NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

Speeches

Michael A. Cardozo, *Corporation Counsel*

Web: nyc.gov/html/law/home.html

For Immediate Release

NEW YORK CITY AS A PARTY IN THE COURT: THE CHALLENGES AND THE OPPORTUNITIES

SPEECH BEFORE THE BRANDEIS BAR ASSOCIATION, QUEENS COUNTY

Contact: Kate O'Brien Ahlers, Communications Director, (212) 788-0400, Hkahlers@law.nyc.gov

Queens, NY, November 29, 2005 -- It is a unique experience to speak in front of so many lawyers who sue my client every day. I want to extend a warm thank you to those of you who sue the City on a regular basis, and therefore contribute to my book of business. One of the great things about being a government lawyer is that one no longer has to hustle for business. It is definitely always there. Thanks so much for contributing to my bottom line.

Three years ago I had the pleasure of speaking with you. I guess I did ok then since you have invited me back and I am delighted to be here again. Since I first appeared before you I have learned a lot about representing the City and the challenges and opportunities presented to the Corporation Counsel of this great City. This morning I would like to talk about three particular challenges my Office is facing:

- First, what to do about the tort tax resulting from the huge amount the City pays out in tort cases;
- Second, how to deal with public safety concerns in the courts in this post 9/11 age.
- And third, the challenge presented when a City agency is alleged to have acted in violation of the constitution or a federal or state statute.

Torts

First, the tort tax.

At the beginning of the 2004 fiscal year we had 43,500 pending city tort cases, not including World Trade Center and Staten Island ferry litigations or the cases we handle in Federal Court involving alleged civil rights violations by the police and correction officers. And by the end of that 2004 fiscal year the City had paid out more than half a billion dollars in tort judgments and settlements. Think of it, more than $559 million to be exact. This amount had been steadily increasing over the last 26 years; indeed it had increased 2500% in that time period, far in excess of the rate of inflation.

This huge judgment and claim figure represents a tort tax on all of us. After all, it is we taxpayers who have to pay for those settlements and judgments. If the tort judgment and claim figure were cut in half, for example, we could use the money to hire 8,500 new firefighters.

These numbers – huge amounts paid out in settlements and judgments and a close to unmanageable caseload –

present not just a challenge but an opportunity. Specifically, reduce those numbers while at the same time compensating fairly but not excessively people who are in fact injured by negligent acts of the City.

The good news in dealing with this enormous and costly challenge is that we have had some success. Tort judgments and claims in the last year declined 12% to $489 million, the first decrease in the last ten years other than the year covered by 9/11. From the beginning of fiscal year 2004 our pending caseload has declined almost 25%, from 43,500 cases to 33,153.

Four factors explain most of this success: 1) aggressively approaching settlement; 2) effectively utilizing, with the cooperation of the bench and bar, the last clear chance conference approach; 3) institutionalizing a risk management analysis to prevent accidents from happening and making the City safer, and 4) securing passage of the sidewalk legislation. That legislation eliminates the City's liability for sidewalk accidents, except for those that occur in front of one two and three family homes.

While we are making real progress to meet this tort challenge we have a very long way to go. $489 million in tort judgments and claims is still too much money. 33,153 cases are still too many cases. Working with the bench and bar we must continue to work to reduce these numbers, and at the same time fairly compensate those injured because of the City's wrongful conduct.

Public safety

The second challenge we face involves public safety; specifically, how to balance freedom and safety in this post 9/11 world. The best example of this – one that involves an enormous and serious challenge to the City and every one of you – involves the legality of the random subway bag searches .

As I am sure you know, this summer, following the bombings of the subway system in London, the New York City Police Department instituted random bag searches of subway riders. The New York Civil Liberties Union sued, contending that such suspicionless searches were an improper invasion of one's privacy and violated the Fourth Amendment. We responded that, just as airport searches or random drunk driving stops are permissible as minimally invasive and useful deterrents, so too are the subway bag searches. Final briefs in the case were filed yesterday and Judge Berman of the Southern District will probably rule before the end of the year.

Unfortunately, I think it fair to predict that the public safety versus constitutional freedom challenge, which also played out during the Republican National Convention in the summer of 2004, is one with which we will be dealing for many years to come.

Consent Decrees

In addition to the tort and public safety challenges, we face the challenge of consent decrees. This challenge involves what to do when the City is accused of some statutory or constitutional violation, such as not providing homeless people with shelter, or maintaining unsanitary prisons, or not providing special education as required by law.

As the chief attorney for New York City I can tell you that my client is virtually always right. But I must concede, after almost four years on this job, that once in awhile the City, like any governmental entity, can be wrong. To illustrate my point assume with me that someone sues, alleging that a particular City action or non-action violates the law. Assume that after a factual investigation my Office decides that the plaintiffs' case is quite strong, and if we go to trial we may well lose. So to avoid losing at trial, and a resulting onerous permanent injunction, we do what any good lawyer would do, we try to settle for less than might result from a trial. A so-called consent decree emerges.

But experience has shown that what starts out as a well-intentioned decree quickly results in the courts, acting at the behest of plaintiffs, maintaining supervision over the affected agency for long periods of times, sometimes decades, and using the decree to micro manage the agency. In 1978, for example, the City conceded that the physical conditions of prisons at Rikers Island did not pass constitutional muster. Twenty-seven years later the oldest case on the Southern District docket is still alive, with the federal court continuing to issue orders under that decree with respect, for example, to the required wattage of light bulbs in the prisons and the minimum number of feet prison beds must be from one another.

Similarly, a 1979 Eastern District consent decree, entered after the City conceded it had violated federal law dealing with Special Education requirements, sets out the parameters of how Special Education must be provided to children in this City. Although the facts and the law have substantially changed – the federal law has been amended three times since the decree was entered, radical changes in the ways New York City administers its schools have occurred, and the accepted wisdom of how to provide education to children with special needs has substantially evolved – special education rulings from that 1979 decree are still being issued from the federal court in Brooklyn.

On the State Court side, more than 20 years after a landmark Appellate Division ruling that found in the State Constitution a right to shelter, there continues to be on-going court battles over homeless issues, with the Manhattan Supreme Court issuing order after order mandating that the City take certain steps to protect the homeless. Those orders range from setting out specific standards shelters have to meet, to the type of medication to be provided to infants in those shelters.

In making these observations I am not saying the courts were wrong in entering their original decrees. It may well be that the City's actions left the court, and my predecessors when they entered into consent decrees, no choice but to decide as they did. But how long should these orders last? How can we prevent them from resulting, as too frequently has been the case, in courts, not commissioners, making the management decisions on how to run the agency? When faced with fiscal priority decisions how, in the face of these orders, can we be sure that elected officials, not the courts, decide how much of scarce resources should be devoted to a particular agency's needs?

We are starting to make progress on this critical problem. We are learning to try to avoid consent decrees whenever possible, and we do everything we can to avoid open ended decrees. When the facts and the law have changed, or the problems that led to the original decree have substantially ended, we are moving to end those decrees. But we have a long way to go.

And this critical public policy issue—what to do when government does something wrong, but at the same time not allow the courts to be in charge of running city agencies for a long periods– is also one that promises to be with us for some time.

To deal with the challenges I have outlined today –together with scores of other problems -– takes smart and dedicated lawyers representing the City. The lawyers on my staff, some of whom I am glad to see here today, meet that standard and the City is very fortunate to have them, and I am honored to lead them. But we cannot meet these challenges alone. We need help from the private bar, and particularly the bench.

Judges and Judicial Elections

And this brings me to my last point. For the City to meet its challenges in court, indeed for all of us – private and public lawyers and the general public to meet these challenges – we need judges who are the best and the brightest.

There is no question in my mind, and I want to emphasize this point as has the Mayor, that most judges in this City are hard working, fair and dedicated to deciding cases fairly. But sadly, the fact today is that too many judges are not the best and the brightest and as a result we face a crisis in confidence in the judiciary.

We in this room are all too aware of the corruption scandals involving judges in Brooklyn. Unfortunately, however, the problems extend to the bench in this borough as well. And these issues are compounded because the City's judicial "elections", I use that word in quotation marks, are a farce. The challenge of this crisis in confidence in the judiciary offers all of us an opportunity to solve the perennial problem of how best to select our judges.

Let me be more specific as to what goes on here in Queens. Everyone in this room knows there are no real elections for the bench in this borough. The individuals who will become Surrogates, civil court elected judges and Supreme Court justices are decided upon in a smoke filled back room. The Democratic nominees for these positions – after all Republican opposition is non-existent – are not selected by the voters. The political leaders don't give the voters a chance to have a say.

For example, last year a resident of Brooklyn was "elected" – and I use that term very loosely – to a Supreme Court position in Queens. An even better example can be found in the selection of the last two surrogates. Each of their predecessors resigned one day after the last day a primary could be scheduled, so their successors for a 14-year term could be determined by the County Committee.[1] And if there was any doubt that the current Surrogate's selection was politically, not merit, based it was dispelled when the new Surrogate promptly made appointments that were clearly political payoffs.[2] This process of filling a surrogate position without a primary was so successful that the Brooklyn organization, with help from a backroom deal in the State Legislature, recently replicated the process, recognizing how well Queens had patented how to escape the scrutiny of the electorate.

Lets face it, as one judge who was forced to step down a couple of years ago in this borough has been quoted: "You don't have to know something to be a judge. You have to know somebody. They give you a robe and expect you to know the law."[3] What a damning indictment of a system on which we rely to uphold the law.

If this system nevertheless produced great judges who were beyond reproach there might be less room for concern. But not only are there no real judicial elections in Queens, recent incidents in this borough have reminded us that some judges are not qualified to sit on the bench.[4] And other events in the relatively recent past -- including judges using their office to advance private interests, and engaging in sexual harassment and intemperate behavior – have also demonstrated improper activities by members of the bench.[5]

---

1 . Surrogate Laurino was selected in 1971 when the previous surrogate resigned a day after the deadline for entering the primary. Surrogate Nahman was selected in 1991 when Surrogate Laurino resigned a day after the deadline for entering the primary. "King Manton Feasts on Queens Dead," Daily News, July 28, 2003.

2 Surrogate Nahman appointed the previous Surrogate's Law Secretary as public administrator and Gerard Sweeney, a Manton confident, as counsel. Id.

3 Feiden, "Trial and Error in Queens Courts, Some Judges make travesty of Justice," Daily News, July 7, 2003.

4 Judge Laura Blackburne was recently recommended for removal from the bench ("Commission Seeks Removal of Judge," New York Times, Nov. 23, 2005); Justice Rios was recently accused of having sex with a prosecutor who had pending matters before him.

5 See "King Manton Feasts on Queens Dead," Daily News, July 28,2003; Feiden, "Trial and Error in Queens Courts," Daily News, July 7, 2003; Glaberson, "Judge Censured For Remarks, And He Agrees To Step Down," New York Times, Oct. 4, 2003.

These events should not surprise us. Some of the judges just referenced, whom the Commission on Judicial Conduct sanctioned, had been found not qualified by bar associations when they first ran for Office. But the political leaders don't care. In fact in Queens, unlike every other borough in the city, there is not even a pretense by the political parties of a screening committee to determine if a candidate is qualified to be on the bench.

How can we lawyers, sworn to uphold the law, whose professional lives are governed by judges deciding cases fairly and honestly, allow this situation to continue? What should be done? The long-term solution, I suggest, should be a constitutional amendment modeled after the approach Mayor Bloomberg and his three predecessors have all followed in selecting judges for the lower courts.

Under that process an independent screening committee nominates the three most qualified candidates. The Executive is then required to appoint one of those three to the bench. In Mayor Bloomberg's case this has meant that a 19 person nominating committee, a majority of whose members the Mayor does not appoint, recommends three candidates for every family, criminal and interim civil court judgeship. The Mayor's executive order obligates him to appoint one of those three to the bench. The result has been the appointment of a diverse and high quality group of judges, including, from Queens, Judges Serita, Zigman, Zayas and O'Donoghue [some of whom are here today.][6]

But the crisis of confidence in the judiciary we have today can't wait for adoption of a constitutional amendment. We must insist that the political parties – right now – appoint independent judicial qualification commissions that will determine which three judicial candidates for each vacancy are the most highly qualified to serve on the bench. The parties must commit – right now -- to only nominate from among those candidates. And to ensure that this happens the Legislature should enact legislation – right now -- along the lines recommended by Chief Judge Kaye's Commission to Promote Confidence in Judicial Elections, that mandates such an approach.

The charade of judicial elections is a prime reason why we do not have on the bench a diverse group of judges who are the most qualified of the profession. Given the critical importance of the Rule of Law in this City, and the enormous legal challenges the City, and all of us, face, we must take steps to restore complete public confidence in the judicial system.

Lets start working together – right now – to solve this problem and these challenges.

Thank you.

# # #

[6] The Mayor has also appointed or reappointed the following additional judges from this Borough: Judges Gerald, Lebowitz, Erlbaum, Leach, Wong, DePhillips, Grosso, Harrington, Salinitro, Mullings and Bogacz.

In addition, I note than Chanwoo Lee from Queens is a hard working member of the Mayor's Advisory Committee on the Judiciary :