

## THE DAY THINGS CHANGE

# Every generation faces its moment of truth

By Vivian Berger SPECIAL TO THE NATIONAL LAW JOURNAL

I WILL REMEMBER WHERE I WAS at the start of the business day on Sept. 11. I will also remember where I wasn't. Like all the '60s folk I know, I remember where I was and what I was doing on Nov. 22, 1963, when President Kennedy was shot. Because I entered the underground stacks of Harvard's main library around lunchtime—when word was just beginning to get out—and did not emerge until dinner time, I was likely the last American outside a coal mine to hear of the tragedy. (In one of those bizarre synchronicities between history and private events, I had been writing a paper on "When Lilacs Last by the Dooryard Bloomed," Walt Whitman's poem on President Lincoln's funeral cortege.)

Similarly, members of an earlier generation doubtless recall where they were

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when the Japanese struck Pearl Harbor.

On Sept. 11, I happened to be at a Bar Committee meeting in midtown Manhattan when I learned about the attacks on the World Trade Center towers. The day before, I had been conducting a mediation at the World Trade Center. In scheduling the case, I had offered the parties a choice of several days—one of which was Sept. 11. Luckily, they found Sept. 10 more convenient. I suppose I will always think of Sept. 11 as the day I wasn't at the World Trade Center.

In reacting to disaster, people think first about its personal impact on them, and so did I. But as the initial shock wore off and I heard of additional terrorist attacks, even on the Pentagon, I wondered whether our government would treat this day's events as an act of war and, if so, whom we'll attack and when. My parents, refugees from Hitler, spent many nights covering in bomb shelters in London. Although I doubt it will come to that, never again will I bask in the thought that "It

can't happen here." As a friend said to me, "I now know what it's like to be an Israeli."

### What now?

But we are. In fact, Americans, and what I fear is what will happen in our daily lives—especially in cities. Will we fly when we don't absolutely have to? Can we comfortably visit (let alone work in) government buildings, sports arenas and other places where crowds may attract fanatics aiming for high body counts?

To what extent will we sacrifice our civil liberties, as we attempt to protect ourselves against unknown enemies around the globe? Compared to the architects of Tuesday's multiple horrors, Timothy McVeigh, our homegrown terrorist, in retrospect seems a rank amateur.

When I entered the subway after my

**How we handle our grief will say a lot about us.**

meeting, strangers were excitedly talking with each other. A transit workman inveighed against the "foreigners" in the United States, such as the residents of Chinatown. I told him I sincerely doubted that the Chinese, here or abroad, had anything to do with today's events. But what if he had said Arabs?

The way in which we handle our grief, anxiety and rage in the wake of this domestic Pearl Harbor will say a lot about who we are. The authorities must find the responsible parties and make them pay dearly for this outrage. At the same time, we must avoid mindless scapegoating and blunderbuss attacks—by ourselves—against our cherished freedoms.

I believe Americans can rise to the challenge, but it won't be easy. **■**

## CIVIL LIBERTIES

# Let's not trade freedom for security

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

THE DANGER that lies ahead for both security and liberty is that our leaders and police agencies will propose, our legislatures will adopt and our courts will sanction severe limitations on civil liberties with no appreciable increase in security. Such legislation would have the dual impact of changing the "look and feel" of a heretofore free society, while falling utterly to prevent terrorism.

This is precisely what happened after prior recent incidents, when the executive branch took advantage of some horrific act in order to induce Congress to pass liberty-restrictive legislation that, on close examination, makes no sense and has contributed not at all to the prevention of terrorism. The Oklahoma City bombing and the earlier attacks on the World Trade Center resulted to the Antiterrorism and Effective Death Penalty Act of 1996, which has all but eviscerated the ancient writ of habeas corpus.

Other terrorist attacks, domestic and foreign, resulted in the FBI's persuading Congress to pass the so-called Digital Telephony Initiative, which forces manufacturers of telecommunications equipment to make their devices wiretap-friendly. The super-secret National Security Agency has long had the capacity to monitor and analyze all international telecommunications. Surveillance cameras are becoming ubiquitous. Money laundering laws, originally a tool in the "war on drugs," have been turned to fighting the war on terrorism and have made substantial inroads in citizens' financial confidentiality. And, still, the

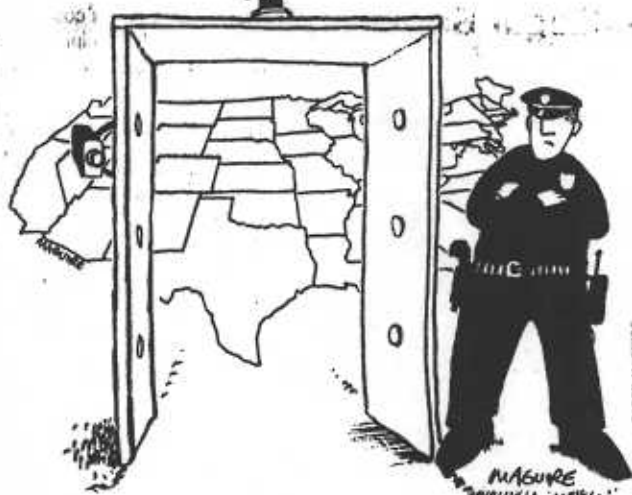
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United States has just experienced its most devastating act of terrorist destruction.

It is possible, of course, that but for these restrictions on civil liberties, there would have been more such incidents, more carnage. But it is also possible that we are making a huge mistake in assuming that increasingly draconian restrictions on liberties at home have in fact produced substantial added security. Such an approach, when overdone, injures both liberty and security. It may be that we need to return to the days when we had more intelligence on the ground, in the form of reports from spies, agents and other sources close to those who would plot against and attack us.

### Find sensible solutions

Consider the reported edict of the Federal Aviation Administration that plastic knives no longer be available at airport food stands. It does not take great intelligence to comprehend the uselessness of such a restriction. Would it not make more sense to build airplanes with a double set of doors separating passenger compartment from cockpit, such that a person moving from one compartment to the other would have to pass through two doors, only one of which could be opened at a time, trapping the person temporarily while, he or she is being



identified before being allowed into the cockpit? Would it not make more sense as well to provide the pilot the ability to inject sleeping gas into the passenger compartment at the first sign of trouble, which the pilot could monitor on a video screen, as some experts in airline security have suggested? Are there not sensible steps that would not narrow our ability to function normally as free citizens? Does restriction of individual rights always have to be the first answer to terrorism and lawlessness?

What has been accomplished by the evisceration of the writ of habeas corpus that resulted from the ill-considered antiterrorism act? It has made it virtually impossible for innocent convicts to challenge their convictions, including sentences of death, a year or more after their direct appeals have expired. Anti-

immigration legislation has enabled the Immigration and Naturalization Service to run rampant over the rights and dignities of noncitizen immigrants at a time when it is more essential than ever that the United States send the message to the world that hatred should not be based on such irrelevancies as ethnicity, religion or nationality. Instead, if we are to hate, it should be directed at the purveyors and practitioners of evil, who are in ample supply around the world.

One hopes that the Bush administration, including Attorney General John Ashcroft and FBI Director Robert Mueller, will resist the temptation to repeat history and stampede a pliant Congress

into adopting ever more draconian legislation. Our best chance to prevail—indeed our greatest strength as a nation—remains our ability to make all citizens feel that they are equal participants in this greatest experiment in liberty that the world has ever known. We must not treat our own people, and others who reside peacefully among us, as the enemy. We have the capacity to keep our defenses strong, and the capacity to gather intelligence from around the world by means that target our enemies rather than ourselves.

The next time we need a plastic knife to cut a bagel at an airport but cannot find one, the next time we feel concern that an intimate phone call to a loved one might be listened in on, we should not be fooled into thinking that we make such a sacrifice in order to be safer. **■**