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APPEALS COURT UPHOLDS NYC SUBWAY BAG INSPECTION PROGRAM TO DETER TERRORIST ATTACKS

(MacWade v. Kelly)

The Washington Legal Foundation (WLF) scored a major victory last week when the United States Court of Appeals for the Second Circuit upheld a lower court ruling rejecting a constitutional challenge by the New York Civil Liberties Union (NYCLU) to New York City's subway bag inspection program designed to detect and deter terrorist attacks. The security program, implemented shortly after the London terrorist subway bombings last summer, is designed to detect and deter would-be terrorists who would bring explosive devices aboard the subway system. 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, and may leave the subway system if they refuse.

WLF's organizational clients include **Families of September 11, Inc. (FOS11)**, a nonprofit organization founded in October 2001 by the families of those 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 national 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 New York City's 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 1996, Congress enacted the so-called "Flatow Amendment" to allow victims of torture or terrorist activity to sue countries or groups responsible for the torture.

In its brief filed in the court of appeals, WLF reiterated many of the arguments made in its two briefs that were filed last year in the district court. In particular, 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 also recounted numerous incidents worldwide where urban mass transit has become an attractive target for terrorists. WLF also noted that bags are subject to inspection at airports and government and private office buildings, including NYCLU's office.

The court of appeals noted that while passengers have full privacy interests in their personal bags, the minimal intrusion involved in inspecting those bags, coupled with the "special needs" doctrine to detect and deter subway bombings by terrorists, satisfies the Fourth Amendment's requirements.

"We're pleased that the court of appeals upheld New York City's subway bag inspection program as a reasonable and constitutional measure to detect and deter terrorist activity," said Paul Kamenar, WLF's Senior Executive Counsel. "The NYCLU, which claimed that their clients are 'extremely anxious' at just the thought that their bags *might* be subject to a request for a brief inspection on the subway, should consider the absolute horror suffered by the innocent victims on London's subways last summer, not to mention the terrorist attacks of September 11, 2001," Kamenar said.

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, along with partner Bryce L. Friedman, and associate Seth M. Kruglak. WLF has been a strong advocate in the courts over the last 29 years supporting a strong national security and defense, and effective law enforcement measures that satisfy constitutional requirements.

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