



March 19, 2012

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Re: Legal Analysis of the NYPD's Surveillance of Muslim Student Organizations and Mosques

Dear Mr. Attorney General:

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued numerous free speech and religious freedom cases before the Supreme Court of the United States.¹

I. Introduction

The New York City Police Department (NYPD) has recently come under fire from groups such as the American Civil Liberties Union (ACLU) and the Council on American-Islamic Relations (CAIR) for conducting surveillance of Muslim individuals, groups, and mosques as one aspect of their counterterrorism efforts. Such groups have asserted that the NYPD's surveillance has been conducted in violation of the First Amendment rights of those under surveillance² as well as in

¹*See, e.g.,* Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); McConnell v. FEC, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

²*See* Letter from the Am. Civil Liberties Union Found. of Pa. et al., to the Honorable Linda Kelly, Pa. Office of the Att'y Gen. (March 1, 2012) [hereinafter ACLU Letter], *available at* <http://www.citypaper.net/blogs/nakedcity/ACLU-asks-PA-Attorney-General-to-investigate-NYPD-spying-on-Philly-Muslims.html>.

violation of the NYPD's own Guidelines for Investigations Involving Political Activity (Guidelines).³ Specifically, the ACLU of Pennsylvania sent a letter to Pennsylvania Attorney General Linda Kelly accusing the NYPD of violating "civil rights of law-abiding Pennsylvanians (as well as residents of New York, New Jersey, and Connecticut) who have been the targets of massive, abusive surveillance practices based on their ethnic or faith background"⁴ The ACLU letter further alleged that the NYPD has given "false and misleading statements about these discriminatory policing activities."⁵ CAIR sent a letter to President Obama accusing the NYPD of engaging "in a widespread campaign of religious profiling targeting the American Muslim community."⁶ However, analysis of the NYPD's intelligence-gathering operations under its Guidelines reveals that the department's practices are in compliance with the Guidelines, Guidelines which have withstood judicial scrutiny. Moreover, Constitutional violations would only occur if the NYPD were to go beyond what is authorized under the Guidelines.⁷

II. NYPD Guidelines for Surveillance and Investigations of Political Activity.

The NYPD's investigation Guidelines are the result of a settlement agreement reached following a class action suit filed against the NYPD in 1972.⁸ In the *Handschu* case, the NYPD was accused of conducting surveillance on certain political groups that had "a 'chilling effect' on plaintiffs and members of their class in the exercise of their constitutional rights of freedom of speech, assembly and association"⁹ The original Guidelines sought to ensure that NYPD investigations complied with constitutionally guaranteed rights and privileges. This was to be achieved by delineating the process by which the NYPD collected, retained, and disseminated information. The purpose of the original Guidelines was to guide conduct when investigating political activity.¹⁰ The original Guidelines authorized NYPD's Intelligence Division to conduct an Event Planning Inquiry "to preserve the peace, deploy manpower for control of crowds and to protect the right of individuals to freedom of speech and assembly."¹¹ Under those Guidelines, NYPD's Intelligence Division was authorized to commence an investigation upon receipt of information "that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime"¹² The original Guidelines also allowed the use of undercover personnel after approval by the designated officials within the NYPD's Intelligence Division.¹³ The purpose to allow the use of undercover personnel was to

³Guidelines for Investigations Involving Political Activity, *reprinted in* Handschu v. Special Div. Servs., 288 F. Supp. 2d 411, 420 app. A (S.D.N.Y. 2003) [hereinafter Guidelines].

⁴ACLU Letter, *supra* note 2.

⁵*Id.*

⁶*NYPD Kept Secret Files on Muslim-Owned Businesses*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (Mar. 9, 2012), <http://www.cair.com/ArticleDetails.aspx?ArticleID=26935&&name=n&&currPage=1&&Active=1>.

⁷*See* Handschu, 288 F. Supp. 2d at 419.

⁸Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985) (The agreement came to be known as the Handschu Guidelines, named for the lead plaintiff. However, the Guidelines have since been modified.).

⁹Handschu v. Special Servs. Div., 349 F. Supp. 766, 768-69 (S.D.N.Y. 1971).

¹⁰Handschu, 605 F. Supp. at 1384.

¹¹*Id.* at 1420-21.

¹²*Id.* at 1421.

¹³*Id.* at 1422.

“develop information about the activities of the person, group or organization under investigation.”¹⁴ The original Guidelines further allowed investigators to attend “public activities of political organizations.”¹⁵ However, investigators were not required to obtain prior approval from higher authorities to attend *public events*.¹⁶ Finally, the original Guidelines allowed and governed the “[u]se of electronic or mechanical surveillance in cases where a warrant [was] not required by law”¹⁷ This initial version of the Guidelines was affirmed by the Court of Appeals for the Second Circuit in 1986.¹⁸

The Guidelines were modified following 9/11 and subsequently upheld by the U.S. District Court for the Southern District of New York in 2003.¹⁹ The modifications were in response to “unprecedented threats to [the] continued safety and security”²⁰ of New York City and “the need to investigate terrorism in a changed world.”²¹ These Guidelines authorize preliminary inquiries and investigations of political activity and preclude individuals and groups from being investigated based upon a constitutionally protected freedom.²² The Guidelines provide a detailed framework of investigation, including different levels of investigation, surveillance of public places and events, investigation techniques, dissemination and maintenance of information, and counterterrorism activities and other authorizations.²³ The Guidelines also authorize the “*use of confidential informants, under-cover activities and operations, eavesdropping and video surveillance, pen registers and trap and trace devices, consensual electronic monitoring, and searches and seizures.*”²⁴ Because of the sensitivity of such operations, the Guidelines require that “[t]he use of undercover and confidential informants must be authorized by the Deputy Commissioner of the Intelligence Division prior to commencement of the undercover operation.”²⁵

The Guidelines provide for three levels of investigative activity in an attempt to provide the NYPD with the “necessary flexibility” required to act *prior* to the commission of an unlawful

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Handschu v. Special Servs. Div.*, 787 F.2d 828 (2d Cir. N.Y. 1986).

¹⁹*Handschu v. Special Servs. Div.*, No. 71 Civ.2203 (CSH), 2003 U.S. Dist. LEXIS 5648 (S.D.N.Y. Apr. 4, 2003).

²⁰Guidelines, *supra* note 3, at 420.

²¹*Id.* at 421.

²²*Id.*

²³*Id.* at 421–430.

²⁴*Id.* at 428 (emphasis added).

The use of secret informers or undercover agents is a legitimate and proper practice of law enforcement and justified in the public interest -- indeed, without the use of such agents many crimes would go unpunished and wrongdoers escape prosecution. It is a technique that has frequently been used to prevent serious crimes of a cataclysmic nature. The use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights.

Handschu, 349 F. Supp. at 769. Most of the surveillance techniques authorized by the Guidelines are in compliance with the Attorney General’s Guidelines for Domestic FBI Operations. THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS 20, 31–33 (2008), available at <http://www.justice.gov/ag/readingroom/guidelines.pdf>.

²⁵Guidelines, *supra* note 3, at 428.

activity.²⁶ The three levels of investigative activity are: checking of leads, preliminary inquiries, and full investigation.²⁷ The lowest level of investigation is checking leads to determine whether to start a preliminary inquiry or full investigation.²⁸ This initial checking of leads should be undertaken “whenever information is received of such a nature that some follow-up as to the possibility of unlawful activity is warranted.”²⁹ Responsible handling of information sometimes requires more scrutiny than merely checking initial leads. In those instances, a preliminary inquiry can be initiated prior to any “reasonable indication” of unlawful activity, but some information exists indicating the possibility of unlawful activity.³⁰ The Guidelines thus eliminated the need for “specific information” of current *criminal activity prior to commencing an inquiry*,³¹ which was required under the previous Guidelines.³²

Finally, “[a] full investigation may be initiated when facts or circumstances *reasonably indicate* that [an] unlawful act has been, is being, or will be committed.”³³ The “reasonable indication” standard is substantially lower than probable cause but still requires an objective, factual basis for initiating the investigation.³⁴ In the case of a future unlawful act, “[t]he standard for opening an investigation is satisfied where there is *not yet a current substantive or preparatory unlawful act*, but facts or circumstances *reasonably indicate* that such unlawful conduct will occur in the future.”³⁵

III. NYPD Investigations of Student Groups and Mosques Are Valid Under the Guidelines.

In February 2012, news reports exposed ongoing NYPD surveillance of mosques and Muslim student organizations at a number of universities, including schools in New York, New Jersey, and Pennsylvania.³⁶ As part of the NYPD’s surveillance of Muslim student organizations and mosques, the NYPD’s Cyber Intelligence units monitor *publicly available* information on websites, blogs, and forums of such groups. The NYPD also sends undercover operatives to the groups’ *public meetings* and activities.³⁷ The NYPD’s surveillance practices have been criticized because the surveillance is not confined to New York City, because the surveillance reports indicated no wrongdoing by the student groups under surveillance, and because the NYPD never brought any terrorism charges against any of the students. Yet, that often occurs in intelligence-gathering where no criminal activity is discovered.

²⁶*Id.* at 422.

²⁷*Id.* at 422–24.

²⁸*Id.* at 422.

²⁹*Id.*

³⁰*Id.*

³¹*See id.*

³²Handschu, 605 F. Supp. at 1404.

³³Guidelines, *supra* note 3, at 424 (emphasis added).

³⁴*Id.*

³⁵*Id.* (emphasis added).

³⁶Chris Hawley, *NYPD Monitored Muslim Students All over Northeast*, ASSOCIATED PRESS, Feb. 20, 2012, available at <http://news.yahoo.com/nypd-monitored-muslim-students-over-northeast-201653480.html>.

³⁷*Id.*

A. Reasonable Indication of Criminal Activity or Wrongdoing.

The Guidelines authorize the NYPD to initiate preliminary surveillance and inquiry when there is some information that reasonably indicates the possibility of unlawful activity.³⁸ Under the Guidelines, the NYPD is authorized to use undercover and confidential informants to follow up on leads and conduct preliminary inquiries to determine the possibility of unlawful activity.³⁹ Critics argue that the NYPD's investigation of Muslim student organizations and mosques is both unjustifiable and overly intrusive. However, evidence has amply shown that many Muslim student organizations and mosques foster and advocate terrorist activity. At least 12 individuals who were once members of Muslim student organizations have been arrested or convicted on terrorism charges.⁴⁰ Additionally, several known terrorists have participated in Muslim student organizations, giving reasonable indication of possible wrongful conduct by the same groups in the future.

In 2010, NYPD, working with the Federal Bureau of Investigation and New Jersey law enforcement agencies, arrested two New Jersey-based Muslims, Mohamed Alessa and Carlos Almonte, at Kennedy Airport en route to join the Somali terrorist group, al-Shabaab.⁴¹ Two New Yorkers, Mohammed Junaid Babar and Syed Fahad Hashmi, were arrested in connection with the July 7, 2005, London bombings.⁴² Both men, who pled guilty to terrorism offenses, had been radicalized to militant Islam through university-based activities in the New York branch of al-Muhajiroun, an Islamic group banned in Britain. "The group [al-Muhajiroun], as well as Babar and Hashmi, actively recruited at Brooklyn College and Queens College's Muslim student organization."⁴³

Further, Abu Mansour al-Amriki, a member of the Somali terrorist group, al-Shabaab, served as president of the University of South Alabama's Muslim student organization.⁴⁴ Ali Asad Chandia, who was convicted as part of the "Virginia jihad network,"⁴⁵ also served as the president of the University of Maryland University College's Muslim student organization.⁴⁶

³⁸Guidelines, *supra* note 3, at 422.

³⁹Guidelines, *supra* note 3, at 422–23.

⁴⁰Hawley, *supra* note 36.

⁴¹Judith Miller, *Should Police Monitor Muslim Student Groups?*, MINDING THE CAMPUS (Mar. 5, 2012), http://www.mindingthecampus.com/originals/2012/03/should_police_monitor_muslim_s.html.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Al Qaeda-Linked American Terrorist Unveiled, as Charges Await Him in U.S.*, FOX NEWS (Sept. 4, 2009), <http://www.foxnews.com/story/0,2933,546510,00.html>.

⁴⁵An Islamic militant network in Northern Virginia. Many members of the network were prosecuted in 2003 and 2004. Press Release, Department of Justice, Two Defendants in Virginia Jihad Case Plead Guilty to Weapons Charges, Will Cooperate With Ongoing Investigation (Jan. 16, 2004), *available at* http://www.justice.gov/opa/pr/2004/January/04_crm_030.htm.

⁴⁶Sharahn D. Boykin, *From Teaching to Terror: Accused of Aiding Terrorists, Ali Asad Speaks Out*, DIAMONDBACK ONLINE (June 15, 2006), <http://www.diamondbackonline.com/2.2814/from-teaching-to-terror-1.289271#.T1-aPcUgfZg>.

Furthermore, Aafia Siddiqui, who has been called “Lady Al Qaeda” and was caught in Afghanistan with bomb-making materials and a list of New York landmarks, was an active member in the Massachusetts Institute of Technology’s Muslim student organization.⁴⁷ Hani Hanjour, one of the 9/11 hijackers, came to the United States in 1991 to study English at the University of Arizona.⁴⁸ According to the 9/11 Commission Report, Hanjour’s time at the University of Arizona was significant because “a number of important al Qaeda figures attended the University of Arizona in Tuscon or lived in Tuscon in the 1980s and early 1990s.”⁴⁹

President Obama’s Senior Director for Global Engagement on the National Security Council, Dr. Quintan Wiktorowicz, is charged with countering violent extremism.⁵⁰ His book, “Radical Islam Rising,” highlights the importance of the college campus as a radicalization and recruiting tool for terrorist organizations. Based on interviews with hundreds of British militants, Dr. Wiktorowicz concluded that young university students are “the dominant recruitment pool for al-Muhajiroun.”⁵¹

The fact that members of Muslim student organizations have become involved in terrorist plots and activities provides ample, legitimate reason to monitor such groups. Further, monitoring such organizations to prevent future terrorist attacks is not only a legitimate law enforcement, but also a higher national security, interest. These cases (and numerous cases discussed below) show that terrorists readily adapt to Western culture and infiltrate the society as students, Imams, and scholars so that they can move freely and even receive benefits to further their unlawful activities. For example, Faisal Shahzad, who attempted to detonate a car bomb in Times Square in 2010, became a naturalized U.S. citizen. Yet, at his trial, he admitted that he took the oath of allegiance fraudulently. Following is the dialogue between the Judge and Shahzad at a court hearing:

Judge: “Didn’t you swear allegiance to this country when you became an American citizen?”

Shahzad: “I did swear, but I did not mean it.”

Judge: “You took a false oath?”

Shahzad: “Yes.”⁵²

The fact that terrorists adapt to American culture and infiltrate American society through student organizations and political groups is not hidden from the NYPD and the courts of this country.

⁴⁷Scott Shifrel, *Pakistani Scientist ‘Lady Al Qaeda’ Sentenced to 86 Years in Prison for Trying to Kill U.S. Soldiers*, N.Y. DAILY NEWS (Sept. 23, 2010), http://articles.nydailynews.com/2010-09-23/local/27076210_1_aafia-siddiqui-afghan-police-station-soldiers; Katherine Ozment, *Who’s Afraid of Aafia Siddiqui?*, BOSTON MAGAZINE (Oct. 2004), http://www.bostonmagazine.com/articles/whos_afraid_of_aafia_siddiqui/.

⁴⁸NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *The 9/11 Commission Report* 225 (2004).

⁴⁹*Id.* at 226.

⁵⁰Miller, *supra* note 41.

⁵¹*Id.*

⁵²See Michael Wilson, *Shahzad Gets Life Term for Times Square Bombing Attempt*, N.Y. TIMES (Oct. 5, 2010), <http://www.nytimes.com/2010/10/06/nyregion/06shahzad.html>.

The Guidelines, thus, recognize a difference between “a standard investigation of unlawful conduct” and terrorist activity: “[A] terrorism enterprise investigation does not necessarily end, even though one or more of the participants may have been prosecuted. In addition, groups and organizations provide a life and continuity of operation not normally found in other types of unlawful activity.”⁵³ Therefore, for the purposes of preventing future terrorist attacks, the Guidelines require the NYPD to “proactively draw on available sources of information to identify terrorist threats and activities.”⁵⁴ For counterterrorism investigations, the Guidelines do *not* require police officers to “wait for leads;” instead, they require police officers to “be vigilant in detecting terrorist activities to the full extent permitted by law,”⁵⁵ including the “use of confidential informants, undercover activities and operations, eavesdropping and video surveillance, pen registers and trap and trace devices, consensual electronic monitoring, and searches and seizures.”⁵⁶

Furthermore, definitive proof of criminal activity or prior criminal record is not required to initiate an inquiry about a person or a group.⁵⁷ In fact, if current criminal activity or a previous criminal record were required before commencing such an investigation, it is likely that the NYPD would not have been successful in preventing any of the 14 attempts by Islamic terrorists who were associated with either Muslim student organizations or radical mosques that have been successfully thwarted by the use of the surveillance practices allowed under the Guidelines.⁵⁸

On the other hand, when such surveillance and investigation protocols were absent, the United States experienced terrorist attacks that cost or seriously threatened the lives of scores of American citizens. For instance, Nidal Hasan, a U.S. citizen and an Army Major, shot and killed 13 and wounded 30 others at Fort Hood, Texas, in 2009.⁵⁹ The aforementioned Faisal Shahzad, a 30 year old naturalized U.S. citizen, attempted to detonate a car bomb in Times Square in 2010.⁶⁰ Umar Farouk Abdulmutallab, a Nigerian national travelling to the United States, was aboard a flight bound for Detroit in 2009 when he unsuccessfully attempted to detonate a bomb during the flight.⁶¹ Abdulmutallab was also a member of the Muslim Students Association at the University College of London.⁶² Ramzi Yousef, a former student at Swansea Institute in the United

⁵³ Guidelines, *supra* note 3, at 425.

⁵⁴ *Id.* at 429.

⁵⁵ *Id.*

⁵⁶ *Id.* at 428.

⁵⁷ *Id.* at 422.

⁵⁸ See Rocco Parascandola, *Rep. Peter King, Muslim Leaders Back NYPD in Spy Controversy*, N.Y. DAILY NEWS (Mar. 5, 2012), <http://www.nydailynews.com/new-york/rep-peter-king-muslim-leaders-back-nypd-spy-controversy-article-1.1033382>.

⁵⁹ *Nidal Malik Hasan*, THE NEW YORK TIMES (July 21, 2011), http://topics.nytimes.com/top/reference/timestopics/people/h/nidal_malik_hasan/index.html.

⁶⁰ *Faisal Shahzad*, THE NEW YORK TIMES (Oct. 5, 2010), http://topics.nytimes.com/top/reference/timestopics/people/s/faisal_shahzad/index.html.

⁶¹ *Umar Farouk Abdulmutallab*, THE NEW YORK TIMES (Feb. 16, 2012), http://topics.nytimes.com/top/reference/timestopics/people/a/umar_farouk_abdulmutallab/index.html.

⁶² Miller, *supra* note 41.

Kingdom,⁶³ exploded a bomb in the basement garage of the World Trade Center in 1993, killing 6 people and injuring over 1,000 others.⁶⁴ Ali Saleh al-Marri, a citizen of Qatar and a computer science graduate student at Illinois's Bradley University,⁶⁵ was captured in 2001 while planning attacks on U.S. water reservoirs, the New York Stock Exchange, and the United States military academies.⁶⁶ *None of these individuals had a criminal record prior to his attack or capture.* Moreover, the Vigilance Project, a study analyzing thirty-two cases that resulted in terrorism convictions or arrests since September 11, 2001, found that 56% of arrestees did not have a prior criminal background.⁶⁷ Were NYPD investigations to be limited only to cases where there was specific information of criminal activity or to individuals with a prior criminal history, the national security of the United States would be significantly impaired. As our enemies continue to adapt their methods and adopt new ones, law enforcement officers must be proactive. Terrorists are responding to our defenses and, therefore, we must be vigilant and flexible in defending the security of this country.

B. Surveillance of Individuals and Organizations that Advocate Unlawful Activity.

The Guidelines also authorize investigation of individuals and organizations that *advocate* unlawful activity.⁶⁸ Muslim student organizations have exhibited a propensity to support violence and other illegal activity. In particular, Muslim student organizations have advocated illegal activity by hosting speakers who advocate the violent overthrow of the United States and by raising funds for terrorist groups. One speaker told a Muslim student organization's meeting in New York, "[w]e are not Americans, we are Muslims. . . . The only relationship you should have with America is to topple it!"⁶⁹ The Muslim Students Association (MSA) at UCLA used to hold an annual "Anti-Zionism Week," during which it raised funds for terrorist organizations such as Hamas and Hezbollah.⁷⁰ A former MSA chapter president at the University of Idaho was

⁶³Swansea Student Links to Bin Laden, BBC NEWS (Sept. 18, 2001), news.bbc.co.uk/2/hi/uk_news/wales/1549539.stm.

⁶⁴RAW DATA: Timeline of Terror Attacks Against New York City, FOX NEWS (May 2, 2010), <http://www.foxnews.com/us/2010/05/02/raw-data-timeline-terror-attacks-new-york-city/>.

⁶⁵Context of 'December 12, 2001: Al-Marri Detained as Material Witness to 9/11 Attacks,' HISTORY COMMONS, http://www.historycommons.org/context.jsp?item=torture,_rendition,_and_other_abuses_against_captives_in_iraq,_afghanistan,_and_elsewhere_2177#torture,_rendition,_and_other_abuses_against_captives_in_iraq,_afghanistan,_and_elsewhere_2177 (last visited Mar. 15, 2012).

⁶⁶See *id.*; President George W. Bush, Commencement Address at the United States Coast Guard Academy (May 23, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070523-4.html>.

⁶⁷NEW YORK STATE INTELLIGENCE CENTER, THE VIGILANCE PROJECT: AN ANALYSIS OF 32 TERRORISM CASES AGAINST THE HOMELAND 12–13 (2010).

⁶⁸*Id.* at 421.

⁶⁹Robert Spencer, *Spies of Guantanamo*, FRONT PAGE MAGAZINE (Oct. 8, 2003), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=16027>.

⁷⁰Jamie Glazov, *Brainwashed*, FRONT PAGE MAGAZINE (May 13, 2004), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=13097>.

deported⁷¹ for running websites supporting Hamas,⁷² funneling money to terrorist organizations,⁷³ and working for an Islamic charity suspected of having ties with terrorism.⁷⁴

At the April 2007 West Zone Conference at the University of California-Berkeley, Amir Mertaban, the president of MSA West, stated that Muslims must unconditionally defend the actions of all Muslim “brothers” and must never compromise on any aspect of Islam, including polygamy and external jihad.⁷⁵ At the 2006 MSA East Zone Conference at the University of Maryland, Shad Imam exclaimed that today’s Muslims should strive to spread Islam and make America a “Muslim country.”⁷⁶ These sentiments are not limited to conferences and public gatherings. The UCLA Muslim student newspaper, al-Talib, which distributes 20,000 copies per issue, featured an editorial by an MSA staff member entitled, “The Spirit of Jihad.” The editorial read: “When we hear someone refer to the great Mujahid Osama bin Laden as a ‘terrorist,’ we should defend our brother and refer to him as a freedom fighter; [sic] someone who has forsaken wealth and power to fight in Allah’s cause and speak out against oppressors. We take these stances only to please Allah.”⁷⁷

According to the NYPD Guidelines, an individual’s or a group’s statements are to be considered when evaluating whether a reasonable indication for further investigation exists.⁷⁸ Furthermore, numerous instances where Muslim student organizations and Muslim leaders have advocated violence reasonably support the NYPD’s authorization of intelligence-gathering at such events using surveillance techniques, including the use of undercover operations, specifically allowed under the Guidelines. Although Muslims have the right to believe and profess their religion, they do not have the right to engage in unlawful activities for the propagation of their religion, even if Islam mandates violent jihad. Advocacy of unlawful activity is sufficient to warrant investigation under the Guidelines.

C. Monitoring Public Websites and Forums.

Critics of the NYPD investigations argue that monitoring of mosques and Muslim student organizations’ websites, blogs, and forums is an infringement of Muslims’ constitutional rights to speech and privacy. In one specific instance identified by the media as an undue infringement

⁷¹Betsy Z. Russell, *Deportation Ordered for Saudi Student*, THE SPOKESMAN REVIEW (Apr. 6, 2003), <http://www.spokesmanreview.com/pf.asp?date=042603&ID=s1341984>.

⁷²*Trial of a Graduate Student Could Test the Patriot Act*, USA TODAY (Apr. 14, 2004 9:17 AM), http://www.usatoday.com/news/washington/2004-04-14-idaho-case_x.htm.

⁷³*Id.*

⁷⁴Russell, *supra* note 71.

⁷⁵THE INVESTIGATIVE PROJECT ON TERRORISM, *Muslim Students Association* 28–29, <http://www.investigativeproject.org/documents/misc/31.pdf> (last visited March 13, 2012). Jihad means “to war against non-Muslims.” The term jihad derives from the word mujahada, which means “warfare to establish the religion.” AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELLER* 599 (Nuh Ha Mim Keller, trans., Amana Publications rev. ed. 2008) (1368).

⁷⁶THE INVESTIGATIVE PROJECT ON TERRORISM, *Muslim Students Association*, *supra* note 75, at 7.

⁷⁷*Id.* at 12.

⁷⁸Guidelines, *supra* note 3, at 425.

by the NYPD, the name of a student at the University of Buffalo was included in a surveillance report after she received and forwarded to a chat group an invitation to an Islamic conference in Toronto. The invitation was very vague, stating only that “‘highly respected scholars’” would be in attendance at the conference, but not giving any specific names or other details about the conference.⁷⁹ The student who forwarded the invitation did not attend the conference herself, but, because she posted it, she was included in a weekly surveillance report to the Police Commissioner. There is no indication that the student was ever investigated further or that she was ever implicated in any wrongdoing. Given the evidence that such conferences and events are used to advocate violence against the United States, it is necessary that the law enforcement officials monitor these events.

NYPD cyber-analysts also monitored other seminar announcements on student organizations’ websites.⁸⁰ Specifically, the analysts were looking for information about the college recruiting practices of the Islamic Thinker’s Society, a New York group whose goal is to see Shariah (Islamic law) imposed on the United States.⁸¹ The surveillance revealed that a leader of the Islamic Thinker’s Society visited a Muslim student organization in New York to recruit members, but reports do not indicate that the surveillance led to any further investigation of Muslim students.⁸²

The NYPD has also been criticized by leaders of surrounding states for conducting surveillance operations that include observing individuals outside New York State. In particular, New Jersey Governor Chris Christie complained: “They think that their jurisdiction is the world. . . . Their jurisdiction is New York City.”⁸³ In response, Mayor Michael Bloomberg noted: “A lot of the World Trade Center terrorists that took 3,000 people went back and forth to New Jersey. . . . To say that the NYPD should stop at the border is a bit ridiculous.”⁸⁴ He continued: “What we’ve been doing in New Jersey is what anybody in this country or in the world can do. You can go to open meetings, and you can go on open websites and look and see what’s there, and that’s really all we’ve been doing. . . . We have a responsibility to do that, and we share the information with New Jersey.”⁸⁵

The Guidelines expressly provide that officials may investigate and monitor *public* events and *public* sources of information without prior authorization.⁸⁶ Under the Guidelines, the “NYPD is authorized to . . . attend any event that is open to the public, on the same terms and conditions as

⁷⁹Hawley, *supra* note 36.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

⁸³*Fallout Continues From NYPD Muslim Student Group Monitoring*, CBS NEW YORK (Mar. 3, 2012), <http://newyork.cbslocal.com/2012/03/03/nj-officials-meeting-with-muslim-community-on-nypd-program/>.

⁸⁴Samantha Gross, *NYC Mayor: NJ Surveillance Complaints ‘Ridiculous’*, 6ABC ACTION NEWS (Mar. 2, 2012), http://abclocal.go.com/wpvi/story?section=news/national_world&id=8566238.

⁸⁵*Id.*

⁸⁶Guidelines, *supra* note 3, at 423.

members of the public generally.”⁸⁷ The Second Circuit has held that “the attendance of law enforcement officers at public gatherings is not actionable.”⁸⁸

The Guidelines also authorize the “[e]xamination of records available to the public and other public sources of information.”⁸⁹ Therefore, the NYPD may freely monitor public information on the internet and attend public demonstrations, protests, and meetings. Such action is fully consistent with the United States and New York constitutions. Since national security is the greatest of all public interests,⁹⁰ police officers must be afforded the flexibility to take the necessary measures to combat the unprecedented threat posed by terrorism.

D. Surveillance of Mosques That Advocate Unlawful Activity.

The Guidelines authorize NYPD to monitor political activity to support a legitimate law enforcement purpose.⁹¹ Additionally, they authorize investigation of a terrorism enterprise for the detection and prevention of terrorist attacks.⁹² Thus, it is certainly appropriate and even necessary for surveillance to include those associated with mosques, Imams, and Muslim scholars who have encouraged and advocated positions harmful to the security of the United States. A prime example for supporting investigation and surveillance of mosques and Muslim scholars is the case of Anwar Al-Awlaki, a senior official in Al-Qaeda. Al-Awlaki served as an Imam at Dar al-Hijrah mosque located in Virginia.⁹³ He had also served as Muslim chaplain at George Washington University.⁹⁴ Further, Al-Awlaki was president of the Muslim Students Association at Colorado State University in the mid-1990’s.⁹⁵ Al-Awlaki was in contact with and influenced the following: three of the 9/11 hijackers; the Fort Hood shooter, Major Nidal Hasan; and the so-called “Underwear Bomber,” Umar Farouk Abdulmutallab.⁹⁶ Moreover, Imams, both within and outside of the United States, have espoused violent rhetoric aimed at inciting terrorist attacks. Imam Jamil al-Amin (formerly Hubert Gerold Brown) converted to Islam while in prison and thereafter affiliated with Dar ul-Islam, a militant Sunni Muslim network.⁹⁷ As a civil rights protester, he stated: “If America don’t come around, we’re gonna burn it down.”⁹⁸ Subsequent to his rise within the militant Muslim community, his words took on new meaning among his

⁸⁷*Id.* at 430.

⁸⁸*Fifth Avenue Peace Parade Comm. v. Gray*, 480 F.2d 326 (2d Cir.1973) (holding that a justiciable controversy did not arise from the FBI’s investigation into who would attend a war protest demonstration, surveillance of the gathering, and dissemination of the resulting information).

⁸⁹Guidelines, *supra* note 3, at 423.

⁹⁰*Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951).

⁹¹Guidelines, *supra* note 3, at 421.

⁹²*Id.* at 425.

⁹³*Obituary: Anwar al-Awlaki*, BBC NEWS (Sept. 30, 2011), <http://www.bbc.co.uk/news/world-middle-east-11658920>.

⁹⁴Michael Shaw, *Reading the Pictures: al-Awlaki: What’s Wrong with This Picture*, HUFFINGTON POST (Oct. 2, 2011), http://www.huffingtonpost.com/michael-shaw/anwar-al-awlaki_b_991241.html.

⁹⁵Miller, *supra* note 41.

⁹⁶*Obituary: Anwar al-Awlaki*, *supra* note 93.

⁹⁷*Black America, Prisons, and Radical Islam: A Report*, CENTER FOR ISLAMIC PLURALISM 13 (Sept. 2008), <http://www.islamicpluralism.org/documents/black-america-prisons-radical-islam.pdf>.

⁹⁸*Id.*

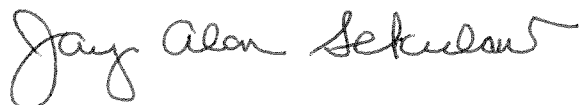
followers. Fellow American Muslim convert, Abdul Alim Musa, has stated: “Imam Jamil coined a phrase, and that phrase meant this: ‘If you don’t give us justice. If you don’t give us equality. If you don’t give us our share of America. If you don’t stay out of our way and leave us alone, we’re gonna burn America down.’”⁹⁹

As mentioned above, “a terrorism enterprise investigation does not necessarily end, even though one or more of the participants may have been prosecuted.”¹⁰⁰ At the very least, radical statements and actual terrorist links of Imams are a reasonable indication of a possibility of a larger terrorist enterprise or, at the very least, a future unlawful activity, warranting investigations by the NYPD.

IV. Conclusion

The NYPD’s undercover operations and examination and surveillance of public information and events are a legitimate response to the dangers inherent in post 9/11 America and comply with court-sanctioned procedural and investigative Guidelines. Critics refuse to recognize that prior terrorist and unlawful activities by Muslims affiliated with Muslim student organizations and mosques provide a valid reason for inquiry and surveillance of such groups in the interest of national security. The NYPD is not straying from limits imposed by the Constitution nor is it taking extraordinary measures not authorized by the Guidelines. The world is changing, and law enforcement must be given the means to deal with the new challenges created by global terrorism. Surveillance of mosques and student organizations with a significant record of terrorism is a legitimate response to the serious problems facing New York City and the Nation.

Respectfully,



Jay Alan Sekulow
Chief Counsel



Robert W. Ash
Senior Counsel

cc:

The Honorable Andrew M. Cuomo, Governor of the State of New York
The Honorable Chris Christie, Governor of the State of New Jersey
The Honorable Michael R. Bloomberg, Mayor of the City of New York
The Honorable Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania
The Honorable Raymond W. Kelly, Commissioner of Police of the City of New York

⁹⁹THE INVESTIGATIVE PROJECT ON TERRORISM, *Jamil Al Amin Fundraiser*, UC-Irvine 1 (2001), <http://www.investigativeproject.org/documents/misc/41.pdf>.

¹⁰⁰Guidelines, *supra* note 3, at 425.