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The Aftermath of 9/11: Reflections of Michael A. Cardozo

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EDITOR'S NOTE: This article is an edited version of remarks Mr. Cardozo delivered on September 8, 2011, at the *Lawyers and the Law in New York City: 10 Years After 9/11* event, hosted by the New York City Bar Association's New York City Affairs Committee and the *New York Law School Law Review*. The video of his full address is available at <http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=4dec496d5c4f49afb5ab187d567ab6401d>. The *New York Law School Law Review* provided some of the citations.

9/11 forever changed the world, the United States of America, and certainly New York City. The events of that day also had a profound and long-term impact on the operations of the New York City Law Department, the matters it handles, and the law applicable to its clients. 9/11 was also a defining event in my own professional life.

Most of us remember where we were on that fateful morning. I was working in private practice and having breakfast on the top floor of Rockefeller Center. I was looking south, directly at the World Trade Center, when I suddenly saw smoke coming out of the building. Little did I suspect that the cause of this smoke would change my life forever. To oversimplify: it did.

There are many who say that but for 9/11 and New Yorkers' recognition that a nonpolitical businessman was needed to lead the city in 9/11's aftermath, Michael Bloomberg would never have been elected mayor. And of course, if he had not been elected he could not have appointed me Corporation Counsel.

After 9/11, I was frustrated by my inability to help, despite all the many needs that were apparent. I was not a firefighter, nor a police officer, nor a rescue worker. I was not even a bar leader who might have taken the initiative to organize pro bono legal help for 9/11 victims. So when Mayor-elect Bloomberg offered me the opportunity to serve as Corporation Counsel, I jumped at the chance. Although I had never met him before he interviewed me for the job, I thought that I could help the city I love. I have never regretted my decision. Not only does the job give me the opportunity to help New York City every single day, but the operational and substantive legal challenges emanating from 9/11 have been immense.

Although I was not Corporation Counsel on 9/11, it is important to understand what happened at the New York City Law Department in the days and weeks following that dreadful day. Since the Law Department is located directly across the street from Ground Zero, the office obviously had to be evacuated; indeed, debris from the collapse of the towers reached the sixth floor offices of the Department. All of our computers were destroyed. For the next seven months, the Department's lawyers and staff were located in forty-four separate offices throughout New York City, primarily in space generously donated by law firms as well as in space abandoned by other city agencies. The logistical challenges posed by such an arrangement were immense. For example, for the first three or four months after 9/11, our lawyers had to cross a National Guard roadblock in order to retrieve their case files.

Yet the legal work of New York City had to continue. Only hours after the planes hit, lawyers from the Department, who had no access to records or form files, sat at New York City's Pier 94 in front of borrowed laptops drafting emergency statutes as well as the executive orders and related documents then Mayor Rudy Giuliani issued in the tragedy's immediate aftermath. Others spent the initial weeks after 9/11 at the pier helping the families of the victims obtain death certificates and related documents. It was a very grim job, but the lawyers reported feeling tremendous satisfaction in helping others. As one lawyer in my office said, "This was why I became a lawyer." Numerous volunteer lawyers joined in this effort, leading then Chief Judge Judith S. Kaye of the New York Court of Appeals to call the profession's response to the tragedy "the bar's finest hour."

Although the Law Department moved back to its headquarters in April of 2002, some of the psychological scars from 9/11 remain today. Every day, when Law Department attorneys look out their windows, they see both the rebirth of the Ground Zero area and a reminder of what was there before 9/11. People who were in the building when the planes hit across the street may have outwardly recovered. But I have no doubt that painful memories remain for many, perhaps forever changing how they view the world.

We naturally focus on the human impact of the disaster, but the effects of 9/11 go beyond that; the operational challenges of running a government law office were forever altered by the events of that day. Security passes to enter buildings, disaster plans, continuity of operations contingencies, emergency website addresses, full building evacuation drills, and notebooks and CDs containing draft executive orders for every eventuality are the norm for Law Department attorneys today—and, I have no doubt, for virtually every government law office in New York City.

The impacts of 9/11 described above are undoubtedly well known. However, the long-term effects of 9/11 on the law—and, in particular, on the legal matters the Law Department handles—may not be readily apparent, are still evolving, and are in many ways among the most interesting effects to reflect upon. At the Law Department, 9/11 has had a major influence on at least three substantive aspects of our practice: the rebuilding of Ground Zero, the lawsuits resulting from 9/11, and the law's accommodation of our constitutional rights with the government's need to guard against terrorism.

The most immediate need was to rebuild the area where the World Trade Center towers once stood. In redesigning the site, the planners faced the choice of rebuilding to the prior level of development or leaving the site as a memorial and a park. Many who argued for the latter were not only the families of 9/11 victims, who wanted the site to be sacrosanct, but also those who believed the site could never be adequately protected as long as a terrorist threat existed. But to take that approach would have been to anticipatorily surrender. The compromise was to achieve a design plan that shifted development away from the footprints of the towers and to provide for numerous security arrangements, such as an on-site vehicle security center and a manpower allocation between the New York Police Department and the Port Authority of New York and New Jersey.

The legal problems with which the Law Department had to deal in connection with the rebuilding could fill a textbook on corporate and real estate law. They included reaching agreements over the parameters for the actual redesign of the site among the numerous local, state, federal, and private stakeholders at Ground Zero; structuring the reinstatement of part of the street grid at the site (which had been eliminated when the World Trade Center was built in the 1960s); providing legal support for the construction financing; addressing street closures and other practical issues that arose during construction; and reaching agreement on the payment of real property taxes, which involved settling several lawsuits the city had brought against the Port Authority for such taxes.

A very different set of issues that have occupied an enormous amount of the Law Department's time concerns compensation for individuals who claim to have suffered injury as a result of 9/11 and its aftermath. Since Osama bin Laden and the other terrorists responsible for the attack were not going to pay their victims, who would compensate the families of the nearly 3000 people who were killed or the thousands of people who became ill during the months that followed? Initially, Law Department lawyers worked with congressional representatives to make the regulations of the federal no-fault September 11th Victim Compensation Fund of 2001 as broad and efficient as possible. Until it closed in 2004, the Fund, which was extraordinarily well-administered by Special Master Kenneth Feinberg, provided approximately \$7 billion in compensation to the families of those killed and to many of the people injured on 9/11 and in its immediate aftermath.

The Law Department also worked to protect the city from the excessive costs of the litigation that would inevitably flow from 9/11. With the help of numerous others, Law Department lawyers were able to persuade the government to amend existing federal legislation to add a \$350 million cap on city liability relating to 9/11 and its aftermath. We also crafted a completely new kind of insurance entity—a city-created “captive” insurance company—to provide additional insurance since the insurance covering the city and its contractors was clearly insufficient. Working with others, we helped convince the Federal Emergency Management Agency (FEMA) to fund this new kind of insurance, and we worked with Congress and the New York State legislature to pass legislation to permit the captive insurance company to become a reality. As a result, more than \$1 billion in federal funds was made available to insure the city and its contractors and, assuming liability might be shown, to compensate Ground Zero workers and others who became ill following the attack.

This insurance proved to be very important. In the years after it was obtained, more than 10,000 separate suits were brought against the city and its contractors by individuals claiming to have become ill as a result of their work during the rescue, recovery, or debris-removal operations at Ground Zero.¹ Since the Victims Compensation Fund had already closed at the time the later suits were brought, however, these more than 10,000 potential claimants had no alternative but to sue. The litigation—which would have required each plaintiff to prove both that the city and/or the contractors were negligent and that the plaintiff's illness resulted from working at Ground Zero—was protracted, contentious, and expensive. Hundreds of depositions were taken and millions of paper and electronic documents were produced. Injured plaintiffs received nothing while this massive discovery effort was conducted and important issues were appealed twice to the U.S. Court of Appeals for the Second Circuit.² The city found itself in the unwanted position of opposing many of the heroes who responded so bravely to the terrorist attack. And the litigation

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1. Another 1000 suits in addition to the original 10,000 were filed by people who worked to clean buildings near ground zero. Unlike the other 10,000 suits, these were not settled.
 2. *See* McCue v. City of New York (*In re* World Trade Ctr. Disaster Site Litig.), 521 F.3d 169 (2d Cir. 2008); McNally v. Port Auth. of N.Y. & N.J. (*In re* World Trade Ctr. Disaster Site Litig.), 414 F.3d 352 (2d Cir. 2005).

cost many millions of dollars that might have been better spent caring for those who became ill.

In December of 2010, the city settled one of the largest mass tort litigations in this country's history when more than ninety-five percent of the plaintiffs agreed to accept a total payout of more than \$625 million. The settlement means that the plaintiffs receive compensation and, at the same time, the city's captive insurance company has more than \$400 million left to defend the city in the unsettled cases and the many more suits that are likely still to come. During settlement negotiations, the city and others continued to advocate for a reopening of the Victim Compensation Fund. Those efforts bore fruit with the passage of the James Zadroga 9/11 Health and Compensation Act,³ which, in addition to reopening the Victim Compensation Fund to cover claims not covered by the just-settled litigation, provided a stable source of long-term funding for medical services for people affected by the attack.

The Law Department's experience with the 9/11 claims—the success of the Victim Compensation Fund and the problems encountered litigating other claims—leads me to ask a fundamental question: Are mass tort actions the way to compensate either the victims of a terrorist attack or the people who become ill as a result of recovery efforts? Cases like these engender huge legal and administrative fees, take years to resolve, and require those injured to prove their injuries resulted from fault by the defendant. Think about it. Eight years of litigation, literally hundreds of millions of dollars of legal fees, and the government being forced to litigate against its citizens who were real heroes in the city's time of need. At the same time, the very prospect of being sued could deter private companies from playing their essential role in disaster recovery. Concretely, will the experience of the 9/11 contractors being named in thousands of post-9/11 lawsuits discourage private companies from helping the city, or any government, the next time (and we all recognize there may well be a next time) America suffers an attack of this magnitude?

I suggest that the way to avoid this litigation quagmire in the future is for Congress to enact legislation *now* that creates an administrative mechanism for compensating the people who suffer as a result of a major disaster like 9/11. Federal legislation could be modeled on the no-fault 9/11 Victim Compensation Fund and written to compensate people who become ill as a result of vital disaster recovery work as well as the immediate impact of the disaster. While others involved in the 9/11 litigation disagree with this approach,⁴ and while there may be many other solutions, one thing is clear: this is an issue to be confronted now rather than after the next disaster, when people will be suffering and response efforts may be hobbled by litigation fears.

One dominant post-9/11 legal issue remains to be discussed: our freedoms. How can we honor our treasured constitutional rights, particularly those under the First

3. See James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (2011) (codified in scattered sections of 42 U.S.C.).

4. See, e.g., KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005); Kenneth R. Feinberg, *The September 11th Victim Compensation Fund of 2001: Policy and Precedent*, 56 N.Y.L. SCH. L. REV. 1115 (2011-12).

and Fourth Amendments, when at the same time we need to protect ourselves against terrorism? This has been an issue with which our country, and in fact the entire world, has struggled since the attacks of 9/11. No easy answer exists, and this issue is likely to be debated well into the next century, if not beyond. However, a number of cases litigated by the Law Department that raised these issues have highlighted that courts, while being very careful to protect our liberties, recognize that the balance they must strike in such situations has changed.

The first case to pose this issue for the Law Department was *Handschu v. Special Services Division*, in which the city successfully moved to modify a consent decree that had placed limitations upon the New York City Police Department's ability to collect and utilize intelligence information.⁵ The main limitation in the then-existing consent decree was the requirement that, before the NYPD could conduct investigations of "political activity" (defined as "the exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions"),⁶ it needed a reason to believe that criminal activity had occurred, was occurring, or was about to occur. Unfortunately, this limitation created a loophole for terrorists: investigations of preparatory activities to an attack such as 9/11 were prohibited by the decree, thereby precluding investigation at an early stage.

Accepting that fact, the court in *Handschu* modified the consent decree to provide the NYPD with greater flexibility to collect information and to investigate political activity. While "[t]he Constitution's protections are unchanging," Judge Haight wrote, "the nature of public peril can change with dramatic speed, as recent events show."⁷ The court, however, was "mindful of the crucial importance of preserving both individual freedoms and public safety, and balancing the legitimate demands of those two goals."⁸

Handschu is by no means the only post-9/11 case in which courts have had to strike a balance between individuals' freedoms and public safety. In *United for Peace and Justice v. City of New York*, an anti-war group sought an injunction that would require the city to issue a permit for a protest march past the United Nations headquarters, despite a post-9/11 ban on all marches past the building.⁹ Citing security and logistical concerns, the NYPD was willing to permit only a stationary rally near the U.N.¹⁰ Weighing the need to protect the public against the protesters' interest in expressing themselves, the district court and the Second Circuit agreed with the city that, under the circumstances, a stationary rally constituted a reasonable time, place, and manner restriction under the First Amendment.¹¹

5. 273 F. Supp. 2d 327 (S.D.N.Y. 2003).

6. *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1420 (S.D.N.Y. 1985).

7. *Handschu*, 273 F. Supp. 2d at 348.

8. *Id.* at 349.

9. 243 F. Supp. 2d 19 (S.D.N.Y. 2003), *aff'd* 323 F.3d 175 (2d Cir. 2003).

10. *Id.* at 25.

11. *Id.* at 25, 30–31.

A few years later, Law Department attorneys once again found themselves defending the city's actions against claims that it had gone too far in restricting individual freedoms in the name of safety. In the summer of 2005, after terrorists bombed public transportation systems in London, Moscow, and Madrid, the NYPD instituted a random bag search program on the New York City subway system. The New York Civil Liberties Union (NYCLU) sued, claiming that the searches were unlikely to deter terrorists and too invasive to satisfy the Fourth Amendment. Presented with expert evidence that random bag searches had significant deterrence value, the district court rejected the NYCLU's argument.¹² Unanimously affirming, the Second Circuit held that the bag search program "satisfies the special needs exception to the Fourth Amendment's usual requirement of individualized suspicion."¹³

The courts faced a similar need to balance public safety and civil rights in two decisions arising out of the ongoing litigation involving the 2004 Republican National Convention (RNC) held in New York City. In the first, a precedential decision on the law enforcement privilege, the Second Circuit found the public's interest in the non-disclosure of confidential police department intelligence documents outweighed the plaintiffs' need for the information.¹⁴ In another decision, the district court found that the city's time, place, and manner restriction on protests near the main site of the RNC was narrowly tailored "because of the unique policing challenges posed by the RNC venue and the customized nature of the corresponding security measures."¹⁵ The RNC litigation will undoubtedly generate additional decisions addressing these competing interests.

The events of 9/11 forever changed this country and this city. The lives lost, the physical and emotional damage done, and the hopes and dreams that died that day are losses from which we will never fully recover. 9/11 was a day on which we all lost a feeling of security, a sense of innocence. Children today grow up in a very different world than children at their age ten years ago; they do not have the luxury of considering an emergency response drill as an annoyance, as something that they will certainly never need. This new awareness of the dangers all Americans face simply by living in a place of our choosing influences the debate about the balance of our freedoms against the need to increase public safety measures. In this new, changed world there are those who believe that the only way to win the War on Terror is by protecting the very freedoms the terrorists are attacking, and there are others who believe that the safety of our people is most important—that freedoms will mean little in a society where people constantly fear for the lives of their loved ones.

12. *MacWade v. Kelly*, No. 05 Civ. 6921, 2005 U.S. Dist. LEXIS 39695, at *69 (S.D.N.Y. Dec. 7, 2005), *aff'd* 460 F.3d 260 (2d Cir. 2006).

13. *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2010).

14. *In re City of New York*, 607 F.3d 923 (2d Cir. 2010).

15. *Marcavage v. City of New York*, No. 05 Civ. 4949, 2010 U.S. Dist. LEXIS 107724, at *19–20 (S.D.N.Y. Sept. 29, 2010).

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Governments, and certainly government lawyers, must somehow seek to strike a balance that is as elusive as it is vital. The only thing we really do know is that we will continue to struggle to find the best answer, one that represents the views and interests of New Yorkers and one that reminds us and all of the world why this country, and this city, are seen as symbols of progress and civilization.