

Bush administration moves to stifle discovery in 9/11 lawsuits

By Walter Gilberti
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The Bush administration and the Department of Justice are moving to suppress evidence that could be used in discovery proceedings in several civil lawsuits resulting from the September 11 attack on the World Trade Center. In June, Robert D. McCallum, US attorney general for the civil division, and James B. Comey, United States attorney for the Southern District of New York, informed US District Judge Alvin Hellerstein in a letter that the Justice Department intends to intervene to control access to all evidence and documents related to the 9/11 attacks.

The letter states their intention to “seek entry of a global discovery order” requiring that the “Transportation Security Administration (TSA) be served with all requests for party and non-party discovery,” and that the “defendants and non-parties submit all proposed discovery responses that may contain ‘sensitive security information’ (SSI) to the TSA prior to releasing such material to plaintiffs.” The TSA would then have the “necessary opportunity to review such material and to withhold ‘sensitive security information.’”

To insure that these requirements are met, Attorney General John Ashcroft will press for the appointment of a lead counsel who will exercise a supervisory role over all victim family attorneys. The Justice Department is seeking to limit the scope of discovery by setting parameters for the “adoption of uniform discovery requests to streamline litigation, reduce costs for all parties and conserve judicial resources.”

With this intervention, the Bush administration is embarking, behind the claim of “grave national security concerns,” on an unprecedented vetting of evidence that denies the claimants their right to due process and a fair hearing of their legal claims. The purpose of the government’s intervention is to block any substantive disclosures concerning the events leading up to September 11.

The Bush administration is particularly fearful that a discovery procedure might place under scrutiny such documents as the August 6, 2001 Presidential Intelligence briefing that warned of a possible airplane hijacking by terrorists linked to Osama bin Laden, and the July 2001 memo from an Arizona FBI agent suggesting that Islamic fundamentalists linked to Al Qaeda were seeking training at US flight schools.

To underscore the seriousness with which the Bush administration regards any disclosure of its negligence and possible complicity in the events leading up to the September 11 attacks, Justice Department attorneys McCallum and Comey further informed Judge Hellerstein of possible consequences for the claimants. In what amounts to a veiled threat against anyone who seeks to exercise his democratic right to a tort lawsuit, the US attorneys warned claimants: “In making their election (to forego

monetary compensation), plaintiffs should be fully informed of the risks accompanying litigation. TSA's vigorous enforcing of the rules governing non-disclosure of sensitive security information may present significant litigation consequences for all plaintiffs, and the government respectfully requests that the court include a statement to this effect in any finalized protocol."

Attorneys McCallum and Comey did not spell out the possible "risks" and "consequences" that might result from carrying forward the civil lawsuits. But the Bush administration is clearly attempting to intimidate prospective claimants who refuse to accept what is perceived by many as a payoff in exchange for keeping one's mouth shut.

Judge Hellerstein has suspended all 9/11-related tort lawsuits pending a clarification of the government's guidelines.

In the immediate aftermath of the September 11 attacks, Congress passed and Bush signed into law a bill setting up the Victims Compensation Fund, which was designed to preempt an anticipated spate of tort suits. Tort law affords US citizens the right to redress a civil wrong—in this case the incompetence, negligence or complicity of the Bush administration, the various intelligence agencies and the airlines in the events prior to, during and after September 11. The Association of Trial Lawyers of America initially supported the fund.

However, it soon became evident that many of the families of 9/11 victims harbored doubts and unanswered questions, and would not settle for the government's compensation package. In an article posted on *Law.com* last March, Roger Parloff of the *American Lawyer* journal wrote: "But now that the dust is settling, some traditional plaintiffs' lawyers are horrified by what their trade group has consecrated."

As early as September 29 of last year, the article continued, Mary Schiavo, a former inspector general of the US Department of Transportation, who is currently a law partner in the Los Angeles firm of Baum, Hedlund, Aristei, Guildford and Schiavo, urged families to use the tort system rather than be "bulldozed into taking a cheap payout from the government." Schiavo has since filed several lawsuits on behalf of victims' families.

So far, as many as 33 families of September 11 victims have chosen to forego any financial remuneration from the Compensation Fund, in favor of civil lawsuits that seek redress for government and airline company negligence in failing to prevent the attacks. Additional lawsuits, involving 450 potential plaintiffs, have been filed against the New York/New Jersey Port Authority. Their complaints range from inadequate security at Newark Airport, where United Flight 93 took off, to locked roof doors and poor escape routes at the Twin Towers.

In the more than 10 months that have elapsed since the attacks, only a handful of the 3,200 families of September 11 victims have opted for the government's compensation payout. Thrashing about for explanations for the slow response to the government's monetary offer, officials cite confusion over the paperwork and ongoing grieving for lost loved-ones. But the family members as a group have also been vilified in some quarters as being "greedy."

The speed with which the government is moving to control the dissemination of information on the September 11 attacks speaks to its fear that families are choosing litigation over immediate monetary compensation because they believe the Bush administration is involved in a cover-up and hope to use the courts to extract information that is being concealed from the public.

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