety, and balancing the legitimate demands of those two goals to the best of my ability, I conclude that the NYPD is entitled to a conditional order of the Court approving the proposed modifications to the consent decree and to the *Handschu* Guidelines.[141]

Ultimately, he conditioned the modifications on the NYPD's prompt submission to him of the text of the substance of the FBI Guidelines.[142]

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[137] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *51.

[138] *Id.* at *60 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392 n.14 and 391 (1992)).

[139] *Id.* at *60.

[140] *Id.* (citing Alliance to End Repression v. City of Chicago, 237 F.3d 799, 802 (2d Cir. 2001), which modified, due to changed circumstances, a consent decree arising from Chicago police investigations of political groups); *see also infra* Part III.B.

[141] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *62-63.

[142] *Id.* at *63-64; *see also* FBI Guidelines, *supra* note 136. It should be noted here that an additional, perhaps more chilling, development is on the horizon: federal legislation rumored to be originating with the Department of Justice that could terminate the *Handschu* Settlement even if plaintiffs appeal. *See* Charles Lewis & Adam Mayle, *Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act*, THE CENTER FOR PUBLIC INTEGRITY, *at* http://www.publicintegrity.org/dtaweb/list.asp?L1=10&L2=0&L3=0&L4=0&L5=0 (Feb. 7, 2003) (providing an electronic copy of the Domestic Security Enhancement Act of 2003 (Confidential Draft Jan 9, 2003)). In the Act's "Section by Section Analysis," the *Handschu* Settlement is mentioned by

III. *HANDSCHU* REMAINS VITAL

Accepting that *Handschu*'s protection of an individual's First and Fourth Amendment rights hinders the NYPD's ability to fight terrorism requires accepting the following difficult proposition, which should be rejected: the political views of dissenters raise suspicion of terrorism.[143] It was predictable that the police would invoke the stressfulness of the current climate to modify the decree and use modification as a cover for an interest in suppressing dissent.[144] But, contrary to the defendants'

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name:

> During the 1970s and 1980s, some law enforcement agencies-e.g., the New York City Police Department-entered consent decrees that limit such agencies from gathering information about organizations and individuals that may be engaged in terrorist activities and other criminal wrongdoing. *See, e.g.*, *Handschu* . . . . As a result, they lack the ability to use the full range of investigative techniques that are lawful under the Constitution, and that are available to the FBI. (For example, the Attorney General's investigative guidelines authorize agents, subject to certain restrictions, to attend public places and events "on the same terms and conditions as members of the public generally.") The consent decrees also handicap officers in their efforts to share information with other law enforcement agencies, including federal law enforcement agencies such as the FBI. These problems threaten to frustrate the operations of the federal-state-local Joint Terrorism Task Forces, and could prevent effective cooperation at all levels of government in antiterrorism efforts. . . . This proposal would discontinue most consent decrees that could impede terrorism investigations conducted by federal, state or local law enforcement agencies. It would immediately terminate most decrees that were enacted before September 11, 2001 (including New York City's). All surviving decrees would have to be necessary to correct a current and ongoing violation of a Federal right, extend no further than necessary to correct the violation of the Federal right, and be narrowly drawn and the least intrusive means to correct the violation.

Domestic Security Enhancement Act, *Section by Section Analysis: Section 312: Appropriate Remedies with Respect to Law Enforcement Surveillance Activities*, at (Confidential Draft Jan. 9, 2003).

[143] *See infra* Part III.A.2 (discussing link between political activity and terrorism).

[144] *See infra* Part III.A.2 (discussing government use of stressful times to

arguments and the court's determination, changes in circumstances since September 11 with respect to the consent decree are not sufficient to require modification.[145] Ultimately, the modifications impermissibly seek the constitutional floor, risk constitutional violations and are not tailored to any changed circumstances.[146]

A. Analysis and Arguments in Context

In times of relative societal calm, courts should seek to protect fundamental constitutional rights, such as those protected by the First Amendment, that come under harsh attack in "pathological" times.[147] Vigorous protection of these rights in times of calm provides greater stability for the future.[148] This is particularly necessary because in stressful times the courts will be constrained in their ability to monitor concentrations of executive power.[149] To be sure, it is difficult to pin down exactly when

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suppress dissent).

[145] *See infra* Part III.A.2 (arguing that modifying decree cannot be shown to assist with preventing terrorism).

[146] *See infra* Part III.A.2 (arguing that defendants' arguments cannot justify modifications).

[147] *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456, 459-62 (1985) (arguing that the doctrine surrounding certain core constitutional rights, and specifically the First Amendment, ought to be formulated with an eye toward pathological time periods). Professor Blasi defines pathology as a "social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is [an increased] likelihood that people who hold unorthodox views will be punished for what they say or believe." *Id.* at 450. This note employs Blasi's formulation for analytical purposes.

[148] *Id.* at 512. This is because the strength of constitutional ideals is most severely tested in pathological times, and if those ideals had solid grounding in other times they would be more robust when tested. *Id.* at 456.

[149] *Id.* at 507; *see also* Korematsu v. United States, 323 U.S. 214, 218 (1944) (upholding as constitutional a military wartime decision to round up and detain people of Japanese descent); Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) and

pathological times are upon us.[150] The years leading up to World War I, the years of World War II and the McCarthy era are generally considered exemplary pathological times.[151] The year following September 11, 2001, could also be included.[152] Since September 11, vulnerable constitutional rights have been under attack and society has not tolerated dissent.[153] Intolerance of

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commenting on Chief Justice Rehnquist's belief that it is not of concern that in times of national security crisis, civil liberties suffer); Anthony Lewis, *Marbury v. Madison v. Ashcroft*, N.Y. TIMES, Feb. 24, 2003, at A17 (recognizing that the Supreme Court "disappointed us" when it refused to interfere with the internment of Japanese Americans, and that judges cannot "close their eyes to violations of our rights" during a possibly endless war on terrorism). There is something of an inverse relationship between executive power and civil liberties: civil liberties contract as executive power expands, and vice versa.

[150] *See* Blasi, *supra* note 147, at 466.

[151] *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 329 (Douglas, J, concurring). Referring to "the flood of cases before us this term . . . we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era." *Id.*

[152] Blasi, *supra* note 147, at 464 (citing examples of events that precipitate a pathological period outside of the most natural example of a nation going to war). Among those are "a sudden disturbance of a comfortable way of life" or "[v]ivid reminders of a group's or nation's vulnerability." *Id.*; *see also Bush Speaks of Security To Group of U.S. Attorneys*, N.Y. TIMES, Nov. 30, 2001, at B7. "But we're at war. The enemy has declared war on us. They . . . seek to destroy our country and our way of life." *Id.* (quoting President George W. Bush).

[153] *See, e.g.*, *Hearing on Anti-Terrorism Policy Before the Senate Jud. Comm.*, 106th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft, who said, "[T]o those who scare peace-loving people with phantoms of lost liberty . . . your tactics only aid terrorists."), *quoted in* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (arguing that it is the liberty of non-citizens, not the liberty of citizens, that Americans have been historically, and are now even more willing, to give up); David Glenn, *The War on Campus: Will Academic Freedom Survive?*, THE NATION, Dec. 3, 2001 (discussing pressures put on professors at the University of New Mexico and UNC-Chapel Hill, a library assistant at UCLA, and condemnation of teach-ins at CUNY, all for academic commentary about the U.S. response to September 11); Bill Pennington, *Player's Protest Over the Flag Divides Fans*, N.Y. TIMES, Feb. 26, 2003, at D1 (reporting that a college basketball player's act

dissent is a distinctive feature of pathological periods.[154]

Discussing the pathology of these times requires recognizing that periods of heightened national security do not become so without some influence from the government.[155] In other words, compliant mass media that parrots the official story provided by government sources contribute to national hysteria.[156] This

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of facing away from the flag during the national anthem made her a controversial figure); Bill Berkowitz, *Academic Bashing*, *at* ZNET, http://www.zmag.org/znet.html (Nov. 6, 2002) (discussing the new study of university faculty by the American Council of Trustees and Alumni (ACTA) and recognizing effort to label university professors as anti-American where they question governmental policy). ACTA was founded by Lynn Cheney and Senator Joseph Lieberman in 1995. *Id.* The report condemns university faculty as being the "weak link" in America's response to terrorism. *Id.* Such a report seeks to stifle dissenting voices on campus and everywhere by listing those that seriously consider government policy. *Id.*

[154] Blasi, *supra* note 147, at 457 (noting that "[t]he aggressive impulse to be intolerant of others resides within all of us"). "It is a powerful instinct. . . . When the constraints imposed by [socialized norms about the value of free speech] lose their effectiveness . . . the power of the instinct toward intolerance usually generates a highly charged collective mentality." *Id.* The constraints on this aggressive intolerance are removed in stressful times, and "the problem is compounded by the fact that the suppression of dissent [manifests itself] in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community." *Id.* at 457-58; *see also* United States v. Sinclair, 321 F. Supp. 1074, 1079 (E.D. Mich. 1971) (recognizing the influence of the stressfulness of the Vietnam era on the public). "In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand [the views of political opponents of the government]." *Id.*

[155] Interview by Znet with Robert McChesney & John Nichols, ZNET, Nov. 6, 2002 (discussing their recent book explaining the struggle between free and independent press which serves the people on the one hand and concentrated corporate media subservient to power on the other), http://www.zmag.org/znet.html. For a detailed analysis of powerful interests shaping information, s*ee generally* EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT (1988) (establishing a model for understanding how information contrary to the needs of powerful institutions is suppressed and controlled in a democracy and applying that model to news stories of the 1970s and 1980s).

[156] *See* HERMAN & CHOMSKY, *supra* note 155, at 18-23 (recognizing elite

deference benefits those in power when the media ignore and suppress stories that conflict with governmental interests.[157] History predicts that government actors will invoke the stressfulness of a climate to justify abuses or extraordinary exercises of power.[158] Indeed, in their request to modify the

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influence on mass media). This contention, that media is subservient to the interests of power, allows for some contrary evidence. Thus, articles occasionally appear in mainstream publications the content of which may seem to undermine views routinely espoused in those publications. *Id.* This theory may explain how the majority of news coverage of the war on terrorism examines both the U.S. vulnerability to terrorism and a high-ranking U.S. military official's contrary opinion. *See, e.g.*, Eric Schmitt & Philip Shenon, *General Sees Scant Evidence of Close Threat in U.S.*, N.Y. TIMES, Dec. 13, 2002, at A26 (noting that the head of the military's Northern Command, four star General Ralph E. Eberhart, who oversees domestic counterterrorism efforts, does not consider threat of terrorism to be "significant").

[157] HERMAN & CHOMSKY, *supra* note 155, at 26-28. Noting the institutional attributes of media does not dismiss the public's legitimate concerns about safety or security; it merely points out that those concerns can be driven to some extent by reporting and repetition of certain stories and how those stories are framed. *Id.* at 23. It is beyond the scope of this note to conduct an empirical analysis of news stories that dealt with the September 11 events with respect to their content and omissions. For readers interested in news ignored by mainstream media, *see, e.g.*, *Censored 2003: Top 25 Censored Stories of 2001-2002*, http://www.projectcensored.org/stories/2003/default.htm (Mar. 23, 2003) (listing top stories not reported or underreported, including U.S. efforts that could be considered terrorism).

[158] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 218 (1944) (recognizing the threat of invasion by Japan during World War II to justify internment of Japanese-Americans). The Court noted:

> All citizens . . . feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Id. at 219-20. During World War I, the post office took away the use of the mail for publications that printed antiwar articles. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 360 (1994). The Department of Justice raided dozens of union meeting halls and seized documents later used

Handschu Settlement defendants' posited that times are different now than in the past.[159] Their actions demonstrate a predictable attempt to take advantage of this pathological period.[160]

1. District Court Modification

In his decision to modify *Handschu*, Judge Haight focused on the undisputed assertion in defendants' papers that the conspiracy to bomb the World Trade Center in 1993 was coordinated by an imam.[161] The court concluded that the defendants had met their burden of showing that the settlement may impose restrictions on the police because the plaintiffs could not show that terrorists would never participate in lawful political or religious activities or organizations.[162] It is impossible, however, to contend that terrorists never participate in lawful activities. The court

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in trials for conspiracy to "hinder the draft [and] encourage desertion." *Id.* at 363-64. And the *New York Times* quoted a former Secretary of War as saying: "We must have no criticism now." *Id.* at 359. Thus, from U.S. Solicitor General Theodore Olson:

> When you have a long period of time when you're not engaged in a war, people tend to forget, or put in the backs of their minds, the necessity for certain types of government action used when we are in danger, when we are facing eyeball to eyeball a serious threat.

Charles Lane, *Parallel Legal Unit to Handle 'Enemy Combatants,'* DAILY GAZETTE (Schenectady), Dec. 1, 2002, at A13 (quoting the Solicitor General in reference to the war on terror).

[159] *See* Defs.' Mem. of Law, *supra* note 5, at 12 ("When the Handschu Guidelines were agreed to in 1985, the NYPD had no conception of the challenge it would face in protecting the City and its people from international terrorism").

[160] *See* Arundhati Roy, *Come September*, Speech at the Lensic Performance Arts Center, Santa Fe, New Mexico, ZNET (Sept. 29, 2002) (condemning the use of September 11 grief for political purpose as a "terrible, violent thing for a State to do its people"), *at* http://www.zmag.org/content/showarticle.cfm?itemID=2404&sectionID=15; *see also supra* note 158 (noting examples of government abuse during stressful times).

[161] *See* Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003); *see also supra* Part II.B.2 (describing the decision to grant modification).

[162] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *33.

correctly used the example of the notable imam as proof that lawful political or religious activity has been used as a cover for preparation of terrorist attacks.[163] But reliance on this notion raises the important question of what one should do with such knowledge. Judge Haight's argument allows for a dangerous assumption and illegitimate next step: that political activity *itself* becomes suspect in terrorism investigations simply because there is crossover, at times, between lawful political or religious activity and terrorist preparation.[164] The real import of the decision is that because protected political activity once crossed paths with terrorist planning, political activity now can be deemed a specific indication that criminal activity will or is threatening to occur.[165] Political activity thus can be said to *raise* criminal suspicion.

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[163] *Id. But see* Andy Newman & Daryl Khan, *Brooklyn Mosque Becomes Terror Icon, but Federal Case is Unclear*, N.Y. TIMES, Mar. 9, 2003, at 29 (noting that certain infamy has surrounded a Brooklyn mosque with accused links to raising money for terrorism).

[164] *Handschu*, 2003 U.S. Dist. LEXIS 2134, at *34-35 (requiring that plaintiffs show that terrorists "have never engaged in . . . or will never in the future [engage in political activity]"). The court reasoned that the breadth of the plaintiff class necessitated the finding of a possible relationship between political activities undertaken by the members of the plaintiff class and those undertaken by terrorists. *Id.* at *34. Thus, the court determined that the settlement's restrictions on investigation of political activity may inadvertently restrict the NYPD's investigations of terrorism. *Id.* at *35. This note contends that by focusing on the relationship between political activity and terrorist activity without factoring in criminal activity whatsoever, the *Handschu* Settlement modification creates a single-factor test for determining the existence of suspected terrorist activity: political activity.

[165] *See, e.g.*, Mari J. Matsuda, *Foreward: McCarthyism, the Internment and the Contradictions of Power*, 19 B.C. THIRD WORLD L.J. 9, 17-18 (1998) (recognizing, in a discussion of how Japanese-Americans were vilified during World War II, that "[a]s with the threat of terrorism today, as with the mysterious Communists that McCarthyism searched for, the lack of evidence against the accused Japanese Americans became an additional solipsistic reason to violate their rights: there was no other way to fight such a hidden threat").

2. Defendants' Arguments

Defendants sought and obtained removal of the "criminal activity requirement."[166] Removing the requirement that investigations are based on suspected criminal activity eliminates the underlying reason for the settlement.[167] After modification, the Authority no longer approves investigations based on whether it considers officers to have sufficient basis to determine that there is a crime to investigate.[168] Thus, the only role for the Authority is to investigate violations of the constitution.[169] This is an evisceration of the decree.[170]

The NYPD should not be permitted to avoid the requirement that their investigations be based on specific information of criminal activity. It is reasonable to require that virtually all police investigations start with information that criminal activity is afoot. In the absence of criminal activity, it follows to ask what other factors are to be used as a basis for investigations. Neither Judge Haight nor the NYPD specified the factors on which the police would rely to begin investigations in the absence of criminal activity.[171] The defendants referred to "lawful

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[166] *See Handschu*, 2003 U.S. Dist. LEXIS 2134, at *63; Defs.' Mem. of Law, *supra* note 5, at 14.

[167] *See* Anderson, *supra* note 11, at 729 (noting that the success of a consent decree is contingent upon "preserving the spirit" of consent that attended its creation); Chevigny, *supra* note 6, at 737 (noting that the relief sought in complaints of police surveillance was control of such surveillance in non-criminal contexts).

[168] *See* Defs.' Mem. of Law, *supra* note 5, at 20 ("Under [the] modification, the Authority . . . retain[s] a role in monitoring compliance with the core policy of the decree: that police investigations 'conform to constitutionally guaranteed rights and privileges'").

[169] *Id.* at 20-21.

[170] *See, e.g.*, Flynn & Fries, *supra* note 5, at A18 (reporting plaintiffs' counsel as saying police were trying to undo the settlement).

[171] *See* Handschu v. Special Servs. Div., 2003 U.S. Dist. LEXIS 2134, *36-37 (S.D.N.Y. Feb. 11, 2003) (finding no reason to doubt the defendants' assertion that the criminal activity requirement inhibits terrorism investigations but recognizing no other factor upon which police could rely to commence an investigation).

preparatory activities" of potential targets that may indicate conduct pinpointing terrorists: "They may own homes, live in communities with families, belong to religious or social organizations and attend educational institutions."[172] If the NYPD considers these activities suspicious, then a government "dragnet" has been realized,[173] and the NYPD apparently now assumes that otherwise lawful actors are suspicious potential terrorists.[174] This suspicion, however, must arise from *something*.[175] Regrettably, in the current climate it is reasonable to fear that merely espousing opinions unpopular to those in power may create suspicion.[176]

a. The Change in Contemporary Circumstances Does Not Satisfy the Rufo *Analysis*

Defendants' argument that "circumstances have changed" is similar to those previously offered by the government to defend

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[172] *See* Cohen Decl., *supra* note 115, at 9.

[173] *See* United States v. United States Dist. Court, 407 U.S. 297, 327 (1972) (Douglas, J., concurring) (stating that the Fourth Amendment protects against "dragnet techniques").

[174] Cohen Decl., *supra* note 115, at 9.

[175] *See* ARTHUR KINOY, RIGHTS ON TRIAL 21-25 (1994). Silence on the factors police use to determine suspicion when they are not required to show specific information of criminal activity or the threat of criminal activity recalls the government's "trust the integrity of the executive" argument. *Id.* (discussing the government's oral argument in *United States v. United States Dist. Court*, 407 U.S. 297).

[176] For examples of conduct that the NYPD has deemed suspicious in the past, *see Handschu v. Special Serices Division*, 131 F.R.D. 51 (S.D.N.Y. 1989) (discussing investigation of civil rights group); *People v. Collier*, 376 N.Y.S.2d 954, 961-63 (Sup. Ct. 1975) (discussing investigation of community activist); Murphy Aff., *supra* note 57 (discussing the police activities that led to the adoption of the settlement); *supra* notes 57-58 (same). For examples of what the Chicago police and the U.S. government consider suspicious, see Frank Main, *Police to Videotape Protesters*, CHICAGO SUN-TIMES, Nov. 7, 2002, at 6 (discussing Chicago police surveillance of social justice activists); Dave Lindorff, *Grounded*, SALON (Nov. 15, 2002) (discussing the federal government's list of people it does not want to fly, which includes peace activists), *at* http://archive.salon.com/news/feature/2002/11/15/no_fly.html.

suspect executive action.[177] For example, in *United States v. United States District Court* the government argued that times were dangerous and thus necessitated government actions to defend itself.[178] The case involved individuals attempting to review government wiretaps of their conversations to determine whether their indictments were based on illegally obtained evidence.[179] The government posited that electronic monitoring of the defendants' conversations without a warrant was lawful.[180]

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[177] *See* United States v. United States Dist. Court, 407 U.S. 297 (1972) (forcing discovery of the source of information the U.S. government was using to charge defendants with conspiracy to, *inter alia*, illegally sabotage an Ann Arbor Central Intelligence Agency office). In *United States v. United States District Court*, the government had proffered the constitutionally unsound argument that the President of the United States, acting through the Attorney General, possessed inherent executive powers to authorize wiretaps of domestic groups without first obtaining a warrant. *Id.* at 299-300; *infra* Part II.B.2 (discussing defendants arguments). *See also* David Edwards, *Unique Threats, Profitable Responses*, MEDIA LENS (2002) (demonstrating that there was a "unique" threat posed by the Soviet Union in the 1950s, by international terrorism in the 1980s, and by Iraq today), *republished in* ZNET, http://www.zmag.org/znet.html (Nov. 6, 2002).

[178] 407 U.S. at 311-13 (noting that the government was concerned with "threats and acts of sabotage"). *See also* KINOY, *supra* note 175, at 21-25 (describing the arguments raised by the U.S. in the papers and to the Supreme Court). As reason for supporting a domestic security exemption to the warrant requirement, the government cited historical laws that reflected fear of domestic violence and rebellion as well as the Presidential oath of office and told the Court that it had to rely on the "integrity of the Executive branch." *Id.* at 22, 24. The *Handschu* defendants' argument was the same: times are dangerous, which creates the necessity of unfettered police conduct. *See supra* Part II.B (discussing defendant's requested modifications).

[179] United States v. Sinclair, 321 F. Supp. 1074, 1076 (E.D. Mich. 1971) (ordering the government to make full disclosure to the defendant of monitored conversations).

[180] *Id.* Recognizing that the Supreme Court had not ruled on the validity of the government's position that the government should be able to determine unilaterally whether a given situation concerned national security, the district court noted that "[w]e are a country of laws and not of men," *id.*, and warned:

> An idea which seems to permeate much of the [g]overnment's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion.

Justice Powell noted:

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. [Constitutional] protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security."[181]

The argument that times are dangerous should fail now for the same reasons it failed then.[182] Domestic security concerns were invoked in the 1970s in the same manner that terrorism is today.[183] But citing the specter of terrorism, as with domestic security, inadequately supports the government's drastic plea to

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> There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in . . . citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions.

Id. at 1079.

[181] United States v. United States Dist. Court, 407 U.S. at 314. For example, in the years preceding and during World War I, nine hundred people went to prison under the Espionage Act. *See* ZINN, *supra* note 158, at 356-59.

[182] United States v. United States Dist. Court, 407 U.S. at 318-19 (recognizing that the government cannot simply invoke national security to justify exercising power to, in effect, suspend the constitution whenever it deems appropriate). The Court also rejected the government's argument that the issues were too complex for the judiciary to handle. *Id.* at 320.

[183] *Compare id.* at 320 ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize surveillances to oversee political dissent."), *with* Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003) (acknowledging defendants' argument that the restrictions are inconsistent with the public interest because of the threat of terrorism).

eviscerate the *Handschu* Settlement.[184] Indeed, "the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of . . . [Fourth Amendment] prohibition[s]."[185]

It can be argued that dedicating resources to preventing terrorist attacks is a necessary police action after September 11, especially in New York.[186] Some commentators have advocated government use of military force where local law enforcement is overmatched.[187] The media bombarded the public in the past year with suggestions that the intelligence community did not perform its function to prevent the terrorist attacks of 2001.[188] But neither

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[184] United States v. United States Dist. Court, 407 U.S. at 320.

[185] *Id.* at 327 (Douglas, J., concurring). Justice Douglas recognized that "such excesses as the use of general warrants and the writs of assistance . . . led to the ratification of the Fourth Amendment." *Id.*

[186] William K. Rashbaum, *Kelly Seeking Federal Money for City Police*, N.Y. TIMES, Nov. 11, 2002, at B1 (reporting that police asked the federal government for funds to allay the cost of the NYPD's counterterrorism efforts). The NYPD has approximately one thousand officers devoted to working on terrorism. *Id.*

[187] David A. Klinger & Dave Grossman, *Responses to the September 11 Attacks: Who should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 HARV. J.L. & PUB. POL'Y 815, 823 (2002) (arguing that since local law enforcement is overmatched in dealing with terrorist threats, perhaps some consideration should be given to lifting the two hundred year ban on U.S. military involvement in local law enforcement). Klinger & Grossman describe an updated and fanciful version of the LAPD shootout with the Symbionese Liberation Army (SLA), with a much better armed and trained Al Qaeda in the SLA's former role. *Id.* at 824-25. *But see* Schmitt & Shenon, *supra* note 156 (discussing the comments of an officer who does not consider the threats against the U.S. to be significant). General Eberhart recognized that "[o]ur basic freedoms must be protected" and that the country had "to make sure that we're not out there doing . . . some of the things we did in the '50s with McCarthyism . . . [,] a very sad chapter in our history." *Id.*

[188] *See, e.g.*, Jan C. Ting, *Unobjectionable but Insufficient–Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145, 1148 (2002) (commenting that the USA PATRIOT Act itself was promulgated because of intelligence failures); Allison Mitchell & Todd S. Purdum, *A Nation Challenged: The Congress; Lawmakers Seek Inquiry Into Intelligence Failures*, N.Y. TIMES, Oct. 22, 2001, at A1; David E. Sanger,

a perceived need to allocate resources nor the discussion of intelligence failures justify removing the safeguards of the *Handschu* Settlement. *Handschu* was concerned with government intrusion on lawful political activity, not legitimate investigations by local law enforcement of activities that can be shown to be criminal.[189] Considering the settlement provisions, it is difficult to understand how this seemingly innocuous framework could be considered to hinder police work.[190] In fact, plaintiffs' counsel recently described the agreement as not particularly stringent in terms of what the police are required to show to conduct an investigation.[191]

Defendants cannot establish the necessary connection between lawful political activity and terrorism.[192] This is because any

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Bush Was Warned Bin Laden Wanted To Hijack Planes, N.Y. TIMES, May 16, 2002, at A1; Philip Shenon, *Traces of Terrorism: The Warnings; F.B.I. Knew for Years About Terror Pilot Training*, N.Y. TIMES, May 18, 2002, at A1.

[189] Handschu v. Special Servs. Div., 605 F. Supp. 1384, 1420 (S.D.N.Y. 1985) (establishing settlement guidelines for the purpose of regulating investigations of political activity). Political activity is the "exercise of a right or expression or association for the purpose of maintaining or changing governmental policies or social conditions." *Id.*

[190] *See supra* Part II.A (discussing settlement provisions).

[191] *See* Perrotta, *Police Ask Court to View Secret Papers*, *supra* note 107 (quoting plaintiffs' counsel as describing the original agreement as a relatively "low hurdle" because a showing of specific information is a lower threshold than reasonable suspicion); Chevigny, *supra* note 6, at 765 n.200 (recognizing differing views on whether specific information is any different from reasonable suspicion). *See also* Terry v. Ohio, 392 U.S. 1, 21 (1968) (defining reasonable suspicion as requiring an officer to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an intrusion).

[192] *See, e.g.*, Press Release, American Civil Liberties Union, ACLU Says Rewriting of Domestic Spying Restrictions Gives FBI New Powers Despite Growing Evidence of Analytical Failures (May 30, 2002) (noting that rewriting the FBI's guidelines on domestic spying "will do little to make us safer but will inevitably make us less free"), *available at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm; *see also* Cole, *supra* note 153, at 999-1000 (discussing the role of citizenship in historic assaults on civil liberties). The government in *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995), *rev'd*, Reno v. American-Arab Anti-

logical connection between the city's interest in preventing future attacks and spying on domestic political groups is tenuous as best.[193] Lawful political activity usually has nothing to do with planning or designing terrorist acts.[194] One example from the FBI Guidelines illustrates a situation where lawful activities might lead to terrorism suspicion: an urban organization's attempt to purchase vast amounts of fertilizer or other combustible agents.[195] According to the guidelines, this presumptively raises suspicion to investigate a particular group.[196] The political or religious nature of this hypothetical group cannot raise suspicion.[197]

Discrimination Comm., 525 U.S. 471 (1998), argued that in order to deport non-citizens they should only have to show association with and support of a terrorist group and not that any of the individual's conduct assisted terrorist activity. Cole, *supra* note 153, at 999-1000. The Ninth Circuit, rejecting the argument, held that the First Amendment protected both citizens and aliens alike in this regard. *Id.* Subsequent legislation reversed federal court jurisdiction over this type of claim by a noncitizen. *Id.*

[193] Press Release, American Civil Liberties Union, How "Patriot Act 2" Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free (Mar. 20, 2003) (establishing the falsity of the claim that it is necessary to undermine civil liberties in order to effectuate safety), *available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12161&c=206.

[194] *See* Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003) (explaining that acts of peaceful civil disobedience are not terrorism). The government's reply to this contention would most likely be that some lawful political activity may develop into planning terrorist acts. The response must be that if this is so, only strict oversight can ensure a minimum of abuse in investigations. Moreover, assuming its resources are scarce, the government has an interest in focusing its investigations where it is most confident they will yield results. *See* Press Release, American Civil Liberties Union, How "Patriot Act 2" Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free, *supra* note 193 (recognizing that scarce resources should drive investigations to focus on actual potential threats).

[195] FBI Guidelines, *supra* note 136, at 2 (noting that where groups attempt to acquire toxic chemicals, without apparent reason, an investigation may be justified).

[196] *Id.*

[197] *See* Cole, *supra* note 153, at 1003 (noting that using political or religious affiliations to determine guilt bypasses the procedures that are in

Rather, the attempted purchase is specific information of criminal or threatened activity.[198] If the mere political nature of a group raises suspicion, the predictable result is simply that dissenters—those with unpopular ideas—will be viewed as suspicious.[199]

Blurring the lines between lawful political activity and terrorism constitutes an implicit government effort to link actual terrorists on the one hand and political dissenters on the other.[200] Over the past year, government officials have sought to establish a this link,[201] but the link, to the extent that it can be established, serves only to justify the government's desire to reinstate surveillance of activists and dissenters. Political dissent, however, should be a protected activity any time "our way of life" is threatened.[202] Although political groups unpopular with

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place to distinguish the guilty from the innocent).

[198] FBI Guidelines, *supra* note 136, at 2.

[199] *See* Cole, *supra* note 153, at 994-95 (recognizing that early targets of government harassment were alien union members that were critical of capitalism). Cole warns that "[o]nce again, we are treating people as suspicious not for their conduct, but based on their racial, ethnic, or political identity." *Id.* at 1003.

[200] For example, the federal government has a list of people, including peace activists and civil libertarians, who are subjected to scrutiny and harassment when they attempt to fly. *See* Lindorff, *supra* note 176 (discussing a alleged government no-fly list). The list was acknowledged by the U.S. Transportation Security Administration and has resulted in the airport harassment of a Milwaukee nun heading to a peace conference. *Id.* This link has also been implicitly established by other commentators. *See* Klinger & Grossman, *supra* note 188, at 824-25 (analogizing the SLA shootout, which involved radical government activists, to a hypothetical shootout with Al Qaeda).

[201] D.T. Max, *The Making of the Speech*, N.Y. TIMES, Oct. 7, 2001, at 32 (quoting President Bush as saying, "You're either with us, or with the terrorists.").

[202] *See Bush Speaks of Security*, *supra* note 152. *See also* Press Release, American Civil Liberties Union, ACLU Appalled by Ashcroft Statement on Dissent; Calls Free Speech "Main Engine of Justice" (Dec. 10, 2001) (statement of Laura W. Murphy, director of the ACLU's national office in Washington, D.C., that a lesson from the history of dissent is "that free and robust debate is one of the main engines of social and political justice. . . . [D]ebate only strengthens our government [by providing legitimacy to its

those in power are not necessarily terrorists, given the opportunity and the cover of legitimacy, government officials will naturally focus their attention on dissenters.[203] But neither local law enforcement nor societal needs will be met by silencing dissent, and suppressing these voices will make New York inhospitable to the lawful activity of groups concerned about government action.[204]

The *Handschu* Settlement was a natural target for exploitation in a stressful time.[205] The police argued that the present situation is grave and that removing procedural safeguards from their investigations was a necessary precaution.[206] Without more, however, this argument is unavailing. Justice Douglas noted more than thirty years ago that "[w]hen the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients."[207]

Moreover, a variety of situations can be deemed to create a

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actions] in this time of national crisis"), *available at* http://www.aclu.org/FreeSpeech.cfm.

[203] *See* United States v. United States Dist. Court, 407 U.S. 297, 314 (1972) (recognizing government tendency to focus on dissenters).

[204] This observation is supported by the events that prompted the *Handschu* Settlement in the first place. *See supra* Part II (describing background events to the settlement). The terms of the settlement reveal that residents' interests are better served by limiting law enforcement capacity to muffle dissent. *See supra* Part II.A (describing terms of the settlement). *See also* Leonard Levitt, *No Connection to Intelligence*, NEWSDAY, Sept. 30, 2002 at A12 (reporting the motion's lack of evidence that abrogating the *Handschu* Settlement would in any way assist the NYPD in fighting terrorism); Flynn & Fries, *supra* note 5 (reporting that police contend modification of *Handschu* warranted by change in circumstances).

[205] *See, e.g.*, John Barlow Weiner, Note, *Institutional Reform Consent Decrees as Conservers of Social Progress*, 27 COLUM. HUM. RTS. L. REV. 355 (1996).

[206] Defs.' Mem. of Law, *supra* note 5, at 13-14. *See also* Cole, *supra* note 153, at 955.

[207] United States v. United States Dist. Court, 407 U.S. 297, 331 (1972) (Douglas, J., concurring).

heightened sense of national security.[208] And, the United States is constantly conducting military operations against various countries and enemies.[209] Thus, an argument that points to a time of war or grave danger becomes all-inclusive. Judge Haight relied almost entirely on the notion that changes to the world are "perfectly apparent" in his decision to modify the *Handschu* Settlement.[210] The NYPD is justifiably concerned about the safety of New Yorkers.[211] Nevertheless, the safety of New Yorkers can be protected without removing the restrictions on police activity obtained by the *Handschu* litigants.[212] Safety of residents and citizenry depends as much on the free and open exchange of ideas as it does on physical protection.[213] Removing procedural

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[208] *See, e.g.*, Zoltan Grossman, *From Wounded Knee to Afghanistan: A Century of US Military Interventions*, ZNET, *at* http://www.zmag.org/list2.htm (Oct. 8, 2001) (demonstrating, even with an incomplete list, that there has been virtually unceasing U.S. military activities since 1890). *See also* Noam Chomsky, *Terror and Just Response*, ZNET, *at* http://www.zmag.org/znet/htm (Aug. 1, 2002) (itemizing U.S. military operations, including the war against Nicaragua, the invasion of Panama in 1989, and the bombing of the Sudan in 1998, and those of its clients and allies, that when applying a non-controversial definition of terrorism, qualify as terrorism).

[209] Grossman, *supra* note 208.

[210] Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003).

[211] NYPD Mission Statement, *available at* http://www.nyc.gov/html/nypd/html/mission.html (last visited Mar. 8, 2003). "The Mission of the New York City Police Department is to enhance the quality of life in our City by working in partnership with the community and in accordance with constitutional rights to enforce the laws, preserve the peace, reduce fear, and provide for a safe environment." *Id.*

[212] *See, e.g.*, CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2000) (arguing that American foreign policy activities that hurt people worldwide make terrorist attacks predictable and that some changes in foreign policy would likely result in reducing the threat of terrorism); *see also supra* Part II.A (discussing the terms of the settlement).

[213] *See, e.g.*, United States v. Goba, 220 F. Supp. 2d 182, 184 (W.D.N.Y. 2002) (recognizing at the outset of proceedings against an alleged terrorist group in Buffalo, New York, that constitutional protections and concepts of American democracy provide "sufficient strength and protection to

safeguards in government surveillance techniques cannot be proven to lead to an increase in security.[214]

b. Seeking the Constitutional Floor

Defendants' modification maintained the existence of the Authority.[215] Arguably, the Authority was maintained solely for the purpose of not violating the *Rufo* requirement that any modification not seek the constitutional floor.[216] But its mere existence does not necessarily keep the defendants above the constitutional floor.[217] Indeed, a strong argument exists that the *Handschu* defendants, beyond just seeking the constitutional

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bring citizens to justice without weakening our security"); Press Release, American Civil Liberties Union, Threats to Civil Liberties Post-September 11: Secrecy, Erosion of Privacy, Danger of Unchecked Government (Dec. 14, 2001) (statement of Gregory T. Nojeim, associate director of the ACLU's national office in Washington, D.C., noting that American democracy is "a political system based on the ideas of transparency and accountability"), *available at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9857&c=24.

[214] *See, e.g.*, Press Release, American Civil Liberties Union, ACLU Appalled by Ashcroft Statement, *supra* note 204 (disagreeing with the Attorney General that "domestic debate about the government response in any way harms the investigation"); *see also* Press Release, American Civil Liberties Union, ACLU Says Rewriting of Domestic Spying Restrictions Gives FBI New Powers, *supra* note 193 (recognizing that the FBI Guidelines, which provide for investigation upon a showing of a law enforcement purpose, will allow the government to gather even more of information it has shown it has difficulty analyzing).

[215] *See supra* Part II.B.2 (describing modifications of the *Handschu* Settlement and the role of the Authority after modification). *See also* Handschu v. Special Servs. Div., 2003 U.S. Dist. LEXIS 2134, *50-51 (S.D.N.Y. Feb. 11, 2003) (considering the existence of the Authority and the incorporation of the FBI Guidelines into the patrol guide as sufficient to keep defendants above the constitutional floor).

[216] *See supra* Part I (discussing the requirements of consent decree modification).

[217] *See supra* Part I (discussing the requirements of consent decree modification). It further allows them to suggest that they are not perpetuating a constitutional violation. *See supra* Part I (discussing the requirements of consent decree modification).

floor, actually risked creating or perpetuating a constitutional violation.[218]

Citing *Laird v. Tatum*,[219] which agreed with the government that the United States Army's program of domestic surveillance was not, in itself, a harm that could be redressed, the *Handschu* defendants claimed that the existence of a domestic surveillance program alone is not redressable harm.[220] This proposition, however, was qualified by the Supreme Court's decision in *Meese v. Keene*,[221] which held that government harm to a plaintiff's reputation is cognizable.[222] Consequently, courts are willing to review the constitutionality of government surveillance that harms an individual's reputation or opportunity for employment.[223] Thus, *Handschu* cannot be minimized by

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[218] 502 U.S. 367, 391 (1992). Staying above the constitutional floor means respecting the rights guaranteed by the First and Fourth Amendments but not providing any additional safeguards not mandated by the Constitution. *See supra* notes 120-37 (discussing the district court analysis of whether modification impermissibly sought the constitutional floor). If, without the oversight of the settlement, the NYPD returns to its past practices of investigating dissenters and minorities without suspicion of crime, the police run the risk of First and Fourth Amendment violations.

[219] Laird v. Tatum, 408 U.S. 1 (1972) (holding that the claim was barred as not justiciable and that military surveillance of the civilian population ought to be reviewed by the legislature).

[220] Defs.' Mem. of Law, *supra* note 5, at 18.

[221] 481 U.S. 465, 472 (1987) (holding that government harm to a plaintiffs reputation is cognizable). A California State Senator wanted to exhibit Canadian films. *Id.* at 467. The films had been labeled "political propaganda" pursuant to the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-21 (1966), and the state senator contended that he was deterred from showing the films because it would have had a negative impact on his reputation. *Id.* at 473. The Court held that the state senator had standing because he had demonstrated that a government action—labeling the films propaganda—could have caused him a direct injury, distinct and palpable. *Id.* The Court ultimately held that the statute did not actually violate the state senator's First Amendment rights. *Id.* at 484.

[222] *Id.* at 472.

[223] *See, e.g.*, *id.*; Riggs v. City of Albuquerque, 916 F.2d 582, 585-86 (10th Cir. 1990) (holding that the plaintiff class of lawyers, political activists and political organizations had standing to sue police for unconstitutional

reference to *Laird*.[224]

Moreover, the defendants disingenuously disregarded the benefits that accrued to them when they claimed that no cognizable harm was established in *Handschu*.[225] The litigants agreed to the consent order thereby avoiding long, drawn out litigation[226] and, arguably, unflattering exposure of police misconduct. Furthermore, in addition to the harm caused by the chilling effect on the exercise of their constitutional rights, the *Handschu* plaintiffs also had argued that police use of informers, among other techniques, would have constituted harm.[227] The absence of a conclusive judicial finding of harm does not prove a total absence of harm; settlement was simply an effective and expeditious means to end the litigation.[228]

c. Compilation/Exchange of Data and Information Sharing

The NYPD also complained that prohibiting collection of publicly available information "compel[led] the NYPD to

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surveillance and maintenance of files since plaintiffs alleged that they were actual targets of the surveillance and the conduct of the police caused harm to their reputations).

[224] Handschu v. Special Servs. Div., 349 F. Supp. 766, 770 (S.D.N.Y. 1972) (recognizing that because the plaintiffs alleged a specific instance where the police conduct curtailed their exercise of First Amendment rights, the case was brought "beyond the pale" of *Laird v. Tatum*).

[225] *See* Defs.' Mem. of Law, *supra* note 5, at 18. The defendants cite *Laird v. Tatum* for the proposition that "the Constitution does not constrain government from collecting, retaining, and sharing information regarding lawful activity." *Id.*

[226] Anderson, *supra* note 11, at 726 (explaining that "[s]ettlement through consent decrees holds numerous advantages over protracted litigation. Settlement avoids the time, expense and risk of trial"). *See also* Handschu v. Special Servs. Div., 605 F. Supp. 1384, 1398 (S.D.N.Y. 1985) (recognizing that settling the litigation provided defendants the opportunity to reduce the publicity surrounding their actions that allegedly harmed plaintiffs).

[227] *See Handschu*, 349 F. Supp. at 768 (itemizing categories of harm from police action).

[228] *See supra* Part I.A (discussing the use of consent decrees in reform litigation).

virtually close its eyes to that which everyone but police officers can see, record, and reflect upon."[229] According to the defendants, the police must sit on their hands at public events while "[t]errorists take advantage of this lopsided state of affairs and safely use political events to advance their terrorist purposes."[230] Yet, defendants did not and presumably could not explain how "terrorist operatives" would use public events to further an illegal purpose.[231] Moreover, the *Handschu* Settlement neither required the NYPD to ignore public information, as defendants stated,[232] nor barred police attendance at public events.[233]

Defendants also argued that the restriction on sharing information with other agencies made it impossible for the NYPD to participate in the international effort to fight terrorism.[234] They claimed that the settlement affected a necessary partnership of local, state and federal law enforcement.[235] If, however, another law enforcement agency requests information on a particular individual or group, the *Handschu* Settlement does nothing to prevent police from providing it.[236] On the contrary, the plain

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[229] Defs.' Mem. of Law, *supra* note 5, at 14 (referring to the *Handschu* Settlement, *supra* note 65, § VI.A).

[230] Cohen Decl., *supra* note 115, at 16.

[231] *See* Cohen Decl., *supra* note 115, at 7-8. Deputy Commissioner Cohen does note that a confiscated terrorism manual teaches would-be terrorists to "attend public meetings to learn about major decisions and topics being discussed . . . to follow news[,] to keep track of tourist activity and arrival times of foreign tourist groups . . . and to note advertisements about new and used car lots which may be used in assassination, kidnapping, and overthrowing the government." *Id.*

[232] *Handschu* Settlement, *supra* note 65, § VI.A (prohibiting *maintenance* of public information *with the intelligence unit* of the NYPD). The settlement does not require ignoring information from publicly available sources. *Id.*

[233] *Handschu* Settlement, *supra* note 65, § IV.B (allowing for police inquiry into a planned public event).

[234] *See* Cohen Decl., *supra* note 115, at 17-22 (noting that there are practical difficulties of forcing other agencies to comply with *Handschu* and asserting that the police have to be empowered to work with other agencies).

[235] Defs.' Mem. of Law, *supra* note 5, at 16-17.

[236] *Handschu* Settlement, *supra* note 65, § VII.A (requiring the other law

language of the settlement allows the sharing of information.[237] It is also interesting to note that, until recently, the partnership the defendants appear to crave seemed to be moving in the opposite direction. For example, congressional legislation authorizes the federal government to sue local law enforcement for patterns and practices resulting in civil rights violations.[238] The Department of Justice could include a pattern or practice of illegal and intrusive police surveillance and infiltration as a cognizable claim.[239]

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enforcement entity or government agency to adhere to provisions on maintenance of information).

[237] *See* Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 579, 632 (concluding that interpretation of contested language of consent orders ought to be accomplished by looking to the "grievance the decree was designed to cure"). This argument does not attempt to ascertain what is meant by "law enforcement agencies or government agencies conducting security clearance procedures" in section VII.A of the settlement and will assume the statement can be fairly read that other government and law enforcement agencies can legitimately obtain information collected by the NYPD pursuant to the settlement.

[238] 42 U.S.C. § 14,141 (1994).

> It shall be unlawful conduct for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

Id. For detailed discussions of the potential use of § 14,141 to curb unlawful police activities, see Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. R. 815 (1999) (discussing the possibility of consent decrees in the cities of Pittsburgh, Pa., and Steubenville, Ohio, to enjoin police abuses); Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149 (1998) (studying the legislative intent of the statute, how it can be used and what the Department of Justice would have to show to establish the pattern or practice and anticipating how the courts will react to suits based on alleged violations). *But see* Schlanger, *supra* note 13, at 2022 (pointing out that, given its history in prison reform litigation, the Department of Justice is hardly to be trusted to act as "trailblazer" for reform suits).

[239] Meese v. Keene, 481 U.S. 465, 472 (1987) (recognizing that harm to a plaintiff's reputation is an action of government that causes direct injury,

Unfortunately, current Department of Justice sentiments may limit this possibility.[240]

Defendants correctly noted that the USA PATRIOT Act urges government agencies to share information.[241] But, the sections of the USA PATRIOT Act cited by defendants largely encourage only *further* sharing of information gathered and shared under federal law in place before *Handschu* was settled.[242] Thus, the

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distinct and palpable, and is thus cognizable). Therefore, if police surveillance and infiltration causes a direct injury and a pattern and practice can be established, the Department of Justice could succeed in a suit against a local police department. *See also* Riggs v. City of Albuquerque, 916 F.2d 582, 585-86 (10th Cir. 1990) (holding that plaintiff class of lawyers, political activists, and political organizations had standing to sue police for unconstitutional surveillance and maintenance of files since plaintiffs alleged that they were actual targets of the surveillance and the conduct of the police caused harm to their reputations); United States v. City of Philadelphia, 482 F. Supp. 1248 (E.D. Pa. 1979) (dismissing for lack of standing a suit brought by federal government to enjoin the allegedly unconstitutional activities of the Philadelphia Police Department). The government's standing problem in *City of Philadelphia* seems to have been cured by 42 U.SC. § 14,141. *See* Livingston, *supra* note 241, at 815 (recognizing that 42 U.S.C. § 14,141 authorizes Department of Justice to sue police departments).

[240] *See, e.g.*, *Hearing on Anti-Terrorism Policy Before the Senate Jud. Comm.*, 106th Cong. (2001) (testimony of Attorney General John Ashcroft, stating, *inter alia*, that the Department of Justice was going to shift its focus from enforcing the nation's laws to becoming an anti-terrorism outfit). *See also* Miller, *supra* note 238, at 178 (noting that because individuals do not have standing to sue under § 14,141, it will be incumbent on the Department of Justice to bring suit).

[241] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, at § 701 (2001) (USA PATRIOT Act) (codified in scattered sections of the U.S. Code) (expanding information sharing to facilitate federal-state-local law enforcement response related to terrorism). *See* Defs.' Mem. of Law, *supra* note 5, at 16-17, *citing* USA PATRIOT Act § 701.

[242] Defs.' Mem. of Law, *supra* note 5, at 17 (citing USA PATRIOT Act sections 701, 314). Section 701 amended a portion of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3796h (2003), by adding the words "terrorist conspiracies and activities" to a statute that authorized grant and contract making by the federal government with state and local law enforcement to share information related to crime. USA PATRIOT Act § 701. Section 314 encourages further cooperation among financial institutions, law

USA PATRIOT Act may not comprise a necessary change in law under *Rufo*.[243] Because the law has not changed from the time of the settlement, the NYPD cannot successfully argue that the USA PATRIOT Act provisions permit modification.[244]

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enforcement and others, revising the 1970 and 1982 enacted 31 U.S.C. § 5311 (2003), which required sharing of information by financial institutions, law enforcement and regulatory agencies to facilitate criminal investigations. § 5311. The argument that the USA PATRIOT Act's express extension of the application of information sharing laws to terrorism investigations has only a slight practical effect on activities of law enforcement entities is a narrow one. Because of the ambiguities surrounding the definition of "terrorism," it is difficult to see what more these new provisions do besides increase the possibility of abusive police practices. This note does not comment on the reach of the USA PATRIOT Act's other provisions or on the cumulative radical effect of the Act in conjunction with other recent positions adopted by the government. For an examination of the cumulative effect, *see* Chisun Lee, *Bracing for Bush's War at Home*, VILLAGE VOICE, Mar. 26-Apr. 1, 2003, at 56 (looking at recent government activity including the USA PATRIOT Act, the proposed Domestic Security Enhancement Act, and treatment of prisoners in the war on terror, that, taken together, paint a terrifying picture of the future of American liberty and democracy).

[243] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 390 (1992) (acknowledging that a change in the law may require modification); *see also* Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright, 364 U.S. 642, 649 (1961) (recognizing a change in the law when congressional legislation was passed, authorizing union shops before such union shops were prohibited).

[244] *Rufo*, 502 U.S. at 390. It is true, as defendants noted, that the other entities must agree to the same restrictions in their management of the information. *See* Defs.' Mem. of Law, *supra* note 5, at 16-17. But this should not be problematic for governmental agencies which routinely manage vast amounts of information. *But see* Ann Davis, *FBI's Post-Sept. 11 'Watch List' Mutates, Acquires Life of Its Own*, WALL ST. J., Nov. 9, 2002, at A1 (discussing the FBI list of people considered to be threats to the U.S. that was disseminated to the corporate world after September 11 and now is "lost"). The loss of the information and the subsequent problems are certainly regrettable. It could be argued, however, that a governmental *inability* to effectively share information due to bureaucratic inefficiency or fights over turf are a final safeguard against intrusions by government into our lives.

B. Potential Deleterious Results of Modifying Handschu

Recent modification of a similar 1982 Chicago consent decree aptly illustrates the potential effects of modifying *Handschu*.[245] The settlement arising from *Alliance to End Repression v. City of Chicago* was recently modified.[246] As in *Handschu*, the Chicago

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[245] Alliance to End Repression v. City of Chicago, 561 F. Supp. 537 (N.D. Ill. 1982). The plaintiffs from *Alliance* were a class of Chicago residents that:

> engaged in lawful, political, religious, educational or social activities and who, as a result of these activities, have been . . . subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination.

Alliance, 561 F. Supp. at 540. The defendants conducting the activities regulated by the Chicago Settlement were the Chicago Police, the FBI, CIA and the Department of Defense. *Id.* The Chicago Settlement created restrictions on investigations of political actors, including prohibition on investigations that were solely based on protected First and Fourth Amendment activities. *Id.* at 560. The settlement also required periodic audits by independent public accounting firms. *Id.* at 568-69.

[246] 237 F.3d 799, 802 (7th Cir. 2001) (deciding that the with the Red Squads gone there was support to modify the settlement). This decision, from January 2001, reflected the Chicago police's belief that the era of harassment of political actors, which stretched from the 1920s to the 1970s, had come to an end. *Id.* at 801. The court noted that the "core" of the decree, which forbade "investigations intended to interfere with or deter the exercise of the freedom of expression that the First Amendment protects, and requires . . . periodic audits," remained, but "periphery" restrictions would be lifted. *Id.* at 800. What Judge Posner considered the periphery of the decree, however, included the requirement of reasonable suspicion of possible criminal activity. *Id.* The *Handschu* Settlement and the Chicago Settlement have some minor differences. *See* Handschu v. Special Servs. Div., No. 71 Civ. 2203, 2003 U.S. Dist. LEXIS 2134 (S.D.N.Y. Feb. 11, 2003) (recognizing a difference for the purpose of a modification seeking the constitutional floor, that the Chicago Settlement requires periodic independent audits); *see also* Chevigny, *supra* note 6, at 760-63. Judge Posner's assertion that "advocacy of violence" does not raise a reasonable suspicion does not reflect the reality of the Chicago Settlement. *Alliance*, 561 F. Supp. at 563, 565 (establishing settlement and reasonable suspicion as showing Chicago police and the FBI have to make).

police argued that circumstances had changed to allow the modification of the settlement.[247] In his decision granting modification, Judge Posner cited no actual changes that would warrant the modification, and argued simply:

> Today the concern, prudent and not paranoid, is with ideologically motivated terrorism. The City does not want to resurrect the Red Squad. It wants to be able to keep tabs on incipient terrorist groups. New groups of political extremists, believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. Until the group goes beyond the advocacy of violence and begins preparatory actions that might create reasonable suspicion of imminent criminal activity, the hands of police are tied. And if the police have been forbidden to investigate until then, if the investigation cannot begin until the group is well on its way toward the commission of terrorist acts, the investigation may come too late to prevent the acts or to identify the perpetrators.[248]

The Chicago police, perhaps in addition to the work fighting terrorism, recently initiated a new project.[249] Under their renewed

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The police under that settlement were rightly allowed to begin an investigation if they became aware of credible advocacy of violence. *Id.*

[247] *Compare Alliance*, 237 F.3d at 802 (noting a difference between circumstances surrounding the police harassment of political dissenters and current police action to deal with terrorism), *with Handschu*, 2003 U.S. Dist. LEXIS 2134, at *27-28 (accepting defendants' argument that the world was different after September 11).

[248] *Alliance*, 237 F.3d at 802. *See also* H.C. 5100/94, Public Committee Against Torture v. State of Israel, *reprinted in* SANFORD H. KADISH AND STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 827 (7th ed. 2001) (disposing, by the Supreme Court of the State of Israel, of an argument made by the Israeli government that the world is dangerous and that the "ticking time bomb" requires torture).

[249] *See* Main, *supra* note 176, at 6 (reporting that "anti-globalization" protesters in Chicago for a business conference would be taped, their photos saved to prepare for future protests, and their meetings infiltrated by police).

license to investigate lawful political activity, the Chicago police have targeted peace and social justice demonstrators.[250] This indicates how the proposed modifications of the *Handschu* Settlement will likely be used in New York City.[251]

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[250] *Id.*; *see also* Paul Street, *Empire Abroad, Repression at Home: Notes From Chicago*, ZNET, http://www.zmag.org/znet.html (Nov. 8, 2002) (criticizing as hypocritical comments by the CEO of Boeing Corporation, a leading manufacturer of weapons, expressing his concern about the possibility of violence at protests of the business conference).

[251] At least one commentator has noted that police forces across the nation began re-instituting long-condemned practices prior to September 11. Abby Scher, *The Crackdown on Dissent*, THE NATION, Feb. 5, 2001, at 23 (discussing police targeting of activists and demonstrators throughout 2000, including at the major political party conventions in Philadelphia and Los Angeles). The police rounded up hundreds of activists in "preemptive" arrests in Philadelphia, although charges against them were dismissed when police could offer no reason for the arrests. *Id.* Scher noted overt police surveillance of the type restricted by *Handschu* as well as "police raids of demonstrators' gathering spaces . . . [, f]alse stories to the press . . . [, r]ounding up demonstrators on trumped-up charges . . . [, l]ist making . . . [, p]olitical profiling . . . [, u]nconstitutional bail amounts . . . [and b]rutal treatment." *Id.* On the other hand, the use of police "debriefings" after the arrests of protesters and demonstrators has supposedly been curtailed. *See* William K. Rashbaum, *Police Stop Collecting Data on Protesters' Politics*, N.Y. TIMES, Apr. 10, 2003, at D1 (noting the practice, which had begun in February with the use of the "Demonstration Debriefing Form," information from which had been loaded into a database, would end and the database destroyed). Civil liberties lawyers noted that calling these un-counseled interrogations "debriefings" did not remove them from the ambit of constitutional protections. *Id.* The police would not comment on the debriefing's constitutionality but denied the separate contention that asking protesters what school they were from, what prior protests they had attended and their involvement in any organizations, violated either *Handschu* or the modified *Handschu* Settlement. *Id.* In response to this questioning, the *Handschu* plaintiffs moved (too late for consideration in this note) to incorporate the FBI Guidelines into the decree itself. *See* Tom Perrotta, *Attorneys Seek to Codify Rule Against Police Questioning of Political Beliefs*, N.Y.L.J., Apr. 18, 2003, at 1 (noting plaintiffs' motion seeking to make the FBI Guidelines part of the decree was a response to the demonstrated "aim" of the NYPD's modification motion: to harass dissenters). The modification order required that the NYPD include the FBI Guidelines in the patrol guide, but this created no enforceable rights. *See* Handschu v. Special Servs. Div., 2003 U.S. Dist. LEXIS 3643, at

CONCLUSION

New York City residents and the NYPD share a profound interest in deterring terrorist attacks on the city.[252] Residents and citizens, however, also have an interest in protecting individual liberties in the face of government action and ensuring that government agents do not violate constitutional rights in the exercise of their authority.[253] The current climate has heightened the interests of both parties. To understand why the police wanted to remove the *Handschu* safeguards, and the connection between *Handschu* and the current climate, the lessons of history must also be considered.[254] Those lessons demonstrate that consolidation of government power and intimidation of dissenters is predictable in times of societal stress.[255] When government

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*11-12 (allowing the FBI 'Reservation' to be included in the patrol guide); *supra* Part II.B.2 (describing the court's decision to modify). The reservation section makes clear that the FBI Guidelines are not part of the decree itself:

> These guidelines are set forth solely for the purpose of internal NYPD guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the NYPD or the City of New York.

Handschu, 2003 U.S. Dist. LEXIS 3643, at *11-12.

Thus the plaintiffs' motion, if successful, would elevate the FBI Guidelines to a requirement imposed upon the police and enforceable through the court. *See* William K. Rashbaum, *Civil Rights Lawyers Seek Teeth For Rules on Police Surveillance*, N.Y. TIMES, Apr. 18, 2003, at D3 (reporting that the plaintiffs are asking for a revision to the new *Handschu* guidelines that will allow for contempt proceedings against the NYPD if it violates the substance of the FBI Guidelines).

[252] *See supra* Part II.A (discussing reasons for defendant's motion).

[253] The government shares this interest with citizens in that it needs to be perceived as legitimate. Government is seen as legitimate when it acts lawfully.

[254] *See supra* Part III.A-B (discussing predictable targeting of dissenters in stressful times).

[255] *See supra* Part III.A-B. Its ability to be successful in such measures may be based at least in part on how our fundamental freedoms are protected in other times. *Id.*

agencies argue that the nation's vulnerability to terrorism requires the removal of restrictions on police, such arguments must be met with skepticism.[256] The NYPD did not, and cannot, show that harassing dissenters reduces the threat of terrorism.[257] The worthy goal of preventing terrorist attacks is not furthered by removing safeguards to civil liberties. There was good sense in requiring the NYPD to establish criminal activities of political actors and obtain approval prior to investigating those political actors.[258] The *Handschu* Settlement provided some assurance that the war on terrorism would not become a pretext for the NYPD to return to its past transgressions or further other illegitimate government ends. The settlement existed to ensure that police investigations do not trample on the rights of New Yorkers.

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[256] *See supra* notes 231-37 and accompanying text (discussing actions taken by Chicago police after similar restrictions were lifted on that city's police force).

[257] *See supra* Part III (discussing defendant's arguments for modifications and the court's reason for granting modification).

[258] *See supra* Part II.A (discussing abusive government behaviors that provided the backdrop to the settlement).