



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Legal Primer

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For Immediate Release

**FROM THE SIZE OF YOUR SODA TO THE SAFETY OF YOUR STREETS:
BEHIND THE SCENES NYC LEGAL BATTLES THAT AFFECT YOUR DAILY LIFE**

***SPEECH GIVEN BY CORPORATION COUNSEL MICHAEL A. CARDOZO
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Introduction

It is a pleasure and honor to be speaking with all of you today.

Let me begin by describing what might be a typical morning for many of you. You take the subway to work, perhaps passing, as you enter the station, policemen conducting a random bag search on the person in front of you. Walking out of the subway, you stop at Starbucks, where no one is smoking, to buy coffee. You reach for a chocolate muffin that has a small label in front of it saying "500 calories." You decide instead to buy a small 200-calorie plain muffin. In a different scenario, if it is a Saturday and you live in Queens, you might decide to take a trip to Manhattan and take a walk on the Highline with your spouse and daughter. You hail a green cab, and after a few blocks, pass a shop with a sign in the window that says "Roll Your Own Cigarettes." You look again and see the shop has been closed.

Behind these everyday scenarios lie the results in six major lawsuits handled by lawyers in the Corporation Counsel's Office, also known as the New York City Law Department. The 700 lawyers in my office handle every case brought by or against the City, a city agency or commissioner, the City Council, and the Comptroller. I doubt very much that in 1683 -- when the Corporation Counsel's Office was founded -- the legal issues it dealt with resembled the ones I will discuss today. Incidentally, in case the next mayor is listening, let me suggest, -- now that I will soon be stepping down as Corporation Counsel -- that after 230 years of males occupying the position, it is time for the Corporation Counsel to be a woman.

Use of the Law to Affirmatively Advance the Mayor's Priorities

I want to begin by discussing some of the cases we have initiated to advance some of Mayor Bloomberg's priorities, that may have affected the quality of your life.

First, our gun litigations. Relatively early on in the Bloomberg Administration, the mayor said to me: "Michael, we have discovered that the overwhelming number of guns that are used to shoot people in New York City have been purchased out of state, primarily in three southern states, plus Ohio and Pennsylvania. And we suspect that despite the very lax gun laws in those states, the guns have been obtained illegally. Can we bring some kind of lawsuit to stop this?" Wanting to please my new boss, I naturally responded that I would try.

A few months later, the City brought suit in Brooklyn federal court against 27 gun stores located in those five states. Before commencing suit, we sent a male investigator into the store who went through the motions of buying a gun. He

then asked his female companion to fill out the necessary paperwork, a practice that was not only an absolute violation of federal law, but was being recorded by a video camera hidden inside the male investigator's Yankees baseball cap.

Faced with that unassailable proof, virtually all the defendants in the lawsuits we then brought agreed to the appointment of a federal monitor whose role was to oversee those stores' sales practices for three years. A dramatic decrease in the illegal trafficking of guns from the areas where the stores were located followed, and the number of guns traced into the City from the monitored dealers decreased by almost 85 percent.

One footnote to this particular story. While the suit was pending, some of the stores sued the mayor and me personally, alleging we had slandered them. While in the end all those suits were dismissed, the immediate good news for me was that shortly after the slander cases were brought, the mayor and I reached an important agreement. We agreed that as long as I was Corporation Counsel, if someone brought suit against us resulting in a damage award, the mayor would pay the damages. But, if the suit ended by a city official being incarcerated, it would be me rather than the mayor who would go to jail. Needless to say, this agreement never had to be carried out.

Another area where the City has brought suit to advance the mayor's priorities can be found in the City's efforts to curb smoking, in part by the rigorous enforcement of cigarette tax laws.

A particularly interesting case involved cigarette smoking on Indian reservations. Under federal law, Native Americans have the right to purchase untaxed cigarettes. But we didn't think that explained why, on a particular Indian reservation in Suffolk county, the number of cigarettes being sold to Native Americans amounted to 293 packs per day for every man, woman, and child living on the reservation. As a result, we were able to persuade a federal judge to enjoin retailers on the reservation from selling untaxed cigarettes to anyone other than a bonafide Native American.

Another case we brought -- this one against sellers of untaxed cigarettes on the Internet -- reached the United States Supreme Court. While that Court ultimately rejected our innovative legal theory, Congress, on the heels of that decision, passed a law in part based on City lobbying, that provided the City with an equally viable remedy. And just last week, in part utilizing that remedy, we brought suit against a Virginia-based package delivery service, alleging that the company delivered untaxed contraband cigarettes to New York City residents, in violation of federal and state law.

It has been estimated that the mayor's anti-smoking crusade, including persuading the City Council to ban most cigarette smoking in public places, has resulted in 200,000 fewer smokers in New York City, which in turn has resulted in a reduction of 1,500 deaths annually.

We have also used litigation to promote the mayor's goal of achieving the cleanest air quality of any large U.S. city, an effort that has seen a 16 percent decrease between 2005 and 2011, in Greenhouse gas emissions in the City.

In one case we brought by the City, several states, and advocacy organizations, the U.S. Supreme Court sustained our challenge to the federal Environmental Protection Administration's determination that it did not have the authority to regulate greenhouse gases.

In another environmental case, brought against Exxon-Mobil for polluting ground water in Queens, a federal appellate court recently affirmed a \$104 million verdict we obtained. Exxon-Mobil has stated that it will ask the U.S. Supreme Court to review the decision.

Health Care Initiatives

The Corporation Counsel's Office has also helped the mayor's quality of life efforts in a variety of health initiatives. In this area, rather than initiating litigation, my office has been intimately involved in carefully drafting a particular law or regulation, recognizing that it may well be challenged as legally invalid, and then defending against the inevitable lawsuit when it is in fact brought.

For example, my office participated in drafting the law -- subsequently copied throughout the world -- that outlawed most cigarette smoking in public places. We also prepared the regulation and then successfully defended the resulting litigation requiring calorie disclosures on menus in various restaurants.

One of our most recent health initiatives relates to the City's efforts to deal with the obesity epidemic by restricting, through a Board of Health regulation, the sale of soda in large containers. Can the Board of Health --an agency whose members are appointed by the mayor and whose authority comes from State as well as City law -- prohibit large sugary

drink containers, or can only the New York City Council enact such a rule? While the courts have thus far decided that only the City Council has such power, the New York State Court of Appeals has recently agreed to review that ruling.

Taxis

My office's efforts to improve the daily lives of New Yorkers extends to New York City taxis. As I alluded to earlier, it is now possible to hail a so-called green taxi on the streets of the Bronx, Staten Island, Queens or Brooklyn, just like you can hail a yellow cab in Manhattan. The implementation of this initiative was preceded by almost three years of intense litigation that reached the state's highest court. The introduction of these green taxis should not only bring a substantial halt to the more than 150,000 illegal gypsy cab pick ups that had previously occurred in the outer boroughs every day, but will offer substantial protection to riders, since the operation of these green taxis, including required insurance and fare amounts, will now be regulated by the Taxi and Limousine Commission, affectionately called by some, the TLC.

Like virtually every law firm, even the Corporation Counsel loses cases once in awhile. Recently, a state court judge decided that the TLC lacked the power to mandate a Taxi for Tomorrow, an iconic taxi with distinctive features that would have been a major contributor to the City's landscape and which provided for major safety and comfort improvements to the taxi passenger. The judge ruled, erroneously we believe, that the TLC lacked the power to mandate such a taxi. While we have appealed that ruling, for now this initiative has been halted.

Protecting the Public Fisc

To pause for a moment on a somewhat lighter note, the quality of all of our lives would certainly have been affected adversely had we lost the case involving a man who kept both a live alligator and tiger, along with his two children, in his rent-controlled apartment. Fortunately, his suit against the City for the wrongful removal of his animals failed. In our litigious society, this was just one of the literally more than 8,000 cases a year we handle in our role as the protector of the City's fisc. These matters range from defending more than 700 annual certiorari challenges to the City's real property tax assessments, which involve over \$26 billion in the market value of City real estate; to damage suits against the City, which result in the City paying out more than a half billion dollars annually. Incidentally, payouts on these damage cases have declined by approximately 14 percent in the last 12 years.

Public Safety

Public safety is, of course, an essential aspect of the quality of life for all of us.

When I became Corporation Counsel in January of 2002, four months after the attacks of 9/11, the United States was beginning to face the reality of terrorism threats, and the incredibly difficult issues posed by the need to balance anti-terrorism efforts with constitutional rights. As Tom Friedman of the *New York Times* wrote shortly after 9/11, this country was one terrorist attack away from wiping out the Bill of Rights. In the last 12 years, my office has dealt with literally hundreds of cases raising these constitutional issues, ranging from demonstrations over the invasion of Iraq in 2003, to police activities during the 2004 Republican National Convention, to issues involved with the Occupy Wall Street demonstrations, to observations of potential terrorist suspects.

One example of this balancing of constitutional rights against public safety arose when the police, to guard against terrorism and following the London subway bombings, decided to conduct random bag searches at New York City subway stations, even though most riders who carry bags do not appear to be doing anything wrong. Police officers now conduct those searches, but people who wish to avoid them have the option to turn around and exit the subway system. A legal challenge to random subway bag searches, defended by my office, was rejected by the federal appeals court.

In another terrorism area, the newspapers are now filled with stories about the federal government spying not only on its citizens, but even on the heads of state of our closest allies. A New York City version of this terrorism versus constitutional rights issue relates to the circumstances under which the Police Department, without violating the constitution, can observe individuals suspected of potential involvement in terrorist activities. In an effort to learn the whereabouts of potential or suspected terrorists, can the police observe political gatherings, conduct surveillance of certain persons, and maintain records of what they find? Under what are referred to as the *Handschu* guidelines, named after a federal court case -- guidelines the Court, at the City's urging, revised after the 9/11 attacks -- the Police Department is permitted to both investigate the *possibility* of unlawful activity *before* it occurs and attend public events on the same terms and conditions as members of the public. The plaintiffs in the pending court cases, aspects of which were

recently argued in federal court, are claiming that in conducting its anti-terrorist efforts, the police are violating those revised guidelines and the constitution, a charge that we deny.

No discussion of public safety during the Bloomberg years would be complete without reference to the Occupy Wall Street demonstrations of two years ago. Hundreds of people had taken over Zuccotti Park, a public space one block from Wall Street, and from there staged continuous demonstrations throughout the City. The park, owned and maintained by the owner of a neighboring private building, was required by City law to be kept open and accessible to the public 24 hours a day.

Was the First Amendment right of assembly in public places applicable to this privately-owned yet public space? In any event, at what point did the increasing threats to public safety of those in and adjoining the park justify the police moving in and clearing the demonstrators out of the park? Did advance notice of any mandatory evacuation order have to be given to the demonstrators in the park? After the occupation had gone on for some time, Mayor Bloomberg, Police Commissioner Kelly, and Fire Commissioner Cassano -- after evaluating, with my help, the interconnected public safety and legal issues -- decided that the situation justified the Police, Fire, and Sanitation Departments moving into the park in the middle of the night, with little advance notice, ordering everyone to temporarily leave and arresting those who did not. The result was a relatively peaceful ending to an occupation that had drawn worldwide attention.

Finally, I could spend the entire lunch discussing the legal and policy issues surrounding the stop and frisk litigation, involving the proper balance between public safety and individual rights, which today is probably the most controversial public safety case in the city. As I am sure most of you know, a federal judge decided, after a ten-week trial, that the stop and frisk procedures conducted by the NYPD were unconstitutional and had to be reformed in a variety of ways. The judge decided this despite the fact that she found that 94 percent of the 4.4 million stops conducted by the police over more than eight years could not be challenged by plaintiffs' expert, and only nine out of 19 anecdotal accounts of challenged stops lacked reasonable suspicion. In the course of her 198-page opinion, the judge also found illegal the Police Department's use of crime suspect data to help determine whom to stop.

Under her ruling, for example, if there has been an uptick in robberies in a particular area by a suspect described as a young Hispanic male, it would be improper for a police officer to take that general characteristic into consideration in determining whether a particular Hispanic male, who seemed to be acting suspiciously, should be stopped in an effort to apprehend the suspect.

Earlier this morning, my office argued before the federal appeals court asking it to prevent that ruling from going into effect until the City's appeal from the court ruling was heard. When I checked my BlackBerry just before I got up to speak, I had not yet been advised of what the court ruled on what we lawyers call a "stay" application.

Conclusion

Unfortunately, time prevents me from discussing numerous other areas in which my office has been involved in matters that affect your life, including the major development projects that have changed the face of this City, such as the Highline, Brooklyn Bridge Park, the development of Hudson Yards on the far West Side; and the tech sector, highlighted by the Cornell Science Park, whose construction on Roosevelt Island will soon begin. Quality of life is also affected by some of the approximately \$14 billion worth of contracts the City enters into every year, such as the Citibike contract negotiated by my office, that has substantially expanded the biking opportunities of many New Yorkers.

Hopefully, this brief snapshot of the Corporation Counsel's Office has given you a better understanding of the legal challenges government faces. It also illustrates, I hope, the way the law can be utilized -- through the initiation of litigation, careful drafting to ensure policies and practices can withstand legal attack, and defensive litigation -- in a positive way to help bring about constructive change. And perhaps my discussion today can also make you understand why I honestly believe, as I frequently say, that being the Corporation Counsel of New York City is the best legal job any lawyer can ever have.

Thank you.

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