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Government, Law and Policy Journal

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On the Cover

A major component in the World Trade Center response efforts was the use of the Geographic Information System (GIS). The New York State Office for Technology (OFT), through its Center for Geographic Information, was responsible for the acquisition and delivery of daily imagery flights over the disaster scene. OFT contracted with Maryland-based EarthData International, who performed the imagery acquisition flights and processed the raw imagery data immediately after the flights.

The cover image shows a depiction of the damage in the World Trade Center area after September 11 using LIDAR imagery (Light Detection And Ranging). LIDAR uses broadly scattered, high frequency laser light pulses emitted by an aircraft-mounted sensor as the aircraft flies over terrain. Ground elevations are measured by the time taken for the pulses to reach the ground and then return to the aircraft-mounted sensor. LIDAR technology produces a dense set of ground points with elevations which can then be rendered into a three-dimensional terrain surface model showing the shape and elevation of the debris pile and surrounding buildings. The various color shadings on the image depict elevation ranges. The red at the top of the image represents heights greater than 200 feet above ground. The aqua, purple and darkest blue bands represent height ranges down to 50 feet below ground (darkest blue). The data was collected at an altitude of 5000 feet over the World Trade Center site at a point spacing of approximately 5 feet.

By comparing LIDAR surface models collected on different dates, calculations were performed to determine volumetric differences resulting from settlement or removal of rubble. These models were beneficial to emergency response personnel in assessing risks and guiding recovery efforts.

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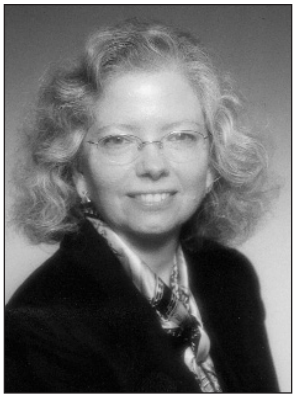
Message from the Chair

By Barbara F. Smith



This issue of the *Government, Law and Policy Journal*, which focuses on the experience and aftermath of the 9.11 events, can be seen as a memorial to those who perished and a tribute to individuals in public service who served so selflessly on that day, and subsequently.

Accolades have been heaped particularly on the firefighters and emergency response personnel who placed themselves in harm's way. But the events brought such an outpouring of emotion that countless individuals in both the public and private sector contributed money, goods, and, importantly, their time in helping with recovery efforts.

Whatever the motivation, the outcome can be seen as "public service." The 9.11 events have prodded—maybe even forced—people to reassess what is important in their lives. Many find that answer in family and work. People want meaning in their lives; many want to make a difference. How that urge manifests itself is as varied as we humans are.

I am proud of the contributions made by government employees at all levels in the wake of the events. Never before had it been so important for government to keep functioning well. Beyond the rescue and security personnel whose activities have been highlighted, government employees provided such wide-ranging services as crisis counseling, helping to restore telecommunications utilities, expediting processing of claims adjuster licenses, assessing environmental issues such as water and air quality, tracking charitable contributions, and coordinating efforts to assist affected businesses. For example, the state Emergency Management Office cites more than 30 state agencies that were involved, with a force of more than 16,000 agency personnel and volunteers.

Likewise, I am proud of the response by lawyers to the 9.11 events. The New York State Bar Association and The Association of the Bar of the City of New York were inundated with lawyers who volunteered to assist victims' families and businesses faced with managing the unimaginable—lost lives and livelihoods. These efforts ranged from streamlining the process for the issuance of death certificates, initiating adoption proceedings, filing insurance claims, resolving landlord/tenant issues, determining applicability of workers' compensation, assisting small business administration, and handling calendar matters for lawyers whose practices had been disrupted.

"The 9.11 events have prodded—maybe even forced—people to reassess what is important in their lives."

The NYSBA Committee on Attorneys in Public Service is pleased to share with you this edition of its *Journal*. Publishing the *Journal*, produced in cooperation with the Government Law Center of Albany Law School, is but one activity of the Committee. We sponsor continuing legal education courses of interest to our constituents, and we maintain a page within the NYSBA Web site that contains information including articles from previous *Journals*, news of Committee activities and links to many legal topic sites. We provide an opportunity for government lawyers to network and enhance their professional development, and we welcome you to the dialogue.

Barbara F. Smith is Chair of the NYSBA Committee on Attorneys in Public Service and a member of the Committee on Attorney Professionalism. She currently serves as the Executive Director of the Lawyer Assistance Trust. The views expressed are not necessarily those of the Trust.

Editor's Foreword

By Vincent Martin Bonventre

9.11. The day. The attacks. The reactions. The heroism. The resolve. We are now all its children. It has affected how we think, we feel, we act. And like other crises in our history, it is having a significant impact on law, governance and policy.

In this issue of the *GLP Journal*, we take a look at some of the fundamental questions of public law and policy, as well as some practical realities, that have come to the forefront in the aftermath of 9.11. In the "aftermath," because it has been a year since the attacks and since the initial, immediate reactions. In the "aftermath," because we have had time for anger, for weeping, for cheering, and now for sober second thinking. In the "aftermath," because as Americans who have suffered together and fight a war against terrorism together, we are also lawyers who are back at work plying our analytical skills—not only at the office, but also in the public arena where we raise questions and seek resolutions to the problems of addressing the threat of terrorism in a free society. We, at the *GLP Journal*, hope that our readers will find this issue a worthy contribution to that endeavor.

To begin, a distinguished panel presents a forum on the competing values of security and freedom in the wake of the terrorist attacks. Albany's Public Safety Commissioner John Nielsen, State Police Criminal Investigator Pedro Perez, New York Civil Liberties Union Executive Director of the Capital Region Chapter Louise Roback, and International Center of the Capital Region Executive Director Helene Smith offer their distinct insights and positions on an array of practical and philosophical issues about law enforcement and guarding against terrorism in the post-9.11 era.

In the first article, Janiece Spitzmueller, an eyewitness in lower Manhattan to the attacks on the World Trade Center, reviews disaster preparedness and the delivery of rescue services in New York City. She suggests the need for legal and governmental revisions which became evident in the recovery efforts. Jean Cox, Counsel for the State Emergency Management Office, reviews the provisions and operation of Article 2-B of the Executive Law. She familiarizes us with the state's framework for coordinated intergovernmental preparation and response to disaster.

State Attorney General Eliot Spitzer writes about his office's oversight of charities soliciting funds in New York. He addresses the initial lack of coordination among charities and government agencies in tending to the needs of the victims of 9.11 and the actions taken by his office to ensure accountability of charities and to protect the interests of the intended beneficiaries. New York State Bar Association Executive Director Patricia Bucklin outlines the efforts of our association and profession, responding to the inhumane with humanity, competence, grace and courage. Robert Snashall, Chairman of the Workers' Compensation Board, and Cheryl Wood, its Deputy Counsel, share the efforts and special measures taken to ensure the prompt and certain provision of benefits to workers injured as a result of the 9.11 attacks. Expedited processing and adjudication, and state-wide utilization of personnel were among the streamlining and coordination implemented as part of the Board's comprehensive response.

"[A]s Americans who have suffered together and fight a war against terrorism together, we are also lawyers. . ."

Professor Alicia Ouelette of Albany Law School examines the Court of Appeals' recent decision allowing so-called "pretextual" automobile stops. She considers the risk of racial profiling in the post-9.11 climate, now enhanced by the Court's permissive ruling. Professor James Gathii, also of the law school, considers the competing interests of consumers and the pharmaceutical industry in responding to bio-terrorism. He does so in the context of analyzing the recent decision in a federal lawsuit against Bayer, the manufacturer of "Cipro," the antibiotic used against anthrax.

Todd Ritschdorff, an Albany Law student, examines New York's Anti-Terrorism Act in light of the Supreme Court's decisional law on hate crimes. He concludes that New York's legislation passes federal constitutional muster. Finally, *GLP* former Executive Editor and now-graduated Albany Law student Erin Kate Calicchia

explores the international law of terrorism to discern a working definition. She applies the resulting concept of terrorism to the 9.11 attacks as well as to this country's war against terrorism in Afghanistan.

This issue and, thus, its readers are the beneficiaries of our authors' contributions, but also of the efforts of both the New York State Bar Association (NYSBA) and *GLP* staffs. The CAPS Committee and the *GLP* Board of Editors provided support and good counsel on the theme of this issue; the NYSBA staff, especially Pat Wood in membership and Wendy Pike and others working in publications, have been invaluable in making every issue of the *GLP Journal* a reality, as well as making all the issues look as good as we think they are; Patty Salkin and Rose Mary Bailly at the Government Law Center have helped in innumerable ways; and finally the student editorial staff is largely responsible for all that requires meticulous attention to detail in the editorial process.

Erin Kate Calicchia completes her term as student Executive Editor with this issue; she has been nothing short of extraordinary. The *GLP Journal* has profited and improved immeasurably as a result of her efforts. Incoming Executive Editor Kathryn Mazzeo has been an extremely dependable and capable member of the student editors this year. Erin Kate is a very difficult act to follow, and I expect to say the same about Kathryn next year at this time.

As always, the errors, flaws and shortcomings are all mine. Comments may be directed to me at the *GLP Journal* or at vbonv@mail.als.edu.

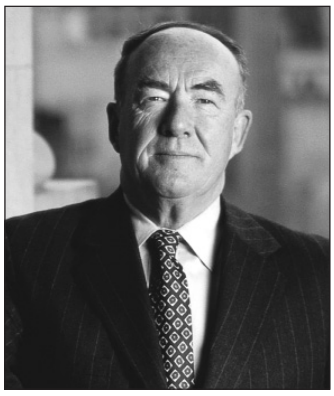
Vincent Martin Bonventre, Editor-in-Chief of the *GLP Journal*, is Professor of Law at Albany Law School. He is also the Editor of *State Constitutional Commentary*, published annually by the *Albany Law Review*.

Erin Kate Calicchia, Albany Law School class of 2002, was the Executive Editor of the *GLP Journal* for the past academic year. She also served as an Associate Editor of the *Albany Law Review* and a judicial intern with Appellate Division Justice Edward O. Spain.

In Memoriam

Hon. Thomas M. Whalen, III

1934-2002



COLLEAGUE LEADER FRIEND

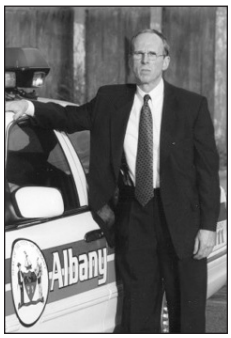
Security and Freedom: Balancing Civil Rights and Public Security in the Post-9.11 Era

On February 20, 2002, Albany Law School hosted a forum on the timeless tension between order and liberty, particularly as it has reemerged in the aftermath of the 9.11 terrorist attacks. The forum was sponsored jointly by the Empire State Capital Chapter of the American Society for Public Administration, the State Academy of Public Administration, and the law school's Government Law Center. The result was a highly fascinating and equally enlightening discussion. Fortunately for GLP Journal *readers, the panelists gave their approval to transcribing and, with minimal editing and abridgement, publishing their remarks in this issue.*

The program was introduced by Kelly Lopez, Principal Budget Examiner in the state Division of the Budget, who was primarily responsible for coordinating the program, as well as coordinating the panelists' review of the transcript. Prof. Thomas Birkland of the Rockefeller College of Public Affairs and Policy served as moderator. The panelists were John Nielsen, Albany's Public Safety Commissioner; Pedro Perez from the State Police Bureau of Criminal Investigation; Louise Roback of the New York Civil Liberties Union's regional chapter; and Helene Smith from the International Center of the Capital Region. The panelists brought a wide range of experience, perspective and wisdom to the critical questions they examined together. We are the beneficiaries.

V.M.B.

Thomas Birkland



John Nielsen

Pedro Perez

Louise Roback

Helene Smith

Introduction, Kelly Lopez: The American Society for Public Administration and the State Academy of Public Administration are collaborating this year to put together a series of programs that seemed to beg being done after the attacks of September 11. This is part of a series of programs exploring the complexity and depth of government's response to the attack on the World Trade Center. At our first program we heard firsthand about September 11 from people who were there or who had an immediate hand in reacting to that awful event. Today, we are focusing on the delicate balance that we find ourselves trying to maintain between civil liberty and public security.

To moderate today's panel is a political scientist who specializes in crisis management, including press coverage of sudden and dramatic events. Dr. Tom Birkland is an associate professor of political science and public administration and policy at the University at Albany, where he is Director of the Center for Policy Research. Dr. Birkland is the author of two books, including *After Disaster*, published by Georgetown University Press, and he is a frequent public policy commentator in the print and television media. Dr. Birkland's current seminar on the press and September 11 was discussed in a recent article in the Albany *Times Union* regarding the University's response to these difficult times.

Dr. Birkland will begin our program with a brief presentation before introducing our distinguished panel. I thank all of the speakers on our the panel for their willingness to come and present their points of view on this difficult and broad issue. I also ask our panel to consider the questions that are before you on the program. The questions that Dr. Birkland has posed are the following: Has everything really changed since September 11? Has anything stayed or returned to the same as it was before September 11? Where should our policy and administrative attention be focused—on national defense, law enforcement, foreign policy, civil rights and liberties? Is there a balance to be struck between civil liberties and public safety? If so, how? Some commentators say that there may be some connection between United States foreign policy and the Middle East, and the discontentment felt by many people in the Middle East and other areas of the world. Should the United States rethink its foreign policy and what lessons have been learned in the wake of the event, and in the wake of pressures to rapidly change policies and practices to address similar catastrophes?

Let me turn the program over to Tom Birkland. Thank you.

Moderator, Prof. Birkland: Good afternoon. I'd like to thank ASPA, SAPA, and the Government Law Center for organizing this event. I think it's a remarkably important topic and the more we talk about it, amongst ourselves and in public fora, the better we will be prepared as citizens and as managers, as administrators and as students of politics, to understand these events. Let me start by offering a few thoughts about what is probably one of the most difficult and trying policy questions of our era or even in our nation's history.

I don't think anybody will forget where they were on September 11, what they felt, and what they thought when they first learned that an airplane had crashed into one of the World Trade Center towers. None of us will forget seeing, either live or on tape, the buildings collapse. I first heard about it on the radio while on the way to teach my public policy course. Many of us heard it at home or in our workplaces. The first crash seemed so horrific and unbelievable that it was difficult to grasp the magnitude of the event. Then, as the morning of September 11 progressed, we watched the television, or heard radio accounts, or the Internet or a friend told us that a second tower had remarkably been hit by another aircraft. The Pentagon had been attacked. Rumors abounded about the White House being attacked. Then the towers collapsed, killing what turned out to be almost 3,000 people at once, in an event unlike anything we had seen in American history. Later that day, and into September 12th and 13th, we learned to appreciate the heroism of the many people who responded to the attack—the police, the fire departments, the EMS in the city of New York, the Port Authority police, even the passengers in United Flight 93 who took heroic actions to prevent what could have been a much worse disaster. And all of us across this political spectrum, conservative, liberal, left or right, were thankful for the efforts of the many public and private sector employees who risked death and injury to help others. It is important that public administration take pride in the fact that the people acknowledge the importance of public service, especially in times of crisis like this. This theme came up more than once in press coverage of the event.

In the wake of the event, it is natural to want to know who did this horrendous thing. Perhaps some of us are curious as to why such a thing could have happened. Many people are less concerned about the "why" question than about the "who" question, and, in particular, want to know "what can we do to punish those who did this?" These remain important questions today.

But the attack also raised questions far beyond these. As the President and other leaders have made clear, we cannot be satisfied with responding to the attacks. Rather, government must work to prevent such attacks from happening again, or, at a minimum, to prevent such a great loss of life and economic activity from ever happening again. There are many ways to respond, but all responses, and indeed all policy-making, requires some balancing between equally important but sometimes conflicting goals. Two such goals are incorporated into today's topic, two of the most important goals in any government, and especially in American government—the tradeoff between security and freedom.

"The events of September 11, like other periods of crisis and unrest, throw this contrast between liberty and security into much sharper contrast. . ."

An important question I hope to confront today is whether we need to think about tradeoffs between security and liberty. Can we be both free and secure? Some might argue that freedom and the strong urge to protect it is a bulwark of security. This argument suggests that attackers struck at our nation to undermine our liberty, to make us more security-conscious, thereby undermining our free society. On the other hand, these questions are at the heart of any community's constant struggle to balance liberty, on the one hand, with limits, on the other. Our nation limits people's liberties daily; all societies do. We jail criminals, we commit the mentally ill to hospitals and other institutions, we restrict the rights of children to participate fully in adult society, we deny people the right to use their land or property as they wish, and so on. We do so because we know that the community suffers if we let individuals do whatever they want, whenever they want, to whomever they want. The challenge, of course, is to strike a balance between the needs of the community and the rights of individuals. We're working that out as a society, and that's why we're here today.

The events of September 11, like other periods of crisis and unrest, throw this contrast between liberty and security into much sharper contrast than exists in "normal" times. In other periods of our history, most notably the internment of Japanese-Americans during the Second World War, we perhaps erred too far in the direction of security by severely damaging liberty. In retrospect, this action against our own citizens is viewed as unjust and even unjustified on security grounds, and it may have undermined our moral justification for our participation in that war. Today, the President, the Governor, former Mayor Giuliani, current Mayor Bloomberg, all public officials and leaders appeal for calm and for tolerance, because thankfully

we've learned a great deal from the World War II experience. We have not engaged in wholesale government-sponsored roundups of people just because of their ethnicity, nor would such a thing be popularly supported or even imaginable today. Yet we know of many instances where people have been denied boarding on planes, have been yelled at, beaten or even killed, because they look like the people who attacked us on September 11. These are popular, not governmental, responses, by people who are still trying to make sense of September 11. At the same time, our freedom to travel and to communicate are not now being greatly diminished, although travel may be a little less convenient and less practical due to increased aviation security measures such as screening and bag checking.

Also on the agenda, even before September 11, are systems such as Carnivore and Echelon, which would allow easier law enforcement access to private communications. These things made some people very anxious before September 11, and since September 11 the debate has reopened, with people saying that although electronic eavesdropping may restrict our liberties to some extent, it may be worth it to gain and maintain an improved sense of security. Others have expressed fears that some sort of national identification card or internal passport system might be implemented, although it is interesting to note that a large number of people who live among us in the United States already have an internal passport known as a green card. A recent article in *Harper's* illustrated the stringency of the restrictions and the requirements placed on green card holders. In other words, some people among us already have to carry a national identification card. Again, this is another issue where the debate has been reinvigorated by the September 11 attacks.

In the rush to do something about the terrorist attacks, the voices of concern about these and other measures have been largely drowned out by other voices calling for national security. National security has dominated the agenda for the last several months, and this debate hasn't very clearly engaged the tradeoffs between liberty and security. Rather, the debate has been about whether we should intervene in the affairs of foreign countries. When the national security argument fails to engage the tradeoff between liberty and security, or, worse yet, argues that there is no balancing act to be made, our system of democracy suffers because all citizens in a free society have a right to participate in making policies that affect their lives. To the extent that any policy restricts that right, it does have a tendency to undermine democracy.

On the other hand, September 11 may show us that we can't have it all. We can't have unfettered access to aviation and communications, to any number of other avenues of expression, travel, and communication that can be used for innocent daily life purposes and also be exploited for evil purposes.

I know there is a lot of disagreement about what measures we can or should take. This forum is an opportunity to air some of these issues and to discuss them so that we can learn from each other. We can then share what we've learned with our families, our friends, our colleagues and especially our elected and appointed officials, as we seek in these trying times to make policies that maximize our security while protecting liberty. Liberty is the great value upon which this nation was founded, so it is entirely appropriate that we think very hard about liberty today.

This outstanding panel that has been assembled will help us understand and appreciate the balancing act that must occur between security and liberty as we continue to respond to the fallout of the September 11 attacks. I'd like to now introduce each of our panelists in turn, and after the introductions are complete we'll invite them to share their ideas and insights with us.

First is Lieutenant Colonel Pedro Perez, an assistant deputy superintendent of the Bureau of Criminal Investigation in the New York State Police. He is the first Hispanic to obtain the rank of lieutenant colonel in the 80-year history of the State Police. Colonel Perez is a 1982 graduate of the New York State Police Academy, quickly moving from trooper to uniformed sergeant to investigator, and he was promoted in 1992 to lieutenant in the Bureau of Criminal Investigation. He has supervised major criminal and drug investigations, and received the Superintendent's Award for the arrest of more than 200 drug traffickers in Operation Crackdown. In 1994 he was promoted first to Captain, Detail Commander for the Community Narcotics Enforcement teams, then to Major, Troop A Commander in Western New York. Among other things he has been Staff Inspector for Internal Affairs, and has also served as the inspector overseeing the New York State Police Narcotics Enforcement program. Colonel Perez holds an Associate's degree in child development and a Bachelor of Science degree in public administration, and he is working on a Master's degree. He is a graduate of the FBI National Academy.

Louise Roback has held the position of Executive Director of the Capital Region chapter of the New York Civil Liberties Union since February of 1999. She previously served on the Board of Directors of the New York Civil Liberties Union, Capital Region chapter. Louise has been an attorney for 17 years in New York State, including six years in the Attorney General's office. She has practiced in both the public and private sectors, primarily in the fields of constitutional, environmental and administrative law. She received her B.A. from the University of Pennsylvania and her J.D. from Temple University.

John Nielsen is the Commissioner of Public Safety in the city of Albany. He was appointed in March 2001 following the consolidation of the police, fire and building departments into the one Department of Public Safety. He began his 30-year career with the Albany Police Department, walking the beat with the tactical patrol as part of the successful Arbor Hill Neighborhood Unit, the predecessor to today's Community Police. He has also been in the Detective Division, the Forensics Unit, and he has served as the Assistant Chief of Criminal Investigations and the Deputy Chief of Departmental Operations to the Chief of Police. Commissioner Nielsen has received many awards and commendations. He has an associate's degree from Hudson Valley Community College, a B.A. from Empire State College, and is a graduate of the FBI National Academy.

Our final panelist is Helene Smith, Executive Director of the International Center of the Capital Region. Since 1971, she has led the International Center's mission to provide cross-cultural resources to the rapidly growing population of foreign-born residents in the Capital Region, including foreign students, immigrants and refugees from more than 90 countries in the last year alone. The International Center provides immigration counseling, job skills training, job placement and language classes, and promotes cultural awareness, to work with schools, public employers, and the private sector throughout the Capital District.

Without further ado, I'd like to turn it over to Colonel Perez. We'll have a few introductory remarks, address some of the questions, and then open it up to audience participation. Thank you.

Lt. Col. Perez: Thank you for inviting me. Frankly, I think this is a wonderful opportunity to discuss issues that are very pertinent to our society and to our nation. I know as a police officer that it is very important for us to maintain the security of our community, and I participate every day in that function. That simultaneously includes protecting our liberty. I welcome the scrutiny; I welcome the transparency. We ought to be transparent in the way we do our business. The world has changed—that's a cliché now, but it's also a fact, and it has changed because this country now is as vulnerable as other countries in the world have been. We are subject to the same kind of horrific acts that have occurred elsewhere in the world, and we have to be prepared. How do we do that while protecting our freedom? How do we do that without impinging the rights of individuals who may not be fully fledged members of this country, such as foreign nationals that may come in? Because we ought to protect their human rights if not their United States rights. So how do we do that as law enforcement? I think that the way we do that is by having these kinds of open forums and discussions, because without this type of exchange and dialogue, we may commit the same mistakes that law enforcement and our society have previously committed each time we have been faced with a major challenge. We can look at the Depression, when Mexican-Americans were deported. We can look at Japanese-Americans in internment camps. We can look at many other issues, such as racial profiling. All of these are horrific, should not have happened, and must be prevented from happening again. At the same time, we cannot allow ourselves to be vulnerable. We cannot allow ourselves to be subject to another attack.

"We can look at Japanese-Americans in internment camps. We can look at many other issues, such as racial profiling. All of these are horrific, should not have happened, and must be prevented from happening again."

How do we do that? How can we prevent it? Well, the one way that we can prevent it is by investigating and trying to develop intelligence. And that is what this discussion is really about. How do we find out who is doing what, and do so in a manner that does not put innocent people under the scrutiny of unjustified law enforcement intrusion? I think that's really what this is about. When I'm not in uniform, I deal with that every day as a minority in this country. I am extremely sensitive to that kind of unjustified scrutiny. I can recall being in a small community on my first assignment as a trooper, in the extremely rural Allegany County. When I got out of uniform and walked around a supermarket and a department store, I was followed by the store's security personnel. I turned around and asked the person for direction to the nearest aisle for which I was looking for an item, and then, in that conversation, educated him. So I am particularly sensitive to the issue of freedoms being impinged by law enforcement. As Poirot has put it very succinctly, the devil's in the details.

Ms. Roback: I'm very glad to be here today. Since September 11, I've been asked to speak quite frequently on the topic of civil liberties, which I'm always pleased to do. It's both heartening to see a great interest by the public in civil liberties and disheartening, because I am asked to talk about how our civil liberties are being infringed upon. So while it's not all good news, I think it's very useful to engage in a dialogue about our individual liberties.

When the horrific events of September 11 happened, it seemed that people were very willing to support whatever law enforcement needed to do to keep us safe. People had a very great fear, and, if asked, said they were willing to give up civil liberties and allow others to be interned. A poll to this effect was done

locally, and it was disheartening to see that a large percentage of people supported that. I think now that time has passed people have calmed down a little, and realized that the world has not entirely collapsed. Now people want to step back and engage in reasoned discussion and decision-making on how to respond to terrorist threats.

In the wake of September 11, a few things happened that are important to us at the Civil Liberties Union. Congress rushed amazingly fast after September 11 and enacted the Patriot Act, which many have said came out so fast that it really was law enforcement's wish list, a list that long preceded September 11, only now they had a vehicle to get those reforms made. Then John Ashcroft, the attorney general, took it upon himself to take actions and issue orders which greatly infringed civil liberties. So it's sort of ironic, in our view, that shortly after the attack, the President was talking about how we were attacked because the beacon of liberty shines so brightly in this country, and then the president and the attorney general set about quite quickly to dismantle those liberties.

Certainly, law enforcement needs to engage in investigations and to take those actions necessary to keep us safe. However, it is our contention that the balancing has already been worked out, that there is a very important balancing in constitutional protections, particularly with respect to the Fourth Amendment protection against unreasonable search and seizure. Law enforcement seems to have been able to operate very effectively in the past under the existing standards, and we all know what those are, and that they are workable. Similarly important is the concept of judicial oversight. The courts have the very important role of ensuring that individual liberties are protected. After September 11, the congressional action, and the action in the executive branch by the attorney general and the INS, that balance has dramatically changed. Our concern is that while these actions may have been undertaken in response to the threat of terrorism, those increased powers apply to all crimes and to all investigations and are not limited to terrorism. This changes the delicate balance that has been long recognized and has been workable. Also, let's assume that people are willing to change that balance. At what point do we recognize that the emergency no longer exists and we should go back to the balance we had beforehand? Those constitutional standards have taken a long time to become established, and once they are changed I don't believe they will easily be changed back. As a practical matter, who is to say when we will no longer be under the threat of terrorism? In fact, Israel lives with not only the constant threat, but also the reality of terrorism to this day.

I would argue that we should not change the balance, and unfortunately we very much have. Certainly government and law enforcement should take all reasonable measures to keep us safe, but there are things that can be done to keep us safe that don't unduly infringe our civil liberties. I think most people are willing to accept the inconvenience when they fly on a plane of increased airport screening and searches. Those types of measures certainly can be taken; those are practical measures that are directly designed to keep us safe and they don't deprive us of our civil liberties. By contrast, some of the new powers that have been enacted under the Patriot Act very much do deprive us of civil liberties. I think we should learn from our past mistakes, and hopefully we won't do anything like we did in World War II of interning Japanese-Americans, which included American citizens and people born in this country. Many of the principles of international human rights and constitutional rights have evolved over the last decade, and we need to look at those standards and make sure that the increased powers of the Patriot Act extend only to the extent necessary to address the threat of harm. We must remember that those increased powers which don't actually make us more safe will certainly make us less free. Thank you.

Commr. Nielsen: Good afternoon. I've been a city employee for 30 years, and for the last several of them it seems like a bureaucrat. I was chief of police for a couple of years, and deputy chief of operations before that. It was my personal view that we needed to do some direction changing. It was my personal view that some of the things that had been common throughout law enforcement's entire industry were less than understandable and probably too restrictive. So I viewed this as an opportunity to make some changes that I thought would be good for this city, good for our citizens, and good for the police department and the officers involved. I thought a lot of things prior to September 11, to be honest with you, that have since then become not quite as clear.

I've always been interested in policing and how policing is done in other countries. I have a number of friends in Mexico and a number of friends and relatives in the north of Ireland, so I visit both places pretty regularly. I often tell my officers that they need to understand how important their job is, and the manner in which they do it. They need to see this through the perspective of people who are given what is called police service through either criminally or politically corrupt systems. The application of the police power in the atmosphere of a martial state affects not only the day-to-day life of those citizens, but the individual officers and the organization for which they work. That totally skews and distorts the entire situation, and makes a mockery of what is a fine and noble profession.

The 11th of September put a difficult spin on my views. I had thought up until then that this was all very simple; that the entire public safety department—the

police department, the fire department, the buildings and code enforcement departments—could view our citizens as clients. I thought we could be a company that basically administered service to customers, and if everyone was happy when the officers, firefighters, inspectors, etc. walked away, then business was good. We could clearly delineate and define the bottom lines, whether through hard numbers or more nebulous things, but nonetheless we could come away with something that was readable. In fact, the law school contracted with SUNY to do customer surveys to get an idea of whether or not we were being successful.

And then came the 11th, and all of a sudden things changed. On the 10th of September, I honestly believed our water system was something that was somewhere up the spigot in my kitchen. I had no idea, and I don't think most of the people that worked for us did. On the 13th, it was our responsibility to not only know everything about it, but to protect it. It was our responsibility to look at the different aspects of our infrastructure, like the fiber optics network that comes through our city and services the entire Northeast; like the airport, the way that the planes come in and out, the overflights; the trains that come through our city and the things they bring through. Having been the chief of police, I empathize with Bobby Wolfgang, the current chief, and say these aren't things we had to think about yesterday, but we do today.

"I still believe that Mr. Ashcroft is wrong and that many of the things he's suggesting are Draconian and unnecessary, . . . but I can't just dismiss it as wild-eyed."

Last week I was in Washington for a conference on chemical and bio-terrorism, and we had some internationally known people delivering their thoughts. I've been a policeman for 30 years and I don't think I've ever been afraid of anything in my life, but I walked away from there thinking, "who knew?" Who knew that the Russians made over 150 briefcase-sized nuclear bombs and can account for only 50 of them? We didn't know these things. We didn't know that we have these things to now worry about. We've got a city of almost 100,000 people depending on us to keep them safe—to keep their water safe, to keep their air safe—so that the plume coming off of the explosion of one of these nuclear briefcases in a chemical facility that's two miles outside of our city, with a wind that blows right over our city, doesn't kill everybody. It's no longer simple enough to just think that it may not be right to hold suspects, and deprive people of the right to a lawyer for a long period of time while euphemistically referring to it as an interview. Under today's circumstances, it has a whole different spin to it, it has a whole different color to it. I'd like to say that it's still black and white, and in my heart I still believe that Mr. Ashcroft is wrong and that many of the things he's suggesting are Draconian and unnecessary, that we can do this without going that far, but I can't just dismiss it as wild-eyed.

Most of the intelligence that comes from throughout the city—and, as you might well expect, there is a tremendous amount of intelligence generated from throughout this area—comes across my desk as part of my responsibilities. It's not simple enough any more to say, "That's not possible." None of us thought they could have done what they did, and none of us would have believed on the 10th of September that we'd be worrying about these things today. So, as we look at these steps that our government has now taken, I think that to a degree we have to be somewhat loyal. Maybe that's not the right word, but we have to follow our leadership. They are doing what they believe to be the right thing in terms of the safety of our country and of our citizens, and as I look at this issue of security vs. freedom, I am left with the view that everything has to be taken individually, each individual case needs to be analyzed in terms of its own merits and its own aspects. There are no overarching applications; it's a question of dealing with them one at a time. I walked away from this thing last week being pretty sure that something is coming, that some other event will happen. We don't want it to, and we want to prevent it, and only diligent application of our security can prevent it from happening.

Ms. Smith: I'd like to try to put an international perspective into this discussion. I very strongly believe that we will only be free and secure to the degree that the world we live in is free and its peoples—all of them—feel secure. As a nation, we have suffered a deep shock, a wound of pride. A physical and psychological wound has shaken our population. We keep asking, "Why don't they like us?" And that is a very common cultural problem in our country. We expect as Americans to be liked. Culturally, we expect that because we are free, because we are the land of the brave, because we say in our documents that every resident is protected by the Bill of Rights, then we must be the epitome of culture in the world. We have done a very poor job of educating our citizens about the cultures of the world, about the issues of friction between our country and other countries. Historically, we have condemned England for its imperialism, and we have come down on the Spanish and the Portuguese to a degree and the French. We don't often speak of capitalism as a present-day form of imperialism.

I am very aware of the collapse of Enron and the ripples internationally. There are outrageous problems

in India due to Enron's collapse and misuse of its power. Our government is saying to the community, go out and be part of the world. Invest. And we will protect you for those things that are in our country's best interest. I would put to you that what is in our country's best interest is not a capitalist approach.

"We have new immigrants, we have refugees, we have asylees. They are all here. We help them acculturate, or we alienate or isolate at our own peril and at the globe's peril."

People from all over the world come to the International Center. Many of them are refugees who fled from terrorism in their own countries. They felt they needed a place in the culture of freedom, and yet they do not feel welcome in our culture. They do not feel the freedom they thought they were going to find. Freedom to them is a concept that ensures fundamental treatment as equals, with respect, and with appreciation for their uniqueness. Just last Friday, the imam from one of the mosques went into the Price Chopper after evening prayers in his religious robe, with one of his preschool children in each hand. He walked in to make a simple purchase, and some teenagers at the cash registers started saying, "Oh, oh, we need to leave, they're here, let's get out of here." We have a lot of educating to do in this country about being part of a global community that is free and secure. We don't do a good job teaching about other cultures.

We are afraid to undertake discussions of religion in our education system. Our traditional religions worldwide are so much a part of the security that people feel. You can't deny the spiritual dimension of a culture. In a vacuum, you open up the possibilities for very misguided commitments to what has been called fundamentalist religion of some sort or another. For me, education is critical to the issue that we are facing. As we talk about coalescing the world's nations behind the United States' war on terrorism, it is becoming more and more evident, if you read the foreign press, that maybe the governments are there, but the people aren't. The people have been shocked at the level of violence that was perpetrated on Afghanistan. And maybe we got him and maybe we didn't; nobody knows. Then we have what I call the sound-bite government, the "axis of evil." And when you start talking in very simplistic, violent kinds of terms, the general person has no idea how to respond to that.

If we are not very careful, we are going to have severe internal problems, because now we are a culture that is made up of citizens of every nation of the world; however, they are not all schooled in what it means to be part of a democratic society. Most of those who are now becoming citizens are from countries other than Europe and Canada and Australia and New Zealand—in other words, non-Western nations. They are coming from traditions where volunteerism, participation in the cultural life of the community, are not natural. If we are not reaching out as a community of people who have grown up with that tradition and who continue to value it as part and parcel of being a citizen of this country, we risk internally the ability of the country to remain secure and free as we have known it. When you think about the thousands of foreign students who come here, the hundreds of international professional visitors who visit our state, our city, and our nation, the degree to which we participate in their experience here is the degree to which they can go home and interpret the people and the values of the United States. All too often, our foreign students become alienated and isolated by their experiences in this country.

It is disheartening to me that 20 people could have lived amongst us and been so isolated and alienated that they found it necessary to destroy us at the heart of what they perceived to be our power, and that goes back to the Twin Towers as the symbol of capitalism and empire building. We have hundreds of foreign students in the Capital Region. We have foreign visitors coming and going all the time. We have new immigrants, we have refugees, we have asylees. They are all here. We help them acculturate, or we alienate or isolate at our own peril and at the globe's peril.

Moderator: Everybody has had important, interesting, provocative comments. We have heard a glimmer of some of the questions that were posed at the outset of this panel discussion. Let me begin by asking a question to Louise [Roback]. With respect to electronic wiretapping, one of the provisions of the Patriot Act that was rather avidly debated was the notion that the wiretap should attach more to the suspect than the device in question. What was the Civil Liberties Union's position on that?

Ms. Roback: We were opposed to it. But another part of your question speaks to me: that there was an avid debate on the Patriot Act. Actually, there was very little debate on the Patriot Act. A lot of people in Congress never even read it. They didn't know what was in the Act, and actually felt somewhat threatened that they were somehow helping the cause of terrorism if they were to actively engage in what I would consider their duty to be informed and to debate, and allow for the input from their constituents on the Patriot Act.

Moderator: That position I think makes sense, but I'm just curious as to what the doctrinal position is. What violence is done to the Fourth Amendment by

shifting the paradigm from the particular telephone line to the criminal suspect, and I emphasize the word suspect, rather than the instrument with which the suspect may communicate? What is the Civil Liberties Union's position on the damage that does to the notion of privacy under the Fourth Amendment?

Ms. Roback: Well, it certainly takes away the privacy, and unreasonably so, for any family members, friends, or people who are unsuspectingly on the line, and have law enforcement listening to their conversations. And it removes the judicial oversight component when law enforcement can go get the new device without having a court look at it. So that is a concern of ours. But we have many more significant concerns about the Patriot Act, and specifically with respect to search and seizure, and with removal of judicial oversight, with what we call "sneak and peek" warrants, where law enforcement can execute a search and the person doesn't know. So there are other components that give us more concern.

Moderator: Colonel Perez, did you want to respond to that, and then I'll ask another question?

Lt. Col. Perez: I wonder how I would stop a terrorist by knocking on his door and saying, hey, by the way, I recognize that you're a terrorist and I really would like to go through all of your papers. Can I sit in here and get your consent to listen to your conversations and anything else? The reason some search warrants are essentially clandestine is because there exists no other means of detecting them. These individuals are trained to avoid detection. These are not specific citizens that are just committing normal crimes. These are trained spies, infiltrators that are here to commit crimes against all of us, not just singular crimes against singular individuals. So it would be very difficult for me to do that as a law enforcement officer.

I would also like to address the issue of racial profiling. I think it is abhorrent to conduct a police investigation using race as the single and only factor, but race is a factor. Race still counts in America. It counts negatively, and it counts positively. It is one factor in a large myriad of factors which a good police officer can use. If, for instance, a woman comes to me and says that the individual who attacked her had a scar over his right eye, had blue eyes and blond hair, for me to stop African-Americans would make no sense. For me to stop all white males would make no sense. But for me to stop blond-haired and blue-eyed white males to see if they have a scar over their right eye would make sense. As long as I did not unreasonably detain them for longer than it would take me to identify whether they had a scar, that's not unreasonable. So race is a factor, but it is not and should not be the only factor on which we do investigations.

Moderator: I wanted to comment that one of the terms that we as a society have to define is reasonability. We've heard the term from several speakers. We've got liberty, we've got security, and now we've also got the term reasonability on the agenda.

"Our current laws were designed for things like wiretaps at a time when you were still talking to the operator to get through to your connection . . ."

Audience: As a fellow student of the world, I want to respond to some of the context of these crimes. I think it's really important for us not to get a false notion of capitalism as negative. If it's true in the liberal economic sense of the word, capitalism can be a liberating force around the world rather than a strained force, and I think most other economic systems have been less successful in engaging in prosperity and security for people around the world. I do feel that the whole notion of telling our story better, educating, being as committed to education in Pakistan, for example, as we are to bombing is certainly not a bad idea. We are woefully ignorant about international cultures. For example, I shop in Patterson, New Jersey, and happen to know some of the people in Islamic centers there—and Patterson is apparently one of the terror cells. I wonder how you balance liberty and security when we know the given community is acting violently against our way of life, but also know that they have the right to express that set of opinions. I guess my question is: how do we balance civil liberties from a law enforcement perspective, with free expression of opinions that differ from our values, when it edges towards violence?

Moderator: Who wants to take that one first?

Commr. Nielsen: I think that we have to look at the realities of this. We would all like to think that if we look at it from Helene's perspective, or from Louise's, that there is nothing to say, that no one you see in any mosque is any threat to his or her fellow citizens. But we cannot be naïve. I think that the clause on the search warrants for cell phones is simply acknowledgment of the progress of technology. The reality is that the FBI and CIA were able to arrest people for the kidnapping of a man who hasn't even been found, in another country, by following through on a laptop e-mail that came back. And that's the kind of thing that can be done today. Our current laws were designed for things like wiretaps at a time when you were still talking to the operator to get through to your connection, and are outdone by today's technology. We don't want to throw the baby out with the wash water. Whatever the realities are, we have to face those.

Moderator: You brought up the issue of Patterson, New Jersey, and a mosque. Helene [Smith], there seems to be a conflation in this country with Islam and violence, and Islam and violence directed at the United States or at the West. It's a very common argument in the United States that there are some adherents of that religious faith that want to harm the United States. How do you respond to this connection to Islam as a culture, since many of the international people passing through this region are in fact of the Islamic faith?

Ms. Smith: I think in our community we've been very fortunate that the leaders in our mosques have been very open and tolerant of all of the rhetoric. They've really reached out into the community to invite school children and other groups to the mosques to observe Friday prayers. I feel that by and large the leaders in the mosques have opened up a dialogue that wasn't really there before. It's been good for our community, even if it had to happen in this unfortunate way. There's a lot of hope for interaction amongst Jews, Muslims and Christians in the greater Capital Region. I think it's difficult, however, for the average Capital Region resident to understand what's happening locally in light of the rhetoric on the television and the radio internationally, the loss of the leader in Afghanistan, and the violence that's coming out there. A Schenectady *Gazette* article yesterday said that the United States will leave when civil war breaks out in Afghanistan. They equate all that violence with the religion, which may or may not have validity. Obviously, we also have violence in Christianity.

Lt. Col. Perez: You made a statement regarding the point at which we become alarmed regarding rhetoric, and the response of law enforcement. If I yell "fire" here in this room, I should be investigated, detained, and looked at very carefully, because it would be unreasonable to yell "fire" in light of what might happen. Everyone here may panic and trample other people in an attempt to save themselves. That is analogous to how we handle terrorism in this country. When individuals exercise their liberty to express their views, that is fine. When that expression threatens the greater good, or may cause harm merely by its expression, there has been case after case demonstrating that free speech is not absolute. It has to be examined within the context of where it is spoken. So if there is a group of individuals, regardless of their origin, that advocates the violent overthrow of this county, we ought to investigate it. If these individuals are simply disagreeing with the policies of this country, that should be fine. Not a problem. But once they begin to talk violence, there is a clear reason to look more closely at them. Not necessarily to arrest, but to investigate. At that point, the tools we have at our disposal come under judicial, civil, and ACLU review, and I welcome that. I do not want to live in a police state. Look at me all you want, understand that I'm going to do my job, and when I do wrong, hold me accountable.

Ms. Roback: There are a few things I want to say. Actually, you do have the right to shout "fire" in a classroom or theater. But you do not have the right to falsely shout "fire," and I think that's an important distinction. I'm very sensitive to the notion of people disliking the United States or criticizing the government, because the right to dissent is a very important one. But it's important to take a close look at where that line is drawn, and of course that's our concern in the Civil Liberties Union. People have the right to vigorously challenge the government. Free speech goes on and on up to the point where imminent danger is posed to someone else's physical safety. Inciting someone to take a gun and shoot another is not speech. That's too close to the criminal action itself. Our big concern is that unfortunately, in the last several months people have not been exercising their right to critically question the government's acquisition of greater powers and the various actions that it has taken.

There was a public trial after the first bombing of the World Trade Center. There was publicly available information, and it seemed that law enforcement may have been sleeping on the job. At the Civil Liberties Union, we're not at all opposed to law enforcement doing its job. We just say it's critically important that law enforcement follow the rules. And these are not merely rules but constitutional principles, including judicial oversight. And so if law enforcement does the job well, investigates based on sound investigative procedures, and finds and successfully prosecutes someone, that's terrific. That's what we all want. But our concern is that law enforcement is sweeping too broadly and investigates people because they are critical of the government. It wasn't so many decades ago that the government was involved in domestic spying on its citizens. Without those constraints and principles and particularly judicial oversight, I think there's a real danger. We hope that all of law enforcement is as intelligent and sensitive as those in this room, but the fact is that when government gets more power there's a tendency to protect things that are embarrassing. We are already seeing that in this administration, which is trying to restrict access to government documents, and restrict the Freedom of Information Act which gives citizens the right to know what its government is doing. There's a directive issued by executive order to only disclose what they absolutely have to.

Moderator: Other questions?

Audience: Commissioner Nielsen, you spoke of what may be acceptable or unacceptable being determined on a case-by-case basis. Is there some way to come to a recognition of basic standards or approaches that should be applied in investigating terrorism, that

can be clearly understood by all enforcement, rather than just a pure case-by-case analysis?

Commr. Nielsen: In terms of the investigation, I don't think those things have changed at all. I think that prior to the 11th, if you look at the track record and the spy cases of late, they are just so questionable in their quality that one has to question what is going on there. When you look at the kind of embarrassing situations that have been going on, whether it's a scientist in a nuclear facility or it's an investigation of far right radicals, you think someone's not really doing their job. I don't think it's a matter of changing those things. They just need to brush up and be more professional in the application of rules and professional techniques that have been proven over time. There's nothing that's going to be written that will change the way that type of thing is investigated.

During previous administrations we allowed politics to play too much of a part. Agencies were stripped of the ability to do their jobs. For example, human intelligence gathering: using people with less than savory backgrounds as information sources, and that sort of thing. From a local perspective, this all seems like common sense. There's an old saying in the business that you don't get much information in church, and it's true. If you want information on spies and on right-wing terrorists, you have to go to the right-wing terrorists, and to people that deal in those areas. You have to deal with them and pay them for their services. It's not terribly savory, but it's something that has to get done. It's reality. I ran our investigative wings for years. Detectives are expected to mingle amongst the unsavory set. That's where the information is. If they don't go there, they don't find out. That's just a reality. And if we prevent them from doing it, as previous federal administrations did, then to a degree, it isn't the fault of the agents involved, it's the fault of the administration that confined them. Those changes need to be made, but I don't think it's a question of technique changes. I think we simply have to expect them to do it, and give them the ability to do it, free them up to do it, and then hold them accountable and make sure that it gets done. Did I answer your question?

Audience: Well, there was another dimension. You got the part about the practices and approaches that are taken to the investigation, but what about the underlying principles, the Constitution? Let me give you a potential example. From what I read in the paper, we have quite a few people who have been taken into custody, and they have basically been in custody since close to September 11th. There has been public acknowledgment that they are in custody, but no public acknowledgment as to why they are in custody. Some of these individuals have been in custody for lengthy periods of time and then summarily released, without explanation. Should we not have some concerns about that, and does the public have the right to know?

Commr. Nielsen: There are citizens that we, in conjunction with the federal authorities, picked up on the 12th, and who are still gone. I have no idea where they are. But through our contacts with those agencies, I do follow up to see where they are. There are things that we can't know. I have come to believe that there are things that the citizens just can't know. I know that Louise [Roback] doesn't like hearing this, but, according to our government, we are at war, and there are things that just can't be released. It's a long time now since the World Trade Center, and yet people picked up the day after are still being held. Are they being held completely without cause? We are told not that there are issues of immigration and that sort of thing, but nonetheless they are being held. That's one of those things. I don't think on the 10th I would have felt this way about it, but today I do. They present enough information to convince me that they have grounds to do this. At some point I make the decision that I don't need to know any more, and this is not something we can tell the public. We can't release the reason we haven't seen this person in months, because that would be counterproductive to what our federal agencies are doing to protect us. In sum, the answer to your question is that we have learned over these last few months that there are some things we don't like, that we don't find terribly tasteful, but that have to be done.

Moderator: Louise, I'm going to ask you to respond to that very briefly, because I see a bunch of hands going up, I think in response to this very topic.

Ms. Roback: Well, I have a lot of respect for Commissioner Nielsen, but the fact that he's confident or comfortable with the detentions doesn't mean that we are at the ACLU. In fact, we have sued the federal government to find out information about the hundreds of people who are being detained. The government has not told us how many there are, who they are, and what the reasons are, and that concerns us quite a lot. I understand that there may be law enforcement concerns about releasing that publicly, but there are other avenues that can be devised, and it is particularly troubling to us that a large number of people are being held on technical immigration violations without judicial oversight. It's very dangerous when you have the executive branch doing whatever they want, without telling anyone—including the court—and asking us to just trust them on this.

Audience: Ms. Smith, you mentioned that our citizens aren't educated to a great extent on their role in the community. Do you see that as a fault of the education system, and if so, what methods seem to work best to educate citizens?

Ms. Smith: At the risk of sounding trite, I think we all share the responsibility to educate. But formally, there must be much more education at all levels of our cultural gathering points, whether it be in community groups and neighborhoods, in the school systems or religious institutions, or wherever there's an opportunity. And certainly I feel that there is a need for the media to consider how it reports incidents and international stories. They need to be sensitive not only to just getting the news out there and making people want to read it, but also to what that says to the reader or to the television watcher. We've had some terrible racial and ethnic slurs in our television and radio locally, about Jamaicans, about Iranians, about Mexicans. We have freedom of speech and freedom of press. But I think that there is responsibility that accompanies those freedoms. People constantly tell me that only public television is supposed to educate, that none of the other media has that responsibility. Well, I'm not sure we should let the media off that easily. There are ways to give background or stories in depth about incidents that are going on around the world that will help Americans better understand what the dynamics of it are.

Moderator: That's interesting. You know, along those lines, since I'm a student of the media, it's worth noting that a considerable body of research suggests that the United States has the world's freest press. Of course, the old saying goes that "the freedom of press belongs to the person who owns one," but with new technologies it's a little easier to publish a newsletter, or even publish it through the World Wide Web. That said, we have the freest press in the world; it's the only industry that is protected in the Constitution. And yet, we have the most ideologically constrained mainstream press in the world. You look at European countries and they have a much broader range of ideological positions being expressed in the news media than in the United States. I think that's an important question that you raised, because it's not education in a pedagogical or classroom sense, but rather the ongoing, continuing education that we encounter every day in the world. As a critic of the media and as a fairly avid one, I can't say I've seen anything since September 11 that gives me new hope for the quality of journalism in this country. I can say I've found a lot that confirms my previous suspicion that journalism in this country is performed remarkably poorly. I'll step back off my soapbox and be the moderator again.

Audience: I've been thinking about the title to this program, Security vs. Freedom, and I've been wondering if anyone else has been privy to this new series of laws called the Patriot Act. It was rammed through. It seems to me that there was a fear, or at least a perceived fear by the members of Congress that if they didn't vote for it they would be unpatriotic. In my mind, I've come to call that a sort of creeping, chilling effect upon our capacity as citizens to express ourselves.

One other issue, and you've alluded to it in a way, is that there was a fairly lengthy article in Sunday's Albany *Times Union* indicating that the administration in Washington is suggesting that scientists not publish and not share information with each other, because after all, bad people might use that information to do bad things. But other people have suggested that when we share our knowledge, that leads to new discoveries, and may lead to any number of great benefits to society. Personally, I am worried about the tone that is coming out of Washington, which it seems to me is anti-intellectual, and in so many ways is potentially stifling to the First Amendment, and I wondered if anyone else is concerned about that. It drives me nuts every day.

Lt. Col. Perez: And you have a legitimate right to be concerned, and I am concerned as well. As I've been stating all along, the important thing is for scrutiny and transparency. Clearly, as a law enforcement officer, I am sometimes given laws to enforce that have not been well thought through. This creates other problems for me as a law enforcement officer, so your point is well taken. There ought to be some very vigorous and clear discussion about the laws we enact and the laws we propose before we actually ask law enforcement officers to enforce them. Otherwise, we end up having situations in which the law enforcement officer is walking the razor's edge. We end up cut very badly, and by we I mean U.S. citizens and the world as a whole. So there is a clear need to have greater discussion and clearly, it's up to us. We live in a representative democracy, and we placed these people there. I don't know how many of us called our representative and said, "Why did you ram this through?" or let them know that we would like them to discuss it further and think it more carefully through. So we bear some of the responsibility.

In terms of education, the point that you made is very clear. We are responsible for educating ourselves about other cultures and peoples in the world. How many of us engage someone that looks different on a regular basis, and actually started genuine dialogue? Or how many of us became frightened, and refused to engage them because of preconceived perceptions of what that individual may or may not do to us?

Moderator: I want to comment too on this point, because this is something I have studied. First, on the name of the Patriot Act. There has been a tendency in the last 10 years at the Congress and state levels to give names to acts that are less descriptive of the substance of the legislation and more evocative of an emotional response. Naming acts after things that they don't do goes at least back to 1968, with the Omnibus Crime Control and Safe Streets Act, which neither made the streets safe nor controlled crime. There's been a lot of

that, even in laws like Jenna's Law. You run down the alphabet and you'll find someone's law. It's usually in response to a heinous crime, where there's an identifiable victim. That way, the news media can personalize the story to make it about a person rather than about a concept, because the news media are ill equipped to deal with concepts, but they are set to deal with people very well. So now we have all these bills, like the Individual Responsibility Act. I don't have a problem with individual responsibility; I don't think anybody does. But that was the Welfare Reform Act that said after so many years you are going to go back to work. Maybe a good idea and maybe not; I don't do welfare policy and I'm ecumenical as to what we should do about welfare policy, but it certainly did make you think in a particular way.

I don't know if the intention of naming the Patriot Act was to warn that speaking out against it would be viewed as unpatriotic. There was a wave of patriotism after September 11, and a lot of us spontaneously flew a flag in front of our home and things like that. So keeping with the tone and tenor of the times, of course it was intended to make the bill less palatable to oppose, but this is about rhetoric and about politics. Politics is about who gets what. The Patriot Act is a decision about how to allocate rights from one group of people to another, or from people to the government.

Government's attempts to restrict the dissemination of research information dates back to at least the Second World War. A lot of basic scientific research was done during the Manhattan Project, and of course most of the scientists were enjoined from publishing the fruits of their research labor while at Los Alamos. To the extent that scientific debate took place, it was in this very cloistered area. The point I'm making is that once again, we are seeing a period in which we are fearful for our national security and therefore we are starting to restrict liberties of certain people, in this case scholars to discuss their findings. I agree that there is a sort of chilling effect.

Which leads to the question I'd like to pose to the panel: has anything really changed since September 11? The headlines are full of things like the Enron scandal. Gary Condit is even getting back in the papers, his efforts notwithstanding. World-shaking judging decisions in figure skating have also made it above the fold on the front page of the paper. These newer issues are crowding out September 11. Are we losing focus on this? Are we starting to return to normal? Has anything changed?

Ms. Roback: Well, there are several hundred people who are being detained by the federal government and we don't know anything about them. That's changed. And there's a whole host of additional powers for the government to use.

Having said that, there's an argument to be made that not a lot has changed. Americans want to return to normal, and these repeated warnings from the government are kind of odd. At least I found them to be odd. "Americans should be on heightened alert." What am I looking for? What does that mean? To a large extent, we have gone back to the way we were before.

Lt. Col. Perez: Yes, 300 people or more are detained, but they are detained because there are over 3,000 people dead. So yes, something has changed tremendously in our society. We are no longer immune. If we thought we were separate from the world because the two oceans kept us safe, it's not the case. We are no longer safe in America from acts of terrorism.

Moderator: Let me just interject that this exact sort of language was uttered in early 1993, at the first bombing of the World Trade Center. Are we condemned to learn this lesson every so often?

Lt. Col. Perez: Well, unfortunately, we are talking about human industries. Therefore, they are imperfect by the very nature that they are governed and managed and staffed by human beings. We can point fingers all day, and say that clearly there have been mistakes and failures that have occurred at all levels, including our level as citizens. We have talked about that. We have talked about the failure to interact with each other, our failure to engage other peoples. There are always going to be failures. The object is to ensure that those failures are minimized, that we do not repeat the same errors we made before. A lot has changed in this country.

At the same time we do these strange and bizarre "stay alert" messages, we also get the message that we should get back to normal. That's kind of bizarre, but we have to do that, because we can't live in constant fear. We can't have a society ready to jump at every moment because something is going to happen. We have to engage and educate our children, and we have to go back to work. But at the same time we have to recognize that we must be vigilant about what is going on.

The other thing I think is important is that while Ashcroft and the president may be making things more difficult from your perspective, they have also been very clear that we must not be prejudiced in how we do this. This is not about race, or Muslims, or things of that nature. This is about terrorists. That has been said many times. I find that an interesting change, because there is a recognition that we have to talk about inclusiveness and tolerance while simultaneously being prepared to investigate, arrest, and prosecute terrorists.

Commr. Nielsen: This was the second bombing of the Tower. I think this was a case where we got kicked by the mule twice. I don't think we're going to need it again. Some agencies got caught with their pants down, and I don't think that will happen again. I think we have to have a certain amount of faith that those agencies are all filled with consummate professionals. They may have slipped, and I think we can end on that. I know that nobody likes this, but I think the Colonel is right—I know 3,000 people that didn't like what happened to them, so we're going to do what we have to do.

Ms. Smith: I think there's another unfortunate thing that's changed, and that has to do with the foreign-born population feeling comfortable here. In our community, the greater Capital Region, they have tended to pull in. They don't feel comfortable at work. Some of them have been let go from jobs that they legitimately held because of the country they came from. And they don't want to say anything to anybody because they don't want to stand up and be counted, bring a civil rights act or complain about how they are being treated on the job. I think their natural response when people are looking at them is to pull back and try to fade into the woodwork. We've had a lot of Central Americans profiled as Middle Easterners. That's sad, but that's happening, and that's our community. It's going to take a lot of reaching out, listening, and sensitivity. A very talented architect from the Middle East told me the other day that when she walks into the lunch room, nobody will invite her to come and sit at the table any more. And so she said, "I think I need to leave my job. I'm not welcome any more." And I can talk with her about all the issues involved in that, but it's her feeling of comfort. So we can talk about ideas, but it really comes down to the human and the human interactions, and how we are responsible for that. And then we deal with the underlying fear.

Commr. Nielsen: On the afternoon of the 11th, Albany Mayor Jennings and I visited the leaders of both the Jewish and the Muslim communities. We stationed police officers at every single facility of both communities for a fortnight after that. We had assigned officers keep a daily relationship up with every single member of that community that we felt was at risk, including all of our merchants, many of whom are Muslims. From that day up until today, we have had only a couple of very minor incidents. I think that we as a community and America in general can be proud of the way we have reacted to this. Three thousand Americans were killed that day. I don't think we've had the kind of whiplash effect that people would like to say that we have had. We haven't. Americans have by and large behaved politely under the circumstances toward their fellow citizens and neighbors, who might in fact be different from them.

Crisis Management in the Wake of 9.11

By Janiece Brown Spitzmueller

In the months prior to 11 September 2001, I was engaged in the political campaign of Lower Manhattan's new city councilperson. It was a hotly contested race as seven candidates were competing to run in the general election. One candidate was a formidable contender for a significant bloc of votes where I reside. I also joined the campaign of Lower Manhattan's city councilperson in her race for public advocate, and had poll-watched and electioneered for both candidates on Primary Day. As the sun brightened into a beautiful, warm day, I enjoyed competing for voter attention during the morning rush and greeted the council candidate, the public advocate candidate and the Community Board 1 chairperson as they passed by. Suddenly, a commercial jetliner flew directly overhead. *Ooh, that plane is flying low! What airline is that? No name on the underside. Well, at least the pilot has control of the plane. He could make it to Newark*[1] *if the engine doesn't explode.*

* * *

Like other primary witnesses to the 9.11 disaster, including Fire Department of New York (Fire Department) and Port Authority of New York and New Jersey (Port Authority) officials,[2] I processed what I saw in a context that I could understand. Although the city of New York demonstrated its readiness to respond to crisis,[3] the successful recovery from this unprecedented event remains questionable. The city's lack of preparedness for a catastrophe of this magnitude gave rise to a myriad of issues. Among the more significant of them are the communication and deployment failures among the Fire Department ladder and engine companies as they arrived on the scene,[4] the misguided advice of the Port Authority,[5] and the complications in delivering basic life-sustaining services. There is also controversy concerning the environmental impact of the disaster on Lower Manhattan and its environs.

The U.S. Environmental Protection Agency (EPA), which is responsible for "assur[ing] the protection of the environment,"[6] and for "a variety of research, monitoring, standard setting, and enforcement activities related to pollution abatement and control to provide for the treatment of the environment as a single interrelated system,"[7] is at the heart of that controversy. Its duties to establish clean-up protocol, oversee worker safety and account for the indoor air quality in Lower Manhattan are at issue.

> With solid scientific support, dust from the WTC site and in the buildings in the area must be removed by trained, certified contractors and workers using full abatement procedures. The continuing clean-up efforts at the WTC site are stirring up more asbestos-containing dust, which is spreading throughout the area. Tests performed by impartial, out-of-town firms have proven that there are huge numbers of tiny asbestos particles in the WTC dust. This creates a significant danger that can only be reduced by full abatement procedures.[8]
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> Belated outdoor air results are 50 times worse than seen before . . . Nature cleans the [outdoor] air . . . Time does not heal [indoor air]. There is no rain and wind [indoors]. Shortly after 9.11, [Christie] Whitman[9] said [the] air was safe . . . The EPA has a duty to clean the [indoor] air . . . Any toxicity found in Lower Manhattan requires professional mediation at an approximate cost of $10,000.00 per apartment, or 100M-200M dollars.[10]

The problem of providing essential services to downtown residents and workers was an unforeseen challenge that warrants a review of local disaster preparedness and the environmental impact of the 9.11 disaster.

Local Disaster Preparedness and New York City Government

New York State Executive Law (Executive Law) mandates that "local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such programs."[11] The term "local chief executive" generally refers to county executives or managers of the county.[12] The city of New York is composed of five counties,[13] each with its own county executive known as the borough president. The Executive Law,

however, excludes borough presidents from the responsibility of taking an active and personal role in the development and implementation of disaster preparedness, instead charging the mayor with this duty.[14] A borough president's active role in local disaster preparedness is germane to response and recovery. While the mayor is responsible for all phases of disaster preparedness,[15] communication between and amongst the borough presidents, the community board(s) of the jurisdiction in which a disaster occurs, and the Office of Emergency Management (OEM) is of paramount importance.

Pursuant to § 82 of the New York City Charter, the borough president "[m]akes recommendations to the mayor and to other city officials in the interests of the people of the borough,[16] . . . [provides] technical assistance to the community boards within the borough"[17] and serves as chairperson of the borough board, which consists of district council members and chairpersons from each community board within the borough.[18] The borough board assists agencies that deliver services within the borough in the preparation of service statements for the borough and reviews such statements,[19] considers the needs of the borough,[20] and cooperates with community boards and city agencies with respect to matters relating to the welfare of the borough and its residents.[21]

Each community board is an autonomous city agency and the respective borough president appoints its members.[22] Each community board consists of up to 50 members, who live, work or have some significant nexus in the jurisdiction.[23] Included in their duties are assessing "the needs of the district which it serves"[24] and cooperating with, consulting, assisting and advising local government officials about "any matter relating to the welfare of the district and its residents."[25]

Service Delivery

In the hours, days and weeks following the disaster, the Manhattan borough president, along with the city councilperson and other community leaders, took personal responsibility for providing meals, filling prescriptions and getting access to and for the elderly and disabled in the frozen zone.[26] This close contact with local residents provided an opportunity to learn firsthand the needs and concerns of the area residents.[27] Given the lack of telephone and transportation service to the frozen zone, those who remained in the disaster area immediately following the collapse of the towers were in the best position to identify immediate issues in the interest of public health and safety.[28] Given the role of the community board to address the needs of the community that it serves, the input of the borough president, as the local county executive, ought to be recognized in the Executive Law where local response and recovery are concerned. In the aftermath of 9.11, the borough president demonstrated the ability to address the need for a "centralized coordination of resources, manpower and services"[29] which a mayor of a metropolis the size of New York did not and could not have achieved alone.

In the first few days and weeks after the disaster, OEM was overwhelmed with rescue and recovery efforts and could not focus on residents and businesses.[30] To fill this void, U.S. Rep. Jerrold L. Nadler[31] established the Ground Zero Elected Officials Task Force (hereinafter "Ground Zero Task Force"), comprised of nine elected federal, state and local officials (including the Manhattan borough president) and Community Board 1,[32] to address the initial problems of local residents and businesses, and to present OEM with a prioritized list of issues.[33] At inception, OEM "responded excellently then stopped communication after three or four weeks."[34] As a result, The Ground Zero Task Force was forced to take a more proactive role in serving the community and facilitating lines of communication among the various federal, state and municipal agencies involved in the recovery of Lower Manhattan. "The Ground Zero Task Force was effective in that it got EPA, DEC [the New York State Department of Environmental Conservation], DEP [the New York City Department of Environmental Protection], Verizon and Con Ed [Consolidated Edison] together" [35] and held a forum for residents and business owners in Lower Manhattan to voice their concerns. The Ground Zero Task Force established protocol for DEP via cleanup, put air testing machines in the community, attracted attention outside the hot zone,[36] opened up access to streets and facilitated telephone service.[37] The proactive approach of the Ground Zero Task Force in response to a recalcitrant administration illustrates the need to reexamine the Executive Law as it pertains to local disaster preparedness.

The mayor's suspension of services by broadly restricting access to the affected area not only jeopardized the health and welfare of the public, but also was "not reasonably necessary to the disaster effort."[38] His refusal to communicate with other elected officials, whose constituents were directly affected by the 9.11 disaster, undermined the powers and duties of local city officials and service delivery to the affected area.[39] The Executive Law needs modification to give borough presidents of the city of New York more latitude and voice in disaster response and recovery.

The Environment

In early November 2001, the New York City Council held a series of hearings to assess the environmental impact of the 9.11 disaster.[40] One objective was to ascertain "the responsibilities of the different agencies for testing and cleanup procedures, the protocols being employed, the coordination of activities and the

enforcement of relevant laws and regulations both at Ground Zero and in the surrounding neighborhoods."[41] Conflicting testimony surfaced between government agencies and scientific experts. According to Kathleen Callahan, the EPA's Acting Deputy Regional Administrator who identified the EPA as the lead agency in air testing, "the vast majority of its tests determined that the levels of asbestos, fine particles, lead, benzene, polychlorinated biphenyl (PCBs), and other dangerous chemicals and substances posed no long-term health risks to residents, employees and visitors beyond Ground Zero."[42] Nonetheless, questions persist about the multitude of particulate matter that was released into the air when the towers collapsed. Dr. Robert Johnson, Agency for Toxic Substances and Disease Registry,[43] acknowledged that there is a "lack of knowledge of the synergistic effect of the various substances."[44] Patricia Clarke, New York Regional Administrator, U.S. Occupational Safety and Health Administration (OSHA), testified, "while levels of air contaminant outside the site were considered safe, rescue workers occasionally have been exposed to unsafe levels of dioxins, carbon monoxide, heavy metals and other potentially dangerous pollutants."[45] Marjorie J. Clarke, Ph.D., Scientist-in-Residence at Lehman College and adjunct professor at Hunter College, added that since "ambient air standards are for individual pollutants, it is imperative that research be done to assess the impacts on public health of combinations of pollutants."[46]

"It is hoped that the concentrated combinations of toxic airborne matter has created for the federal government and medical community a never-to-be-repeated opportunity to study the synergistic impact of toxins."

Contrary to the government's position on air safety, Dr. Stephen M. Levine, Medical Director, Irving J. Selikoff Center for Occupational and Environmental Disease (Selikoff Center), Mount Sinai Medical Center, testified that

> the Selikoff Center's data found the public health risks to be higher than the more optimistic assessments by the government agencies[47] . . . people are experiencing . . . symptoms of 'reactive airway disease' . . . a form of asthma in which an individual experiences chest tightness, cough, wheezing and an "inability to fill one's lung with air."[48]

He added that

> [the] Fire Department is the only agency with an active medical monitoring plan in place to track the development of symptoms of illnesses [and that people] who have worked or continue to work, live or go to school at Ground Zero or in surrounding areas should be registered and offered medical surveillance.[49]

In his prepared statement taken after the hearings, Philip Landrigan, M.D., Chairman, Department of Community and Preventive Medicine, Mount Sinai School of Medicine, wrote: "To assess the long-term consequences, an urgent need exists to establish a registry of all workers and to conduct baseline physical examinations of those at highest risk."[50] Dr. Marjorie J. Clarke recommended that the New York City Council

> commit City funds and encourage the Administration to seek federal 9/11 grants to conduct ongoing, comprehensive surveillance of symptoms in affected populations: research the acute and long-term impacts on health of highly concentrated combinations of pollutants acting for a short time and elevated level of combinations acting for longer periods of time; and write new standards to reflect short-term exposure to high concentrations as well as synergistic effects.[51]

It is hoped that the concentrated combinations of toxic airborne matter has created for the federal government and medical community a never-to-be-repeated opportunity to study the synergistic impact of toxins.

In addition to emphasizing the need for monitoring the short- and long-term impact of a toxic environment, testimony at these hearings also advised taking precautions. Peter Iwanowicz, Director of Environmental Health, American Lung Association of New York City, stressed "requirements that workers at the site wear proper respiratory protection since they are the ones most directly exposed to the chemicals and particles associated with the plume and dust."[52] Yet on 14 December 2001, some three months after the disaster, New York City Council members of the Committee on Environmental Protection and their staff toured Ground Zero and Pier 25.[53] They observed that none of the rescue workers and other on-site personnel appeared to be using the protective respiratory gear.[54] The EPA's failure to act as mandated by statute and enforce worker safety and clean the indoor air should be a wake-up call.

Conclusion

The successful recovery from the 9.11 disaster does not rest solely on rebuilding downtown. Revising the Executive Law to empower borough presidents to take an active role in response and recovery would not only prevent a mayor from acting in a manner that could jeopardize public welfare, but also provide guidelines for a better "system for obtaining and coordinating disaster information" [55] among city agencies. The office of the borough president is an invaluable resource during a disaster in New York City. The borough president and local community board(s) of an affected area are essential for assessing the needs and services to businesses, workers, students and residents. The Hon. C. Virginia Fields[56] emphasized the need for an agency that

> would have the sole responsibility for establishing cleanup protocols, on and off site, power to enforce compliance, and would act as the public information clearinghouse . . . There are entirely different requirements for cleaning residences, offices, commercial and retail spaces, and establishments preparing and selling food. These considerations reinforce the need for one environmental oversight agency.[57]

Establishing cleanup and certification protocols for residential buildings and developing uniform standards for cleaning toxic waste would advance the purpose of the disaster preparedness plans, enhance public health, safety and welfare, and serve to preserve the public trust.

Endnotes

1. Newark International Airport is approximately 10 miles from the World Trade Center site, commonly referred to as Ground Zero.
2. See Jim Dwyer, *Before the Towers Fell, Fire Dept. Fought Chaos* (Jan. 30, 2002), available at http://www.nytimes.com/2002/01/30/nyregion/30FIRE.html (noting that the Fire Department set up a command station at the World Trade Center lobby); David E. Rovella, *No Escaping It* (Oct. 3, 2001), available at http://www.law.com (stating that the Port Authority directed South Tower tenants to remain in their offices).
3. Pursuant to Executive Law, the mayor exercised his authority to declare Lower Manhattan a disaster area (N.Y. Executive Law § 24(1) ("Exec. Law"), evacuate the area (§ 24(1)(b)), and restrict its access (§ 24(1)(e)).
4. *See* Dwyer, *supra* note 2; Kevin Flynn & Jim Dwyer, *9/11 in Firefighters' Words: Surreal Chaos and Hazy Heroics* (Jan. 31, 2002), available at http://www.nytimes.com/2002/01/31/nyregion/31FIRE.html.
5. *See* David E. Rovella, *No Escaping It* (Oct. 3, 2001), *available at* http://www.law.com.
6. *See* 40 C.F.R. § 1.3.
7. *Id.*
8. *Air Quality and Environmental Impacts Due to the World Trade Center Disaster: Hearings Before the Committee on Environmental Protection,* New York City Council, (2001) (statement of Lowell Peterson, Esq.; Meyer, Souzzi, English & Klein, P.C.; representing Local 78, Asbestos, Lead and Hazardous Waste laborers, AFL-CIO).
9. Christie Whitman is the EPA Administrator.
10. Address by Representative Jerrold L. Nadler, Community Board 1, Monthly Meeting (Feb. 19, 2002) (hereinafter "Nadler Address").
11. Exec. Law § 20(1)(b).
12. *See* Exec. Law § 20(2)(f)(1).
13. The City of New York classifies each county as a borough. Bronx County is the borough of The Bronx; Kings County is the borough of Brooklyn; New York County is the borough of Manhattan; Queens County is the borough of Queens; and Richmond County is the borough of Staten Island.
14. Exec. Law § 20(2)(f)(3); *see also* Exec. Law § 23(1).
15. *See generally* Exec. Law § 23 (articulating three phases of local disaster preparedness: prevention, response and recovery).
16. N.Y. City Charter § 82(6) ("N.Y.C. Charter").
17. N.Y.C. Charter § 82(9).
18. *See generally* N.Y.C. Charter § 85(a).
19. N.Y.C. Charter § 85(4).
20. N.Y.C. Charter § 85(12).
21. N.Y.C. Charter § 85(1).
22. *See generally* N.Y.C. Charter § 2800(a). Half of the members are recommended by the city councilperson serving that community district. The community board also may have non-board or public members appointed by the chairperson of the community board.
23. *Id.*
24. N.Y.C. Charter § 2800(d)(1).
25. N.Y.C. Charter § 2800(d)(2).
26. The term "frozen zone" is used to describe the geographical area upon which the mayor imposed restricted access. On 9.11, the frozen zone included Battery Park to 14th Street, from the East River to the Hudson River. Today, the frozen zone is limited to Ground Zero.
27. One community board member volunteered at the World Trade Center site from 9.11 to 9.13, others engaged in feeding residents and rescue workers, and still others organized residents to meet and assess the impact of the disaster.
28. Many of those who were instrumental in assisting the borough president and former City Councilperson Kathryn E. Freed were, in addition to community board members, tenant associations, business owners and other volunteers. Note, however, that the participation of Community Board 1 members is consistent with their responsibilities to "gather information through personal observation, conversations with neighbors, written statements by individuals or groups, local newspaper articles, and appearance by residents to monthly meetings." Mayor's Community Assistance Unit, *Handbook for Community Board Members*, at 45.
29. *See* Exec. Law § 23(7)(b)(1).
30. Nadler Address, *supra* note 10.
31. Representative Nadler represents the 8th Congressional District, which includes Ground Zero and its environs.
32. Ground Zero falls within the jurisdiction of Community Board 1, as does most of Lower Manhattan. Community board members elect the chairperson.
33. The Ground Zero Task Force was instrumental in arranging access to the area for food and medical deliveries, home health

attendants and other essential services that restricted ingress to the area had prevented.

34. Nadler Address, *supra* note 10.
35. Telephone interview with Madelyn Wils, Chairperson, Community Board 1, Manhattan (Jan. 31, 2002) (hereinafter "Wils interview").
36. The term "hot zone" is used to describe the geographical area upon which the mayor imposed the most restricted access while the fires were burning.
37. Wils interview, *supra* note 35.
38. *See* Exec. Law § 24(1)(f)(ii).
39. It is noted that the NYC Department of Sanitation did an outstanding job of frequently watering the streets on a 24-hour basis to minimize the reintroduction of toxic dust into the air.
40. The Committee on Environmental Protection held hearings on November 1 and November 8, 2001. Witnesses included representatives for federal, state and city agencies, experts in the field and the public-at-large.
41. Report of the Committee on Environmental Protection, New York City Council (2001) (hereinafter NYCC RCEP).
42. *Id.*
43. This agency is a branch of the U.S. Department of Health and Human Services.
44. NYCC RCEP, *supra* note 41.
45. *Id.*
46. *Id.* Dr. Clarke went on to state that OSHA's standard risk level assessment is based on a 40-hour week, 50-week year over a lifetime. A number of residents were exposed to the toxic environment 24 hours a day.
47. *Id. Compare with* Patrick L. Kinney, Sc.D., Associate Professor, Mailman School of Public Health at Columbia University, who testified that "[p]otential risks appear to be much less serious for the general public in the areas downwind of the site." *Id.*
48. NYCC RCEP, *supra* note 41.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. Pier 25, the site where Ground Zero debris is dumped onto barges for transport, is located near two public schools and a large high-rise residential complex.
54. NYCC RCEP, *supra* note 41.
55. Exec. Law § 23(b)(16).
56. C. Virginia Fields is the Manhattan Borough President.
57. *Air Quality and Environmental Impacts Due to the World Trade Center Disaster: Hearings Before the Committee on Environmental Protection,* New York City Council, (2001) (statement of the Hon. C. Virginia Fields). The borough president's testimony advances the purposes of Exec. Law §§ 22 and 23 to develop "mechanisms to coordinate the use of resources and manpower for service during and after disaster[s] . . . and the delivery of services to aid citizens and reduce human suffering resulting from the disaster." Exec. Law § 22(2)(ii).

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New York's Framework for Disaster Preparedness

By Jean Cox

Local chief executives and the Governor derive their authority to manage natural and man-made disasters and emergencies from Article 2-B of the New York State Executive Law. Article 2-B was enacted in 1978 as a response to the need for a comprehensive approach to coordinate the preparation for, response to and recovery from natural and man-made disasters. Article 2-B has three main components. It describes the extraordinary powers of local chief executives and localities in bringing emergency situations under control. It establishes the Disaster Preparedness Commission and provides for its powers and authorities. It also describes the powers and authorities of the Governor in response to a disaster situation.

I. Local Government Powers

A. State of Emergency

The local chief executive[1] is empowered to declare a state of emergency and issue emergency orders. Before declaring a state of emergency, the local chief executive must first make a finding that a disaster has occurred or there is an imminent threat that a disaster will occur and that the public safety is imperiled by the disaster.[2] Once the state of emergency is issued, the local chief executive may issue emergency orders. The purpose of these orders is to bring the situation under control. Some examples of emergency orders are: limiting access to a geographical area, evacuating an area, limiting the sale of alcohol or firearms, restricting access to places of public amusement, the designation of shelters, and setting curfews.[3] These emergency orders are valid for five days and renewable for five-day terms thereafter. A violation of an emergency order is punishable as a class B misdemeanor and violators are subject to six-month jail terms.

The use of a state of emergency is not limited to the list outlined in section 24 of the Executive Law. In fact, local chief executives have used this tool very creatively to avoid a disaster in their municipality. In a 1982 opinion,[4] the state Attorney General concluded that it was allowable for a town supervisor to declare a state of emergency for the installation of filters in private homes. The town had received information that there were suspected carcinogens in the private wells of the town residents. There was a filter available to protect the residents from the carcinogens. The filters were only available to municipalities, thus the town supervisor declared a state of emergency and ordered the purchase, installation and maintenance of these filters in the residents' homes. The Attorney General agreed with the use of Article 2-B in this manner, as the definition of a disaster included water contamination. The Attorney General stated that the town should attempt to retrieve the filters once the emergency was over.

Another creative use of an Article 2-B declaration was to keep first responders within the municipality. On September 11, 2001, many people wanted to assist in the recovery of victims from the World Trade Center. A County Executive north of New York City believed that there was still a threat to his county and needed a mechanism to keep the first responders in the county. The County Executive declared an Article 2-B state of emergency and issued emergency orders stating that the county first responders could not leave the county to assist New York City. The order worked and the first responders stayed within the county's boundaries.

As these examples illustrate, Article 2-B provides local chief executives extraordinary powers to manage a disaster situation. The language of 2-B allows chief executives to be creative in their use of these states of emergency. Thus, credit should go to the drafters of this law in having the foresight to draft the law in such a manner that chief executives are allowed to use their discretion in bringing disasters under control.

B. Suspension of Local Laws

The local chief executive also has the power to suspend any local law, rule or ordinance or part thereof, that the chief executive believes hinders the disaster effort and "does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort."[5] The suspension is valid for five days, but can be renewed for five-day periods thereafter. The local legislature at any time can override the suspension of a local law, rule or ordinance by the local chief executive.

C. Local Disaster Preparedness Plans

The legislature placed the authority to prepare a disaster plan with the local government, not the chief executive.[6] The chief executive has the extraordinary power to declare an emergency;[7] however, the authority to plan lies squarely with the legislative body. This principle was affirmed in *Prospect v. Cohalan*.[8]

The *Prospect* decision involves the Long Island Lighting Company's (LILCO) efforts to start up the Shoreham nuclear electric generating facility on Long Island. Before granting a license to start the plant, the Nuclear Regulatory Commission (NRC) first had to approve an off-site emergency plan. The Suffolk County Legislature passed a resolution terminating Suffolk County's radiological emergency preparedness planning. Subsequently, LILCO submitted its own off-site emergency plan to the NRC for approval. Upon receipt of the LILCO plan, the Suffolk County Executive issued an executive order directing the Suffolk County Police Commissioner and the Suffolk County Planning Department to review and implement LILCO's emergency off-site plan. Several members of the Suffolk County Legislature and four towns within Suffolk County brought an Article 78 against the Suffolk County Executive to annul the executive order.

The Court of Appeals affirmed the Appellate Division's ruling that the executive order should be annulled. The Court found that the state legislature, in enacting section 23 of Article 2-B, placed the responsibility for local planning in the county legislature, not with the county executive. The court opined that if the state legislature wanted to give the authority for planning to the local chief executive, the state legislature knew how to empower the chief executive, as it had in section 24 of the Executive Law. Thus, the executive order was annulled and the Suffolk County Executive was enjoined from implementing the plan.

Once it has decided to prepare a plan, the local government must create a plan that addresses three areas: preparation for, response to and recovery from disasters.

Preparation—must include the following: identification of the types of potential disasters and the locations of those disasters, recommendations on ways to deal with those disasters, and "suggested revisions to building and safety codes and zoning and other land use programs."[9]

Response—Obviously the response to a disaster is the most critical, as an effective response can save lives and protect property. There are 17 requirements for local disaster preparedness plans under the response section.[10] The overall responsibility of the locality is to establish an effective coordinated response to a disaster that provides for orderly evacuations, shelters, adequate warning systems, integrated communications between all levels of government, and the continuity of government.

Recovery—After a disaster has occurred it is vital that a community gets back to normal as quickly as possible. To that end, the recovery provisions require a review of all appropriate codes for updating for future disasters, adequately trained staff to deal with any federal or state recovery programs, and consideration of the economic recovery of the area.[11]

"The sharing of intergovernmental resources is an important tool that a locality can utilize in bringing an emergency situation under control. It is vital that local governments enter into mutual aid agreements prior to the occurrence of a disaster."

The law also requires public input into the plan, either by a public hearing or other method chosen by the local government.

D. County Registry of Disabled Persons

In 1996, the state legislature added a new section to Article 2-B to provide more effective assistance to the special needs population during disasters.[12] This section allows a county[13] to establish a registry of disabled persons. The purpose of this registry is to allow the county to plan for the needs of its citizens, and gives citizens the opportunity to pre-authorize emergency service personnel to enter their homes during disasters to ensure the safety of these residents. It also provides liability protection to the county for its officers or employees who in good faith carry out the purposes of the disaster preparedness plan. The registry can also be given to other county, state or federal officials, to be utilized in the delivery of their services.

E. Use of Local Government Resources

Section 25 of Article 2-B provides local governments with two very important powers. It allows a local government to enter into mutual aid agreements with any other political subdivision for the utilization of resources. It also protects the municipality from liability for the performance or failure to perform a discretionary duty on the part of an officer or employee of that municipality in carrying out their duties under Article 2-B.

The sharing of intergovernmental resources is an important tool that a locality can utilize in bringing an emergency situation under control. It is vital that local governments enter into mutual aid agreements prior to the occurrence of a disaster. In all local plans, mutual aid should be recognized and encouraged as a mechanism that can greatly assist in a disaster situation.

Immunity from liability during a disaster/emergency is vital to protecting the local government when it is taking extraordinary steps to bring a situation

under control. Its employees must be able to perform their tasks without fear that they will be subject to liability after the disaster situation has ended. There are many instances in disaster situations where responders must take extraordinary measures to protect life and property. Providing this immunity allows the responders the freedom to take the risks that could save a life.

This immunity provision was tested in *Litchhult v. Reiss*.[14] In 1989, a tornado struck Orange County and hit a school. Thirty children were either killed or injured. The families of the children brought suit against the county.

The county had an emergency preparedness plan, which included the provision to notify schools "as conditions warrant." The county received a notice over the State Police Information Network that the National Weather Service issued a tornado watch for the area. A tornado watch indicates that weather conditions are favorable for the development of a tornado. A tornado warning indicates that tornadic activity is in the area. The county emergency manager provided this information to the county public information officer for dissemination to the general public. For whatever reason, the information did not get sent out. The plaintiffs sued, stating that the county had a duty to warn the schools. Thus it was a ministerial act rather than a discretionary one and the county could be held liable for its failure to warn.

The trial court denied the county's motion to dismiss. The Appellate Division, Third Department, reversed and dismissed the complaint. The court stated that the plan called for a discretionary act because the language "as conditions warrant" required an analysis of the situation and a determination that a notification was needed. The provisions in section 25 releasing a municipality from liability for a discretionary act applied to the facts of this case. The court also found that the county, by enacting the plan, did not have a duty to warn the schools specifically. In fact, the plan intended to warn the general public and indicated that notification to the schools was just one method of reaching out to the general public.

II. Disaster Preparedness Commission

Article 2-B of the New York State Executive Law created the Disaster Preparedness Commission (DPC).[15] The DPC is comprised of the following agencies and departments of New York State: the Emergency Management Office, Agriculture and Markets, Banking, Criminal Justice Services, Education, Empire State Development Corporation, Energy Research & Development Authority, Environmental Conservation, Office of Fire Prevention and Control, General Services, Health, Housing and Community Renewal, Insurance, Labor, Mental Health, Military and Naval Affairs, Public Service Commission, Department of State, State Police, Office of Temporary and Disability Insurance, Thruway Authority, and Transportation. The two non-state members on the commission are the Red Cross and the Onondaga County Executive. The State Emergency Management Office provides the staff services to the DPC.

The purpose of the Commission is to provide an integrated approach at the state level for all aspects of disaster preparation, response and recovery. The Commission is charged with drafting the state plan for response to emergencies, keeping current an inventory of programs to assist local governments, and directing state disaster operations in a declared area. To accomplish its mission, the DPC through the State Emergency Management Office works with all levels of government—local, state and federal—to coordinate all aspects of disaster operations. The DPC also has the authority to coordinate the state and local efforts involved in radiological preparedness for nuclear electric-generating facilities.[16]

The DPC also provides advice to the Governor when the Governor is contemplating the suspension of a state or local law, rule or regulation, which in some way hinders the disaster operation. During the World Trade Center Disaster, approximately 47 laws were suspended to assist in coordinating the disaster.

III. State Disaster Emergency

The Governor has the authority to declare a state disaster emergency.[17] He may do this on his own initiative or at the request of a local government. The Governor declares a state disaster emergency by executive order. This executive order is valid for six months and may be renewed for six-month periods.

Once a state disaster emergency is declared, several methods can be utilized to assist local governments in handling a disaster. First, the declaration of a state disaster emergency provides the public with notification that a disaster exists. It is important that the public understand the severity of the situation and follow the advice of local officials in order to lessen the impact of the disaster. Second, it allows the Governor to direct whatever state assistance is necessary, through the coordination of the DPC, to support local efforts during the emergency.[18] However, extending credit to the local government is not permissible.[19] During the World Trade Center disaster of 9.11, the DPC directed the actions of more than 16,000 state personnel who assisted in the response and recovery from this disaster. Third, it allows the Governor to suspend any state law, rule or regulation for 30 days which may hinder the disaster operations.[20] The Governor is limited by the state and federal constitutions, and the state legislature

may terminate this suspension at any time by concurrent resolution.

A declaration of a state disaster emergency also allows the DPC, with the approval of the Governor, to create a temporary organization, if necessary, in the disaster area to manage state and local assets to bring the disaster under control.[21] This power is seen as a last resort, in that most local governments can adequately respond to a disaster.

The declaration of a state disaster emergency allows the state government to provide many types of assistance, but it does not automatically provide monetary assistance as a federal disaster declaration does.[22] The Governor has the responsibility to request federal assistance. Federal assistance for disasters comes through the Federal Emergency Management Agency (FEMA). Since 1996, there have been 19 federally declared disasters or emergencies in New York State. From these declarations, more than $1 billion has been given to state and local agencies for their costs in coping with disasters.

IV. Emergency Management Assistance Compact (EMAC)

In 1996, Congress approved the Emergency Management Assistance Compact.[23] Since then, 47 states and two territories have joined the compact. New York State joined on September 17, 2001. EMAC provides a method by which states may assist other states during a gubernatorially declared emergency.

The requesting state's governor must have declared an emergency for a part, or all, of that state before a request can be made through EMAC. The Director of the New York State Emergency Management Office (SEMO) is the authorized representative for New York State for EMAC. An EMAC state has the following responsibilities: It must develop procedural plans for a state hazard analysis, interstate procedures, notification to adjacent states as to hazards that could affect the adjacent states, an inventory of personnel, equipment and material for the interstate loan of such during a disaster, reimbursement or forgiveness of a loan of equipment, materials or personnel, and the temporary suspension of laws that may hinder the response to the emergency. After the declaration of an emergency by a governor, the authorized representative of the state may request materials, equipment or personnel from any EMAC member state.

EMAC recognizes that a significant difference exists between loaning a state materials or equipment and loaning personnel. Hence, EMAC treats assisting state personnel as agents of the requesting state for purposes of tort liability and immunity. EMAC also provides protection for assisting state personnel for acts or omissions made in good faith. EMAC handles the workers' compensation question in a different manner. All personnel are considered covered as if they were working in their own states.

Article 2-B has proven to be a very valuable tool for the state and local governments in bringing disaster situations and emergencies under control and to a swift conclusion. Joining EMAC should make disaster preparedness in New York even more effective.[24]

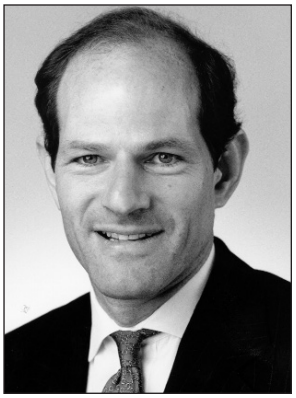
Endnotes

1. "Chief executive" is defined as (1) a county executive or manager of a county; (2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body; (3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and (4) a supervisor of a town, except where a town has a manager, it shall mean such manager. N.Y. Exec. Law § 20(2)(f) ("Exec. Law").
2. *Id.* § 24.
3. *Id.*
4. N.Y. Att'y Gen. Op. 82–F11.
5. *See id.* § 24(1)(g).
6. While the local government has the authority to prepare a plan, it is not required to do so.
7. *See* Exec. Law § 24.
8. 482 N.E.2d 1209 (N.Y. 1985).
9. Exec. Law § 23(7)(a)(2).
10. Exec. Law § 23(7)(b).
11. Exec. Law § 23(7)(c).
12. Exec. Law § 23-a.
13. It does not authorize any other type of municipality to provide this service.
14. 583 N.Y.S.2d 671 (App. Div. 1992).
15. *See* Exec. Law § 21.
16. Exec. Law § 29-c.
17. Exec. Law § 28.
18. Exec. Law § 29.
19. *Id.*
20. Exec. Law § 29-a.
21. Exec. Law § 21(3)(f).
22. Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. §§ 5121 *et seq*.
23. Pub. L. No. 104-321.
24. Those seeking more information on the New York State Emergency Management Office may visit the Web site at http://www.nysemo.state.ny.us or contact the Office of Counsel at (518) 457-8900.

Jean Cox is Counsel, State Emergency Management Office.

Charitable Response to the 9.11 Attacks

By Eliot Spitzer



The physical and emotional impact of the events of September 11 are staggering. Several thousand people lost their lives at the World Trade Center, at the Pentagon and in Pennsylvania. Many children will grow up without one of their parents, and families may need support for years. Thousands were injured as they fled the World Trade Center, tried to rescue others or searched for remains. Many will require years of medical treatment and other assistance. Thousands of others in New York lost homes, jobs, businesses and their sense of security. The individual and aggregate physical, emotional and economic losses are huge. The need for services ranging from education and training to mental health counseling is equally enormous and will endure for years to come.

In the face of so enormous a need, the American people responded by opening their hearts and wallets in an unprecedented way. Charities collected more than $2 billion[1] in donations and pledges, approximately half of which has already been distributed as this article goes to press.

Government's response to a tragedy of this nature and scale must be guided by a single overriding principle. We must address the needs of the victims and their families as promptly and coherently as possible, mindful of the legitimate expectations of the American public that its great generosity will produce meaningful relief both for immediate needs and over the long haul. Government's job is to ensure that the charities entrusted with public funds spend them in a manner that fulfills the donors' will. In addition, government has a key role to play in ensuring that funds are distributed equitably, so that no victim is left unassisted.

As New York's Attorney General, I am charged with overseeing those charities that solicit funds in our state, as well as the charitable organizations, including foundations and charitable trusts, that are created or hold assets in our state.[2] It is my duty to help ensure that the interests of the donor and the public are protected when charitable funds are raised and spent. It is a privilege to perform this important function, especially in this time of great need.

The essence of charity is its voluntary nature. Americans decide individually, often in a manner closely linked to our individual views and faiths, how to make contributions to charities that serve our shared goals. There are many diverse ways in which relief can be provided effectively, in keeping with our country's strong tradition of private philanthropy. Because of the intense media and public scrutiny in the wake of September 11, if the singularly important task of distributing this aid is not performed well—with dignity, fairness, equity and justice for all of the victims—then donor and public confidence in the entire not-for-profit sector could well suffer.

In New York, most not-for-profit groups (other than religious organizations and certain other exempt entities, such as the Red Cross) are required to register with the state and comply with annual financial reporting requirements.[3] My office makes those reports public, so that donors can make informed choices as they plan their contributions. We oversee not-for-profit groups, including those that are exempt from registration and reporting rules, to ensure that they use their charitable assets in ways that fulfill the intent of the donors and further the public interest. My office tries to ensure that charitable solicitations are truthful, that charities invest their funds carefully and that the officers, directors and trustees who manage not-for-profit institutions uphold their fiduciary duties to the beneficiaries of the charities they run.[4]

My office does not and cannot tell the charities how to spend money within the ambit of their exempt purposes. Nevertheless, very soon after the disaster, it became clear that coordination would be crucial to the success of the charitable response. We could not afford to wait for that coordination to evolve over an extended period of time. We therefore worked to jump-start the necessary collaboration. While there was some initial resistance from some charities, that resistance has been largely overcome, and my office is now working very cooperatively with many of the charities involved in this effort.

In particular, my office has made substantial progress toward achieving six critical goals:

1. making it easier for victims to learn what relief is available, and to access that aid;
2. creating a victims database, to facilitate coordination, avoid duplication and ensure fairness in the aid distribution process;
3. providing the American public with information about the amount of donations received and

expended, and the purposes of those expenditures;

4. investigating and prosecuting any instances of fraud and abuse that arise;

5. creating a working group of charities and victim advocates to solve problems as they arise and to swiftly identify gaps in the services required to meet victims' needs in the future; and

6. monitoring the charities involved in the September 11 relief effort to see that they meet their obligations, both to their donors and beneficiaries, under New York State law.

The remainder of this article is devoted to a more detailed discussion of each of these initiatives.

I. Victims' Need for Access to Information and Streamlined Process

The government agencies and charities that stepped in first to meet victims' most immediate and acute needs distributed tens of millions of dollars in aid within a matter of a few short weeks, but there clearly have been, and had to be, delays and gaps in service. Most of the victims found the process baffling, with its dizzying array of forms and scores of phone calls, ever-changing assistance personnel, delays in receiving relief and minimal or confusing explanations as to how families would eventually access relief for longer-term expenses.

The initial lack of coordination also affected the charities, particularly those seeking to support the longer-term needs of the victims. Such charities found it particularly difficult to identify the victims they pledged to serve. While it was reasonable to expect that charities, especially those whose missions focused upon broader, community-wide needs, would require time to assess the needs, consult with other charities and develop effective service plans, the donors and the public also had a legitimate expectation that a process would develop expeditiously and openly, so that the victims and donors could monitor progress.

One of my top priorities was, and is, to bring all of the various charities together in an effort to address these issues—particularly the problems faced by the victims—as quickly as possible. From the outset, we urged that charities pay special attention to helping those individuals and families obtain the information they need to locate the assistance they deserve. The charitable organizations responded positively to our efforts. Over 200 charities and other private entities provided my office with detailed information about their programs and funding criteria. We created a public Web site for this information: http://www.wtcrelief.info.

This Web site—which has been up and running for more than five months—includes a search function that helps victims and their families locate those charities that are providing the precise type of assistance the victims need. This Web site also includes contact information and other guidelines, so that victims will find it easier to obtain relief as well as constantly updated news bulletins concerning the relief effort.

The Web site can also easily be used by donors in deciding which charities to select. Donors can find the charities that are providing the specific kinds of assistance they wish to support, can link to those charities' financial reports on an independent Web site (http://www.GuideStar.org), and in many instances can link directly to the charities' own Web sites to obtain more information or donate on-line.

The www.wtcrelief.info Web site also provides charities with a vehicle to learn more about their colleagues' efforts, so that they can work closely with those serving the same goals as their own, and can identify those needs that may be receiving less attention.

II. Importance of the Victim Database to the Charities' Coordination

With hundreds of charities raising funds for September 11 relief, the challenge of coordinating this effort began six months ago and will continue for many years to come. The charitable organizations that tapped the reservoir of public generosity so successfully had to work together as never before to expedite assistance, avoid duplication of services, prevent fraud and ensure fairness in providing relief. This was not an easy undertaking.

That is why, in November 2001, I recruited talented professionals from the private sector, all of whom have provided services and products on a *pro bono* basis, to create a database that maintains a private, secure listing of the grants to victims and their families.[5] My office's role in the creation of this database acted as a catalyst, setting forth the parameters and urging that the database be established, up and running as quickly as possible. In particular, the database had to include strict security measures to protect the privacy of the victims and their families from unauthorized disclosure.

Our model was a similar effort undertaken after the 1995 bombing of the Murrah Federal Building in Oklahoma City. With the able assistance of the staff of Oklahoma City's charities, including the United Way and the Oklahoma City Community Foundation, who shared their wisdom, expertise and experience, we began to develop our database initiative.

In the case of Oklahoma City, despite the magnitude of the tragedy, most of the victims worked directly for the government and the number of families affected was smaller. Thus, the charities could meet around a

table on a regular basis and work through the issues family-by-family. Their jointly-managed database served a crucial case management role, helping ensure both the integrity of the process and the equitable distribution of relief.

In contrast, the scale of the World Trade Center disaster—with thousands killed and tens of thousands suffering severe physical, emotional and economic losses—was much more vast. Our challenge was to find a way for the charities to work together smoothly and with the same sense of shared purpose as their Oklahoma City counterparts.

"The charities cannot and should not spend all of the money immediately."

In November 2001, many of the largest charitable organizations—including the American Red Cross, the Salvation Army, the September 11 Fund (a joint venture of the United Way and the New York Community Trust) and Safe Horizon, which together accounted for approximately 80 percent of the charitable pledges—agreed to participate. These charities acknowledged the need for the database, and expressed a desire to operate it themselves, rather than having it run by a government entity.

Our efforts culminated in December 2001 when these charities, along with other major New York City human service organizations,[6] announced the formation of the 9/11 United Services Group (USG). USG strives to ensure that assistance is delivered in an effective, timely, and supportive manner—while ensuring accountability and strengthening confidence in the delivery of charitable aid and social services.

The primary responsibility of USG is creating and maintaining the victims database. USG also assigns a personal case manager to anyone receiving assistance who needs help navigating the system. The case manager serves as a point of contact, while helping individuals or families access services. This coordinated approach also includes a toll-free hotline to facilitate access to services.

My office continues to monitor the progress of USG's database closely, recognizing that it is an essential component of the charities' efforts to prevent duplication and fraud, and is a critical tool enabling organizations to collectively reach and to equitably serve the broadest range of victims.

III. Obligation to the American Public

The charities must recognize that they are only able to provide assistance because of the overwhelming generosity of the American people, and that the American people, in turn, expect to see that these funds are provided to those in need promptly and equitably.

Another lesson from Oklahoma City—where services are still being provided to victims seven years after that tragic event—is that the needs of the victims of the World Trade Center disaster for services and funds will continue for decades. Thus, programs must be carefully designed and funds prudently managed so they remain available to meet evolving needs. The charities cannot and should not spend all of the money immediately. A coordinated process by which the charities account for their progress will demonstrate that they are fulfilling their mission and remaining faithful to their public trust.

My office has urged each charity to publicize, on a regular basis, the amount of money it has received, detailing how much it has spent and identifying the purposes for which its funds have been targeted. For those charities that are required to register with my office, we also monitor administrative and fund-raising costs through the annual reporting process.

Over the long term, I will work to expedite and improve the charities' disclosure of their programs, priorities and finances, to better inform and empower the donating public.

IV. Vigilance Against Fraud and Abuse

While the volume of fraud has not reached the proportions many had feared, we have seen evidence of individuals taking advantage of the public's charitable impulses. Some have sought to raise funds from the public, making references to the September 11 attacks, implying that the funds raised will benefit specific groups of victims of that tragedy. This has been particularly evident with some solicitations purporting to benefit law enforcement and firefighting organizations, by entities that do not really raise any substantial funds for such causes. There have also been some commercial products sold with representations that proceeds will benefit causes relating to September 11 relief, with the sellers then failing to follow through on such commitments. In still other cases, a few unscrupulous individuals have falsely claimed a connection to the tragedy and have sought to profit from the generosity of an unsuspecting public.

Given the scale of this tragedy and the corresponding scale of the charitable outpouring, we must remain vigilant against fraud and waste if we are to preserve public confidence in the charities doing the work so desperately needed. Our responsibility in government includes the obligation to move swiftly and aggressively to enforce the laws against those who mislead the

(Continued on page 32)

Barbara Smith looks on as Patricia Salkin accepts congratulations from William Redmond, President of the Government Law Center, who spoke on Ms. Salkin's numerous accomplishments in public service.

Professor Susan Herman from Brooklyn Law School.

Professor Erwin Chemerinsky from the University of Southern California Law School, Los Angeles at the CAPS "Supreme Court" program

COMMITTEE ON ATTO

2002 ANNUAL

The Committee on Attorneys in Public Service (CA for Excellence in Public Service event during NYSBA's

On January 22, the Sub-Committee for Administrat gram on "Decision Making and Stress Management," p chaired by CAPS member James Horan.

The CAPS afternoon program featured a joint prese Chemerinsky on "Supreme Court Review: Still Quiet at member, Marjorie S. McCoy.

The day concluded with the committee's annual aw lence in Public Service." Patricia E. Salkin, director of A late Archibald R. Murray, a former NYSBA president, a ety, were both honored for their outstanding contributi accepted the award on his behalf.

Kay Murray and Susan Lindenauer, NYSBA Executive Committee member, and colleague of Mr. Murray from the Legal Aid Society. Ms. Lindenauer paid a moving, personal tribute to Mr. Murray at the Awards Reception.

Patricia Salkin and after the reception.

Kay Murray and Patricia Salkin at the Awards ceremony.

NYSBA President Steven Krane presents a donation to the Legal Aid Society's Murray Fund to Kay Murray. The award was made by NYSBA's Committee on Attorneys in Public Service in Archibald Murray's memory.

RNEYS IN PUBLIC SERVICE

MEETING EVENTS

PS) hosted two educational programs and its Award Annual Meeting week, January 22-26, 2002.

ive Law Judges sponsored a morning educational pro- resented by Dr. Isaiah Zimmerman. The event was

entation by Professors Susan Herman and Erwin t the Storm Center?" This event was chaired by CAPS

wards reception, honoring two individuals for "Excel- lbany Law School's Government Law Center and the nd Executive Director of New York's Legal Aid Soci- ons in public service. Mr. Murray's wife, Kay Murray,

Barbara Smith, CAPS chair, welcomes Awards Reception attendees at the Sky Lounge at the New York Marriott Marquis.

William Redmond,

Marjorie McCoy, Susan Herman and Erwin Chemerinsky enjoy a lighter moment at the "Supreme Court" program.

(Continued from page 29)

donating public or defraud charities.[7] We are dedicating substantial resources within the Department of Law to that purpose, and are assisting many charitable agencies with their own internal efforts to curb fraud and abuse.

In addition, we are working with legislators on both sides of the aisle, as well as with Governor George Pataki, to address a number of deficiencies in the New York State Executive Law provisions governing enforcement actions against individuals and entities that engage in fraudulent charitable solicitations. Many of our proposed changes are contained in legislation currently advancing through the New York State Legislature in the form of S.5611 (Stafford)/A.871 (Morelle). This legislation would, *inter alia*, address one problem that has become especially troublesome in the wake of September 11: misleading charitable solicitations that use a New York mail-drop address to confuse the public into believing that donations will benefit causes within the state, when no such charitable programs are in fact supported.[8]

"In the wake of the formation of several hundred new charitable organizations following September 11, my office is closely monitoring the approvals granted by the Internal Revenue Service of new tax-exempt organizations, to help ensure that those required to register with New York State do so promptly."

Additionally, on October 10, 2001, Gov. Pataki issued an executive order[9] supplementing law enforcement's arsenal of weapons against charities fraud. We are currently working to develop legislation to make some of these changes permanent, particularly those that increase civil administrative penalties and permit greater flexibility in their use. We are also developing legislation to curb abuses in charitable telemarketing, and better protect the public against misleading attempts to associate charitable fundraising with public safety causes such as firefighting.

V. Need for Ongoing Working Group

Because of the unprecedented scope of the World Trade Center tragedy, the process of delivering aid to victims will be long and complex, and many problems will arise. As a result, I called for the creation of a working group of the major charitable organizations and victims groups, as occurred in Oklahoma City, to meet on a regular basis and to address these problems as they occur. Here, I encouraged the charities not only to develop such a group, but also to include in the governance of the group representatives of the victims' organizations that have come together in response to this tragedy.

The 9/11 United Services Group (USG) is just such a working group. In February 2002, USG named five victims' representatives to its board of directors. These representatives will assist USG in assessing the needs of victims, their families and others affected by the events of September 11, help it to examine both long-term and unmet needs of victims, and provide advice on how to serve them better. In addition, USG has proposed the creation of an advisory council that will further allow the group's member organizations to better understand the needs of the victims, their families and others affected.

VI. Monitoring Charities

In the wake of the formation of several hundred new charitable organizations following September 11, my office is closely monitoring the approvals granted by the Internal Revenue Service of new tax-exempt organizations, to help ensure that those required to register with New York State do so promptly.

Already, several significant legal issues have arisen within the universe of these new entities. Of particular interest were the issues involved in the formation and evolution of the "Twin Towers Fund," a charity promoted by Mayor Rudolph Giuliani in the days immediately following September 11 as the official charity of the city of New York, one aiming to support the families of the uniformed services workers (police, fire, emergency medical services) who were killed or injured in the disaster. To enable that entity to get off the ground quickly, funds were solicited and collected by a pre-existing not-for-profit corporation controlled by the city of New York, the New York City Public Private Initiatives, Inc. (PPI).

Subsequently, PPI announced its intention to seek court permission to transfer nearly $100 million in unspent funds to the Twin Towers Fund, Inc. (TTF), a new charity to be headed by Mr. Giuliani following his departure from office. Under that proposal, TTF was to assume PPI's obligations to disburse additional charitable assistance to the families of the rescue workers affected by the September 11 tragedies at the World Trade Center. New York State law mandates that a fund transfer of this magnitude, being substantially all the assets of the transferor, receive the approval of the state Supreme Court, pursuant to a proceeding conducted on notice to the attorney general.[10]

The purpose of my review of charitable transactions of this type is to see that the consideration and terms

are fair and reasonable, and that the transaction serves the corporate purposes of the transferring organization. In this case, I worked to structure the fund transfer in a manner that would preserve the commitments made to the PPI/TTF donors who, I concluded, had intended to support the city of New York's official charity. With solicitations encouraged on the city's own Web site and the involvement of numerous prominent city officials, it was reasonable to conclude that the indicia of "official" accountability helped induce many donors to select TTF, rather than one of the many private charities raising funds for September 11 relief. Similarly, I found that the corporate purposes of PPI, designed to be an umbrella organization to support and incubate projects to benefit the city, were best promoted by an assurance that the city itself would remain involved in some fashion with the administration of these funds.

In response to my expressed concerns, TTF agreed to take steps to preserve its ongoing accountability to the city and to its donors and beneficiaries. TTF agreed to structure itself so that the city's current mayor would name 20 percent of its board of directors plus an additional member of the board to represent the interests of the charity's beneficiaries. In addition, the city comptroller will have audit authority over TTF for the period the transferred funds remain in its accounts. None of these funds will be used for administrative costs; indeed, 100 percent of the transferred funds are expected to be disbursed directly to the victims within 60 days of court approval of the proposed transfer. Finally, interested parties have an opportunity to submit to the court their views regarding the proposed transfer, prior to the court's determination.

My goal in applying this long-standing provision of New York charities law to an unprecedented transaction was to protect the public interest, the interests of the generous Americans who funded this charity with its unique mission of aiding the families of rescue workers, and most importantly, the interests of the families of those heroic victims. With the cooperation of both the current and former mayors, I believe we have established an appropriate framework of accountability that will allow TTF to fulfill its public trust.

Conclusion

There are not always obvious or "right" answers in the post-September 11 charitable world, but, as the guardian of charitable assets in New York, I have urged the importance of having all of us—the regulators, charities and beneficiaries—communicate and coordinate our respective approaches to these issues. Although each charity has its own unique mission, all have come to recognize that the events of September 11 demanded a team response. Only through an ongoing cooperative effort can we possibly hope to provide meaningful and sustained care for the victims of this terrible tragedy. This cooperation is essential if the charities are to maintain the confidence and faith of the American people—faith not only in wise use of the donations raised for this crisis, but also in the integrity of our great tradition of private philanthropy.

Endnotes

1. The Chron. of Philanthropy, March 7, 2002.
2. In addition to our efforts to coordinate the charitable response to September 11, we have fought to ensure that all victims of the September 11 terrorist attacks receive full and fair compensation for their devastating losses. That is why my office, along with Governor Pataki, filed formal objections to the Department of Justice proposed interim regulations governing the administration of the September 11 Victim Compensation Fund—regulations which I believed were unduly restrictive and subverted the intent of Congress to provide monetary relief to all the victims of September 11.
3. *See* N.Y. Exec. Law § 172 (McKinney 2002); N.Y. Est., Powers & Trusts Law § 8-1.4(f)(2) (McKinney 1992 & Supp. 2002).
4. *See also,* N.Y. Not-for-Profit Corp. Law §§ 112, 720 (McKinney 1997); N.Y. Exec. Law § 63 (McKinney 2002); N.Y. Gen. Bus. Law § 349 (McKinney 1988).
5. The *pro bono* team was coordinated by McKinsey & Company, and includes IBM, SilverStream Software, Qwest Communications and KPMG.
6. The participating organizations are the American Red Cross in Greater New York; American Federation of New York; Black Agency Executives, Inc.; The Catholic Charities of the Archdiocese of New York; Catholic Charities Diocese of Brooklyn; Federation of Protestant Welfare Agencies; Hispanic Federation; Human Services Council; Health Association of New York City, Inc.; Safe Horizon; The Salvation Army; UJA-Federation of New York; and United Neighborhood Houses of New York.
7. Thus, for example, on March 21, 2002, I joined with Manhattan District Attorney Robert M. Morgenthau to announce a coordinated arrest of 23 people who fraudulently sought expedited death certificates for relatives claimed to have died in the attack on the World Trade Center on September 11, 2001, when, in fact, none of the alleged deceased died there or were even in the vicinity of the World Trade Center on that day. The purpose of seeking death certificates was to defraud charities, government agencies and/or insurance companies of monies intended for the loved ones of the victims killed in the terrorist attacks.
8. As of the press time of this article, this proposed legislation had passed both the Assembly and the Senate, and was awaiting submission to the Governor for signature.
9. Exec. Order No. 113-33, "Temporary Suspension and Modification of Provisions Relating to Enforcement Actions to Prevent Fraudulent Solicitations of Charitable Donations."
10. *See* Not-For-Profit Corp. Law §§ 510-511 (McKinney 1997).

Eliot Spitzer is the Attorney General of New York State. **The author gratefully acknowledges the assistance of Assistant Attorneys General Marla G. Simpson and Sally G. Blinken, who contributed to the preparation of this article. This article was adapted from testimony given before committee hearings of the United States House of Representatives, the New York State Assembly and the New York State Senate, and supplemented from other materials, including public comments filed with other governmental agencies.**

The Organized Bar in Public Service

By Patricia K. Bucklin

If it's true, as the ancient Greek playwrights wrote, that tragedy ennobles us, then September 11, 2001, when thousands of citizens leading very ordinary lives responded with extraordinary courage and compassion as the unfathomable unfolded before their eyes, became a day when a city and then a nation rose to inestimable heights.

As rescuers, victims, their families and colleagues experienced immeasurable grief, shock, and horror, those of us who were fortunate enough to be far removed from what would become "ground zero" considered ways in which we could lend assistance in this catastrophe.

As one NYSBA leader would come to say as the day drew to a close, "I am not trained to mend broken bones or search for the living amidst mountains of rubble. But I can use my skills as a lawyer to help victims deal with the practical details that surely will follow."

It was against this backdrop that the largest voluntary statewide association of lawyers in the nation moved into action. Drawing from their expertise in the law, sections, committees, rank-and-file members, and staff were quick to recognize the kinds of issues that would now impact thousands of individuals and families:

- families who lost breadwinners and would need immediate financial assistance;
- families who would need proof of death to access insurance and other benefits;
- attorneys who lost offices, equipment, client files and documents;
- clients who had no way of knowing where or how to locate their attorneys.

Drawing on Our Core Strengths

More than 700 NYSBA members were part of teams that volunteered their services in at least one of the following ways:

- provided on-site consultations for victims and family members at one of the disaster relief centers;
- provided direct and continuing legal representation to victims and families.
- donated office space to displaced lawyers;
- offered to lend/share equipment;
- provided staff support to affected colleagues;
- assisted colleagues with cases and helped with document recovery, and;

Sections and committees mobilized quickly, furnishing volunteers for the disaster relief effort and sharing the depth and breadth of their knowledge in helping to produce answers for the frequently asked questions section of the NYSBA-WTC Web site.

Our Trusts and Estates Law Section helped craft procedures for expedited death certificates, and would serve as guardians *ad litem* to children now orphaned. The Tax Law Section worked with the state Department of Taxation & Finance to provide pro bono tax lawyers. Trial Lawyers Section members helped develop an Attorney Hardship Affidavit for lawyers in what would become known as the "frozen-zone," to allow them additional time in pending cases. The Committee on Mass Disaster Response provided direct intake services to families and worked closely with SEMO, FEMA and other relief agencies at the disaster relief sites in New York City.

"As one NYSBA leader would come to say . . .'I am not trained to mend broken bones or search for the living amidst mountains of rubble. But I can use my skills as a lawyer to help victims deal with the practical details that surely will follow.'"

Others Step Forward to Aid the Profession

Assistance would also come from many of our business partners, and from one unlikely source. *New York Lawyers Diary and Manual* aided both the public and the profession by allowing us and other bar associations to post on their Web site a comprehensive listing of address changes for lawyers forced to relocate as a result of the disaster. Additionally, through MicroLaw, Inc., we offered on our Web site access to "Legal

TechAid," which enabled lawyers to find the technical assistance and products they'd need to restart their practices. Lexis and LoisLaw offered products at reduced rates to assist affected lawyers.

In addition, more than 30 letters were received by then President Steven C. Krane from bar presidents throughout the country and the world, including one from the Central Bar of Iran, offering condolences and pledging support.

"At a time when man's inhumanity to man was never more manifest, our response as an Association was never more humane."

Our Courts Would Not Cower

On the night of September 11, Chief Judge Judith S. Kaye announced that terrorism would not prevail and that the court system would remain functioning despite the horrific destruction that took place earlier in the day. She, Chief Administrative Judge Jonathan Lippman, and the entire court system worked nothing short of a miracle in keeping the courts and the justice system operating. Their courage and leadership, especially in those uncertain and apprehensive days immediately after September 11, served to both inspire and amaze the profession and the public.

Less than a week after the attacks on the World Trade Center, our toll-free disaster assistance telephone number was active and our Web site was providing vital information and late-breaking legal news important to victims and lawyers. Our "hotline" continued well into this summer serving the families of the dead, victims, lawyers who were displaced from their offices (more than 14,000 in the WTC and adjacent neighborhoods), and clients who needed help locating their lawyers. To date, more than 1,000 calls and e-mails have been logged.

And now, one year later, as workers finish the grim task of counting body parts and city leaders struggle with defining what will serve as the appropriate lasting monument to that grim day, we search for order out of utter disarray and for meaning out of destruction. Yet, we can measure our response. The organized bar was able to act effectively to meet the needs of the public and the profession in a crisis of historic proportions; and our Association cooperated fully and unstintingly with state and federal government agencies and officials, as well as the court system.

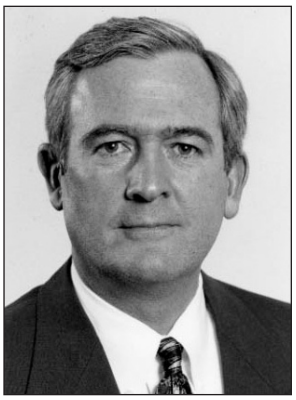
At a time when man's inhumanity to man was never more manifest, our response as an Association was never more humane. We utilized our greatest assets—our members and their keen knowledge of the law, legal procedures, and regulations.

What began as a balmy but otherwise very ordinary late summer day became a day frozen in time, one that will live forever in our collective memory. By day's end, we had seen buildings, once viewed as unyielding, collapse like straw huts and saw scores of people jump to their death rather than face the raging inferno 90 floors above. But, in the days that would follow, we would see the best of what a city, a nation and a profession could do under the most trying circumstances we have faced in more than 60 years. And, we saw heroes emerge as the law prevailed over chaos and fear.

Patricia K. Bucklin is the Executive Director of the New York State Bar Association.

The Workers' Compensation Board's Response to the Death Claims Arising from September 11, 2001

By Robert R. Snashall and Cheryl M. Wood



Robert R. Snashall

On the morning of September 11, 2001, as on other working days, tens of thousands of people were attending their jobs at New York City's World Trade Center. Completed in the 1970s, the World Trade Center was a 16-acre complex in lower Manhattan containing seven office buildings, shopping areas, eateries and transportation links, including two 110-story towers, at which over 50,000 people worked on a daily basis. At 8:45 a.m. on that day, American Airlines Flight 11, carrying 92 individuals, was intentionally flown by terrorists into 1 World Trade Center, the 110-story north tower, causing destruction, explosions and fire. Approximately twenty minutes later, United Airlines Flight 175, carrying 65 individuals, was intentionally flown into 2 World Trade Center, the 110-story south tower, causing additional destruction, explosions and fire. By 10:29 a.m. that day, both towers had totally collapsed after thousands had exited but before thousands more could be evacuated. The impacts and resulting collapses created a scene of mass destruction and death, with thousands losing their lives and numerous others sustaining various injuries.

As many individuals were in some manner in the course of their employment at the time of the attack, an injured individual or the dependents of a deceased employee may be entitled to workers' compensation benefits. The Workers' Compensation Law (WCL) provides medical benefits[1] and wage replacement benefits[2] to workers who are injured due to an accident or occupational disease that arises out of and in the course of employment. In addition, the WCL provides death benefits to statutorily identified dependents of workers who die as a result of an accident or occupational disease that arose out of and in the course of employment.[3]

The New York State Workers' Compensation Board (the "Board") is responsible for adjudicating claims for workers' compensation benefits.[4] The Chair of the Board is the Chief Administrative Officer of the Board.[5] As of September 11, the Board employed approximately 1,685 employees statewide, with 11 District offices and 30 service centers throughout the state. Three-hundred-ninety of those employees worked at the Board's offices in New York City, with the employees in the Brooklyn office actually witnessing the tragic events unfold across the East River in lower Manhattan. Since September 11, the Board has received approximately 6,300 claims related to the attacks on the World Trade Center. Of those claims, approximately 2,200 were death claims and approximately 4,100 were injury claims. To provide perspective, the Board typically receives approximately 400 death claims per year.

Cheryl M. Wood

Considering the significant number of claims, especially the unprecedented number of death benefit claims, it was clear to the Board that in order to honor its commitments to the victims and the families of victims, alternative methods for resolving claims quickly and efficiently needed to be devised. In addition, due to the nature of the tragedy and the response by employers, carriers, the public and the government, novel legal issues would need to be resolved. All of this was especially true for claims for death benefits. This article will examine the Board's response to the death claims that arose from the terrorist attacks on the World Trade Center.

Governor Pataki's Executive Orders

Immediately following the attack, Governor George E. Pataki responded by exercising his authority under the New York State Constitution and the laws of the state, to issue over 50 executive orders. Pursuant to Executive Law § 28, the Governor issued Executive Order No. 113, declaring a State Disaster Emergency within the territorial boundaries of New York State. This Executive Order, pursuant to Executive Law § 29, also directed state agencies to

> take all appropriate actions to assist in every way all persons killed or injured and their families, and protect state property and to assist those affected local governments and individuals in responding to and recovering from this disaster, and to provide such other assistance as necessary to protect the public health and safety.[6]

In addition to declaring a State Disaster Emergency, a vast majority of the executive orders suspended provisions of law pursuant to the Governor's authority under

Executive Law § 29-a. On October 11, 2001, Governor Pataki signed Executive Order No. 113.35 to temporarily suspend the requirement for injured workers or those claiming death benefits due to the death of a worker from the tragedy to notify the employer of the injury or death within 30 days. Further, it suspended the requirement that the notice be in writing and signed. The removal of this provision addressed practical issues regarding the catastrophe, but also provided a level of security for the survivors and families by enabling them to address immediate issues of concern without fear of losing their right to collect workers' compensation benefits. The temporary suspension has been extended every thirty days by additional executive orders.

Workers' Compensation Board Response

Executive Team Actions

At the Governor's direction, the Board acted to award the thousands of families of victims the benefits they were entitled to under the law. In order to implement a coordinated and comprehensive response, the Chair assembled a team of individuals representing executive staff and operations staff from all offices and bureaus. It included the Board's Executive Director, Deputy Executive Director of Information & Management Services, Deputy Director of Regulatory Affairs, General Counsel and the Special Counsel to the Chair. The team met daily from September 12th through the 14th, and weekly thereafter, to discuss the magnitude of the tragedy, assess potential responses, and plan and implement response.

This response had many parts. A major component was outreach, which had two functions: 1) assist victims and the families of victims in obtaining benefits, and 2) gather information to help respond knowledgeably to the crisis. This included the establishment of an information booth at the Family Assistance Center, located at Pier 94 in Manhattan, where citizens could speak with claims examiners. The booth was staffed seven days a week by over 35 Board employees. Some individuals were able to file their claims right at the booth.

In addition, a toll-free hotline was established for victims and families to contact the Board's Advocate for Injured Workers. This hotline was staffed twelve hours a day, seven days a week, for three months. The Board also provided a link on its Internet Web site to a special section devoted to important numbers, information and forms for victims and families.

The Board also accommodated organizations that needed to disseminate information to their members. Immediately following the terrorist attacks, the Chair conducted outreach meetings with the Workers' Compensation Bar Association, the New York State Association of Self-Insureds, the American Insurance Association, the Communication Workers of America, the International Brotherhood of Electrical Workers, the New York State Business Council, the AFL-CIO, the American Insurance Association, and the International Association of Industrial Accidents Boards and Commissions. The Chair informed these organizations of the Board's activities and encouraged further communication.

The Board's Office of General Counsel was vested with the responsibility of coordinating with the New York State Emergency Management Office (SEMO) and the New York State Crime Victims Board. To enable the sharing of information between the Board and the Crime Victims Board, the two agencies entered into an agreement drafted by attorneys in the Office of General Counsel. With this agreement, the Crime Victims Board was able to use the Board's electronic files. In addition, the Office of General Counsel ensured that information was shared with SEMO.

The Office of Special Counsel was charged with contacting and coordinating with the New York State Department of Health and New York City to identify the individuals lost. Due to the unique circumstances of the disaster, there was no complete list. The Office of Special Counsel therefore contacted numerous sources to obtain the necessary information.

A significant part of the outreach focused on the workers' compensation carriers and self-insured employers. The magnitude of the disaster left thousands of families in financial hardship. Following the state's action to continue wages to its deceased employees, the Chair sent a letter encouraging all carriers and self-insured employers to treat this disaster with a high priority and to use WCL § 21-a to make compensation payments without prejudice and without admitting liability. Pursuant to this provision, an employer, or its carrier, if unsure of the extent of its liability, may nevertheless begin compensation payments and continue them for one year, with no prejudice and no admission of liability. If the employer or its carrier continues payment beyond one year, then liability is deemed admitted. Many employers and carriers exercised the option to begin making payments.

Workers' Compensation Board Resolution

To ensure the efficient, proper and compassionate resolution of the numerous death claims, the Board further streamlined its administrative and adjudicatory processes. In the usual case, a death certificate must be submitted to the Board to establish a claim for death benefits. A particularly dreadful aftermath of the horror of the terror attacks was the large number of missing victims presumed to be dead. Generally, New York law requires that the family of a missing person wait three years to obtain a death certificate.[7] To ensure immediate assistance to victims, the Chair convened an emergency session of the Board on September 25, 2001, and introduced a resolution, which was unanimously adopted, to

suspend the requirement for a death certificate in claims for death benefits arising from the events of September 11.

The Board is empowered pursuant to WCL § 142 to hear and determine all claims for compensation or benefits under the WCL and "to make conclusions of fact and rulings of law."[8] Recognizing itself "as the statutorily authorized finder of fact in workers' compensation cases having every right and obligation to judicial notice of accepted facts and to draw reasonable inferences from such facts for the purpose of administering the WCL," the Board took judicial notice of the facts stated in the resolution and eliminated the death certificate requirement. Action was taken

> in an effort to accomplish the BOARD'S statutory and moral duty to process applications for benefits in as timely and efficient a manner as possible, given the circumstances, in order to enable the families of these missing workers to obtain desperately needed benefits of the WCL in this their time of need.

The Board also authorized the creation of an alternative system of establishing death to process the claims, including the submission of proof by affidavit.

With the resolution in place, the Board completed organizing an adjudication team and a new plan to specifically process claims related to the events of September 11, 2001.

Utilization of Technology

A major consideration was to maintain the high level of services provided to claimants across the state with injuries unrelated to the September 11th attacks. To that end, a team consisting of judges and 35 Board personnel from across the state was organized to ensure that no part of the state was short-staffed or underserved. A director was named to head the team and oversee the processing of claims and their adjudication.

Due to recent enhancements in the Board's technology, the agency was equipped to handle the challenges presented by the September 11-related workers' compensation claims. A state-of-the-art computer network connecting the Board's 41 offices across the state certainly helped. The Board's electronic case folder system allows immediate, remote and simultaneous access to the Board's records on individual claims. Through the use of its electronic imaging network, the Board was able to distribute the increased caseload generated by the disaster to offices across the state. The Board was also able to electronically segregate the claims associated with the terrorist attacks so that their filings and progress could be monitored daily.

Additionally, the Board created a virtual claims team so personnel in all districts, including Buffalo, Binghamton and Albany, were able to work on these cases and provide services. Hotlines were established, and telephone calls were distributed across the state with claims examiners from all offices standing by to answer questions and provide comfort to victims and families seeking assistance.

Affidavit and Streamlined Adjudication

Authorizing the use of an affidavit to submit proof, the Board alleviated the need to submit a death certificate or to appear for a hearing before the Board in order to receive benefits. In the usual case, the claimants must appear at a hearing to provide information regarding their relationship to the deceased, information about the dependents of the deceased, and any information about the circumstances of the deceased's death. To spare the families of victims from having to undergo this questioning, to prevent delay due to limited hearing time, and to replace the need for death certificates, the affidavit was created.

The adjudication process was also modified. Rather than scheduling a hearing, when the Board received the employer's report or the compensation claim, a packet was sent to the victim's family containing the general affidavit with explanatory instructions. Upon receipt of the completed affidavit, and the supporting documentation,[9] the Board would simply issue a decision wherever there was no dispute. The decision established the case and determined the average weekly wage, the appropriate recipients of the benefits, and the amount of the benefits.

All cases with controversies would be referred to the hearing process. In order to ensure the prompt handling of death benefit cases related to September 11, 2001, the Board designated all such cases as "expedited." Pursuant to WCL § 25(3)(d), cases may be placed on the expedited hearing calendar when deemed necessary. When a case proceeds as expedited, stiff penalties apply for any unjustified delays. Therefore, increased incentives exist for all parties to be prepared and to resolve issues quickly.

The adjudication team is comprised of judges from around the state. The Board provided training for the judges prior to the start of hearings on the particular legal issues and medical complaints they might encounter.

Additional Issues

September 11th Victim Compensation Fund

The Air Transportation Safety and System Stabilization Act (ATSSSA),[10] created the September 11th Victim Compensation Fund of 2001 (VCF),[11] to provide com-

pensation to those who were injured or to the families or dependents of those killed.

In determining the award to be paid by the VCF, the amount of compensation must be reduced by the amount of collateral source compensation the claimant has received or is entitled to receive.[12] The term "collateral source" is broadly defined in the Act.

Potential claimants of the VCF were concerned about the reduction of the award from the VCF due to the receipt of workers' compensation benefits. In response to the numerous concerns, the commentary to the final regulations clarified that, where collateral sources are death benefits that provide periodic payments subject to adjustment or termination depending on unpredictable, contingent or unknown future events, the Special Master who administers the VCF[13] has discretion not to require a full deduction of the amount of the collateral source. For example, "the Special Master has determined that workers' compensation benefits that are payable only if the spouse does not re-marry will only be offset to the extent they have already been paid."[14] On the other hand, if the benefits can be reasonably computed, such as periodic payments to children until the age of 18, there will be an offset.[15]

September 11th Victims & Families Relief Act

Many family members of victims who were receiving workers' compensation benefits were concerned that if they received an award from the VCF they would lose their workers' compensation benefits. WCL § 29 grants the employer and the workers' compensation carrier a lien on the proceeds of any action against a third-party tortfeasor for compensation benefits it has paid. The lien will be reduced by the employer and compensation carrier's equitable portion of the reasonable and necessary costs, including attorney fees, incurred in obtaining the recovery.

Additionally, WCL § 29 provides that the employer and compensation carrier have a credit, or offset, for future benefits, if the amount of the third-party recovery exceeds the lien. This section also provides that the claimant must obtain the consent of the compensation carrier before settling any action in order to preserve the right to receive future workers' compensation benefits. In other words, if the claimant does not request and obtain the consent of the carrier before settling an action, the claimant will be precluded from future benefits. Finally, WCL § 29 provides that if the claimant fails to bring an action within six months or within one year from the date the action accrued, in this case September 11, 2002, the cause of action is assigned to the carrier.

Section 405(c)(3)(B)(i) of the ATSSSA provides that upon submittal of a claim to the VCF, the claimant waives the right to file a civil action in any court for damages related to September 11, 2001, and that the United States has the right of subrogation with respect to any claim it paid. The Final Rules contain a provision, entitled *Subrogation*, which provides that:

> Compensation under this Fund *does not constitute the recovery of tort damages against a third party nor the settlement of a third party action*, and the United States shall be subrogated to all potential claims against third party tortfeasors of any victim receiving compensation from the Fund. *For that reason, no person or entity having paid other benefits or compensation to or on behalf of a victim shall have any right of recovery, whether through subrogation or otherwise, against the compensation paid by the Fund.*[16]

Based upon this language, a claimant's submission of a VCF claim does not constitute a compromise of a third party action and, therefore, a lien cannot attach. Case law supports this conclusion by suggesting a reluctance by the courts to recognize the section 29 rights of employers and compensation carriers when the assertion of those rights could upset the purpose and intent of the federal statutory provision.[17]

To alleviate the concern of victim's families, Governor George Pataki enacted the September 11th Victim and Families Relief Act.[18] The Act, which took effect immediately upon signing, adds a new subdivision 1-b to WCL § 29 to provide that a carrier or self-insured does not have a lien or right of offset on the proceeds of any award from the September 11th Victim Compensation Fund of 2001.

Memorial Services

An issue that arose shortly after September 11, 2001, was whether the WCL provided reimbursement for expenses incurred when the family held a memorial service, rather than a funeral for a victim of the tragedy whose body was not recovered. WCL § 16(1) provides that funeral expenses shall be awarded when injuries result in death. This provision also authorizes the promulgation of regulations regarding funeral expenses and the maximum fees paid. This subdivision does not define funeral expenses. The regulations set the maximum at which funeral expenses will be reimbursed and defines funeral expenses to include, but not be limited to, "grave sites; headstone; organist; priest, minister, rabbi or other officiant; removal from hospital; casket; vault; chapel rental; embalming; preparation fees; hearse; cemetery fees including plot; death certificates; newspaper ad; and cremation costs."[19]

While neither the statute nor regulation explicitly provide for reimbursement for memorial service expenses, neither do they explicitly prohibit such reimbursement. A review of the items specifically listed in the reg-

ulation reveals that many are identical to those incurred from a memorial service. Since its passage, the courts have held that the workers' compensation law is to be liberally construed to serve the underlying purposes and in favor of the workers and their dependents.[20] Therefore, in light of the extraordinary situation, the purpose of the WCL and the law itself, the Board has ordered payment for, and reimbursement of, memorial services expenses. The workers' compensation insurance carriers have not objected to those orders.

Continued Payment of Wages

After the tragedy, many employers continued to pay victims, many of whom had perished. WCL § 25(4)(a) provides that if the employer makes advance payment of compensation or made payments to an employee in like manner as wages, it is entitled to reimbursement, provided the claim for reimbursement is filed before an award is made. If a request for reimbursement is not filed before award of compensation is made, the reimbursement is waived. In usual cases, any advance payment of wages is made to the injured employee. When reimbursement is requested, the insurance carrier reimburses the employer and any duplicate payments are deducted from future workers' compensation payments to the employee. The continued payment to deceased employees has raised issues regarding the reimbursement of employers. The Board is exploring its options with regard to this matter.

The Aggregate Trust Fund

A further outstanding issue is whether or when the Board will require the payment of the present value of all unpaid death benefits into the Aggregate Trust Fund. WCL § 27 authorizes the Board, at its discretion, at any time, to compute and permit or require the payment into the Aggregate Trust Fund created by this section, the present value of unpaid death benefits along with an additional sum for administration expenses. Since surviving spouses receive death benefits for life or until remarriage, the amount of such a deposit could be significant. With the number of death claims, the effect of ordering such deposits must be considered. In addition, it is not clear what effect such a deposit would have on the calculation of an award from the VCF. The Board is continuing to monitor the situation, to determine the appropriate course of action.

Conclusion

The ability of the Board to process the unexpected 2,200 death claims, without diminished services to all other cases pending with the Board, would not have been possible without Governor Pataki's initiatives in reforming the workers' compensation system, through legislative changes and the allocation of resources. Without the support of the legislature for the statutory changes and the Board's initiatives, it would not have had the capacity to respond effectively. Further, the cooperation, dedication, teamwork and professionalism of the 1,700 Board employees was essential to the Board's ability to provide benefits quickly to those in need. The Board is also appreciative for the dedicated efforts of the entire workers' compensation constituent community during this difficult time. The contributions and support of all of these parties enabled the Board to meet the many and varied challenges presented as a result of the events of September 11th and to develop creative ideas and procedures that may benefit all workers' compensation claimants in the future.

Endnotes

1. N.Y. Workers' Compensation Law § 13 (WCL).
2. WCL § 15.
3. WCL § 16.
4. WCL § 142.
5. WCL § 141.
6. N.Y. Comp. Codes R. & Regs. tit. 9, § 5.113 (N.Y.C.R.R.).
7. N.Y. EPTL § 2-1.7.
8. WCL § 142(1).
9. Though the process was changed, the Board still required that claimants demonstrate their relationship to the victim through the submission of copies of marriage certificates and birth certificates, and provide information about the victim's average weekly wage. In addition, where applicable, guardianship papers were also requested. The necessary documents that must be submitted are clearly identified on each affidavit for the convenience of the claimants.
10. Pub. L. 107-42, 115 Stat. 230 (effective Sept. 22, 2001).
11. Pub. L. 107-42, tit. IV, 115 Stat. 237-241.
12. Pub. L. 107-42, tit. IV, § 405(b)(6), 115 Stat. 239.
13. Pub. L. 107-42, tit. IV, § 404, 115 Stat. 237.
14. 67 Fed. Reg. 11,241 (Mar. 13, 2002).
15. *Id.*
16. 28 C.F.R. § 104.63 (emphasis added).
17. *Atkinson v. City of New York*, 270 A.D.2d 483 (2d Dep't 2000).
18. Section 3 of Chapter 73 of the Laws of 2002.
19. 12 N.Y.C.R.R. § 311.1.
20. *In re Petrie,* 215 N.Y. 335 (1915); *Costello v. Taylor,* 274 A.D. 325 (1916); and *Tate v. Dickens' Estate*, 276 A.D. 94 (1949). "As a remedial statute serving humanitarian purposes, the Workers' Compensation Law should be liberally construed." *Burns v. Robert Miller Construction, Inc.*, 55 N.Y.2d 501, 508, 450 N.Y.S.2d 173 (1982).

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Discriminatory Treatment on the Roadways: Pretextual Traffic Stops of Middle Easterners After *People v. Robinson*

By Alicia R. Ouellette

Less than a month after the September 11, 2001, terrorist attacks, the New York Court of Appeals heard oral argument in three criminal cases with no apparent relation to the attacks or their aftermath.[1] The Court's decision in those cases,[2] however, may have a profound impact on people of Middle Eastern descent in light of other post-September 11 changes. The decision puts the Court's imprimatur on pretextual traffic stops, "traffic infraction stops that would not have been made but for the aim of the police to accomplish an otherwise unlawful investigative seizure or search."[3] Thus, the decision limits the rights of members of populations targeted by the police by making them subject to seizure for even the most minor traffic offenses.[4] Post-September 11 regulatory and legislative changes target people of Middle Eastern descent[5] for investigation, and Justice Department policy now empowers local police to act as agents against terrorism.[6] As a result, targeted pretextual traffic stops of people of Middle Eastern decent are a very real threat on New York's roadways.

This article first examines the pretext stop decision, *People v. Robinson*, to explain how the New York Court of Appeals came to limit protection against illegal search and seizure. The article then explores how public opinion and policy toward ethnic profiling has changed since September 11. In particular, the article argues that many public officials and public policies now accept profiling of Middle Easterners as a valid law enforcement tool. Next, the article shows how federal and state governments have directly enlisted local police in investigating and tracking Middle Easterners in the United States. Finally, the article concludes that the effect of *Robinson* and other post-September 11 changes is a chilling one: New York police, as designated agents against terrorism, armed with the right to stop anyone in a car as long as a minor traffic offense can be identified, may now view their mission as targeting people who appear to be Middle Eastern, Arab or Muslim for stops on the roadways.

A. *People v. Robinson*

In *People v. Robinson*, a 4-3 decision authored by Judge George Bundy Smith, the Court's only African-American judge, the New York Court of Appeals held that the state's constitutional protection against unreasonable searches and seizures,[7] like the federal Fourth Amendment,[8] does not prohibit the police from stopping drivers on the pretext of a traffic offense.[9] Even if the officer pulls a driver over because of her race or on less than reasonable suspicion of criminal activity, the stop does not violate the prohibition against illegal search and seizure if the officer had reasonable suspicion the driver committed some traffic offense.[10] The traffic offense may be so minor as to be regularly ignored, like having an air freshener hanging from a rear view mirror or momentarily traveling a few inches over the white line.[11] "Neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" to the constitutional inquiry.[12] The practical result of the ruling is to "legitimize[] police stops of motor vehicles for any reason. . . . '[A]ny citizen [is] fair game for stop, almost any time, anywhere, virtually at the whim of the police.'"[13]

The *Robinson* decision dramatically changed search and seizure law in New York. Courts in this state had been unanimous in condemning pretextual stops,[14] at least until the Supreme Court's 1996 decision in *Whren v. United States*.[15] In *Whren*, the Court held that the Fourth Amendment does not protect citizens against pretextual traffic stops. The defendants in *Whren* were stopped after police observed a car with temporary license plates remaining at an intersection "for what seemed like an unusually long time."[16] The officers suspected drug activity and made a U-turn toward the car. The car sped off without signaling. The officers pulled the vehicle over and confiscated cocaine. The defendants contested the search on the ground that the officers used the alleged traffic infraction as a pretext to investigate drug activity, for which the officers did not have reasonable suspicion.[17] The defendants argued that the reasonableness of the investigatory stop under the Fourth Amendment should be evaluated according to whether the police officer had reasonable suspicion that the defendant had committed the crime for which the officer actually hoped to obtain evidence.[18]

The Supreme Court rejected the defendants' argument. The Court stated that its prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[19] "Subjective intentions," according to the Court, "play no role in ordinary, probable-cause Fourth Amendment analysis."[20] The Court held that where a police officer has probable cause to detain a person for a traffic violation, the seizure does not violate the Fourth Amendment even if the traffic violation is used as a pretext to investigate some other matter.[21]

Following *Whren*, the lower courts in New York split as to whether the state constitutional prohibition against unreasonable searches and seizures provided any greater protection.[22] The Court of Appeals faced the issue in October 2001. The court heard three cases together, *Robinson, Reynolds,* and *Glenn*.

In the lead case, *People v. Robinson*, New York City police officers on night patrol in the Bronx were assigned to follow taxicabs to prevent robberies.[23] The officers observed a livery cab speed through a red light. They pulled the cab over to give the driver a leaflet on safety. One officer noticed that the defendant, a passenger in the cab, was wearing a bulletproof vest. The officer then saw a pistol on the floor of the cab when he ordered the defendant to get out.

On trial for weapon and vest charges, the defendant moved to suppress both pieces of evidence on the ground that the officers used a traffic infraction as a pretext to search the occupant of the car. At the hearing, the officers admitted that they had no intention of giving the driver a summons for the traffic violation. Nevertheless, the motion was denied and the defendant was convicted.[24] The Appellate Division, First Department, applied *Whren* and affirmed.[25]

In *People v. Reynolds*, the second case, a police officer observed a man he knew to be a prostitute enter the defendant's truck.[26] Suspecting solicitation of prostitution, the officer followed the truck and ran a computer check on the license plate. Upon learning that the vehicle's registration had expired two months earlier, the officer stopped the vehicle. The defendant was arrested and subsequently charged with driving while intoxicated and operating an unregistered motor vehicle. In this case, the charges were dismissed by the trial court because the stop was a pretext to investigate prostitution; an appellate term of the Supreme Court affirmed.[27]

In *People v. Glenn*, the third case, police observed a Manhattan livery cab make a right hand turn without signaling.[28] When an officer noticed one of three passengers in the back seat lean forward, the police stopped the vehicle to investigate whether a robbery was in progress. There was no robbery, but the police found cocaine in the cab and on the defendant in person. The defendant's suppression motion was denied, and the Appellate Division, First Department, adopted *Whren*, and held that the officer's probable cause to believe that the driver turned without signaling justified the stop.[29]

The Court of Appeals majority—Judges Smith, Wesley, Rosenblatt, and Graffeo—approved Justice Scalia's reasoning from *Whren*. In the opinion by Judge Smith, the majority ruled that probable cause to believe that a traffic infraction has been committed justifies stopping the automobile under Article I, section 12 of the New York State Constitution. Adopting the Supreme Court's rationale, the majority explained that, "[i]n making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant."[30]

The majority said that Court of Appeals' precedent had never required courts to inquire into the subjective intent of police officers when considering the legality of roadside stops. Moreover, the majority expressed concern that a rule requiring courts to look into the subjective intent of police officers for pulling over a car would be unworkable. The majority further asserted that dissenters' fear about the discriminatory treatment of minorities by police was misplaced. Recognizing that "discriminatory law enforcement has no place in our law," the majority insisted that the relief for any discriminatory treatment lies in a cause of action for violation of constitutional equal protection.[31]

The dissent, authored by Judge Levine and joined by Chief Judge Kaye and Judge Ciparick, would have held that traffic stops are impermissible under the state Constitution if a reasonable police officer with traffic enforcement responsibilities would not have stopped the vehicle for the traffic infraction.[32] The dissenters argued the state's guarantee against illegal search and seizure prohibits arbitrary police conduct.[33] Pretextual stops, although accompanied by probable cause to believe a traffic infraction has occurred, nonetheless do permit arbitrary police conduct. Contrary to the majority's insistence, "the existence of probable cause that the infraction was committed is manifestly insufficient to protect against arbitrary police conduct."[34] As Judge Levine elaborated:

> First, motor vehicle travel is one of the most ubiquitous activities in which Americans engage outside the home. Second, it is, by an overwhelming margin, the most pervasively regulated activity engaged in by Americans. Because virtually every aspect of the operation and equipping of motor vehicles is codified, the *Whren* petitioners' assertion—that "since * * * the use of

> automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation"—was so self-evidently true that it went unchallenged.[35]

The dissent further argued that the statistics showing that pretextual stops are conducted against a disproportionately high number of African-Americans confirm the danger of giving the police the "wide discretion to engage in investigatory seizures, only superficially checked by the probable cause requirement."[36] The theoretical existence of a constitutional tort claim is no comfort, said the dissent, because it is practically impossible to establish a viable claim based on intentional discriminatory treatment.[37]

"Under Robinson, *an officer can stop a motorist, solely because he appears to be Middle Eastern, if he has a broken headlight or a pine air freshener hanging in the rearview mirror."*

B. U.S. Department of Justice Actions and Other Factors

Much evidence exists that the outcry against profiling by race or ethnicity prior to September 11 has been replaced by an official policy, overwhelmingly supported by the public, that makes profiling of people with ties to the Middle East good law enforcement practice.

Almost immediately after the terrorist attacks, the federal government scuttled its efforts to make racial profiling a federal crime.[38] Before September 2001, President Bush and Attorney General John Ashcroft had moved to make racial profiling by law enforcement agencies a federal crime.[39] After the attacks, Ashcroft knocked the proposed law off the table.

Next, the government singled out Middle Easterners as potential terrorists. In the weeks following the attacks, over 900 people, almost all of Middle Eastern descent, were arrested or detained.[40] Congress passed legislation that allows the indefinite detention of anyone deemed a "threat" to national security.[41] The Department of Justice then sought to interrogate over 5,000 men, the overwhelming majority from the Middle East.[42] In the following months, thousands of Middle Eastern resident aliens were questioned and several Arab-Americans spent weeks in jail without having been charged.[43] The Department of Justice then announced rules giving FBI agents working on detecting terrorism leeway to attend mosques without first having evidence of wrongdoing.[44]

Ashcroft is now pushing regulations that would require tens of thousands of Muslim and Middle Eastern visa holders to register with the federal government and submit to fingerprinting.[45] The regulations would require dissemination of the information to law enforcement agencies.

Apparently, the public largely approves of the crackdown.[46] In fact, one nationwide public opinion poll showed that nearly seven in ten Americans believe law enforcement should be able to randomly stop people fitting the profile of a terrorist, even if that profile is defined as a person of Arab descent.[47] Another found that 54 percent of Americans approve "of using racial profiling to screen Arab-male airline passengers."[48] Even formerly adamant opponents of racial profiling, such as Senator Dianne Feinstein of California, have stated publicly that the fear of racial profiling is impeding good law enforcement.[49]

In addition to adopting a policy that favors targeting Muslims or Middle Easterners, the federal government has enlisted local police in the cause.[50] Attorney General Ashcroft first asked local police to help the Justice Department interview over 5,000 predominantly Middle Eastern men.[51] In March, he again prevailed upon local police to engage in a second round of interviews with non-immigrants from predominantly Muslim countries.[52] He now seeks regulations that would provide local police with information about tens of thousands of Muslim and Middle Eastern visa holders collected through a registration process.[53]

State officials are taking the same course. A bill pending before both houses of the New York State Legislature would require that colleges and universities collect data on foreign students for dissemination to state and local authorities. The information collected would include the whereabouts and activities of students visiting from the Middle East.[54]

These federal and state efforts to enlist law enforcement at every level in the fight against terrorism may well convince New York's police that they are responsible for tracking Middle Easterners. State and local police patrol streets. They may follow motorists with Middle East connections. *Robinson* lets them do more. Under *Robinson*, an officer can stop a motorist, solely because he appears to be Middle Eastern, if he has a broken headlight or a pine air freshener hanging in the rearview mirror. The officer need not fear that the fruits of that stop will be deemed objectionable and excluded as improperly obtained. Additionally, any worries about an equal protection lawsuit are negligible because of the "nearly insurmountable" burden of proof in such cases. Thus, the *Robinson* decision puts thousands of innocent people of Middle Eastern descent at risk of

arbitrary[55] police stops—stops instigated by nothing more than ethnic profiling.

"[T]he confluence of the Court of Appeals' decision in Robinson, *the increasing acceptance . . . of ethnic profiling, . . . makes the threat of discriminatory treatment . . . on New York roadways quite real."*

Being stopped by the police is not a benign experience, even for the innocent. Police stops are traumatic for the driver and passengers. A pattern of stops against a particular community can breed discontent and distrust of the police.[56] Indeed, the literature detailing the tragic experiences of African-Americans stopped for "driving while black" is chilling.

The legacy of *Robinson* may be that it subjects yet another community to that dreadful experience.

C. How Real Is the Problem?

Will pretextual traffic stops become a real problem for people of Middle Eastern descent? Only time will tell. Violent anti-Muslim incidents in the United States increased from 366 validated reports in 2001 to 1,125 this year.[57] Also, 60,000 American Muslims have reported a negative impact from U.S. government policies since the terrorist attacks of September 11, 2001.[58] The thousands of reports of violence, threats, and discrimination against Arabs and Asians in the months following September 11 have involved airport discrimination, private assaults, and employment discrimination—not highway stops.[59] It is theoretically possible that Middle Easterners have not been and will not be subject to the random stops on the highways.[60] On the other hand, the confluence of the Court of Appeals' decision in *Robinson*, the increasing acceptance and occurrence of ethnic profiling, and the enlistment of state and local police officers in the battle of against terrorism, makes the threat of discriminatory treatment against people of Middle Eastern descent on New York roadways quite real.

Endnotes

1. The Court heard argument in *People v. Robinson*, *People v. Reynolds*, and *People v. Glenn* on Oct. 10, 2001.
2. *People v. Robinson*, 97 N.Y.2d 341 (2001).
3. *Id.* at 363 (Levine, J., dissenting).
4. *Id.*
5. The term is used broadly here to include visitors, resident aliens, and U.S. citizens originally from Arab or predominantly Muslim countries.
6. Examples include Attorney General John Ashcroft's use of state and local police to interview thousands of Middle Eastern men, and a Justice Department ruling allowing local police to enforce federal immigration laws. *See New Round of Interviews Planned with Foreigners*, Wall St. J., Mar. 21, 2002, at A1; Eric Schmitt, *Ruling Clears Way to Use State Police in Immigration Duty*, N.Y. Times, Apr. 4, 2002, National Desk.
7. N.Y. Const. art. I, § 12.
8. *See Whren v. United States*, 517 U.S. 806 (1996) (holding that an investigatory stop of a motorist is valid regardless of the officer's actual motivation so long as an officer has an objectively reasonable belief that a traffic violation exists).
9. *People v. Robinson*, 97 N.Y.2d 341 (2001).
10. The majority opinion in *Robinson* acknowledged that racially motivated investigations may violate the equal protection rights of those stopped because of their race. *Id*. at 352; *see also Brown v. State*, 89 N.Y.2d 172 (1996); *Brown v. City of Oneonta*, 195 F.3d 111, 118-19 (2d Cir. 1999) (stating that an equal protection violation may be premised on racial profiling, which exists where police use intentional and express classifications based upon race). The difficulty with bringing a successful equal protection claim against the police is well documented; *see* Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling after* Whren v. United States*: The New York and New Jersey Responses Compared*, 63 Alb. L. Rev. 725 (2000); *People v. Robinson*, 97 N.Y.2d at 367 (Levine, J., dissenting) ("the problems of proof in establishing an equal protection claim may be all but insurmountable").
11. Judge Levine's dissent in *Robinson* cites the following examples: *United States v. Smith,* 80 F.3d 215 (7th Cir. 1996), where a suspected drug courier was followed for 0.7 miles and then stopped for an air freshener hanging from the vehicle's rearview mirror; *United States v. Miller,* 821 F.2d 546 (11th Cir. 1987), in which a stop was made for crossing over the white painted lane marker by four inches during an interval of 6.5 seconds; *United States v. Hill,* 195 F.3d 258 (6th Cir. 1999), *cert. denied,* 528 U.S. 1176 (2000), in which a sheriff's deputy decided to follow a U-Haul truck driven completely lawfully "because it was a U-Haul, and because it had been his experience that U-Hauls carry narcotics," until, after almost a mile, a speeding violation was detected; *United States v. Roberson,* 6 F.3d 1088, 1092 (5th Cir. 1993), *cert. denied*, 510 U.S. 1182, 1204, *cert. denied,* 511 U.S. 1010 (1994), in which a trooper, pursuing a speeder, passed the defendant's van, which displayed out-of-state license plates and was occupied by four black men. Abandoning the pursuit of the other car, the trooper crested a hill, pulled onto the shoulder of the highway, doused his lights and activated his radar gun as the van approached. The van was found to be traveling only three miles per hour over the speed limit. However, in changing lanes to avoid the risk of contact with the trooper's car, the driver failed to signal, although the van was "apparently the only moving vehicle on that stretch of road." *Id.* at 1089. The trooper made the stop for that infraction. *See also People v. Laws,* 213 A.D.2d 226 (1st Dep't 1995) (the defendant's vehicle was observed parked in front of a suspected "narcotics location," and was subsequently pulled over for a broken taillight); *People v. Young*, 241 A.D.2d 690 (3rd Dep't 1997) (a driver was stopped by a plainclothes state police investigator for failure to signal); *People v. Letts*, 180 A.D.2d 931 (3rd Dep't 1992) (a driver was stopped by a plainclothes state police investigator for failure to come to a complete stop at a stop sign). *Robinson*, 97 N.Y.2d at 364-365 (Levine, J. , dissenting).
12. *Robinson*, 97 N.Y.2d at 347.
13. Abramovsky & Edlestein, *supra* note 10, at 733, quoting David A. Harris, "*Driving While Black" and All other Traffic Offenses: The*

Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 545 (1997); *see also* David A. Moran, *New Voices on the War on Drugs: The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 Vill. L. Rev. 815 (2002).

14. *See, e.g.*, *People v. Flanigan*, 56 A.D.2d 658 (2d Dep't 1997); *People v. Ynoa*, 223 A.D.2d 975 (3rd Dep't 1996); *People v. James*, 217 A.D.2d 969 (4th Dep't 1995); *People v. Vasquez*, 173 A.D.2d 580 (2d Dep't 1991); *People v. Watson*, 157 A.D.2d 476 (1st Dep't), *appeal dismissed*, 75 N.Y.2d 971 (1990).
15. 517 U.S. 806 (1996).
16. *Whren*, 517 U.S. at 808.
17. *Id.*
18. *Id.* at 810.
19. *Id.* at 813.
20. *Id.*
21. *Id.*
22. *See* Abramovsky & Edelstein, *supra* note 10, at 733-43 for an extended discussion of the pre-*Robinson* response to *Whren* by the New York courts.
23. *Robinson*, 97 N.Y.2d at 347.
24. *Id.*
25. 271 A.D.2d 17 (1st Dep't 2000).
26. *People v. Reynolds*, 185 Misc. 2d 674 (App. Term, N.Y. Co. 2002).
27. *Robinson*, 97 N.Y.2d at 347.
28. *Id.*
29. *People v. Glenn*, 279 A.D.2d 422 (1st Dep't 2001).
30. *Robinson*, 97 N.Y.2d at 349.
31. *Id.* at 352.
32. *Id.* at 360.
33. *Id.* at 361.
34. *Id.* at 363.
35. *Id.*
36. *Id.* at 364.
37. *Id.* at 367.
38. Derrick DePledge, *Promise to End Racial Profiling on Back Burner after September 11*, Gannett News Service, Apr. 19, 2002.
39. *Id.*
40. *See* Leslie Castro, et al., *Perversities and Prospects: Whither the Immigration Enforcement and Detention in the Anti-Terrorism Aftermath?*, 9 Geo. J. Poverty & Pol'y 1, 10; *Nightline: Profile* (ABC television broadcast, Oct. 1, 2001), *available at* 2001 WL 21773011.
41. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).
42. Kevin Johnson, *Justice Seeks to Question 5,000 Possible Witnesses*, USA Today, Nov. 14, 2001, at A14.
43. *Id.*
44. *See FBI Shouldn't Be Infiltrating Mosques, Churches*, Newsday, June 2, 2002, at B2.
45. Eric Schmitt, *Ashcroft Proposes Fingerprinting Visas' Holders*, N.Y. Times, June 5, 2002 at A1; Eric Schmitt, *U.S. Will Seek to Fingerprint Visas' Holders*, N.Y. Times, June 4, 2002.
46. *See Nightline: Profile* (ABC television broadcast, Oct. 1, 2001), *available at* 2001 WL 21773011.
47. *See* Mark Z. Barabak, *America Attacked—Times Poll*, L.A. Times, Sept. 16, 2001 at A1.
48. *Bush Approval at 74% in Fox News Poll*, The White House Bulletin, June 7, 2002, Poll Watch.
49. Zachary Coile, *Feinstein Says Racial Profiling Fears Hinder FBI, Admit that Nationality is Key, She Says*, N.Y. Times, June 3, 2002 at A8.
50. Eric Schmitt, *Ruling Clears Way to Use State Police in Immigration Duty*, N.Y. Times, Apr. 4, 2002, at A1.
51. Danny Hakim, *Inquiries put Middle Eastern Men in Spotlight*, N.Y. Times, Nov. 16, 2001, at B1.
52. *See New Round of Interview Planned with Foreigners*, Wall Street Journal, Mar. 21, 2002, at A1; Eric Schmitt, *Ruling Clears Way to Use State Police in Immigration Duty*, N.Y. Times, Apr. 4, 2002, National Desk.
53. Eric Schmitt, *Ashcroft Proposes Fingerprinting Visas' Holders*, N.Y. Times, June 5, 2002, at A1; Eric Schmitt, *U.S. Will Seek to Fingerprint Visas' Holders*, N.Y. Times, June 4, 2002.
54. New York State Assembly Bill A.09773, New York Senate Bill S.6043-B; *see* AP, *U.S. Moves to Fingerprint, Photograph Visitors*, Toronto Star, June 6, 2002, at A16 (detailing New York proposal).
55. To be sure, a stop motivated solely by race or ethnicity would violate the Equal Protection Clause, and would therefore be illegal as well as arbitrary. The victim of such an illegal stop is almost always without legal redress, however. *Robinson*, at 367 (Levine, J., dissenting).
56. David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265.
57. The Status of Muslim Civil Rights in the United States, Report of the Council for American-Islamic Relations, April 2002, *available at* http://www.cair-net.org/civilrights2002/.
58. *Id.*
59. Alex Chadwick, *Muslims in America Feel Subjected to Double Standard of Justice Since September 11 Terrorist Attacks*, NPR, *Morning Edition* (Apr. 8, 2002). At least one commentator questions whether the hundreds of reported incidents amount to an upswing in discrimination against Muslims at all. Jim Edwards, *Post Sept. 11 Backlash Proves Difficult to Quantify*, N.Y.L.J., June 12, 2002.
60. For example, a local department in Oregon has refused to cooperate with Ashcroft's request to interview Middle Eastern men. Lynn Marshall, *Now Portland Comes in For Questioning*, L.A. Times, Nov. 30, 2001, at A1.

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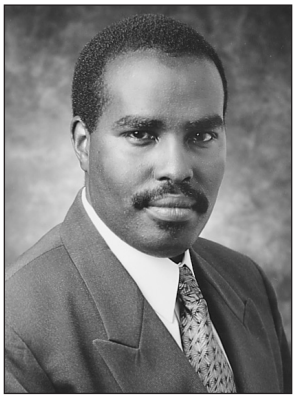
Consumer and Pharmaceutical Dimensions of Addressing Bio-Terrorism: An Analysis of *In re Ciprofloxacin Hydrochloride Antitrust Litigation*

By James Thuo Gathii



A few short weeks after the September 11 terrorist attacks, the Eastern District of New York issued its decision in *In re Ciprofloxacin Hydrochloride Antitrust Litigation*.[1] Seen against the background of these attacks, the tremendous loss of life and the ensuing bio-terrorist threat posed by at least five anthrax-related fatalities between September 11 and November 22, 2001, the significance of this little-noticed antitrust decision begins to emerge.[2] In fact, the need on the part of the United States to amass a stockpile of Ciprofloxacin in response to the bio-terrorist threat[3] needs to be seen in light of the way in which Bayer's control of the market for this patented drug prior to September 11, 2001, was unreasonably restraining its availability.

This suit was a consolidated action against Bayer A.G., a German corporation and its American subsidiary, Bayer Corporation, by prescription drug consumers from various states. Bayer is the sole manufacturer of the popular antibiotic Ciprofloxacin. Ciprofloxacin has led worldwide sales of all antibiotics for at least the last eight years. It is also the 11 most-prescribed drug in the United States. It has earned Bayer more than $1 billion in sales revenue. Bayer holds a patent over '444, the active ingredient in Ciprofloxacin. The patent was filed with the Patent and Trademark Office on May 29, 1984, and issued to Bayer on June 2, 1987.

The consumers contended that Bayer had violated state antitrust laws by depriving them of their right to a market in which manufacturers and distributors of generic equivalents of Ciprofloxacin made their decisions about challenging patents and entering the market free from the influence of cash payments from Bayer to these generic manufacturers and distributors. The consumers therefore argued that these cash payments amounted to unreasonable restraints of trade contrary to state antitrust and consumer laws.

The facts leading to Bayer's cash payments to Barr Laboratories are as follows. In October 1991, the generic manufacturer referred to here, Barr Laboratories, had challenged Bayer's '444 patent under the Drug Price Competition and Patent Term Restoration Act of 1994 (known as the Hatch/Waxman Act). The Hatch/Waxman Act encourages generic manufacturers to compete in the sale of patented drugs by manufacturing bio-equivalent generics of already patented drugs. It does this by telescoping the long and expensive process of verifying the safety and efficacy of the drug to the Food and Drug Administration (FDA).[4] To benefit from expeditious FDA approval, a generic manufacturer needs to demonstrate to the FDA that its bio-equivalent generic contains the same active ingredient as the drug already approved by the FDA and that it will not infringe on the patented drug. Alternatively, a generic manufacturer would have to demonstrate to the FDA that the patented drug is invalid for specified factual and legal reasons in an Abbreviated New Drug Application (ANDA) filing.[5]

Bayer filed a patent suit challenging Barr Laboratories' ANDA filing claim that its '444 patent was invalid and unenforceable. Bayer lost this patent suit. As a result, Bayer entered into a settlement agreement with Barr Laboratories and other parties to the patent suit. As part of the agreement, Bayer agreed to pay Barr Laboratories over $100 million. In consideration, Barr Laboratories agreed to drop its challenge to the validity of Bayer's patent and its plans to market generic Ciprofloxacin as contemplated in its ANDA filing.[6]

It is this agreement that Ciprofloxacin prescription consumers challenged in *In re Ciprofloxacin Hydrochloride Antitrust Litigation*. The consumers contended that Bayer's execution of the agreement constituted an unlawful restraint of trade in the market for Ciprofloxacin, particularly because it effectively eliminated the possibility of generic competition. The consumers further contended that by requiring Barr Laboratories to recognize the validity of Bayer's '444 patent, Bayer caused them injury since they were precluded from having access to generic Ciprofloxacin at a lower price than Bayer charged for its patented bio-equivalent.

Though the case before the United States Eastern District of New York substantially involved Bayer's removal of the case to federal court on grounds of federal question jurisdiction, the court's determination is instructive of the legal quandary surrounding the relationship between patent monopoly, antitrust,[7] and public health. This quandary may be simply characterized by two apparently opposing claims. The first favors a strong regime of patent rights as a necessary incentive for inventors to profitably exploit resources. The second perspective is an anti-cartelist perspective that simultane-

ously incorporates the interests of inventors with those of the consumers of patented products.

According to the first of these claims, a strong property rights regime as embodied in the 20-year patent monopoly allowed under U.S. intellectual property laws is a necessary incentive to inventors to enable them to undertake the risk involved with the high costs of research and development associated with new drug development without fearing that they will be unable to recoup these costs or to be adequately rewarded for investment. The monopoly period achieves this result by preventing competitors from selling the patented product so that the inventor is able to recoup research and development costs.

The second of these claims, the anti-cartelist or balancing perspective, arguably finds authority in the Constitution's patent and copyright clause.[8] Hence, in *Brenner v. Manson*, the Supreme Court, in affirming a Patent Office decision to decline extending a patent for a process since it was not 'new and useful,' observed:

> . . . a process patent in the chemical field, which has not been developed and pointed to the degree of specific utility, creates a monopoly of knowledge which should be granted only if clearly commanded by the statute. Until the process claim has been reduced to production of a product shown to be useful . . . It may engross a vast, unknown, and perhaps unknowable area. *Such a patent may confer power to block off whole areas of scientific development, without compensating benefit to the public. The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility*.[9] (emphasis added) (footnote omitted).

Hence, under this view the patent monopoly is granted to an inventor in return for the inventor producing a benefit to society. This view contemplates a balance between the interests of the inventor and the consuming public. Where the balance tilts too heavily either in favor of intellectual property rights, on the one hand, or in favor of the intellectual commons, on the other, some scholars have argued that the public loses its constitutionally protected right to a vigorous public domain.[10] According to this argument, a vigorous intellectual commons is only possible where the availability of information, knowledge and other raw data is free from monopoly control and available both to the public and the private sector in order to encourage education, research, new discoveries and free speech.

Similarly, the consumers in *In re Ciprofloxacin* argued that the agreement between Bayer and Barr Laboratories tilted the market in favor of Bayer in contravention of state antitrust and consumer laws by deterring generic manufacturers from entering the market for Ciprofloxacin with the result that they were foreclosed from purchasing the drug at a competitive price, or at a minimum that they were precluded from purchasing the drug at a lower price. The premise of the consumers' case was therefore arguably predicated on the view that free competition was the best pricing mechanism for Ciprofloxacin and that the agreement between Bayer and Barr Laboratories constituted a profit-sharing arrangement that resulted in an antitrust injury to them. The consumers argued that Bayer was using its market power to restrict competition in Ciprofloxacin, which constituted an illegal misuse of its patent monopoly.

By contrast, Bayer contended that consumers have no right to purchase competing products that infringed on their patent. In essence, for the consumers to succeed on their antitrust claim against Bayer, the consumers had to show that the '444 patent was invalid. To put it starkly, Bayer argued that the existence of a valid patent forecloses the possibility of any antitrust injury. The primary issue before the Eastern District of New York can therefore be framed as follows: Does the patent 'exception' to antitrust injury swallow the prohibitions against monopolies and trusts as a whole, even when the holder of a valid patent may otherwise be subject to liability for conduct amounting to an unreasonable restraint of trade?

The court declined to agree with Bayer and observed that to argue "that existence of a valid patent forecloses the possibility of any antitrust injury, suggests that patent holders, by virtue of their intellectual property rights, wield almost limitless power to control the market for the patented product."[11] In essence, the patent exception, the court held, does not swallow or preclude antitrust injury.

About one month after losing this case, the anthrax scare and the attendant fears of a bio-terrorist attack put Bayer in yet another predicament over its blockbuster drug, Ciprofloxacin. There were immediate calls to amass Ciprofloxacin since it is the widely preferred antibiotic for patients infected with anthrax. Although the *In re Ciprofloxacin* decision was forgotten in the aftermath of the terrorist attacks, it arguably formed part of the backdrop for Bayer's considerations regarding its negotiations with the federal government to create a stockpile of Ciprofloxacin.

One alternative the government has under federal law, besides subsidizing Bayer to stockpile the drug, is its eminent domain powers to override the patent by issuing compulsory licenses to generic companies to manufacture the drug.[12] The government considered but did not invoke this power; instead it entered into an agreement with Bayer under which it agreed to subsidize Bayer's production of 1.2 billion Ciprofloxacin pills for stockpiling.[13] This stockpile would, according to Health

and Human Services Secretary Tommy Thompson, be adequate to protect at least 10 million Americans on a two-pill regimen for 60 days in the event of a bio-terrorist attack. Under this agreement between the government and Bayer, Bayer initially agreed to lower the drugstore price of $4.50 per pill to $1.89 per pill. Eventually, Bayer agreed to further lower the price of a pill to 95 cents. For its initial order of 100 million pills, the United States government therefore agreed to pay Bayer $95 million.[14]

Notwithstanding Bayer's concession to lowering the price of the drug, observers have noted that the government shortchanged American taxpayers since Indian companies sell a generic version of the same drug for less than 20 cents.[15] In other words, American consumers would have been better off if the government had invoked its eminent domain powers by issuing compulsory licenses to generic manufacturers to produce Ciprofloxacin at a lower cost and in greater quantities as a safeguard against a bio-terrorist threat.[16] Hence, critics of the federal government have argued that it sacrificed public health on the altar of intellectual property rights by allowing Bayer to continue to be the sole supplier of Ciprofloxacin.[17]

There is yet another consideration that factored into the U.S.'s refusal to issue compulsory licenses over Cipro. The U.S. does not want to undermine the legitimacy of its negotiating position with developing countries over whether the World Trade Organization (WTO) treaty, the *Trade Related Aspects of Intellectual Property Rights* (the TRIPS Agreement, which took effect on January 1, 1996), allows these countries to override patents to enable them to effectively address the HIV/AIDS pandemic. The U.S. has consistently opposed efforts by developing countries to override patent protection that would enable them to produce generic equivalents of the patented drugs used in the treatment of HIV/AIDS patients.[18]

According to the U.S., the TRIPS Agreement only accommodates developing country interests by giving them longer transition periods to come into compliance with the Agreement. The TRIPS Agreement, the U.S. has argued, does not authorize developing countries to override patents. Least developed countries have until 2006 (10 years) to come into compliance with the TRIPS Agreement and they could have more time with the WTO's approval. The U.S. has, however, maintained that least developed countries have to make a case for extension of this 10-year period, since they have not yet implemented the TRIPS Agreement and could not therefore make a case against implementing it on the basis of its impact on their public health programs.

According to the Director of UNAIDS, 20 million of the 60 million people infected with HIV/AIDS in the first 10 years of the epidemic are dead, the fastest death rate of any health epidemic.[19] In sub-Saharan Africa the leading cause of death continues to be HIV/AIDS. By 1999, at least 15 million Africans had died of HIV/AIDS and another 25 million were living with the disease. In the same year, four million were newly infected. Infection rates in southern African countries were as high as 35 percent of the population in Botswana; 25 percent in Zimbabwe and Swaziland; 23 percent in Lesotho; and 20 percent in South Africa. These horrifying statistics continue to be deployed in pressuring the U.S. to yield its position of preventing the overriding of patent protection to address the HIV/AIDS pandemic.

As a result, in the recently concluded WTO ministerial meeting in Doha, Qatar, a Declaration on TRIPS and Public Health was passed. The declaration seeks to encourage WTO members to interpret the obligations in the TRIPS Agreement not solely from the perspective of how policies and laws of member countries seeking to address the HIV/AIDS pandemic curtail rights of patent holders, but also from the perspective of how such laws or policies safeguard consumer interests in the provision of low-cost medicine.[20]

"Notwithstanding Bayer's concession to lowering the price of the drug, observers have noted that the government shortchanged American taxpayers since Indian companies sell a generic version of the same drug for less than 20 cents."

To conclude, the decision of the United States District Court for the Eastern District of New York in *In re Ciprofloxacin* is only the tip of the iceberg. This decision, particularly following the threat of bio-terrorism in the United States, raises important questions relating to where the appropriate balance between protecting inventions, encouraging free competition and ensuring public health lies. Within the U.S. domestic context, the balance between patent protection and free competition has received considerable attention as exemplified in *In re Ciprofloxacin.* However, balancing the law as applied by the Eastern District with the public health concerns that arose following the bio-terrorism threat after September 11, 2001, is a challenge that has only begun to emerge. At the international level, the emerging emergency exception to patent protection is also undergoing excruciating birthing pains. Public health considerations sparked by threats of bio-terrorism and the HIV/AIDS pandemic are therefore beginning to challenge the boundaries of patent protection at the domestic and international level more than ever before. This also raises important ethical considerations. For example, can the United States adopt one policy at home to protect its citizens against the threat of bio-terrorism by overriding patent protection, while maintaining its opposition to developing countries

doing the same to address the HIV/AIDS pandemic? The purpose of this brief analysis has been to raise these questions and to point to the challenges that lie ahead without necessarily providing any definitive answers.

Endnotes

1. 166 F.Supp. 2d 740 (E.D.N.Y. 2001).
2. *See* Paul Zielbauer, *A Nation Challenged: The Latest Case—Connecticut Woman, 94, Is Fifth To Die From Inhalation Anthrax*, N.Y. Times, Nov. 22, 2001, at A1.
3. The calls for amassing a stockpile of Cipro were led in part by New York's senior Sen. Chuck Schumer. *See* Timothy J. Burger, *Feds Push Bayer to Boost Cipro Stockpile*, Daily News (New York), Oct. 20, 2001, Saturday Sports Final Edition, at 8.
4. James Thuo Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers*, 53 Fla. L. Rev. 727, 771-784 (2001).
5. 21 U.S.C. § 355(j)(2)(A)(vii).
6. *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 166 F.Supp. 2d 740, 745 (E.D.N.Y. 2001).
7. There is an endless stream of literature on this subject. *See, e.g.*, Louis Kaplow, *The Patent- Antitrust Intersection: A Reappraisal*, 97 Harv. L. Rev. 1815 (1984); Charles C. Hsiehl, Note, *Professional Real Estate: The Line Between Patent and Antitrust*, 7 Harv. J. L. & Tech. 173 (1993); Lawrence Sullivan, *Is Competition Policy Possible in High Tech Markets? An Inquiry Into Antitrust, Intellectual Property and Broadband Regulation as Applied to the 'New Economy'* , 52 Case W. Res. L. Rev. 41-90 (2001); James Langenfeld, *Intellectual Property and Antitrust: Steps in Striking a Balance*, 52 Case W. Res. L. Rev. 91-110 (2001). For federal policy, *see* Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, *reprinted in* 4 Trade Reg. Rptr. (CCH) 13, 132 (1995). For recent comments by current FTC Chairman, *see* Timothy J. Muris, *Robert Pitofsky: Public Servant and Scholar*, 52 Case W. Res. L. Rev. 25 (2001).
8. Art. I, § 8, cls. 8, 18 provide in part that "The Congress shall have power . . . [t]o promote the progress of Science and useful arts, by securing for limited times to Authors and Inventors the exclusive right to their discoveries . . . And [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers."
9. *Brenner v. Manson*, 383 U.S. 519, 534 (1965). Note, though, that in recent times courts have lowered the threshold of patentability. For example, in *Diamond v. Chakrabarty*, 447 U.S. 303, 30-7, 318 (1980), the Supreme Court expanded the scope of intellectual property rights in the absence of express congressional authorization by holding that non-naturally occurring manufacture (or genetically created micro-organisms or life forms) qualify as patentable subject matter. Similarly, in *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F. 3d 1368, 1377 (Fed. Cir. 1998), the scope of patentable subject matter was extended to include a business method. Observed the Federal Circuit Court of Appeals, "the mere fact that a claimed invention involves imputing numbers, calculating numbers, out-putting numbers, and storing numbers, in and of itself, would not render it nonstatutory subject matter, unless . . . its operation does not produce a 'useful, concrete and tangible result'". *Id.* at 1374.
10. Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 Stan. L. Rev. 1293 (1996).
11. *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 166 F.Supp. 2d 740, 749 (E.D.N.Y. 2001).
12. 28 U.S.C. § 1498(a) provides that the U.S. government does not have to seek a license or negotiate for use of a patent or copyright. Any federal employee can use or authorize the use of a patent or a copyright. The right owner is entitled to compensation, but cannot enjoin the government or a third party authorized by the government, to prevent use. Any contractor, subcontractor, person, firm, or corporation who receives authorization from the federal government to use patents or copyrights is construed as use by the federal government, and cannot be sued for infringement. Compensation is not based on lost profits or royalties, but rather on reasonable royalty, or as one court has put it, since compensation is based on eminent domain, the proper measure is 'what the owner has lost, not what the taker has gained.' *Leesona Corp. v. United States*, 599 F. 2d. 958, 964(Ct. Cl. 1979). Section 1498(a) explicitly provides that it shall not have extra-territorial effect.
13. *See Burger*, *supra* note 3 (reporting that Health and Human Services Secretary Tommy Thompson had rejected an assertion by Sen. Chuck Schumer "that the government would save money by using its legal power to authorize other manufacturers to use Bayer's patent on Cipro." *Id.*
14. Press Release, HHS Press Office, *HHS, Bayer Agree to Cipro Purchase* (Oct. 24, 2001), *available at* http://www.hhs.gov/news/press/2001pres/20011024.html.
15. Russel Mokhiber & Robert Weissman, *The Cipro Rip-Off and the Public Health*, ZNET Daily Commentaries, Dec. 2, 2001, *available at* http://www.zednet. Secretary Thompson is reported to have been advised that the "United States would have to pay damages if it ordered generic Cipro, which could make the move expensive." In essence, the administration defended its unwillingness to override the Cipro patent on the ground that the federal government would have had to await an uncertain judicial determination of the extent of damages that it would pay Bayer. This, the Bush administration argued, was a far more expensive option than negotiating with Bayer to produce mass quantities of the drug. H.R. 3235, currently pending before the House of Representatives, seeks to provide the federal government with administrative authority to undertake compulsory licensing of certain patented drugs relating to health care emergencies rather than awaiting a judicial determination of the damages under present law. *See* James Love, *[IPN]CPTech Comments on H.R. 3235, the Public Health Emergency Medicines Act*, available at http://www.cptech.org. For H.R. 3235, *see* http://rs9.loc.gov/cgi-bin/bdquery/z?d107:HR03235@@@x.
16. *See* Letter from Ralph Nader and James Love to DHHS Secretary Tommy Thompson dated Oct. 18, 2001, *available at* http://www.cptech.org/ip/health/cl/cipro/nadethorn/10182001.html.
17. For a similar story in Canada, *see also* David Olive, *It's Sad Sight to See Ottawa Ready to Give in to Bayer on Drug*, The Toronto Star, Mar. 20, 2002, available at http://www.thestar.com.
18. Cecilia Oh, *Developing Countries Call for Action on TRIPS at Doha WTO Ministerial Conference*, Third World Network Online, available at http://www.twnside.org.sg/title.twr.131d.htm..
19. *See* Peter Piot, UNAIDS Executive Director, Testimony to the hearing of the Committee on Foreign Relations of the United States Senate on *Halting the Global Spread of HIV/AIDS: the Future of U.S. Bilateral and Multilateral Responses* (Feb. 13, 2002), transcript available at http://www.unaids.org/whatsnew/speeches/eng/2002/PiotSenate_130202.html.
20. See James Thuo Gathii, *The Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties*, Harv. J. L. & Tech. (forthcoming 2002). For a contrary view, *see* Alan O. Sykes, *TRIPs, Pharmaceuticals, Developing Countries, and the Doha 'Solution'*, John M. Olin L. & Econ. Working Paper No. 140 (2D Series), available at http://www.law.uchicago.edu/Lawecon/index.html.

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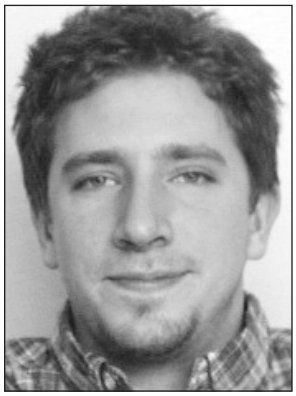
Constitutionally Elevated Punishment: New York State's Anti-Terrorism Act and the Hate Crime Decisions

By Todd A. Ritschdorff

As the smoke began to clear from the World Trade Center and the Pentagon, the wind also shifted, sometimes moving—and sometimes blowing away—the lines the law has long tried to draw among the functions, philosophies, goals, and values of venerable national institutions.[1]



The eleventh of September 2001 has changed, and will surely continue to change, the legal machinery of terrorism-based legislation. The previously established equilibrium between civil liberties and crisis governance has now been called into question.[2]

Four planes filled with passengers awaiting arrival at their designated locations never reached those destinations due to a diabolical and deadly interference of a foreign terrorist group. American Airlines Flight 11 carried 81 passengers and 11 crew members into the North Tower of the World Trade Center, instantly killing all on board, and all in the building within the savage reach of the subsequent explosion and ensuing fire.[3] As the world watched the news coverage of that tragedy, and in what seemed only moments, United Airlines Flight 175 and her 56 passengers and nine crew members flew into the South Tower, causing the same horrific amount of damage.[4] Soon after that, American Airlines Flight 77's 58 passengers and six crew members careened into the Pentagon, claiming the lives of those on board and 125 people inside the building,[5] and United Airlines Flight 93 and her 38 passengers and seven crew members crashed into a Pennsylvania field.[6]

The American sense of security was brought to reality, just as the Twin Towers were brought to the ground. As a result of these terrorist attacks, thousands of people lost their lives and millions of people lost their ability to control the terrorist grip of fear that consumed their thoughts and haunted their minds. It seemed that on this day, terrorism had taken on a new face—one more evil and sadistic than anything experienced by anyone in the United States, or even elsewhere in the world.

While our military forces fight the terrorist threat overseas, domestic policy is fought in another arena with a much different arsenal. The battlegrounds encompass our nation's jurisdiction, and the weaponry is a mixture of existing case law, older statutes modified to conform to present needs, and new legislation directed at the heart of the terrorist threat on our nation's soil. As a result of the vicious attack on the United States, specifically in New York State, the legislature of New York decided to join the fight and arm its state with a most powerful and formidable legislative weapon.

On the seventeenth of September 2001, only six days after the terrorist incident, New York State passed a bill adding six new provisions to the state's penal law targeting terrorist acts and the support thereof. It is called the New York State Anti-Terrorism Act of 2001 (NYSATA).[7] The somewhat intriguing effect of NYSATA is that it possesses a penalty enhancement provision for all specified offenses committed with a terrorist intent, which are included in the legislation's definition of the crime of terrorism. Under NYSATA, a crime of terrorism includes the commission of any specified offense with "the intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination, or kidnapping."[8] If an individual is convicted of a crime of terrorism, and the specified offense is a class C, D, or E felony offense, "the crime of terrorism shall be deemed one category higher than the specified offense the defendant committed."[9] For example, if an individual commits first-degree assault, which is a class B violent felony punishable by up to 25 years in prison, with the intent to intimidate a civilian population, he would then be subject to a class A-1 felony sentence of life imprisonment.[10] Simply because the actor embraces a terrorist ideal in committing the assault, he will receive a more severe punishment.

This models the penalty enhancement structure of hate crime legislation allowing for increased penalties for crimes committed against a victim commonly selected because of his race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.[11] According to the U.S. Sentencing Commission, the penalty for a crime against a person selected for any of the aforementioned reasons shall enhance by three levels.[12]

The very idea of increasing penalties for a certain offense committed raises myriad issues surrounding the appropriateness and constitutionality of such a law. As such issues are raised and these two areas of legislation are compared, a showing can be made that their purposes are similar enough to warrant similar treatment, and NYSATA's punishment scheme gains legitimacy. This article looks at the penalty enhancement provision of the crime of terrorism under NYSATA in the light of analogous provisions present in hate crime statutes. Based on the Supreme Court's treatment of such provisions as they relate to hate crimes, it will be argued that the penalty enhancement purposes of NYSATA are constitutional. This examination will center mostly on the First Amendment protection guaranteed to the expression of thoughts.

NYSATA and Hate Crimes

Arguments against the constitutionality of NYSATA can and surely will be made, just as they have been regarding hate crime legislation. NYSATA can be viewed as punishing the thoughts of the terrorist actor, rather than the crime actually committed by him. Hate crime opponents, who argue that the primary purpose of such statutes is to punish biased thoughts rather than the resulting act, make identical arguments.

What must be understood before this discussion proceeds is that while crimes of terrorism are on a scale much different than hate crimes, their purposes are very similar. No one will dispute the pure evil intent of selecting a victim based solely on his race, gender, sexual preference, or religious beliefs, yet terrorist acts against Americans target an incomparably large group of people and with an equally malevolent motivation. On September 11, an entire nation was targeted for its beliefs and ways of life. The passengers on the planes and the workers in the World Trade Center towers were not marked for death because they were white or black, straight or gay. Rather, they were targeted because they were Americans, or those who worked in foreign businesses located on American soil. In this light, acts of terrorism, especially those recently committed, can be viewed as hate crimes at an amplified level, with an intent to select a greater number of victims and exact ruin upon them simply because they are associated with a nation.

A Constitutional Evaluation

In *Wisconsin v. Mitchell*,[13] one of the leading hate crime cases, the Supreme Court affirmed penalty enhancement for an aggravated battery committed against a victim selected solely because of his race. The penalty administered for such an offense was elevated from a maximum sentence of two years in prison to a maximum sentence of seven years in prison—totally attributed to the actor's motive in singling out his victim.[14] It was settled by the Court that the hatred of another race as a driving force behind the crime was adequate grounds upon which to increase the punishment of the actor. In the case of a terrorist crime under NYSATA, it is the presence of a terrorist intent added to a specified offense—effectively signifying repugnance toward our very way of life—which brings about the enhancement. Both the hate crime offender and the terrorist actor are being punished more severely for committing a certain offense, simply because of their motive in committing the crime.

Therefore, those who view the *Wisconsin* decision as punishing thoughts might also view NYSATA as accomplishing the same thing, since in both instances the penalty is heightened due to the hatefully distinct motives of the actor. In order to further evaluate the elevated punishments of NYSATA in light of the *Wisconsin* case, it is instructive to consider another Supreme Court holding on hate crime penalty enhancement constitutionality—*RAV v. St. Paul*.[15] Reading these two decisions conjunctively makes a much simpler task of following the logic and constitutionality of the NYSATA.

"On September 11, an entire nation was targeted for its beliefs and ways of life."

In *RAV,* several white teenagers assembled a cross with broken chair legs and ignited it within the fenced yard of a black family.[16] Although this conduct could have been punished under a number of laws, the city of St. Paul decided to charge the defendants with a city ordinance that prohibited the targeting of victims based on, *inter alia*, race.[17] Essentially, this case involved a First Amendment challenge grounded in the ordinance's exclusive targeting of fighting words that "insult or provoke violence on the basis of race, color, creed, religion, or gender."[18] The ordinance strictly forbade a class of fighting words containing a message of biased-motivated hatred considered to be especially offensive by the city.[19]

The Court held that this law violated the rule against content-based discrimination.[20] The reason fighting words elude the protection of the First Amendment is not that their content communicates any particular idea, but rather that those words manifest a particularly insupportable mode of expressing whatever belief the speaker wishes to communicate.[21] The city of St. Paul's ordinance neglected to single out a particularly offensive mode of expression—rather, it had "proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious

intolerance."[22] The Court stated that selectivity of this kind creates the likelihood that St. Paul was attempting to hinder the expression of particular ideas.[23]

In contrast, the *Wisconsin* case hinged on the Court's words supporting the assertion that motives were in fact able to be punished while still remaining in the atmosphere of constitutionality.[24] The *Wisconsin* law did not attempt to solely prevent a way of thinking—it endeavored to suppress the content of certain ideas that elicit conduct not protected by the same First Amendment standard.[25] In *RAV*, the ordinance allowing an increased penalty for those who target victims based on race, color, and gender, was aimed at expression through speech,[26] and that was held to be unconstitutional. The ordinance, as stated previously, did not identify any specific mode of expression—rather, it simply criminalized the expression of particular thoughts of racial, gender, or religious intolerance.[27]

"While it may be acceptable for an individual to harbor certain beliefs about the American people, and make those beliefs publicly known, it is no longer acceptable when those ideas, concepts, thoughts, or motives turn into actions."

When applying this analysis to NYSATA, it becomes evident that thoughts, motives, and intent are not the only aspects of the terrorist activity being punished, nor is the expression of particular thoughts being criminalized. While it is true that in order to commit the crime of terrorism under NYSATA, there must be present one of the three aforementioned intent elements, it is understood that New York is not basing its penalty enhancement entirely on this intent requirement. The *Wisconsin* statute was upheld because it targeted thoughts joined with the resulting conduct. Hence, the statute's objective fell outside the scope of First Amendment protection of free expression. NYSATA identifies behavior that escapes the very same level of shelter afforded by the First Amendment. New York, in its definition of the crime of terrorism, statutorily forbids the intimidation or coercion of a civilian population, influencing the policy of a unit of government by intimidation or coercion, or affecting the conduct of a unit of government by murder, assassination, or kidnapping.[28]

While it may be acceptable for an individual to harbor certain beliefs about the American people, and make those beliefs publicly known, it is no longer acceptable when those ideas, concepts, thoughts, or motives turn into actions. Any individual proclaiming the demise of the American way of life will have his thoughts and words defended by the shield of the First Amendment. But the same individual who possesses those thoughts will not be protected if he commits, or intends to commit, any representative act that presents the possibility of harm to anyone. The penalty enhancement provision of NYSATA is not directed solely at the actor's intent, but it is also steered at the conduct resulting from that intent.

Also, the constitutionally-upheld *Wisconsin* statute was directed at "biased-motivated conduct . . . thought to inflict greater individual and societal harm."[29] Essentially, the Court acknowledged, as a justification for penalty enhancement, the need to guard both individuals and society against the acts of others motivated by forms of hatred. NYSATA attempts to do the same thing. It endeavors to protect American citizens from acts of terrorism motivated by the pure abhorrence for our way of life. In enacting NYSATA, New York lawmakers stated that "terrorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated."[30]

Additionally, the *Wisconsin* Court declared in its opinion it is "reasonable that among crimes of different natures those should be most severely punished which are the most destructive to the public safety and happiness."[31] Following this logic of approving enhanced penalties for bias crimes because of their destructive nature to public safety and the greater harm imposed on the victim and society, some questions come to mind. Who can imagine a more destructive crime than terrorism? Who can imagine a crime other than terrorism that has a greater effect on its victim or on the society toward which the crime is directed? In this respect, hate crimes and acts of terrorism are similar enough to warrant equivalent treatment, in that they both disrupt a way of life and exact a toll on their intended victims and on society as a whole.

Conclusion

Proponents of hate crime legislation view the enhancement of penalties as a necessity to mend the tear in the societal fabric caused by the hateful acts of others. The New York Legislature was presented with the same fabric, a much larger tear, and a desire to mend that fissure in a similar way—by punishing more severely those who commit criminal acts with a terrorist intent. NYSATA does not punish thoughts to the point of offending established First Amendment principles, as it does not attempt to preclude a way of thinking or hinder the expression of particular ideas. If the framework set out by the Supreme Court dealing with penalty enhancement in hate crime cases as it involves freedom of expression is honored, NYSATA must be seen not to infringe on the very same First Amendment

guarantees by punishing more severely those who commit specified offenses with a terrorist intent.

Endnotes

1. John Gibeaut, *Winds of Change*, A.B.A. Journal, Nov. 2001, at 32.
2. *See* Gerald S. Walpin, *The Constitution Is Not A Suicide Pact*, N.Y.L.J., Nov. 1, 2001, at 1 (explaining how the catastrophe of September 11 has modified the balance between the need to appropriately equip anti-terrorist agencies in their battle to prevent a reoccurrence of such an event and our protection of civil liberties under the Constitution).
3. *See* Lee Kreindler, *World Trade Center Attack Aftermath,* N.Y.L.J., Nov. 27, 2001, at 5.
4. *See id*.
5. *See* Steve Vogel, *Pentagon Halfway Back In Countdown From Inferno,* Wash. Post, Mar. 10, 2002, at C01 (describing the Pentagon devastation of September 11 and the work that has been done to repair the severe damage resulting from the attacks—both structurally and psychologically).
6. *See id*.
7. 2001 New York Senate Bill 2 (enacted as 2001 N.Y. Laws Ch. 300) (providing §§ 490.00 - 490.35 in the Penal Law as the New York State Anti-Terrorism Act of 2001).
8. N.Y. Penal Law § 490.25 (defining the crime of terrorism).
9. Penal Law § 490.25(2)(b).
10. *See* John Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, N.Y.L.J., Sept. 18, 2001 at 1 (providing an example of penalty enhancement under NYSATA).
11. For an outline of what hate crimes target, see 28 U.S.C. § 994.
12. *See* U.S. Sentencing Guidelines Manual § 3A1.1(a) (2001).
13. 508 U.S. 476 (1993).
14. *Id*. at 480.
15. 505 U.S. 377 (1992).
16. *Id*. at 379.
17. *Id*. at 380 (discussing the St. Paul Bias-Motivated Crime Ordinance, Legis. Code § 292.02 (1990), which stated that "[w]hoever places on . . . property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender . . . shall be guilty of a misdemeanor").
18. *Id*. at 391.
19. *Id*. at 392.
20. *Id*. at 392–394.
21. *Id*. at 393.
22. *Id*. at 394.
23. *Id*.
24. *See Wisconsin*, 508 U.S. at 487.
25. *Id*. at 487.
26. *See RAV*, 505 U.S. at 392.
27. *Id*.
28. Penal Law § 490.25.
29. *See Wisconsin*, 508 U.S. at 488.
30. Penal Law § 490.00 (legislative findings).
31. *Wisconsin*, 508 U.S. at 488 (citing 4 W. Blackstone, Commentaries, at *16).

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Terrorism: International Definition(s) and the Afghanistan Invasion

By Erin Kate Calicchia

Terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism that attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction.[1]

But what exactly is terrorism? Is it like obscenity—we can't define it, but just know it when we see it?[2] This article analyzes the definitions of terrorism proposed by various organizations and authorities, as well as the reasons for needing a precise definition. Under that rubric, this article will then consider whether the United States invasion of Afghanistan is legal under principles of international law.

Attempts at Definition

Although there have been many attempts, there is no uniform definition of terrorism. The General Assembly of the United Nations has repeatedly called for an international conference with the purpose of defining terrorism, without success.[3] Given the events and the collective indignation over September 11, however, there may now be a greater sense of urgency to agree upon a definition. Even within the last 20 years, many academics have opined that terrorism was merely a symbolic threat to America.[4] Indeed, in 1981, when many feared terrorist hijackings, a *Washington Post* article labeled the escalation of the threat of terrorism as "politics of paranoia."[5]

The result of the absence of a uniform definition is that each sovereign entity defines terrorism for itself. In the United States, there are many definitions. However, the overriding theme is that terrorism consists of the use of force with the purpose of intimidating or coercing a government. As a sampling, one federal statute defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[6] A criminal statute defines international terrorism as violence constituting a danger to human life that occurs primarily outside of the United States, violates the United States criminal code, and is intended to intimidate or coerce civilians or influence government policy.[7]

One commentator argues that terrorism should be defined as "the peacetime equivalent of war crimes."[8] He notes that the way we dealt with peacetime acts of terrorism previous to September 11 was through anti-terrorism conventions outlawing the taking of hostages, hijacking, aircraft and maritime sabotage, attacks at airports, attacks against diplomats and government officials, attacks against U.N. peacekeepers, use of bombs or biological, chemical or nuclear materials, and notes that this type of piecemeal treatment leaves significant gaps.[9]

Legislative Responses

Despite the absence of a uniform definition, there have been many legislative responses to the problem of terrorism. For example, the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 extended the jurisdiction of the United States to foreigners outside of the United States who either injured, or participated in the injury of, U.S. citizens, when those acts involved international terrorism.[10] However, this Act did not define "international terrorism." When the Senate version of this bill was introduced, it would have given discretion to the Attorney General to determine what constituted terrorism on a case-by-case basis. The House version attempted to define terrorism as "any act of violence designed to coerce, intimidate or retaliate against a government or civilian population." This issue was irreconcilable, and the final version omitted any definition altogether.[11]

The Anti-Terrorism Act of 1987 designated the Palestine Liberation Organization as a terrorist organization and prohibited its activities within the United States.[12] This took place at a time when Iran and Libya were considered to be the breeding grounds of international terrorism.[13] In 1990, Congress used the immigration laws to attack terrorism by adding a "terrorist activity" provision to the Immigration Act of 1990. In that Act, Congress defined terrorism as any action an alien knows, or reasonably should know, will contribute material support to any individual, organization or government in conducting a terrorist activity. A violation of this provision is a deportable offense.[14]

During the mid-1990s, there were a number of high-profile acts of terrorism, including the bombing of Pan Am Flight 103 over Lockerbie, Scotland; the Hizballah kidnapping and murder of U.S. Marine Col. William Higgins; the 1993 bombing of the World Trade Center;

and the bombing of the Murrah Federal Building in Oklahoma City. In response, the Omnibus Counterterrorism Act of 1995 was introduced, but did not pass Congress. However, many of its provisions were adopted in the Antiterrorism and Effective Death Penalty Act of 1996. The Omnibus Counterterrorism Act of 1995 was intended to "correct deficiencies and gaps in current law," which was described by then-President Clinton as "a confusing patchwork of measures."[15] It defined "terrorist organizations" as those which threaten, attempt or conspire to commit crimes including hijacking, threats of murder, the taking of hostages, violent attack, assassination, or use of biological, chemical or nuclear weapons or other weapons capable of mass destruction.[16] It also purported to endow upon the Secretary of State the sole authority to designate an organization as terrorist in nature. The Omnibus Counterterrorism Act of 1995 would have been more expansive than previous terrorist legislation. It provided that if a sole member of an organization committed an illegal act, even one substantiated only by secret or illegally obtained evidence, each and every alien member of that group would be subjected to immediate deportation as "a risk to the national security of the United States."[17]

Like the Omnibus Counterterrorism Act of 1995, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) included a comprehensive plan to outlaw the provision of fundraising or material support to any organization that a person knows, or should know, is a terrorist organization.[18] The prohibition on material support includes currency, other financial securities, and false documentation or identification.[19] As amended in 1997, the law prohibits financial transactions, including humanitarian aid, with any country designated as a supporter of international terrorism.[20]

Under the AEDPA, a designation by the Secretary of State of "foreign terrorist organization" mandates denial of United States visas to all organization members, imposes a prison term of 10 years on Americans who are convicted of supporting the groups, allows the financial assets of identified groups to be frozen, and allows foreign supporters to be blocked from United States entry, jailed, or deported. The AEDPA acts in tandem with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to expedite deportations by reducing the reviewability of proceedings initiated by the Immigration and Naturalization Service or by the Attorney General.[21]

The Need for Definition

For purposes of international peace and security, we need to define terrorism. The United Nations Charter (the "Charter"), which laid the foundation of a "new world order" after the Allied victory in World War II, has declared that its principal purpose is "to maintain international peace and security."[22] The new order is based upon prescribed international norms outlawing the threat or use of force, which are universally recognized as *jus cogens*. The Charter requires settling disputes by peaceful means.[23] Since the declared purpose of the Charter is to remove threats to the peace and to suppress breaches of the peace, any use of force in international relations would be inconsistent with a Charter purpose. The only exceptions are military enforcement measures under Chapter VII and self-defense under Article 51.

"For purposes of international peace and security, we need to define terrorism."

Chapter VII of the Charter gives the Security Council authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and to make recommendations or decide what measures shall be taken to maintain or restore international peace or security.[24] Article 51 of the Charter, however, deals with the right of a sovereign entity to self-defense. It notes that self-defense is not prohibited after an "armed attack," and is only allowed "until the Security Council has taken measures necessary to maintain international peace and security." Any act claimed to be in self-defense must immediately be reported to the Security Council, and must be both necessary and proportionate to the armed attack.

If we define terrorism in a way that makes it clear that acts of terrorism are included within the meaning of "armed attack," then it will be equally clear that the United States invasion in Afghanistan is a legal international move falling within Article 51 of the Charter. If not, our invasion in Afghanistan may be an "aggressive war"—making it illegal under the Nuremberg principles, and persons responsible for such wars are guilty of an international crime.[25] The Nuremberg principles were affirmed as existing in international law in 1946, via unanimous resolution of the United Nations General Assembly.[26] Absent constitutional inconsistency, the United States is fully bound by international law.[27]

The Legality of the Afghanistan Invasion

Given this international framework, questions regarding the September 11 disaster and the United States response arise at every step: Was the United States subjected to an "armed attack"? Is the "war on terrorism" being fought in Afghanistan an act of "self-defense"? Oscar Schachter, a leading scholar and international lawyer, wrote in 1991 that "[t]he more controversial questions of self-defense have been raised by actions and claims that would expand a State's right to use force beyond the archetypical case of an armed attack on the territory or instrumentality of that State."[28] He then listed and examined several "expanded conceptions of self-defense," including "the use of force against

officials or installations in a foreign State believed to support terrorist acts directed against nationals of the State claiming the right of defense."[29] Schachter notes that, although opinions have been divided, in most cases the Security Council has been reluctant to legitimize notions of self-defense that are expanded beyond the paradigmatic case, and no United Nations resolution has expressly approved the use of force in this situation.

In October of 1985, Israeli forces launched an air attack against the headquarters of the Palestine Liberation Organization, located in the suburb of Tunis, Tunisia. The attack was in response to PLO terrorist activities. Three days later, by a vote of 14-0 and one abstention, the United Nations Security Council adopted Resolution 573, condemning the act as one of armed aggression "in flagrant violation of the Charter of the United Nations, international law and norms of conduct." Interestingly, the one abstention was the United States, which expressed condolences over the loss of innocent lives in Tunisia but could not support the resolution condemning Israel's act because it "disproportionately plac[es] all blame . . . onto only one set of shoulders, while not also holding at fault those responsible for the terrorist acts which provoked it . . . . It is terrorism that is the cause of this pattern [of violence], not responses to terrorist attacks."[30] The United States abstention notwithstanding, the message of the Security Council was clear: an armed retaliation upon a country which harbors a terrorist organization is contrary to the norms of international law and to the United Nations Charter itself.

Another scholar of international law has questioned the legality of defensive measures in response to "indirect aggression"—where a state gives military aid or exercises control over an aggressor or rebel groups. He concludes that an "armed attack" in Article 51 of the Charter does not refer to an indirect aggression situation, such as the harboring of a suspected terrorist. There is only an armed attack for purposes of Article 51 self-defense where "there is a control by the principal, the aggressor state, and an actual use of force by its agents."[31]

Conclusion

The United Nations, and alternatively the United States, will soon feel the need for a universal definition of "terrorism" to determine whether Article 51 of the United Nations Charter applies to actions declared to be in self-defense. Absent such clarity, it is possible that, should Afghanistan complain to the United Nations, the Security Council could find the United States invasion of Afghanistan to have been an illegal action in violation of the United Nations Charter, the Nuremberg principles, and norms of international law.

Endnotes

1. P. Johnson, *The Cancer of Terrorism, in* Terrorism: How the West Can Win 31 (B. Netanyahu ed., 1986).
2. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it [obscenity] when I see it, and the motion picture involved in this case is not that.").
3. *See, e.g.*, G.A. Res. 46/51, U.N. GAOR, 67th plen. mtg., U.N. Doc. A/46/654 (1991).
4. *See* Todd Ritschdorff, *A Question of Intent, An Answer of Constitutionally Elevated Punishment* (work in progress).
5. George Lardner, *Assault on Terrorism: Internal Security or Witch Hunt?*, Wash. Post, Apr. 20, 1981, at 1A; *see also* Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 Comm. L. & Pol'y 76, 81 (2001).
6. 22 U.S.C. § 2656f(d)(2) (1994).
7. 18 U.S.C. § 2331(1994). For more examples of the "typical official and unofficial definitions of terrorism," *see* Louis Rene Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 Vand. J. Transnat'l L. 239, 240-41 (1995).
8. Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 I.L.S.A. J. Int'l & Comp. L. 391, 392-93 (2001).
9. *Id.*
10. Pub. L. No. 99-399, 100 Stat. 855 (1986).
11. *See* Ross, *supra* note 5, at 86; *see also* Warren Richey, *U.S. Tries to Expand Array of Tools to Fight Terrorism*, Christian Sci. Monitor, Apr. 7, 1986, at 1.
12. 22 U.S.C. §§ 5201-5203 (1994).
13. *See* Ross, *supra* note 11, at 86.
14. 8 U.S.C. § 1182(a)(3) (1994).
15. President's Message to Congress on the Omnibus Counterterrorism Act of 1995, 31 Weekly Comp. Pres. Doc. 227 (Feb. 9, 1995).
16. S. 735, 104th Cong. § 210 (1995).
17. *Id.* at §§ 242, 503(a), (c)(1), (e) & (f) (1995).
18. 18 U.S.C. § 2339(B)(a)(1) (Supp. II 1996).
19. *Id.* at § 2339(B)(g)(3).
20. Prohibition on Financial Transactions with Countries Supporting Terrorism Acts, 18 U.S.C. § 2332d(a) (Supp. IV 1998).
21. 8 U.S.C. § 1252(a)(2)(g) (Supp. II 1996); 18 U.S.C. § 401 (Supp. II 1996).
22. United Nations Charter, Art. 1(1).
23. *Id.* at Art. 2, ¶ 3.
24. *Id.* at Art. 39.
25. Oscar Schachter, *In Defense of International Rules of the Use of Force*, 53 U. Chi. L. Rev. 113, 113 (1986).
26. G.A. Res. 95, U.N. Doc. A/64, at 188 (1946).
27. *See* The Paquete Habana, 175 U.S. 677 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").
28. Oscar Schachter, *International Law in Theory and Practice*, 141-46.
29. *Id.*
30. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Resort to War and Armed Force*, 80 Am. J. Int'l L. 165, 166 (1986).
31. Brownlie, *International Law and the Use of Force* 372-73 (1963).

Erin Kate Calicchia, Albany Law School class of 2002, was the Executive Editor of the *GLP Journal* for the past academic year. She also served as an Associate Editor of the *Albany Law Review* and a judicial intern with Appellate Division Justice Edward O. Spain.

GLC Endnote

Patricia E. Salkin

Those who know us have often heard the staff of the Government Law Center say that government lawyers are leaders. At no time has this been more evident than through the actions, intellect, commitment and creativity of government lawyers in response to the tragic events of September 11. There were, and continue to be, many heroes and heroines who contributed greatly to the rescue, recovery and relief efforts, and many stories about these fantastic people have been documented on television, in the newspapers and in magazines. But to us, it is the significant challenges and responsibilities that were instantly thrust upon the public sector lawyers that once again proved the high quality and excellence of government lawyers at the local, state and federal levels.

Rose Mary K. Bailly

Perhaps law school prepared us well for our role as government lawyers. We learned to analyze situations, to think through solutions and to be reflective and thoughtful problem-solvers. September 11 proved that as a group, this profession, while perhaps not expecting the unexpected, could mobilize rapid legal and policy responses appropriate to lead neighborhoods, communities, local governments, the state and the federal government through a major crisis.

The Government Law Center has sponsored and supported a series of programs at Albany Law School examining various aspects of government leadership in this time of crisis. We have explored legal aspects of public policy to deal with terrorism, civil rights, security, immigration and records management. In addition, a new course in Current Legal Issues in Government offered in the Spring 2002 semester at Albany Law School focused for more than half of the semester on the challenges faced by government lawyers in addressing myriad issues that will continue to be with us for some time. Legal talent across the board in the public service was called upon to assist in crafting and advising lawmakers and policymakers on appropriate responses and effective strategies to deal with this extraordinary crisis. Whether it was an attorney in the Governor's Office, the Legislature, the Corporation Counsel's Office, the state Emergency Management Office, the Workers' Compensation Board, the State Insurance Department, the Department of Law, the Comptroller's Office or the U.S. Attorney's Office, everyone was focused on cooperation, communication and a commitment to simply "doing the right thing" for the people of this state. Even after putting in more than a full day of work, many government lawyers spent precious hours with firefighters, the Red Cross and other relief activities to help ease the pain and share in the support process.

There have been dozens upon dozens of legal issues to address as a result of September 11. Some of these issues had to be dealt with immediately, such as the issuance of emergency and executive orders. Other issues will challenge the profession in the coming months and years, such as potential revisions to the laws surrounding the right of intestacy, the wrongful death statute, and the definition of marriage. Government lawyers have been taking a closer look at even more issues, including charities regulation, effectively balancing civil rights and security, and balancing the public's right to know/access government information with safety and security concerns. None of these issues have easy solutions and yet it will be the government lawyers who will be called upon to lead us to practical, workable resolutions to benefit society.

We are proud of the work of the New York State Bar Association in its efforts to assist with lawyering issues after September 11. The Association's Web site has been a source of quality information for practitioners and the public and represents a coordinated effort by the Association staff and leadership. We are also proud of the work of the Committee on Attorneys in Public Service and the editors and editorial board of this *Journal* for devoting precious pages in this popular publication to highlight the incredible work and challenges facing government lawyers as a result of September 11. Most of all, however, we remain privileged to work daily with dedicated and smart government lawyers who make this state and this country a little bit better every day.

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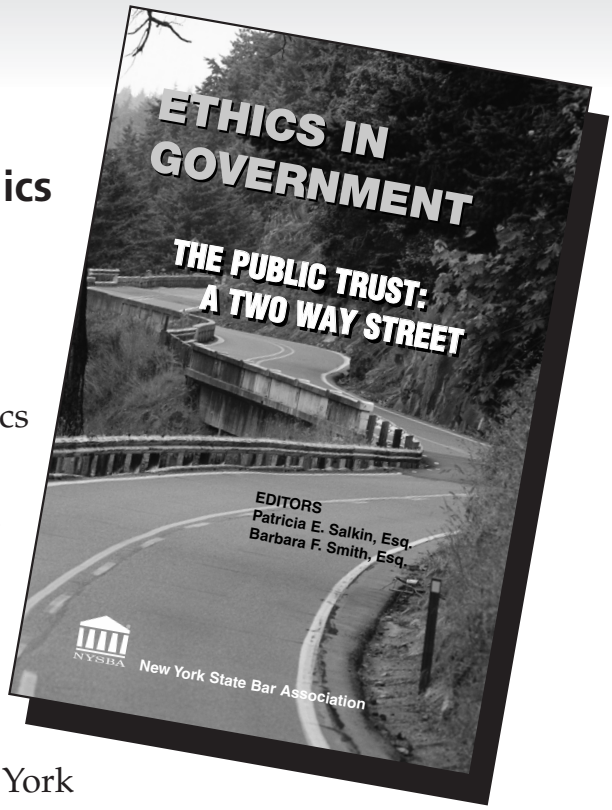

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