2003 WL 151974
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Barbara HANDSCHU, Ralph Digia, Alex McKeiver, Shaba OM, Curtis M. Powell, Abbie Hoffman, Mark A. Segal, Michael Zumoff, Kenneth Thomas, Robert Rusch, Anette T. Rubenstein, Michey Sheridan, Joe Sucher, Steven Fischler, Howard Blatt and Ellie Benzone, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
SPECIAL SERVICES DIVISION, a/k/a Bureau of Special Services, William H.T. Smith, Arthur Grubert, Michael Willis, William Knapp, Patrick Murphy, Police Department of the City of New York, John V. Lindsay and various unknown employees of the Police Department acting as under-cover operators and informers, Defendants.

No. 71 Civ. 2203(CSH). | Jan. 22, 2003.

Opinion

MEMORANDUM AND ORDER

HAIGHT, Senior J.

***1** On January 29, 2003, the Court will hear oral argument on the motion of the New York Police Department ("NYPD"), vigorously resisted by the plaintiff class, to modify the consent decree in this case and its accompanying "Handschu Guidelines." This memorandum describes certain questions which the Court directs counsel to be prepared to address.

Those questions arise out of comparing the Handschu Guidelines if this Court modifies them as requested by the NYPD (the "Modified Handschu Guidelines") with guidelines governing the investigative activities of two other law enforcement agencies: (1) the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, promulgated by United States Attorney General John Ashcroft on May 30, 2002, and binding upon the FBI (the "FBI Guidelines"); and (2) the guidelines binding upon the Chicago Police Department (the "CPD Guidelines") as modified, on the CPD's motion and over the objections of the plaintiff class, by the Seventh Circuit in *Alliance to End Repression v. City of Chicago,* 237 F.2d 799 (7th Cir.2001). I will discuss in turn these two comparisons and some of the questions to which they give rise.

1. The Modified Handschu Guidelines and the FBI Guidelines

From time to time Attorneys General of the United States redraft or modify the guidelines regulating FBI investigations. Thus in an earlier opinion arising out investigative activities in Chicago, *Alliance to End Repression v. City of Chicago,* 742 F.2d 1007 (7th Cir.1984) (*en banc*), the Seventh Circuit's discussion indicates that then-Attorney General Levi published FBI guidelines in 1976 which "led to a sharp reduction in the number of domestic security investigations and set the stage for the settlement of the suit" which the plaintiff class had brought.[1] In 1983 then-Attorney General Smith announced new guidelines for FBI investigations which the plaintiff class contended violated the consent decree, a contention the Seventh Circuit ultimately rejected in the case reported at 742 F.2d 1007.

The FBI Guidelines Attorney General Ashcroft published in May 2002 constitute the latest development in an evolutionary process. But they are the first revision since the events of 9/11, and their text reveals the Department of Justice's purpose to fashion investigation guidelines tailored to the exigencies of an unprecedented form of domestic terrorism, while at the same time preserving constitutional freedoms. Presumably the Attorney General concluded before publishing the present FBI Guidelines that they achieved that purpose.

In an earlier opinion in this case I had occasion to observe that the 2002 FBI Guidelines comprise 24 single-spaced typed pages, a volume of verbiage consistent with the work product of earlier Attorneys General,[2] while the Modified Handschu (Guidelines fit into just over three double-spaced typewritten pages. This raises the questions of (1) whether the FBI Guidelines restrict FBI investigations in ways that the Modified Handschu Guidelines would not restrict NYPD investigations; and (2) if so, whether differences in the circumstances confronting the FBI and the NYPD in investigating terrorism explain the differences in the restrictions.

***2** Given the striking difference in the length of these two sets of guidelines, one would believe intuitively that the FBI Guidelines contain more restrictions on investigations than the Modified Handschu Guidelines. But it is not necessarily so; at least in legal writing, length is not always the handmaiden of clarity. I have read the FBI Guidelines, and will require the views of counsel on their meaning and effect. Specifically, counsel must be ready to respond to these questions:

1. Are there differences, relevant to the concerns professed by the NYPD in support of its motion to modify the Handschu Guidelines, between the restrictions and requirements imposed by the FBI Guidelines upon FBI investigations and the restrictions and requirements that the Modified Handschu Guidelines would impose upon NYPD investigations? If so, counsel should identify the specific language involved.

2. If the FBI Guidelines impose greater restrictions upon FBI investigations than the Modified Handschu Guidelines would impose upon NYPD investigations, why does the NYPD require a lesser degree of restriction?

3. Do the FBI Guidelines abrogate (a) entirely or (b) only in part or (c) not at all that sort of "criminal activity requirement" which the NYPD wishes to eliminate by proposing the Modified Handschu Guidelines?

2. The Modified Handschu Guidelines and the CPD Guidelines

As noted, in *Alliance,* 237 F.3d 799, the Seventh Circuit permitted the Chicago Police Department to modify the consent decree and the accompanying CPD Guidelines. While its briefs cite a number of cases, the NYPD places primary reliance upon *Alliance,* which it characterizes as "directly on point," Main Brief at 10, and "highly persuasive," Reply Brief at 7. So it is useful to look closely at *Alliance* in preparation for the oral argument.

Circuit Judge Posner's opinion distinguishes between "[t]he core of the [consent] decree, which the City does not seek to modify," and "[t]he periphery of the decree, which the City considers insufficiently protective of the public safety and wishes to have lanced," 237 F.2d at 800. The "core" of the decree, as to which no modification was sought, "forbids investigations intended to interfere with or deter the exercise of the freedom of expression that the First Amendment protects, and requires the City to commission independent periodic audits of the City's compliance with the decree." *Id.* The "periphery" of the decree, which the City "wishes to have lanced" (as one would a painful boil), "comprises a dizzying array of highly specific restrictions on investigations of potential terrorists and other politically or ideologically motivated criminals," *id.* at 800–01, which Judge Posner then summarizes; they appear to be analogous to some of the restrictions in the Handschu Guidelines which the NYPD brings this motion in order to lance.[3] That desired result the Chicago Police Department achieved; in *Alliance* the Seventh Circuit remanded the case to the district court "with instructions to make the modifications that the City has requested." *Id.* at 802.

***3** The comparison between the Modified Handschu Guidelines and the CPD Guidelines that I wish counsel to address relates to the "independent periodic audits of the City's compliance with the decree,"[4] which together with a prohibition against violating the First Amendment comprised, in Judge Posner's perception, the "core" of the *Alliance* consent decree. Further explaining the combined salutary effect of that two-component core, Judge Posner said:

> The effect of these provisions is to add the threat of civil and criminal contempt to the usual sanctions for infringing civil rights and, *through the requirement of the audits, to make it easier to detect such infringements.* These are substantial enhancements of the ordinary deterrent effect of constitutional law.

237 F.3d at 800 (emphasis added). It would appear from this analysis that the independent audit provision was a significant consideration in the Seventh Circuit's decision to allow modification of the CPD Guidelines, an impression reinforced by the conclusion to Judge Posner's opinion:

> Modification is not abrogation. The modified decree will leave the Chicago police under considerably greater constraints than the police forces of other cities.[5] A violation of the constitutional rights of any person whom the Chicago police investigate will be a violation of the decree and not just of the Constitution itself and so will invite summary punishment by the exercise of the contempt power, *while the requirement of outside audits will make it more difficult for the Chicago police than for their counterparts in the other big cities to commit constitutional violations undetected.*

Id. at 802 (emphasis added).

I stress the independent audit requirement upon which the Seventh Circuit fastened in *Alliance* because the Handschu Guidelines contain no publically available independent audit requirement, and the Modified Handschu Guidelines would delete such less demanding review (Section VIII) and reporting (Section IX) requirements as now exist.

The question this comparison prompts is whether, if the non-modified independent and public audit requirement was essential to the Seventh Circuit's willingness in *Alliance* to allow the Chicago Police Department's lancing by elimination of the sort of investigation

restrictions that pain the NYPD, *Alliance* can accurately be characterized as "directly on point" with the case at bar.

3. Some Cautionary Notes

Lest there be any misunderstanding, the questions discussed in this memorandum are not intended to restrict counsel in their arguments. Counsel may make any arguments they wish (so long as they have something to do with the case). But I do direct them to deal with the foregoing questions.

Second, neither the questions raised in this memorandum nor the analyses preceding them should be regarded by anyone as intimating or suggesting any opinion on the part of the Court with respect to these questions or to any of the issues and questions presented by the NYPD's motion. Nor should the reader conclude that I regard these questions or any of them as decisive on the merits of the NYPD's motion. My sole purpose in posing these questions is to derive the maximum amount of assistance from the oral arguments of counsel, who as the result of this memorandum will be required to respond to some of the questions that have occurred to me during my study of the case. Oral arguments are the most productive when counsel are talented (as they are here), the judge is attentive (as I will endeavor to be), and counsel have some advance awareness of the preliminary workings of the judicial mind.

***4** It is SO ORDERED.

Footnotes

1 The *Alliance* plaintiff class had sued both the City of Chicago and federal defendants. That two-track litigation was settled by two consent decrees: one entered in the City of Chicago case, regulating the conduct of the CPD; and the other in the federal case, regulating the conduct of the FBI. In the case at bar, the *Handschu* plaintiff class sued only New York City defendants, and so the case has never had a federal dimension.

2 Thus Circuit Judge Posner, writing for the Seventh Circuit in *Alliance,* 742 F.2d at 1010, described Attorney General Smith's 1983 FBI guidelines as "a formidable document—19 single-spaced typewritten pages."

3 For example, the original CPD consent decree and guidelines provided that investigations "directed toward First Amendment conduct" may be conducted "only for the purpose of obtaining evidence of past, present, or impending criminal conduct and only if the Chicago police already have a reasonable suspicion of such conduct." 237 F.3d at 800. This sounds like the "criminal activity requirement" which is a principal target of the NYPD's motion to modify the Handschu Guidelines.

4 The full text of the audit provisions in the consent decree may be found in the district court's opinion at 561 F.Supp. 568–569 (N.D.Ill.1982). Those provisions direct the Chicago Police Board, *inter alia,* to "cause management audits to be conducted, by a national independent accounting firm, of the implementation of and compliance with this Judgment and the regulations adopted" thereunder.... Such audits shall be conducted in 1982, 1984, and thereafter at intervals of not more than five years. The audit report shall be made public...."

5 One wonders if Judge Posner had the Handschu Guidelines in mind when he wrote that sentence.