



December 5, 2005

**FEDERAL JUDGE UPHOLDS NYC SUBWAY
BAG INSPECTION PROGRAM
TO DETER TERRORIST ATTACKS**
(MacWade v. Kelly)

Washington Legal Foundation (WLF) scored a major victory when U.S. District Judge Richard Berman in Manhattan upheld the constitutionality of New York City's subway bag inspection program that was challenged by the New York Civil Liberties Union (NYCLU). The security program, implemented shortly after the London terrorist subway bombings this summer, is designed to detect and deter would-be terrorists who would bring explosive devices aboard the subway system to kill or injure innocent passengers. Passengers who enter the subway system are asked on a random basis to open their backpacks or other containers for a brief inspection by police officers.

Judge Berman issued his 41-page decision late Friday, December 2, 2005, following closing arguments made in the case earlier that morning. He ruled that the risks of terrorist attacks on New York City's subway system justified the minimally intrusive search policy. He rejected NYCLU's argument that individualized suspicion is necessary before passengers could be asked to open their bags and cited WLF's brief several times to support his decision. NYCLU has vowed to appeal the case.

"We're very pleased that Judge Berman rejected NYCLU's lawsuit and agreed with us that the search policy was lawful," said Paul Kamenar, WLF's Senior Executive Counsel. "The NYCLU's clients who claim they were 'extremely anxious' at just the thought that their bag *might* be subject to a brief inspection should consider the absolute horror suffered by those who were innocent victims on London's subway this past summer, not to mention the terrorist attacks of September 11, 2001," Kamenar added.

WLF filed two briefs in the case, the second one following the two-day trial that began on October 31, 2005, at the specific request of the presiding judge and over the objections of the NYCLU. WLF's organizational clients include **Families of September 11, Inc.**, (FOS11) a nonprofit organization founded in October 2001 by families of those who died in the September 11 terrorist attacks, and the **Allied Educational Foundation**, a nonprofit foundation based in New Jersey that has appeared with WLF in other security cases.

WLF's federal legislator clients include **U.S. Representative Peter T. King** of New York who is Chairman of the House Committee on Homeland Security, and **U.S. Representative Ginny Brown-Waite**, of Florida who is a member of the Homeland Security Committee.

WLF's New York State legislator clients include **New York Senator Martin J. Golden**, a former New York City policeman who represents the 22d Senate District in Brooklyn and is a member of the New York Senate Homeland Security Committee; **New York Assemblyman Vincent M. Ignizio** who represents the 62d Assembly District which includes the South Shore of Staten Island; and **New York Assemblyman Matthew Mirones** who represents the 60th Assembly District in Staten Island and Brooklyn and is a member of the Assembly's Transportation Committee, and whose constituents regularly use the New York subway system.

WLF's New York City legislator client is **New York City Council Member James S. Oddo**, Minority Leader of the City Council who represents the City's 50th District encompassing Staten Island and Brooklyn, whose father worked for the New York City Transit Authority and whose two brothers worked as an NYPD Officer and FDNY lieutenant. Finally, WLF represents **Stephen M. Flatow** of New Jersey. In 1995, his daughter, Alisa Flatow, then a 20-year old Brandeis University student, was killed by the Palestinian Islamic Jihad in a bus bombing while studying in Israel.

In its briefs, WLF argued that the inspection program clearly satisfies constitutional standards under the so-called "special needs doctrine" that balance the strong governmental interest in deterring serious threats to public safety with the minimally intrusive aspects of the searches that are conducted by NYPD. WLF's brief recounted numerous incidents worldwide where urban mass transit has become an attractive target for terrorists. Under the inspection program, NYPD officers are assigned to some of the 468 subway stations in New York which carries approximately 4.5 million passengers each weekday. The NYCLU does not claim that there is racial profiling of any kind, but argues that because everyone's bag is not searched, the policy is not 100 percent effective. The court nevertheless found that random searches sufficiently serve to deter attacks because they are "reasonably effective."

WLF's brief was drafted with the *pro bono* assistance of Andrew T. Frankel, partner in the New York office of Simpson Thacher & Bartlett LLP, and associates Bryce L. Friedman and Seth M. Kruglak. WLF has been a strong advocate in the courts over the last 28 years supporting a strong national security and defense, and effective law enforcement measures that satisfy constitutional requirements.

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For further information, contact Paul Kamenar, WLF's Senior Executive Counsel, at 202-588-0302. WLF's briefs are available on its website at www.wlf.org along with the court's decision.