

## Balancing the Right To Protest in the Aftermath of September 11

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The September 11, 2001, terrorist attack on the World Trade Center has had a profound impact on civil liberties and civil rights in this country. Since almost the moment the Twin Towers fell, advocates, law enforcement officials, and academics have been debating the extent to which terrorism concerns justify, or even require, substantial incursions into civil liberties.

The fallout from this debate has been felt most strongly here in New York City, where ironically—given the city’s long and proud history of protest activity—the right to protest has been seriously challenged. A combination of factors has produced a series of dramatic protest controversies over the last several years in New York City: the city was the primary target of the terrorist attacks, its police department is not only the largest in the country but is being reshaped with the primary mission of fighting terrorism, and it has been the site of many high-profile demonstrations. Starting with conflict over the right to march shortly after the attack, continuing with huge anti-war demonstrations and disputes over New York Police Department (“NYPD”) surveillance of political activity, and culminating with last summer’s Republican National Convention, New York City has witnessed ongoing challenges to the right to protest.

As the associate legal director of the New York Civil Liberties Union (the New York State office of the ACLU), I for many years have been deeply involved in public controversies and litigation in New York City in which public officials, advocates, and the federal courts have struggled to balance the First Amendment right to protest against concerns for public safety. Those concerns took on an entirely different complexion after September 11, although even before then terrorism had assumed a role in local First Amendment litigation.

In this Essay, I recount from an insider’s perspective the most important controversies that have shaped the post–September 11 fight over the right to protest in New York City. In doing so, I focus on the tension between terrorism and free expression that has been at the heart of these controversies.

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## INTRODUCTION

The right to protest plays an important role in free and democratic societies, providing individuals and groups with an opportunity to influence government action through means other than the electoral process. The significance of the right to protest in the United States is reflected in its enshrinement in our Federal Constitution, most directly through the First Amendment's free speech, free press, and free exercise clauses.

As a jurisprudential matter, however, the right to protest has had an uneven history in this country. Indeed, one need only go back to World War I to find a series of Supreme Court decisions upholding criminal convictions (with substantial prison terms) of people engaged in core protest activity in times of war.

In *Schenck v. United States*,<sup>1</sup> the Court unanimously upheld convictions of Socialist Party officials who had mailed anti-war leaflets to draftees. In *Frohwerk v. United States*,<sup>2</sup> the Court unanimously affirmed convictions of two individuals who had published newspaper articles that, according to the Court's own description, consisted of broad political condemnations of the war.<sup>3</sup> Most notoriously, the Court in *Debs v. United States*<sup>4</sup> affirmed the conviction and ten-year prison sentence of Eugene Debs—the leader of the Socialist Party and a substantial national figure who would garner over 900,000 votes from jail in the 1920 presidential election—for giving an anti-war speech. Finally, in *Abrams v. United States*,<sup>5</sup> the Court affirmed the convictions of five people sentenced to twenty years in prison for distributing anti-war leaflets in New York City.

In the ensuing decades, the right to protest in times of national crisis has fared better in the Supreme Court. Most notably, in the Vietnam War-era *Pentagon Papers Case*,<sup>6</sup> the Court rejected the federal government's effort to enjoin publication of classified military information by the *New York Times* and the *Washington Post*.

Much has been written about this First Amendment jurisprudence, and this Essay makes no effort to expand on that body of work. Rather, this Essay examines the right to protest from a perspective far removed from Supreme Court decisions—namely, from the perspective of an advocate grappling with the day-to-day reality of helping those trying to protest.

As with most legal rights, the right to protest that appears in Supreme Court opinions bears an attenuated relationship to the right to protest experienced by someone seeking to exercise the right. In reality, a person's ability to protest has little to do with nine justices in black robes; it instead is

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<sup>1</sup> 249 U.S. 47 (1919).

<sup>2</sup> 249 U.S. 204 (1919).

<sup>3</sup> *Id.* at 207–08.

<sup>4</sup> 249 U.S. 211 (1919).

<sup>5</sup> 250 U.S. 616 (1919).

<sup>6</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

governed by police officers standing on the street with handcuffs, guns, and only the most oblique understanding of or interest in legal niceties.

Given this reality, this Essay seeks to look beyond jurisprudence in order to understand fully the right to protest. My experience in New York City since September 11 provides a perspective on the right to protest that encompasses not only litigation, but also a range of other advocacy efforts. This experience provides useful lessons about how terrorism and the government's invocation of the threat of terrorism are affecting the right to protest in our society.

#### A LEGAL FRAMEWORK TO THE RIGHT TO PROTEST

Though judicial doctrine plays only a limited role in many protest controversies, an examination of such controversies post-September 11 nonetheless benefits from an understanding of the basic legal framework undergirding the right to protest. Three well-established doctrines bear most directly on this right: the doctrine of prior restraint, the doctrine governing licensing schemes of First Amendment activity, and the doctrine of "time, place, and manner." In addition, far less settled case law about police surveillance of political activity plays a significant part in examining the right to protest post-September 11.

The doctrine of prior restraint addresses the most serious obstacle to protest activity—a complete banning of it—but also presents the situation in which there are the greatest protections. In the famous dicta from Chief Justice Hughes in *Near v. Minnesota*,<sup>7</sup> the Court stated that in some extraordinary circumstances the First Amendment would pose no obstacle to a prior restraint on speech. Quoting the Court's World War I decision in *Schenck*, Justice Hughes explained:

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right." No one would question but that a government might prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops.<sup>8</sup>

Nonetheless, the Court has stated that any prior restraint bears a "heavy presumption against its constitutional validity,"<sup>9</sup> has invoked this burden

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<sup>7</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

<sup>8</sup> *Id.* at 716 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)) (citation omitted).

<sup>9</sup> *New York Times Co.*, 403 U.S. at 714 (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

to invalidate efforts to restrain rallies and publications,<sup>10</sup> and has never sustained a prior restraint.

Much more commonly presented are schemes used by government officials to regulate protest activity through licensing requirements. In many instances protesters are required to obtain government permits to perform certain protest activities (e.g., to march in the street, hold large rallies, or use amplified sound), and the denial of a permit can impair protest activity just as effectively as a prior restraint. The Court has generally condoned the notion of permit schemes, but has required that they afford government officials no discretion in their administration in order to eliminate any risk of content-based censorship. As the Court explained in one of its most important decisions in this area:

[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority. The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.<sup>11</sup>

There is also well-settled Supreme Court doctrine governing situations in which government officials refuse to allow protest activity to take place as requested by the organizers but offer an alternative such as a different date or time or a different location or route. Categorized as “time, place, and manner” restrictions, these limits on protest activity are subject to relatively straightforward doctrinal standards:

[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.<sup>12</sup>

Finally, there is the issue of police surveillance of protest activity, an area in which the law is far less settled and that is worthy of considerably more attention in light of the post-September 11 emphasis on intelligence

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<sup>10</sup> See, e.g., *New York Times Co.*, 403 U.S. at 714 (rejecting request for judicial injunction against publication of classified materials); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) (invalidating prior restraint on public rally).

<sup>11</sup> *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) (citations and internal quotations omitted).

<sup>12</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations and internal quotations omitted).

gathering. The Supreme Court's one foray into this area came in 1972 in *Laird v. Tatum*.<sup>13</sup> Political activists challenged a domestic surveillance system the Army had established following urban riots—euphemistically dubbed “disorders” by the Court—that took place in the late 1960s, particularly after the 1968 assassination of the Reverend Martin Luther King, Jr. The Court described the Army's system as consisting

essentially of the collection of information about public activities that were thought to have at least some potential for civil disorder, the reporting of that information to Army Intelligence headquarters at Fort Holabird, Maryland, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank located at Fort Holabird. The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation. Some of the information came from Army Intelligence agents who attended meetings that were open to the public and who wrote field reports describing the meetings, giving such data as the name of the sponsoring organization, the identity of speakers, the approximate number of persons in attendance, and an indication of whether any disorder occurred.<sup>14</sup>

The Court focused its analysis on the plaintiffs' alleged injury, noting the lower court's observation that the plaintiffs had failed to allege any specific action targeting them or to point to any specific unlawful surveillance or clandestine intrusion by the Army.<sup>15</sup> As for the information being collected by the Army, the Court described it as “nothing more than [what] a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.”<sup>16</sup> The Court therefore framed the question before it as

whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.<sup>17</sup>

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<sup>13</sup> 408 U.S. 1 (1972).

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* (quoting *Tatum v. Laird*, 444 F.2d 947, 953 (D.C. Cir. 1971)).

<sup>17</sup> *Id.* at 10.

With the issue thus framed, the Court held that no jurisdiction existed because the alleged injury was too speculative.<sup>18</sup>

Beyond its standing analysis, the Court signaled its unease with this type of challenge, accusing the plaintiffs of seeking to use the federal courts as cover to conduct their own intelligence gathering regarding sensitive government operations. To embark on such a journey, said the Court, “is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action.”<sup>19</sup>

The post-September 11 protest controversies that have arisen in New York City have primarily implicated issues of prior restraint, “time, place, and manner” restrictions, and police surveillance. When those controversies have resulted in litigation, however, the litigation has been important less because of any major changes in First Amendment doctrine, but more because of New York City’s consistent effort to inject terrorism concerns into the application of that doctrine. Such an approach, which has been partially successful, essentially destroys the balancing of interests that is central to First Amendment jurisprudence.

#### A PREFACE TO SEPTEMBER 11: THE PROTEST LEGACY OF THE GIULIANI ADMINISTRATION

When the planes hit the World Trade Center on a crystal-clear, primary-election-day September morning, Rudolph Giuliani was preparing to leave office as a discredited mayor whose second term had been marred by a series of highly publicized controversies, ranging from the police torture of Abner Louima to the Brooklyn Museum imbroglio. While Giuliani’s remarkable handling of September 11 has largely obscured the excesses of his administration, they provide an important backdrop for the First Amendment controversies that emanated from September 11.

Giuliani was a forceful mayor, and law enforcement was his passion. Having too little tolerance for criticism and too much willingness to use the power of the city—particularly the might of the NYPD—to punish those with whom he disagreed, Giuliani provoked a series of confrontations over the right to protest that sparked repeated litigation in the federal courts.

Terrorism played a role in only one of these cases, and that case serves as an instructive reference point for the First Amendment controversies that followed September 11. It arose when the Giuliani Administration closed the steps of City Hall to all events—including rallies, press conferences, and demonstrations—in August 1998 after two American embassies in Africa were bombed. After those attacks, American authorities had captured two suspects, and they were being held at the Metropolitan Cor-

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<sup>18</sup> *See id.* at 13–14.

<sup>19</sup> *Id.* at 15.

rection Center, the Manhattan federal detention facility located just blocks from City Hall.

Just one month before the embassy bombings, I had obtained a preliminary injunction against the city enjoining it from enforcing a policy of limiting protest events and press conferences on the City Hall steps to twenty-five people.<sup>20</sup> That decision involved application of the “time, place, and manner” doctrine, and Southern District Judge Harold Baer easily concluded that the twenty-five-person limit was not narrowly tailored to any significant governmental interest.<sup>21</sup> The August terrorist attacks turned this legally straightforward controversy into the first modern contest in New York City between the right to protest and the threat of terrorism.

I only learned of the post-bombing ban on all events when I deposed the NYPD’s head of City Hall security in September as part of the ongoing litigation over the twenty-five-person limit. Though the bombings were far from New York City, my colleagues and I at the NYCLU initially did not intend to challenge what we assumed would be a short-term, across-the-board limit on events at City Hall. But one month later Mayor Giuliani, a New York Yankees fan, allowed a World Series celebration rally on City Hall’s steps and plaza that between 5000 and 6000 people attended.

We then decided to challenge the ban. Our client, Housing Works, was an AIDS-advocacy group that had been fighting with the Giuliani Administration over AIDS policy for years and wanted to hold a protest rally on the steps of City Hall on World AIDS Day, December 1 of each year. On November 4, 1998, I requested the city’s permission for a press conference on the steps, for a rally in the plaza area immediately in front of the steps, and for a parade permit down Broadway; two days later it denied all three requests. We filed an emergency motion on November 12, and Judge Baer conducted an evidentiary hearing on November 19. In the interim, on November 16, the city hosted a 3000-person ceremony on the steps of City Hall to honor John Glenn.

The critical witness in the case was the head of the NYPD’s Intelligence Division, who was placed in a difficult position. He undoubtedly was worried about the potential for a terrorist attack in New York City, but he was forced to concede on the witness stand that events of several thousand people, such as the city had allowed, posed a much greater security risk than did far smaller events, such as the one our client requested. That testimony made it possible for Judge Baer to take the extraordinary step of casting aside the city’s terrorism contention by finding that the ban on the Housing Works event could not be deemed narrowly tailored to legitimate security concerns when the NYPD had allowed two other events

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<sup>20</sup> See *Housing Works, Inc. v. Safir*, No. 98 Civ. 4994 (HB), 1998 WL 409701 (S.D.N.Y. July 21, 1998).

<sup>21</sup> See *id.* at \*3–\*4. Judge Baer also found that the policy afforded the NYPD constitutionally impermissible discretion over First Amendment events. See *id.* at \*4–\*6.

to take place that posed greater security risks.<sup>22</sup> Judge Baer ordered the city to allow Housing Works to hold a 50-person press conference on the steps of City Hall and a 500-person rally in the plaza immediately in front of the building, and ordered the city to allow the march to City Hall.<sup>23</sup>

The city immediately appealed to the Second Circuit for an emergency stay of the order as it pertained to the activity at City Hall. The court agreed to hold a special argument first thing Monday, November 30, the day before World AIDS Day. At the argument, the city's lawyer emphasized the threat of terrorism posed by events at the foot of City Hall, and I argued that the threat could not be all that serious in light of the Yankee and Glenn events.

Early that afternoon we received an unsigned order from the court of appeals that sought to balance the security and First Amendment interests in a way that neither side requested. Reasoning that Judge Baer had applied the wrong preliminary-injunction standards, the court stated it was free to devise its own remedy, which it did.<sup>24</sup> Presumably thinking that a little distance was a good thing, the court granted a stay with respect to use of the steps for a press conference but denied relief with respect to use of the plaza adjoining the steps for a rally.<sup>25</sup> On this latter point, however, the court added, "Nothing contained in this Order shall be construed to limit the authority of the city to exercise such crowd control as it deems appropriate, including the imposition of reasonable limitations on the size of the crowd and its proximity to City Hall."<sup>26</sup>

This last sentence added one more element to the drama the next day. As the Housing Works protesters marched down Broadway toward City Hall, the city's lawyer told me that the NYPD intended to limit substantially the number of protesters allowed through the gates of City Hall and into the plaza. I immediately called the Second Circuit to inform it we might be back for an emergency hearing and told the city this, though it was a bit of a hollow threat given the remote likelihood of obtaining a judicial order on such short notice. Once the marchers reached City Hall, the city backed off and the 250 or so demonstrators were allowed entrance.

The event was completely peaceful. Nonetheless, there was a massive police presence, with hundreds of officers surrounding City Hall and the rally. Police sharpshooters with rifles also patrolled the roof above the rally.<sup>27</sup>

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<sup>22</sup> *Housing Works, Inc. v. Safir*, No. 98 Civ. 1994 (HB), 1998 WL 823614, at \*6-7 (S.D.N.Y. Nov. 25, 1998).

<sup>23</sup> *Id.* at \*9.

<sup>24</sup> *See Housing Works, Inc. v. Safir*, No. 98-9559, 1998 U.S. App. LEXIS 30441, at \*3 (2d Cir. Nov. 30, 1998).

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.*

<sup>27</sup> This was not the end of the litigation. After the city adopted and abandoned several revised policies and after a number of confrontations on the steps in which protesters were threatened with arrest, Judge Baer issued a permanent injunction against a fifty-person



Though it was the only protest litigation to present the issue of terrorism, the City Hall steps controversy reflected a standard approach taken by the Giuliani Administration in a series of disputes pitting protest activity against assertions of security concerns. A few months before the Housing Works dispute, the NYPD shut down all of the East River crossings into Manhattan in an effort to block a taxi-driver demonstration that the city falsely claimed was intended to be disruptive; we obtained a preliminary injunction ordering the department to allow the event. The city unsuccessfully sought an emergency stay from the Second Circuit,<sup>28</sup> and then assigned so many officers to the event that reporters on the scene likened it to security assigned to presidential motorcades.

Later in the summer of 1998, Giuliani tried to prohibit the so-called Million Youth March from taking place in Harlem after exchanging months of public insults with its controversial organizer, Khalid Mohammad. We again obtained a preliminary injunction, the city again unsuccessfully sought an emergency stay,<sup>29</sup> and the event culminated in a virtual riot after police helicopters swooped down on the crowd when the rally ran three minutes beyond its scheduled end time.

In February 1999, immigrant Amadou Diallo died in a barrage of forty-one shots fired by four white members of the NYPD's notorious Street Crimes Unit, sparking peaceful civil disobedience at NYPD headquarters that resulted in over 1000 arrests. In the midst of these protests, the city secretly changed its arrest-processing policy so that anyone charged with a minor offense at a demonstration—and only those charged at demonstrations—would no longer be given so-called desk appearance tickets but instead would be “put through the system” for arraignment. As a result, demonstrators who ordinarily would have been released after several hours routinely were held overnight for the most minor of offenses. This program only became public after an NYPD chief disclosed it to me in the spring of 2001. We immediately sued,<sup>30</sup> and the city quickly abandoned the program.<sup>31</sup>

By September 11, 2001, New Yorkers and civil-rights advocates had been treated to years of heated public controversy and litigation over the right to protest. While September 11 “changed everything,” the pre-September 11 controversies contained many of the elements that would prove

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limit on protest activity. *Housing Works, Inc. v. Safir*, 101 F. Supp. 2d 163 (S.D.N.Y. 2000). The city then increased the size of permitted events to 300 persons, which policy has since remained in effect without challenge or problem.

<sup>28</sup> See *United Yellow Cab Drivers Ass'n v. Safir*, No. 98 Civ. 3670(RPP), 1998 WL 274295 (S.D.N.Y. May 27, 1998), *stay denied*, No. 98-7737 (2d Cir. May 27, 1998) (unpublished order).

<sup>29</sup> See *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334 (S.D.N.Y. 1998), *stay denied but injunction modified*, 155 F.3d 124 (2d Cir. 1998).

<sup>30</sup> See *Martens v. Giuliani*, 01 Civ. 4557 (S.D.N.Y. filed Apr. 30, 2001).

<sup>31</sup> See William K. Rashbaum, *Policy of Jailing Protesters on Minor Crimes Is Revoked*, N.Y. TIMES, July 14, 2001, at B3.

central in post-September 11 New York: the attempted demonization of protesters, the need to resort to litigation to protect the most fundamental of civil liberties, and the willingness of the city to devote immense police resources to controlling protest activity. And the City Hall steps case provided an important first example of the city seeking to invoke terrorism as a basis for blocking core First Amendment activity—a central strategy in the post-September 11 controversies.

#### A BAN ON MARCHING RIGHT AFTER SEPTEMBER 11

The days following September 11 were chaotic ones in New York City, with rescue operations in full swing, much of the city shut down, and people struggling with the shock of the attack. Within days, the Bush Administration started planning a military response, which in turn triggered a public debate about the propriety of such action.

On September 25, a lawyer working with a group of anti-war organizations called me to report that the group wanted to hold a peace march on October 7 but had been unable reach anyone at the NYPD to secure the necessary permit. This was not surprising, since the entire police department was consumed by the World Trade Center attack. Though it was not a propitious time to seek permits for events that required substantial policing, the cause certainly justified it.

As a result of my substantial dealings with the NYPD over the years, I had direct access to high-level department officials at the World Trade Center field command post. I spoke with the chief who oversaw the policing of most major demonstrations in New York City, and he told me the city had instituted a moratorium on all marches. Though extraordinary, this was not a complete surprise, as everyone in the department was working twelve-hour shifts, seven days a week, and marches require a considerable number of officers and supervisors.

A complete ban on all protest marches in New York City comes pretty close to a classic prior restraint. Notwithstanding the presumptive unconstitutionality of prior restraints, this presented a difficult situation for me as an advocate, as it seemed extremely unlikely that any judge in the Southern District or on the Second Circuit—both of which sit just blocks from the World Trade Center site—would order the NYPD to divert resources away from World Trade Center operations to police a march, no matter how noble the cause. Concluding that the threat of litigation might be of limited utility, I elected to continue lobbying the chief, who had a history of fair treatment of protest issues over the years and who seemed willing to try to work something out.

We spoke several times over the ensuing week with little progress until I learned that the city planned to allow the annual Columbus Day parade to take place in early October. This gave us the opening we needed because much of our pre-September 11 protest litigation challenging permit deni-

als—as in our City Hall steps litigation—succeeded because the city had allowed other similar events to take place. Much as I loathed the prospect of dragging the NYPD into court at that time, I was confident that, even in the aftermath of September 11, the city could not allow large cultural parades to proceed while barring a peace march. Though, as detailed below, I was proven wrong on this point eighteen months later, my instincts served me well in October 2001. After further pressure, the chief informed me that the department would allow the march to take place.

On Sunday, October 7, people gathered in Union Square Park for a march that would proceed across Seventeenth Street and up Sixth Avenue to a rally area just south of Times Square. Shortly before the march began, news reports announced that the United States had started bombing Afghanistan in retaliation for the World Trade Center attack. Though the march started with only a few thousand people, by the time it crossed Twenty-Eighth Street, over 10,000 protesters filled three lanes of Sixth Avenue all the way back to Seventeenth Street. A senior-level police official at the front of the march turned to me and said, “Where did all these people come from?”

In the years to come, many more people would emerge to participate in anti-war protests, culminating in the protests during the Republican National Convention in August 2004. This swelling protest activity would prompt a series of controversies that raised difficult questions about balancing the right to protest with concerns about terrorism. And the first test was just months away.

#### THE WORLD ECONOMIC FORUM COMES TO NEW YORK CITY

Shortly after the “war on terror” began with the bombing of Afghanistan in early October 2001, New York braced for the arrival of an annual gathering of corporate and other leaders at an event known as the World Economic Forum (“WEF”), scheduled to take place at the Waldorf-Astoria Hotel in Manhattan between January 31 and February 3, 2002. Similar recent events in Seattle, Washington; Washington, D.C.; and Bologna, Italy, were marred by violence between protesters and police. This history, compounded by well-founded fears of terrorist attacks in New York City, set the stage for the first major post-September 11 confrontation between the right to protest and police actions.

The months leading up to the WEF were filled with media reports about predictions of violence and increasingly harsh rhetoric from top NYPD officials stating there would be zero tolerance for disorder. Given the nature of anti-globalization protest—which features a vast number of small and decentralized groups, some of which have anarchistic beliefs and most of which distrust the police—groups were not stepping forward to seek permits from the NYPD. This created the worst possible situation for the right to protest, as the police did not know what to expect and thus had to

prepare for the worst, the public had every reason to believe there would be police-protester conflict, and few agreements that might otherwise mediate the situation were in place between advocates and the police.

As it turned out, major demonstrations never materialized; the largest event was a Saturday morning march that attracted several thousand protesters. Though not large by New York standards, the event proved to be important for post-September 11 protest purposes because of the NYPD's tactics.

Upon arriving in the general vicinity of the Waldorf-Astoria, the march was met by two lines of blocks-long interlocking metal barricades used by the NYPD to create a chute down which the marchers would have to proceed. Every marcher was required to remain in this metal chute as the march skirted the large "frozen zone" established around the hotel.

Then, as the march turned onto Park Avenue five blocks south of the Waldorf-Astoria, it came to an abrupt halt as the marchers discovered that the interlocking barricades terminated in pens on Park Avenue, and hundreds (if not thousands) of officers in riot gear came into view. After considerable debate, the march leaders agreed to proceed, but serious problems arose. Using the interlocking metal barricades, the police had left only small openings for the crowd to proceed from one pen to the next, slowing the march to a crawl. And as each pen filled halfway, the police closed the pen, creating large gaps in the crowd and leaving most of the march so far from the stage and sound system that they could not see or hear the speakers. Meanwhile, the entire crowd was surrounded by a vast number of officers, and police officers could be seen in adjoining buildings videotaping the protesters.

It was a bitterly cold day, and it was not long before people wanted to leave. However, the small openings effectively trapped people in the pens. When the event ended several hours later with thousands of people still there, the police would allow them to exit only in a single file line out of a single opening.

From the perspective of the police, this may have been an entirely successful event. No one penetrated the security perimeter erected around the world leaders participating in the forum, no police officers were injured, and protesters—at least those who made it into the forward pens—were allowed within "sight and sound" of the Waldorf-Astoria. As a matter of safety and security, the police could argue that they did their jobs.

From the perspective of the right to protest, however, the event was a disaster. The combination of an overwhelming police presence, the extensive use of interlocking metal barricades to restrict the movement of protesters, and the videotaping of demonstrations created an extremely oppressive situation. For many people, the most prominent feature of this march and rally was not the protest, but the police.

Coming so soon after September 11 and given the troubling history of other free-trade events, one could understand why the WEF would prompt

unusual precautions by the NYPD. Nonetheless, I and other advocates were unprepared for the draconian measures the department undertook to impose control over the WEF protest. As we would learn, the WEF would prove not to be an aberration but instead a harbinger, and the NYPD's WEF tactics would become the subject of important post-September 11 litigation.

#### POLICE SURVEILLANCE OF PROTEST ACTIVITY AFTER SEPTEMBER 11

Seven months after the World Economic Forum came the first major post-September 11 court challenge in New York City requiring a balancing of core First Amendment activity against concerns about terrorism. On September 25, 2002, New York City filed a motion in the Southern District of New York seeking to modify a 1985 consent decree that imposed various restrictions on the NYPD's ability to monitor political activity. Given the burgeoning emphasis on post-September 11 intelligence gathering, this motion raised important concerns bearing on the right to protest.

Through the consent decree, the city had settled *Handschu v. Special Services Division*,<sup>32</sup> a case the NYCLU and others had brought in 1971 challenging NYPD surveillance, dossier-building, and disruption of anti-war and other political activities in New York City. Defining covered "political activity" as "[t]he exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions," the 1985 decree contained four primary restrictions on surveillance of political activity: (1) it barred the NYPD from investigating political activity unless "specific information has been received by the Police Department that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime"; (2) it restricted the use of undercover agents in political-activity investigations; (3) it restricted the NYPD's collection and maintenance of information about political activists; and (4) it restricted the NYPD's dissemination of information it had compiled on political activity to other law enforcement or government agencies.<sup>33</sup>

With its September 2002 motion, the city sought to delete all of these (and many other) protections, leaving in place only an NYPD-controlled panel that could conduct inquiries about whether NYPD political investigations "violate[d] constitutionally guaranteed rights and privileges."<sup>34</sup> In doing so, the city relied squarely on the proposition that September 11-based concerns about terrorism required the elimination of limits on the NYPD's spying on political activity.

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<sup>32</sup> 349 F. Supp. 766 (S.D.N.Y. 1972).

<sup>33</sup> *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1420-24 (S.D.N.Y. 1985).

<sup>34</sup> Defendant's Proposed Modified Guidelines at § V(A), *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327 (S.D.N.Y. 2003) (No. 71 Civ. 2203 (CSH)) (attached as Exhibit A to Declaration of Gail Donoghue (Sept. 11, 2002)) (on file with author).

Fittingly, the principal affidavit used by the city came from the NYPD's Deputy Commissioner for Intelligence, David Cohen, who had been brought to the department in February 2002 after thirty-five years at the Central Intelligence Agency. Cohen's affidavit dramatically and starkly illustrated the extent to which the NYPD was prepared to conflate political activity with terrorism.

The affidavit started off cataloguing a series of terrorist attacks and plots since the entry of the 1985 consent decree, including the February 1993 World Trade Center bombing, the April 1995 Oklahoma City bombing, the two August 1998 embassy bombings that triggered the City Hall steps litigation, the October 2000 attack on the U.S.S. Cole in Yemen, and culminating with September 11,<sup>35</sup> which Cohen described as "a watershed moment in which the glaring deficiencies in the nation's intelligence gathering ability provoked widespread demand for reform and improvement."<sup>36</sup> With this as background, Cohen then asserted that "the counter-productive restrictions imposed on the NYPD by the Handschu Guidelines in this changed world hamper our efforts every day."<sup>37</sup> In support, Cohen reviewed portions of the so-called "Al Qaeda Manual"—reportedly found by English law enforcement officials on the computer of an Al Qaeda member—which he characterized as instructing terrorists to take advantage of the freedoms in American society to conceal their planning for terrorist attacks.<sup>38</sup> Cohen's affidavit was twenty-three pages long and emphasized a consistent theme: the *Handschu* guidelines protecting political activity were aiding terrorists.<sup>39</sup>

As noted above, in light of the Supreme Court's decision in *Tatum v. Laird*, the scope of First Amendment protections with respect to law enforcement's surveillance of political activity is far from clear. Further buttressing the city's effort to extract itself from the *Handschu* decree was case law making it easier for police departments to terminate consent decrees. Finally, months before September 11, in a decision presciently invoking the threat of terrorism, the Seventh Circuit granted a motion by the Chicago Police Department to modify a 1981 consent decree, removing many restrictions on the police department's political-surveillance activities.<sup>40</sup>

The Chicago decree was entered in response to abuses by the unit in the Chicago Police Department dubbed the "Red Squad," which for decades had "spied on, infiltrated, and harassed a wide variety of political groups" involved in largely peaceful and lawful political activity.<sup>41</sup> After

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<sup>35</sup> Declaration of Deputy Commissioner David Cohen at 3, *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327 (S.D.N.Y. 2003) (71 Civ. 2203 (CSH)).

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 5–6.

<sup>38</sup> *Id.* at 6–8.

<sup>39</sup> *Id.*

<sup>40</sup> *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001).

<sup>41</sup> *Id.* at 801.

nearly two decades of what it considered compliance with the consent decree, the city sought to vacate what the Seventh Circuit characterized as “a dizzying array of highly specific restrictions” that barred the police from collecting information about political groups unless it was “unavoidably necessary to the investigation of a reasonably suspected crime.”<sup>42</sup>

An intervening 1992 decision from the Supreme Court substantially relaxed the standards for easing institutional consent decrees,<sup>43</sup> but terrorism concerns provided the real impetus for the Seventh Circuit’s reversal of the district court’s denial of the modification request. As Judge Richard Posner explained:

The era in which the Red Squad flourished is history, along with the Red Squad itself. The instabilities of that era have largely disappeared. Fear of communist subversion, so strong a motivator of constitutional infringements in those days, has disappeared along with the Soviet Union and the Cold War . . . .

Today the concern, prudent and not paranoid, is with ideologically motivated terrorism. The City does not want to resurrect the Red Squad. It wants to be able to keep tabs on incipient terrorist groups. New groups of political extremists, believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. Until the group goes beyond the advocacy of violence and begins preparatory actions that might create reasonable suspicion of imminent criminal activity, the hands of the police are tied. And if the police have been forbidden to investigate until then, if the investigation cannot begin until the group is well on its way toward the commission of terrorist acts, the investigation may come too late to prevent the acts or to identify the perpetrators. If police get wind that a group of people have begun meeting and discussing the desirability of committing acts of violence in pursuit of an ideological agenda, a due regard for the public safety counsels allowing the police department to monitor the statements of the group’s members, to build a file, perhaps to plant an undercover agent.<sup>44</sup>

Thus, by the time New York City filed its motion in *Handschu* one year after September 11, its position was very strong. And it was unremarkable that Judge Charles Haight, who had approved the *Handschu* consent decree and overseen compliance since 1985, granted the city’s motion to

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<sup>42</sup> *Id.* at 800.

<sup>43</sup> See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

<sup>44</sup> *Alliance to End Repression*, 237 F.3d at 801–02 (citation omitted).

“modify” the decree.<sup>45</sup> Specifically, he ruled that he would eliminate from the decree the provisions challenged by the city, provided the city agreed to adopt as internal policy a set of guidelines patterned on surveillance guidelines the FBI had adopted in May 2002.<sup>46</sup> Though these guidelines would not be part of the decree, the department would be required to retain them as part of its policies.<sup>47</sup>

What was remarkable about Judge Haight’s ruling, however, was his acceptance of an asserted relationship between terrorism and political activity that threatens to poison the First Amendment well and that would surface in subsequent protest litigation in New York City. Under Supreme Court precedent, one of the burdens borne by a government agency seeking to modify a consent decree is to show that the proposed modification is “suitably tailored” to a significant change in fact or law bearing on the decree.<sup>48</sup> The plaintiffs opposing the proposed *Handschu* modification argued that the city had not met this standard because the decree only concerned lawful political activity and thus did not need to be modified to allow the NYPD to investigate preparation for terrorist acts, such as renting apartments, leasing cars, or taking flying lessons.<sup>49</sup> Judge Haight rejected this argument:

I cannot accept its implicit assumption: that terrorists would *never* in furtherance of their unlawful purposes participate in “lawful political, religious, educational or social activities,” those being the activities engaged in by the individuals and organizations who are members of the class certified in this case . . . and for whose protection that the Handschu Guidelines were drafted. Nor need we speculate that terrorists might on occasion avail themselves of such lawful trappings: the convicted architect of the 1993 World Trade Center bombing was the imam of a mosque. It is a sad reality that such use was made of a place of worship dedicated to Islam, one of the world’s greatest religions, but a reality nonetheless.<sup>50</sup>

The notion that First Amendment activity may be entitled to lesser protection because those involved in terrorist activity might engage in First Amendment activity poses a mortal threat to the First Amendment. If expressive activity is viewed as a potential shield for terrorists, the right to protest is in serious jeopardy.

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<sup>45</sup> *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 329 (S.D.N.Y. 2003).

<sup>46</sup> *Id.* at 345–46, 349.

<sup>47</sup> *Id.* at 349.

<sup>48</sup> *Rufo*, 502 U.S. at 393.

<sup>49</sup> *Handschu*, 273 F. Supp. 2d at 339.

<sup>50</sup> *Id.* (citation omitted).



The threat posed by this conflation of terrorism and protest activity would be aptly illustrated by a controversy over a massive anti-war event that took place just days after Judge Haight's decision. That controversy spawned a series of dramatic developments that would come back to haunt the NYPD and ultimately lead Judge Haight to reimpose restrictions on the department.

#### "COURT BANS PEACE MARCH"

While New York City's motion to modify the *Handschu* consent decree was pending in the fall of 2002, the United States was preparing to invade Iraq. Anti-war groups became increasingly active, and a national umbrella group named United for Peace and Justice ("UFPJ") formed. When American war preparations escalated in late 2002, UFPJ decided to start planning an anti-war march and rally in New York City for February 15, 2003. The group planned to march past the United Nations on First Avenue and then to Central Park for a large rally at which UFPJ expected at least 100,000 participants.

UFPJ contacted me in mid-January seeking help in securing the necessary permits from the NYPD and Parks Department, and I promptly called the NYPD to arrange a meeting. After a few days of dialogue, the department told me it would not permit any march, be it past the United Nations or on any other route. However, when I told the New York City Law Department that we intended to file suit immediately, it asked for a meeting to negotiate a resolution.

On Thursday, January 30, we met at the Law Department's executive offices with high-level city lawyers and police officials. We discussed various potential parade routes and assembly sites, but the police said they would have to consult with top officials in police headquarters. We agreed to meet the following Monday.

The next day the city's lawyer called me to report that Mayor Michael Bloomberg had to be consulted and thus the city needed to move the meeting from Monday to Tuesday. "The Mayor wants this to happen, and you're going to like our offer," she said. I relayed this to UFPJ, and, though time was getting tight, we agreed to postpone the meeting.

Expecting a fruitful resolution, we all arrived for the Tuesday meeting looking forward to planning the demonstration. It was therefore a shock when the city announced that it would not allow any march to take place and would only permit a stationary rally in the vicinity of the United Nations.

We filed suit the next morning in the Southern District of New York, and the case was assigned to Judge Barbara Jones, before whom we appeared that afternoon. She ordered expedited discovery and briefing and scheduled an evidentiary hearing two days later, which was only eight days before the scheduled event. Just hours before we were to appear for that

hearing, the federal government announced it was raising the nation's terror-alert level.

Though the city's position that no march could take place could have been characterized as a prior restraint, we chose to challenge it on "time, place, and manner" grounds. Even after September 11, the city had routinely allowed cultural parades involving 100,000 people or more, including the annual St. Patrick's Day Parade, scheduled for just one month later. In light of this, we argued, the city could not carry its burden of demonstrating that entirely barring the UFPJ march was a narrowly tailored restriction on the undisputed First Amendment right to hold a protest march.

Relying on testimony from a police chief, the city argued that the short amount of time to plan for the UFPJ march and uncertainty about the exact number of participants distinguished it from similarly sized cultural parades and made it reasonable to limit the event to a stationary rally. More significantly, the city repeatedly asserted that the march posed a unique security threat because terrorists might attempt to use it as cover to mount an attack, though it offered no evidence that any such plan was afoot and disclaimed any suggestion that the organizers were involved in terrorist activity.

The NYPD had proven itself fully capable of policing large marches on short notice over the course of many years, and I believed that the terrorist argument was simply alarmist given that political events have not been used for terrorist attacks. But I was not the judge, and Judge Jones accepted the city's argument. In her decision, released late on Monday morning, she wrote:

The City's concerns with respect to crowd control are exacerbated by the added security concerns since September 11, 2001. The nation and the City are currently at the second highest security alert, a fact that the NYPD must take into account in determining the level of risk. The police can more effectively monitor crowds for terror threats at stationary rallies than they can crowds moving in a procession, which is the reason that the NYPD prefers a stationary rally in this case.

Again, Plaintiff argues that this preference cannot be a basis for prohibiting its march, as the City has permitted large scale cultural and celebratory marches since September 11th. In fact, it notes that the City intends to permit the Saint Patrick's Day parade, with upwards of 100,000 participants, to proceed next month. Plaintiff argues that there is nothing to distinguish the policing difficulties, including heightened terrorist concerns, when policing a parade than when policing the type of march contemplated here.

Despite Plaintiff's contentions, the Court credits the City that there are critical differences between monitoring a well formed parade of marchers who step out in a timed manner and proceed at a set pace and monitoring a procession of marchers not organized in a traditional parade format. In a parade, police officers have predetermined formation blocks where they can survey a crowd for terrorist devices. They can also more easily monitor groups as they proceed through a parade route than they can monitor a march of 100,000 plus individuals with uncontrolled crowd formations. Such a march also poses much greater difficulty in observing and tracking suspicious activity. Consequently, the Court finds that heightened security concerns due to September 11th are an additional element of the City's overarching concern that it cannot safely protect the public if a march proceeds as it is currently proposed. This protest march is simply different in kind than an annual parade or a protest march that has been organized over a longer period of time.<sup>51</sup>

"Court Bans Peace March in Manhattan," blared the *New York Times* the following morning in a headline that was somewhat unfair to Judge Jones (though I must confess it did not displease me).<sup>52</sup> We filed an immediate emergency appeal, and the Second Circuit scheduled a special argument for Wednesday, February 12. After hearing over an hour of argument, the panel left the courtroom to deliberate. Within an hour the judges returned and read a decision affirming Judge Jones's ruling.<sup>53</sup> Significantly, the court of appeals' *per curiam* decision made no mention of the city's September 11 security arguments, relying instead on the conventional logistical issues arising from the size and timing of the event.<sup>54</sup>

The stationary rally took place three days later on First Avenue north of the United Nations and was a disaster. Hundreds of thousands attended, only to be met by an army of officers who had closed streets and sidewalks leading to First Avenue and gave no information about how the public could access the event. Tremendous confusion and bottlenecks ensued. With no place to go, crowds surged onto Second, Third, and Lexington Avenues, where police officials rode horses into the crowds in an effort to disperse them. The 100,000 or more people who managed to reach First Avenue were confined in metal pens like those used in front of the Waldorf-Astoria during the World Economic Forum one year earlier.

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<sup>51</sup> *United for Peace & Justice v. City of New York*, 243 F. Supp. 2d 19, 28–29 (S.D.N.Y. 2003) (citations omitted).

<sup>52</sup> Susan Saulny, *Court Bans Peace March in Manhattan*, N.Y. TIMES, Feb. 11, 2003, at B1.

<sup>53</sup> *United for Peace & Justice v. City of New York*, 323 F.3d 175 (2d Cir. 2003).

<sup>54</sup> *Id.* at 176–77.

When it was all over, tens of thousands never made it to the event, more than 200 people were arrested, many of them handcuffed for almost twelve hours in dark and frigid police vehicles before being charged with minor offenses, scores of people—including officers—had been injured, and televised images depicted officers out of control.

The city was widely condemned for its handling of the February 15 rally, and the episode embarrassed Commissioner Raymond Kelly and Mayor Bloomberg. Of critical significance, the city's arguments to Judge Jones were exposed as disingenuous just two weeks later when I informed the city that UFPJ wished to hold a march on Saturday, March 22, and it immediately agreed to allow the event to occur. On an unseasonably warm afternoon two days after the United States launched its attack on Iraq, over 200,000 people paraded down Broadway—from Times Square around Union Square Park to Washington Square Park—largely without incident.

The peace march litigation illustrates the dilemma courts face in confronting post-September 11 terrorism concerns in protest controversies. In my experience, even in calm times judges are loathe to discount testimony from high-level police officials who argue that public safety concerns justify restricting protests. When public safety concerns couched in terms of potential terrorism are added to the calculus, the balancing that is central to First Amendment litigation tilts heavily in favor of the government.

Viewed in this light, it is difficult to fault Judge Jones and the court of appeals for holding that allowing only a stationary rally rather than a march is a reasonable time, place, and manner restriction on First Amendment activity. Viewed from the bench, the differences between such forms of protest may seem minor—though they are enormous to those planning and participating in them—and hardly worth the risk of being deemed responsible for a terrorist attack.

This reveals the core problem: First Amendment balancing is a relatively nuanced affair, but there is nothing nuanced about the threat of terrorism. The calculus is altered fundamentally once the government can introduce terrorism concerns, as evidenced in the peace march and *Hand-schu* litigation.

#### DEMONSTRATOR “DEBRIEFING”

The February 15, 2003, anti-war event spawned several significant disputes implicating the tension between the right to protest and concerns for security. The first arose in early April when a lawyer working with the New York City chapter of the National Lawyers Guild telephoned to tell me he had obtained a copy of a form he understood NYPD officers had been using in conjunction with the interrogation of protesters arrested at the February demonstration. He asked if I would be interested in seeing it, and I asked him to send it over.

What shortly appeared in our fax machine was a bombshell. Titled “Demonstration Debriefing Form,” the form bore the insignia of the NYPD Intelligence Division and a federal law enforcement agency. Following a section for information about the Intelligence Division officer completing the form and the NYPD arresting officer, the form contained a section for information about the protester, including passport number, the name of the organization to which the protester belonged, the position held in the organization, and the protester’s “[p]rior demonstration history.”<sup>55</sup> Guild lawyers were told that, using this form, the NYPD had interrogated protesters, often while in handcuffs, about a range of their political associations and activities. Police then compiled the information in a computer database.

I quickly prepared a letter to Commissioner Kelly demanding that the NYPD discontinue the interrogations and destroy the database. Rather than holding a press conference or releasing the letter publicly, I gave it to the *New York Times*’ NYPD bureau chief, who pressed the department for a response. One day later, the department told the *Times* it was destroying the database and stopping all questioning about political activities. The *Times* story on April 10<sup>56</sup> prompted a huge media response, and the press conference we held that afternoon was packed.

Not only did this political-interrogation disclosure further embarrass the NYPD, it also set in motion a new round of litigation over the *Handschu* guidelines. Two days before the February 15 anti-war rally discussed above, I spoke and wrote to the city’s lead NYPD lawyer to remind her that, notwithstanding Judge Haight’s February 11 ruling relaxing the NYPD consent decree, the original *Handschu* guidelines remained in effect for the rally since Judge Haight’s ruling required the NYPD to undertake certain actions before the decree actually would be modified. Interrogating protesters about their political affiliations and activities appeared to violate the original guidelines directly.

In April, just three days before the demonstrator-debriefing program became public, Judge Haight issued a final order eliminating virtually all of the consent decree.<sup>57</sup> The plaintiffs promptly filed a motion with Judge Haight seeking to reverse the modification in light of the new disclosure, arguing that the debriefing program revealed that the NYPD could not be trusted to conduct political surveillance without direct court supervision.

In a decision issued on August 6, 2003, Judge Haight partially agreed.<sup>58</sup> Citing newspaper accounts in which Commissioner Kelly had stated that

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<sup>55</sup> Demonstration Debriefing Form, Criminal Intelligence Section, New York Police Department (on file with author).

<sup>56</sup> William K. Rashbaum, *Police Stop Collecting Data on Protesters’ Politics*, N.Y. TIMES, Apr. 10, 2003 at D1.

<sup>57</sup> *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203 (CSH), 2003 WL 21961367 (S.D.N.Y. Apr. 7, 2003) (entering final order modifying consent decree).

<sup>58</sup> *Handschu v. Special Servs. Div.*, 288 F. Supp. 2d 411 (S.D.N.Y. 2003).

neither he nor Deputy Commissioner for Intelligence Cohen knew of the demonstrator-interrogation program—the city having chosen not to submit an affidavit from either—the judge noted, “I think it clear that in such a sensitive area and at such a sensitive time (including the pendency of the NYPD’s motion to amend the Handschu consent decree), the two commissioners should have known.”<sup>59</sup> While he found it unnecessary to adjudicate the constitutionality of the political interrogations, Judge Haight found that they raised sufficiently troubling questions to warrant re-modifying the consent decree and incorporating into it the FBI-like guidelines that previously were merely internal department policy.<sup>60</sup> As a result, the guidelines became court-ordered; violations of those guidelines could subject the NYPD to contempt.<sup>61</sup>

#### THE REPUBLICAN NATIONAL CONVENTION

All of this was but a prelude to this country’s most significant post-September 11 contest between public safety and the right to protest: the Republican National Convention. Scheduled to take place in the heart of New York City in the midst of an increasingly bloody and controversial war on terrorism in Iraq, the convention would be the true test of the First Amendment’s vitality in the aftermath of the World Trade Center attacks.

##### *Pre-Convention Litigation over Police Demonstration Tactics*

Shortly after the Republican National Committee announced its selection of New York City in January 2003, I spoke with NYPD lawyers about meeting to discuss policing at what were anticipated to be huge convention demonstrations. Our concerns were heightened by the debacle of the February 2003 anti-war rally and our discovery of the demonstrator-interrogation program. Although the convention would begin in August 2004, in the fall of 2003 the city still claimed it was too early to discuss permits or demonstration tactics.

Meanwhile, in September 2003 the NYCLU had staged a rally outside of Federal Hall on Wall Street while inside then-Attorney General John Ashcroft addressed select law enforcement officials about the controversial Patriot Act. Though relatively small, with only a few thousand participants, the rally encountered many of the same problems as the February 15 peace march—streets and sidewalks leading to the event had been closed, and everyone was required to assemble in a pen. Moreover, shortly before the event was to start, the commanding officer on the scene informed me that anyone wishing to enter the protest area would have to consent to hav-

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<sup>59</sup> *Id.* at 418.

<sup>60</sup> *Id.* at 417–19.

<sup>61</sup> *Id.* at 419.

ing their bags searched. After I objected and called NYPD lawyers, the commanding officer backed off. Nonetheless, when the rally started, officers still demanded to search some bags, including the briefcase of the NYCLU's legislative director.

With this fresh experience and the recognition that any convention litigation would be time-consuming, we started preparing lawsuits. Initially, we considered focusing on damage actions that might yield useful declaratory judgments, but I soon realized that we had viable injunctive claims.

On November 18, I called the city's lead NYPD lawyer and told her we were filing suit the next day. She urged me to hold off, asserting that the department would be much less likely to negotiate if litigation were pending. However, years of experience had shown that nothing forced the city to do something like a lawsuit.

The next day we filed three lawsuits in the Southern District challenging five specific NYPD practices we thought would be used at the convention: (1) closing streets and sidewalks leading to demonstrations without providing adequate information about alternative ways to access the demonstration; (2) using "pens" to confine demonstrators and restrict their movement at demonstrations; (3) using the NYPD's mounted unit to disperse people assembling peacefully on city streets or sidewalks; (4) indiscriminately searching people seeking to attend demonstrations on city streets; and (5) detaining people arrested for minor offenses for prolonged periods under excessively harsh conditions. In addition to the NYCLU—as an organizer of protests and as an organization whose members attended protests—the suits named as plaintiffs three individuals who had sought to attend the February 2003 demonstration and planned to attend convention protests. The first was an eighty-year-old man who, with his wife and children, had been knocked down and injured by a police horse on February 15 after being trapped in a crowd resulting from police street closings; the second was a Brooklyn Law School student who was knocked down and injured by a police horse and then arrested, beaten, and held in handcuffs for hours in a freezing cold and dark police van; and the third was a wheelchair-bound woman who had made it to First Avenue but had been caught in a pen and then had her wheelchair broken by a police officer who refused to allow her to go home.<sup>62</sup>

The cases sought declaratory judgments, injunctions against four of the policing tactics—all but the arrest-processing practice, for which we lacked standing for an injunctive claim—and damages for the individual plaintiffs. Though the injunctions we sought would apply to all demonstra-

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<sup>62</sup> Gutman v. City of New York, No. 03 Civ. 9164 (RWS), 2004 WL 1593870 (S.D.N.Y., filed Nov. 19, 2003); Conrad v. City of New York, No. 03 Civ. 9163 (RWS), 2004 WL 1593870 (S.D.N.Y., filed Nov. 19, 2003); Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1593870 (S.D.N.Y., filed Nov. 19, 2003).

tions in New York City, the case was compelling because it challenged police tactics expected to be used at the convention demonstrations.

In early June 2004, after months of discovery in which we obtained a vast number of documents about NYPD policing of demonstrations, reviewed hours of NYPD videotape, and deposed police officials ranging from mounted unit officers to Commissioner Kelly, Southern District Judge Robert Sweet held a four-day preliminary-injunction hearing.

Our legal claims challenging the NYPD's access, mounted unit, and pen practices were novel in that no case law addressed challenges to similar practices as violations of the First Amendment. However, these three claims were conventional in fundamentally invoking the well-established "time, place, and manner" doctrine, just like the February 15 peace march litigation and many earlier NYCLU protest cases. For example, our position in the access claim was that the NYPD violated the First Amendment when it closed streets and sidewalks leading to demonstration sites without providing members of the public with alternative means of reaching the event because the restriction was not narrowly tailored to any legitimate governmental interest. The city did not challenge the applicability of the doctrine; rather, it simply disputed whether under that doctrine its practices were unconstitutional.

In contrast, the demonstrator-search claim presented a potentially novel doctrinal question. There was only one reported case adjudicating a challenge to indiscriminate searches at a public rally, with the Second Circuit having declared searches of those seeking to attend Ku Klux Klan rallies unconstitutional following a history of serious violence (but allowing the use of magnetometers).<sup>63</sup> Beyond this specific context, however, there was ample Supreme Court precedent requiring individualized suspicion for searches in public places, except in the narrowest of circumstances (like border searches).<sup>64</sup> Yet, as the city was to point out, the Court had not decided any public-search cases in situations in which law enforcement invoked a concern for terrorism.

At the preliminary-injunction hearing, the city chose not to call Commissioner Kelly. I was surprised at the decision not only because testimony from the head of the police department is extremely difficult to counter, but also because Kelly is sophisticated and well-spoken. Instead, the city called Chief Joseph Esposito, the highest-ranking uniformed member of the NYPD. Esposito, who was in charge of the strict policing in front of the Waldorf-Astoria Hotel during the World Economic Forum, provided the single most important piece of testimony in the case.

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<sup>63</sup> See *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987), *cert. denied sub nom. Kelly v. Wilkinson*, 485 U.S. 1034 (1988).

<sup>64</sup> See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (invalidating generalized searches of motorists for law enforcement purposes and observing that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing"); see also *id.* at 37-40 (discussing narrow exceptions).



On cross-examination, I asked Chief Esposito a series of questions about whether the relief we sought respecting the department's access practices, use of pens, or mounted unit would undermine "legitimate law-enforcement concerns or concerns about terrorism."<sup>65</sup> Though the questions violated the cardinal rule of cross-examination about never asking a question for which one does not already know how the witness will answer, I felt it was worth the risk. And sure enough, Esposito answered each question with a "no." This testimony fundamentally undermined the city's effort to use terrorism to challenge our First Amendment claims.

In their briefs and closing argument, the city nonetheless continued to emphasize terrorism concerns. Nowhere was this more explicit than on the search issue, where the city argued to Judge Sweet that September 11, 2001, opened the door to revisiting all of the Supreme Court's Fourth Amendment jurisprudence concerning police searches on public streets without probable cause:

Now there has been no decision from the Supreme Court subsequent to September 11 in which the Court has addressed the issue of whether a bag search or parcel search, a search of anything big that you can see into might be reasonable, your Honor, under the Fourth Amendment after September 11. There is no law in this area, it's pretty clear after all the aircraft hijackings, the Supreme Court decided that the searches we know all of us at airports endure [sic], if not willingly, at least understandingly were justified, were reasonable in light of the pattern of aircraft hijackings.

Does that mean that the Supreme Court when it looks at this question about how do you provide for security and safety at large demonstrations, large accumulations of people in an age of terrorism, in an age of train bombings, in an age of suicide bombers, does that mean the Court looks at that they're going to come down that way? I don't know. But I certainly think an argument can be made that under certain circumstances, it would be entirely un[reasonable] for the police not to conduct certain bag searches.<sup>66</sup>

On July 16, Judge Sweet issued a seventy-eight-page ruling in which he declared unconstitutional the NYPD's demonstration-access practices, its use of restrictive pens, and its blanket searching of demonstrators.<sup>67</sup> (He did not reach the mounted unit injunctive claim on standing grounds.)

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<sup>65</sup> Preliminary Injunction Hearing Transcript at 466–70 (June 4, 2004), *Stauber v. City of New York*, 2004 WL 1593870 (S.D.N.Y. July 16, 2004) (No. 03 Civ. 9162 (RWS)).

<sup>66</sup> Preliminary Injunction Transcript at 77–78 (June 17, 2004) (closing arguments), *Stauber* (No. 03 Civ. 9162 (RWS)).

<sup>67</sup> *Stauber*, 2004 WL 1593870 (S.D.N.Y. July 16, 2004).

The city initially lauded the ruling,<sup>68</sup> but press coverage—particularly a *Daily News* cover story headlined “Judge Mental”<sup>69</sup>—about the search ruling prompted a quick reversal of position.

Judge Sweet’s liability ruling directed the parties to submit a proposed preliminary injunction, which triggered detailed negotiations with the city’s lawyer about the wording of the order with respect to searches, which were the city’s biggest concern. On this point, Judge Sweet said he would enjoin the NYPD “from searching the bags of all demonstrators without individualized suspicion at particular demonstrations without the showing of both a specific threat to public safety and an indication of how blanket searches could reduce that threat.”<sup>70</sup>

According to the city’s lawyer, the NYPD believed the word “specific” implied the department would have to have particular facts or evidence, thus making Judge Sweet’s standard almost impossible to meet. By contrast, I thought Judge Sweet, though ruling the department search policy unconstitutional, had given it far more leeway to conduct searches without probable cause and I was not about to agree to soften his ruling further. If we did not, however, the city intended to seek emergency relief from the Second Circuit. Though I felt confident in our legal position, I was deeply worried about how the court of appeals would respond to the city’s claims about the threat of a terrorist attack during the convention.

We could not reach any agreement and ended up submitting separate orders. On July 27, Judge Sweet issued a preliminary injunction that indeed gave the department a little more latitude. Specifically, without explaining his change of language, he enjoined the NYPD from “searching the bags of all demonstrators without individualized suspicion at particular demonstrations or without the showing of both the probability of a threat to public safety and a determination that blanket searches could reduce that threat.”<sup>71</sup>

The city nonetheless announced it would appeal, but waited until August 7 to do so. It then elected not to seek an emergency stay from the Second Circuit, and Judge Sweet’s order remained in effect through the convention and remains in effect to this day.<sup>72</sup>

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<sup>68</sup> See, e.g., J. Preston, *Searches of Convention Protesters Limited*, N.Y. TIMES, July 20, 2004, at B4 (noting that “[i]n the ruling, which both sides claimed as a victory, Judge Sweet wrote that he intended to strike a ‘delicate balance’ that would ‘encourage free expression in a secure society’”).

<sup>69</sup> *Judge Mental, Cops’ Fury at This Judge’s Nutty Ban on Anti-Terror Searches*, N.Y. DAILY NEWS (July 20, 2004), at 1 (Cover Story).

<sup>70</sup> *Stauber*, 2004 WL 1593870, at \*33.

<sup>71</sup> *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1683166 (S.D.N.Y. July 27, 2004).

<sup>72</sup> The NYCLU’s police-tactics litigation was the only convention litigation that raised terrorism issues. Two cases filed shortly before the convention challenged the closing of Central Park for large rallies during the convention, but neither turned on terrorism considerations. *Nat’l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258 (S.D.N.Y. 2004); *United for Peace & Justice v. Bloomberg*, 783 N.Y.S.2d 255 (N.Y. Sup. Ct. 2004).

Judge Sweet's decision illustrates the dispositive role that terrorism has played in post-September 11 protest litigation. We succeeded, through Chief Esposito's testimony, in undercutting completely the city's invocation of terrorism as a justification and obtaining relief for demonstrators in two areas: the city's restrictions on access to demonstrations and its use of pens at demonstration sites. But the city was able to maintain a plausible terrorism allegation, albeit supported by no evidence whatsoever, with respect to the demonstrator-search policy. Even the independent Judge Sweet surrendered, issuing a ruling that I believe is unprecedented in the extent of suggested police authority to conduct public searches without probable cause.

*The Convention Protests and the NYPD's Response*

The Republican National Convention started on Monday, August 30, 2004. The protests began four days earlier and continued through midnight on Thursday, September 2, when President Bush left New York City and the convention officially ended.

During the eight days of demonstrations, the contest between the right to protest and concerns for terrorism played out on the street. Hundreds of thousands of demonstrators descended on Manhattan and were met by a massive and unprecedented police presence. I spent night and day with top police officials trying to mediate conflicts between protest organizers—most of whom we represented—and the NYPD. In the negotiation of spontaneous march permits, the separation of protesters from police, and the extraction of reporters from handcuffs, the right to protest was at its most fluid.

To its credit—and no doubt due in part to the aggressiveness of the advocacy community—the department had issued permits for all the major demonstrations, and most demonstrations took place without problems, even if surrounded by huge numbers of officers. Most significantly, hundreds of thousands of people marched directly past Madison Square Garden the day before the convention started in the building.<sup>73</sup>

There were no terrorist attacks, but there were plenty of problems with the police. Over 1800 people were arrested—mostly for minor offenses like disorderly conduct and parading without a permit—the largest number of arrests at any presidential nominating convention. Many of those arrested were doing nothing more than lawfully standing on city sidewalks,

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The only other pre-convention case was brought in the Southern District by a religious leader challenging what he considered to be the NYPD's denial of his request for demonstration permits. *Mahoney v. City of New York*, No. 04 Civ. 4320 (S.D.N.Y. filed June 7, 2004). Without any substantive rulings, the parties settled the matter when the City agreed to allow two events.

<sup>73</sup> Robert D. McFadden, *Vast Anti-Bush Rally Greets Republicans in New York*, N.Y. TIMES, Aug. 30, 2004, at A1.

and we convinced the District Attorney's office to dismiss 227 prosecutions of people arrested at just one event.<sup>74</sup> Furthermore, many of those arrested were held in a filthy bus depot for over two days, prompting *habeas corpus* litigation in which the city was ordered to release protesters and then was held in contempt.<sup>75</sup>

Terrorism concerns were reflected in two other practices deployed by the NYPD during the convention. First, the department—using cameras in a blimp, mounted to light fixtures and buildings, and carried by police officers—engaged in blanket video surveillance of people participating in convention protests. This has led the *Handschu* lawyers to initiate a process with the city that may lead to further litigation in that case.

The videotaping was apparent from the outset, but we did not learn of the second tactic springing from terrorism concerns until after the convention, when we started receiving reports that all of those arrested had been fingerprinted by the NYPD. I then learned from a *Washington Post* reporter that many of those fingerprints had been forwarded to the FBI.

Under New York law, those charged with minor offenses (known in New York as “violations”) cannot be fingerprinted except in unusual circumstances particular to the person under arrest.<sup>76</sup> The indiscriminate fingerprinting of protesters was not authorized, and we were deeply concerned that the NYPD was using minor offenses as a pretext to build a fingerprint database of political activists, as it may have been doing with the demonstrator-interrogation program.

On October 4, 2004, we wrote to Commissioner Kelly demanding that the department destroy the fingerprints. We were already preparing lawsuits about the convention arrests, and on October 7 we filed two lawsuits challenging various arrest practices, including the blanket fingerprinting.<sup>77</sup>

Less than two weeks later, the city's lead NYPD lawyer informed me that the city was prepared to destroy all the fingerprints. After she and I agreed upon procedures to preserve evidence necessary for our pending lawsuits, the NYPD destroyed the prints—or so they said.

On October 27, I testified for a second time before the New York City Council about convention policing concerns. Before I spoke, however, an NYPD chief revealed that the fingerprinting was a special program insti-

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<sup>74</sup> See Tom Perrotta, *No Charges for 227 Held in Convention Protest*, N.Y.L.J., Oct. 7, 2004, at 1.

<sup>75</sup> See *People of the State of New York ex rel. Anthony Elitcher v. Kelly*, Index No. 402759/04 (N.Y. Sup. Ct. Sept. 9, 2004) (unpublished order reviewing orders and scheduling contempt proceeding).

<sup>76</sup> See N.Y. CRIM. PROC. LAW § 160.10 (McKinney 2004). Under the statute, a person arrested for a violation can be fingerprinted if a police officer is unable to ascertain the person's identity, reasonably suspects that the identification provided by the person is inaccurate, or reasonably suspects that the person is sought by another law enforcement agency for another offense.

<sup>77</sup> *Dinler v. City of New York*, No. 04 Civ. 7921 (S.D.N.Y. filed Oct. 7, 2004); *Schiller v. City of New York*, No. 04 Civ. 7922 (S.D.N.Y. filed Oct. 7, 2004). These cases also challenge mass-arrest tactics used by the NYPD and the prolonged detention of protesters.

tuted by the NYPD solely for the convention and was based on concerns about potential terrorism. When asked how the blanket fingerprinting could be squared with New York law, the chief said simply that he was fully aware of the law.

#### CONCLUSION: LESSONS AND FUTURE ISSUES

It is no surprise that, in the aftermath of the September 11 attacks, concerns about public safety and security have become paramount in the United States. What has been surprising is the extent to which this shift has affected the right to protest, an activity that rarely has presented serious public safety issues in this country. The effort to associate protest activity with terrorism is alarming.

In New York City, with the largest police department in the country and a long history of large demonstrations, the changes have been particularly pronounced. Since September 11, the NYPD has sought to impose an unprecedented level of control over protest activity. As an initial matter, the department has been much more aggressive in trying to stop events entirely—the ban on the February 2003 anti-war march being the most striking example. For those events that have taken place, policing has been quite aggressive, with the department assigning huge numbers of officers to events and imposing substantial physical constraints on demonstrators, notably through limits on event access and use of interlocking metal barricades to create pens in which those attending events have been required to assemble. Finally, the department has significantly increased its intelligence gathering about political activity, as exemplified by the demonstrator-debriefing program and, during the Republican National Convention, the pervasive videotaping of protesters and blanket fingerprinting of those arrested and charged with the most minor of offenses.

These changes have important consequences for the right to protest. First and foremost, they have transformed the experience of protesting. While police long have been part of demonstrations in New York City, their presence is now so pervasive that it has become a central—if not the dominant—feature of many demonstrations. Often, organizers have complained that their demonstrations have turned into police events, a charge that seems well-grounded.

Second, as the police have exercised increasing control over protests, the need for advocacy has become more pressing. Even in the best of circumstances, the balance of power is lopsided between protest organizers and participants on the one hand and police officials on the other. Since September 11, however, protesters have come under increasingly acute pressure from the police. As I have seen on many occasions over the last several years, relatively aggressive advocacy often is needed to protect even the most basic forms of protest.

Finally, September 11 has substantial implications for protest litigation. As protest activity becomes the target of increasingly aggressive policing, protest disputes may become increasingly resolvable only through litigation, which is a risky course.

Protest litigation against law enforcement agencies is always difficult, as judges often are reluctant to second-guess police officials about the public safety judgments commonly invoked in defense of challenged protest restrictions. In my experience, a police chief on the witness stand telling a judge that public safety requires that a protest be a certain distance from a location, that a march not proceed along a particular route, or that a certain tactic be deployed, often poses an insurmountable obstacle for plaintiffs.

As formidable as this obstacle can be, it becomes exponentially more difficult to overcome when the public safety concerns are couched in terms of potential terrorism. And since September 11, we are for the first time seeing courts grappling with challenges to police action that the police contend is justified by—indeed, required by—concerns about terrorism.

Consequently, at the same time that substantial protest restrictions increase the need for litigation, the prospect that defendants will invoke terrorism makes such litigation riskier. This has proven to be the case in New York City, where the NYPD has pressed terrorism concerns in three litigated controversies: the *Handschu* litigation over NYPD surveillance of political activity; the *United for Peace & Justice* litigation over the February 2003 anti-war march; and the police-tactics litigation preceding the Republican National Convention. The only instance in which the terrorism contention did not prevail was with respect to the portion of the convention police-tactics cases for which the NYPD witness—to the surprise of the city's lawyers—agreed on the stand that the protesters' requested relief would not undermine security concerns.

One cannot fault law enforcement agencies—particularly in New York City—for being acutely sensitive to the risk of terrorism in the aftermath of September 11. And it would be unrealistic in these circumstances to expect federal judges to be anything other than deferential to assertions that public safety considerations warrant greater restrictions of certain activity.

Nonetheless, it has been alarming to witness the extent to which the government has sought to conflate the right to protest with the threat of terrorism. Whatever its motivation for doing so, the introduction of this type of governmental interest overwhelms the delicate balancing that is central to most First Amendment judicial decision making. If First Amendment activity comes to be viewed as freighted with risks of terrorism, even the most robust doctrines of constitutional protection will yield.

Looking forward, one reasonably can expect ongoing disputes about the right to protest in which the courts will face government assertions about terrorism. To the extent those disputes arise out of restrictions on the “time, place, and manner” of protest activity, it seems unlikely that

there will be substantial changes in First Amendment doctrine. Rather, there may simply be a series of cases in which, to the extent terrorism becomes a part of the equation, all but the most egregious of restrictions are upheld.

New doctrinal developments seem far more likely in the area of political surveillance. With intelligence gathering becoming a primary focus of law enforcement, we are likely to see a resurgence of the surveillance litigation that first surfaced in the 1970s. It remains to be seen how any such litigation will fare in light of *Laird v. Tatum*, but this is an issue that the courts undoubtedly will face.

Finally, there is the question about the extent to which September 11 may change basic Fourth Amendment jurisprudence. New York City's argument in the convention litigation—that September 11 justified dispensing with individualized suspicion when it comes to searching individuals attending public events such as demonstrations—is radical, but may resonate with some members of the Supreme Court. After all, in the weeks following the collapse of the World Trade Center, NYPD officers engaged in sweeping searches, particularly of vehicles, without any individualized suspicion, and no one objected.

We are removed four years from the terrible World Trade Center event, but its impact on the right to protest is still developing. It is impossible to predict the full measure of that impact, in large part because of the possibility of another attack and the catastrophic consequences such an event might have for civil rights in this country. All one can say now is that, given the experience in New York City, terrorism has taken a terrible toll on the right to protest and is likely to do so for years, if not decades, to come.

