

# Withdrawn/Redacted Material

## The George W. Bush Library

| DOCUMENT NO. | FORM              | SUBJECT/TITLE                                                               | PAGES | DATE       | RESTRICTION(S) |
|--------------|-------------------|-----------------------------------------------------------------------------|-------|------------|----------------|
| 001          | Letter            | [Thank you] [with attachments] - To: Edward Egan -<br>From: Karl Rove       | 3     | 04/05/2001 | P2; P5;        |
| 002          | Email             | 2d Circuit NY Candidates - To: Courtney Elwood -<br>From: Bradford Berenson | 2     | 06/25/2001 | P2; P5; P6/b6; |
| 003          | Information Sheet | Reena Raggi                                                                 | 1     | N.D.       | P6/b6;         |

**COLLECTION TITLE:**  
Counsel's Office, White House

**SERIES:**  
Elwood, Courtney Simmons

**FOLDER TITLE:**  
Judicial Nominations: New York [2]

**FRC ID:**  
5535

### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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- B. Closed by statute or by the agency which originated the document.
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Brad  
Brett

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
NEW YORK, NEW YORK 10007-1581

FAX  
CANON FAX LC 9000  
FAX NO. (212) 805-7908

**DATE:** June 1, 2001

**FROM:** Judge Thomas P. Griesa  
Voice: (212) 805-0210  
Fax: (212) 805-7908

**TO:** Hon. Tim Flanigan  
Deputy Counsel to the President  
Fax: (202) 456-6279

**DESCRIPTION / MESSAGE:**

**NUMBER OF PAGES (INCLUDING THIS PAGE):** 3

Courtney  
FBI  
Brett

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURTHOUSE  
NEW YORK, NEW YORK 10007

THOMAS P. GRIESA  
DISTRICT JUDGE

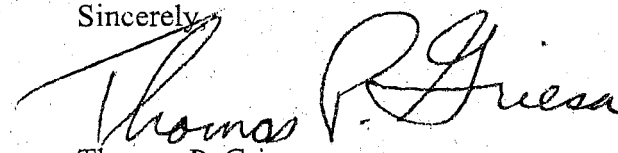
June 1, 2001

Hon. Tim Flanigan  
Deputy Counsel to the President  
The White House  
West Wing, 2<sup>nd</sup> Floor  
Washington, D.C. 20502

Dear Mr. Flanigan,

I believe that Ted Olson mentioned to you that I have a list of judges in our court and in the Second Circuit who are eligible for senior status in the near future. He suggested that I send it to you, which I am happy to do. I have just verified the dates, and I believe that they are accurate.

Sincerely,

  
Thomas P. Griesa

1 encl.

5/2/01

Memo of T. P. Griesa

Potential Court Vacancies

Court of Appeals - New York Vacancies

| <u>Names</u>  | <u>Dates</u> |
|---------------|--------------|
| Pierre Leval  | 9/4/01       |
| Amalya Kearse | 6/11/02      |

District Court

|                  |         |
|------------------|---------|
| Lawrence McKenna | 11/7/02 |
| John Martin      | 5/31/03 |

~~Brad~~  
~~Brett~~  
Counner

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
NEW YORK, NEW YORK 10007-1581**

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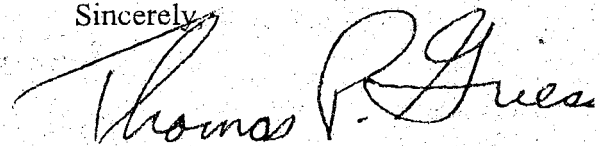
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The White House  
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Office of United States Senator  
**CHARLES E. SCHUMER**

SENATOR FOR NEW YORK STATE

**Washington**  
 313 Hart Senate Office  
 Building  
 Washington DC 20510  
 (202) 224-6542  
 (202) 228-0525/fax

**Long Island**  
 Two Greenway Plaza  
 Suite 300 North  
 145 Pine Lawn Road  
 Melville NY 11747  
 (631) 753-0978  
 (631) 753-0997/fax

**Albany**  
 Room 420  
 Leo O'Brien Building  
 Albany NY 12207  
 (518) 431-4070  
 (518) 431-4076/fax

**New York**  
 Suite 1702  
 757 Third Avenue  
 New York NY 10017  
 (212) 486-4430  
 (212) 486-7693/fax

**Binghamton**  
 Room B6  
 Federal Office Building  
 Binghamton NY 13901  
 (607) 772-8109  
 (607) 772-8124

**Rochester**  
 Room 3040  
 100 State Street  
 Rochester NY 14614  
 (716) 263-5866  
 (716) 263-3173/fax

**Buffalo**  
 Room 620  
 111 West Huron Street  
 Buffalo NY 14202  
 (716) 846-4111  
 (716) 846-4113/fax

**Syracuse**  
 Room 841  
 100 South Clinton Street  
 Syracuse NY 13261  
 (315) 423-5471  
 (315) 423-5185/fax

FAX TRANSMISSION

TO:

TIM FLANIGAN

OF:

WHITE HOUSE COUNSEL OFFICE

FAX:

202-456-6279

FROM:

BEN LAWSKY

PAGES:

3 INCLUDING COVER PAGE

DATE:

4/27/01

COMMENTS:

## United States Senate

WASHINGTON, DC 20510

April 27, 2001

The Honorable Alberto R. Gonzales  
Counsel to the President  
Office of White House Counsel  
Washington, DC 20500

Dear Judge Gonzales:

As the Democratic membership of the Senate Judiciary Committee, we are writing to you to underscore the importance we place on the judicial nomination process and to suggest how the Administration and the Senate might work together effectively on these vital lifetime appointments.

As you know, there has been a long history of consultation between the White House and the Senate on potential nominations. The Senate's recent practice fully recognized that the interests of Senators in judicial nominations are not limited to those in the same political party as the President. With an evenly divided Senate, we think it is of the utmost importance that the Administration coordinate closely with Democrats in the Senate, especially those from the home states of potential nominees and those on the Judiciary Committee.

To that end, we respectfully suggest that the Administration undertake to incorporate the following consultative procedures into its selection, vetting and nominating processes. We understand, of course, that the Administration may reach more specific agreements with individual Senators as to how to proceed with district court nominations in their home states. These suggestions closely parallel those made by Chairman Hatch to your predecessor, Charles Ruff, in 1997.

1. The Administration shall give serious consideration to individuals proposed by home state Senators as possible nominees.
2. The Administration shall consult with home state Senators and the Judiciary Committee (both majority and minority) regarding individuals the President is considering nominating with enough time to allow Senators to consider the potential nominee and provide a meaningful response to the Administration before any formal clearance (i.e. by the FBI) on the prospective nominee is initiated.
3. Should the Administration choose to begin a formal clearance process of a nominee despite a home state Senator's objection, the Administration shall notify the home state Senators and the Judiciary Committee that this is the case before the clearance process starts.

4. When the President has made the final decision to nominate an individual, home state Senators and the Judiciary Committee shall be given at least one week's notice before the formal nomination is made.
5. When a nominee is sent to the Senate, supporting documentation for the nomination shall be simultaneously sent to the Senate in order to expedite the Senate's evaluation of the nominee.
6. The nominee shall be directed by the Administration to cooperate fully with Senators who seek information regarding that nomination.

We believe these procedures will ultimately be in the interests of the Administration, the Senate, the federal judiciary and the country. We would welcome the opportunity to discuss these issues with you further and look forward to hearing from you soon.

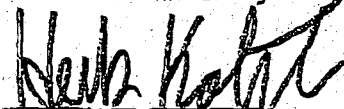
Sincerely,



Patrick J. Leahy



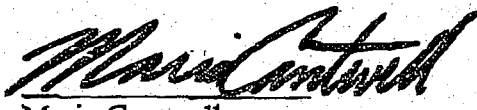
Edward M. Kennedy



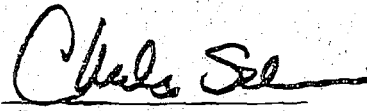
Herb Kohl



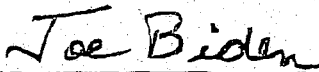
Russell D. Feingold



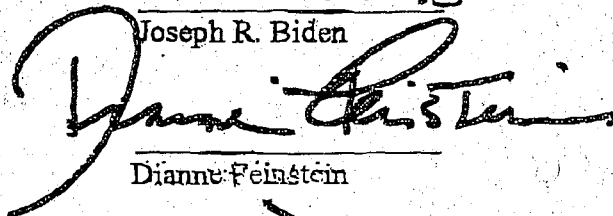
Maria Cantwell



Charles E. Schumer



Joseph R. Biden



Dianne Feinstein



Richard J. Durbin

# Withdrawal Marker

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**This marker identifies the original location of the withdrawn item listed above.  
For a complete list of items withdrawn from this folder, see the  
Withdrawal/Redaction Sheet at the front of the folder.**

### COLLECTION:

Counsel's Office, White House

### SERIES:

Elwood, Courtney Simmons

### FOLDER TITLE:

Judicial Nominations: New York [2]

### FRC ID:

5535

### OA Num.:

763

### NARA Num.:

684

### FOIA ID and Segment:

2014-0108-F

2014-0459-F

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*Rachel*



LEONIDAS RALPH MECHAM  
Director

ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

CLARENCE A. LEE, JR.  
Associate Director

WASHINGTON, D.C. 20544

July 26, 2001

**BY FACSIMILE**

Mr. Timothy E. Flanigan  
Deputy Assistant and Deputy Counsel  
To the President  
2<sup>nd</sup> Floor, West Wing  
The White House  
Washington DC 20500

Dear Tim:

Second Circuit Judge Amalya Lyle Kearse is not eligible to take senior status until June 11, 2002. The tradition at the Second Circuit level is to take senior status upon first eligibility.

Sincerely

A handwritten signature in dark ink, appearing to read "Ralph", is written over a large, stylized, light-colored circular mark.

Leonidas Ralph Mecham  
Director

cb

PREPARED BY: Courtney Elwood

NAME Reena Raggi

NAME & STATE: Reena Raggi of New York

POSITION: United States Circuit Judge for the Second Circuit

TYPE: *(bold one)* PAS PA SES FT PT TERM: LIFE

VICE: Pierre N. Leval GENDER: F DOB: (b)(6)

BIRTHPLACE: Jersey City, NJ PARTY: SSN: (b)(6)

ETHNIC HERITAGE: Italian RACE: Caucasian

CHILDREN: David W. Denton, Jr. SPOUSE: David W. Denton

VOTING CITY, STATE *(in 2000)* Brooklyn, NY HOME STATE: New York

CURRENT HOME ADDRESS: (b)(6) CURRENT POSITION AND WORK ADDRESS: United States District Judge for the Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

HOME PHONE: WORK PHONE: (718) 260-2490

EDUCATION: Harvard Law School, J.D., 1976 AWARDS:  
Wellesley College, B.A., 1973

PREVIOUS POSITIONS HELD: Windels, Marx, Davies & Ives, 1986-1987  
United States Attorney, 1986 (interim, by order of the district's Board of Judges)  
Assistant United States Attorney, E.D.N.Y., 1979-1986  
Chief, Special Prosecutions, 1984-1986  
Chief, Narcotics Section, 1982-1984  
Associate, Cahill, Gordon & Reindel, 1977-1979  
Law Clerk, Judge Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit, 1976-1977

MILITARY SERVICE:

PREVIOUS PRESIDENTIAL APPOINTMENTS:

President approved: \_\_\_\_\_

Security package sent: \_\_\_\_\_

CHAMBERS OF  
REENA RAGGI  
DISTRICT JUDGE

UNITED STATES COURT  
EASTERN DISTRICT OF NEW YORK  
225 CADMAN PLAZA EAST  
BROOKLYN, NEW YORK 11201  
EXEC. OFC. PRESIDENT  
COUNSEL TO THE PRESIDENT  
2002 FEB 12 AM 10:09

October 23, 2001

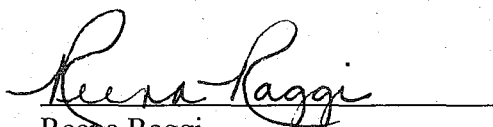
Honorable Alberto R. Gonzales  
White House Counsel  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, D.C. 20500-0004

Dear Judge Gonzales:

I want to thank you and your colleagues for the opportunity to discuss the Second Circuit with you last Friday. In reflecting on our conversation about matters such as judicial philosophy, statutory construction, and the handling of precedent, it occurred to me that a judge's abstract discussion of these topics necessarily provides only partial insight into her approach to actual cases in controversy. A few of my decisions involving statutory construction or complex precedent may give concrete form to some of my responses about judicial philosophy, and so I enclose copies of decisions in United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992) (upholding the federal death penalty statute); Evelyn V. v. Kings County Hosp. Center, 819 F. Supp. 183 (E.D.N.Y. 1993) (dismissing patients' § 1983 suit for hospital's violation of Medicaid); and Richmond Boro Gun Club v. City of New York, 896 F. Supp. 276 (E.D.N.Y. 1995) (upholding city ordinance criminalizing possession of certain firearms). If I can be of any further assistance, please let me know.

Once again, thank you all for your time and consideration.

Very truly yours,

  
Reena Raggi  
United States District Judge

Preservation Copy

United States District Court,  
E.D. New York.

UNITED STATES of America,  
v.  
Thomas PITERA, Defendant.

No. CR 90-0424 (RR).

May 26, 1992.

Defendant charged with committing murders while engaged in or working in furtherance of continuing criminal enterprise, and against whom government sought death penalty, filed pretrial motion challenging constitutionality of statute which permits death penalty in such circumstances. The District Court, Raggi, J., held that: (1) statute does not violate Eighth Amendment on vagueness grounds; (2) statute does not violate equal protection; and (3) permitting prosecution to select nonstatutory aggravating factors on which it will rely in capital sentencing hearing does not violate separation of powers doctrine.

Motion denied.

#### West Headnotes

[1] Sentencing and Punishment ☞ 1612  
350Hk1612 Most Cited Cases  
(Formerly 110k1213.8(8))

Death penalty is not per se cruel and unusual punishment violative of Eighth Amendment. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment ☞ 1612  
350Hk1612 Most Cited Cases  
(Formerly 110k1213.8(8))

Capital punishment is unconstitutionally cruel and unusual if it is imposed arbitrarily or capriciously. U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment ☞ 1624  
350Hk1624 Most Cited Cases  
(Formerly 110k1213.2(2))

[3] Sentencing and Punishment ☞ 1681  
350Hk1681 Most Cited Cases  
Criminal  
(Formerly 110k1213.2(2))

Statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise informs jury as to what it must find to impose death penalty, and thus, does not leave jury with kind of open-ended discretion that would violate Eighth Amendment; statute plainly states relationship that must be established between defendant and charged murder, and states principles on which juries are routinely instructed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A); U.S.C.A. Const.Amend. 8.

[4] Sentencing and Punishment ☞ 1624  
350Hk1624 Most Cited Cases  
(Formerly 110k1213.2(2))

[4] Sentencing and Punishment ☞ 1681  
350Hk1681 Most Cited Cases  
(Formerly 110k1213.2(2))

Statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise is not fatally vague in violation of Eighth Amendment for failing to define relationship that must be proved between defendant's efforts on behalf of continuing criminal enterprise and alleged killing; commonsense reading of statute supports conclusion that defendant faces federal prosecution only for homicidal acts committed while he was engaging in or working in furtherance of continuing criminal enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A); U.S.C.A. Const.Amend. 8.

[5] Sentencing and Punishment ☞ 1628  
350Hk1628 Most Cited Cases  
(Formerly 203k351)

There is no impermissible vagueness in description of involvement defendant must have in charged continuing criminal enterprise in order to subject him to death penalty under statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of such enterprise; government must prove that defendant was engaging in or working in furtherance of continuing criminal enterprise, and how one "engages in" continuing criminal enterprise is expressly defined. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A); U.S.C.A. Const.Amend. 8.

[6] Constitutional Law ☞ 250.3(1)  
92k250.3(1) Most Cited Cases

[6] Sentencing and Punishment ☞ 1624  
350Hk1624 Most Cited Cases  
(Formerly 203k351)

Statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise does not violate equal protection; Congress could reasonably have concluded that, when risk of drug-related violence translates into reality of intentional murder, death penalty is appropriate sanction. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A).

[7] Sentencing and Punishment ☞ 1625  
350Hk1625 Most Cited Cases  
(Formerly 203k351)

Statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise is not unconstitutional on ground that "intentional killing" aggravating factor mirrors mens rea element of charged crime; statute significantly narrows class of murderers eligible for death penalty at guilt phase, and concern that sentencing balance is unfairly tipped by permitting government to argue something in aggravation that really adds nothing new to crime of conviction is easily assuaged by instruction telling jury that statute duplicates element of crime, and stressing importance of quality of information adduced at sentencing hearing rather than its quantity. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(n)(1)(A), 21 U.S.C.A. § 848(n)(1)(A).

[8] Sentencing and Punishment ☞ 1625  
350Hk1625 Most Cited Cases  
(Formerly 203k351)

[8] Sentencing and Punishment ☞ 1684  
350Hk1684 Most Cited Cases  
(Formerly 203k357(11))

[8] Sentencing and Punishment ☞ 1681  
350Hk1681 Most Cited Cases  
(Formerly 203k357(11))

Under statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise,

aggravating factor permitting consideration of whether defendant committed murder in especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to victim adequately informed jury as to what it must find to impose death penalty, and thus, it was not unconstitutionally vague. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(n)(2-12), 21 U.S.C.A. § 848(n)(2-12).

[9] Sentencing and Punishment ☞ 1625  
350Hk1625 Most Cited Cases  
(Formerly 203k351)

[9] Sentencing and Punishment ☞ 1656  
350Hk1656 Most Cited Cases  
(Formerly 203k357(4))

Use of nonstatutory aggravating factors under statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise is neither arbitrary nor capricious; statutory scheme involves congressional narrowing of class of persons eligible for death penalty, and nonstatutory aggravating factors are considered only after defendant's membership in this narrow class is established beyond reasonable doubt and only as part of jury's individualized sentencing consideration. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j), 21 U.S.C.A. § 848(j).

[10] Sentencing and Punishment ☞ 1788(6)  
350Hk1788(6) Most Cited Cases  
(Formerly 110k1134(3))

Scope of review of death sentence imposed for intentionally killing while engaging in or working in furtherance of continuing criminal enterprise is broad enough to permit appellate consideration of proportionality in appropriate case, even though it is not required in every case. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A).

[11] Constitutional Law ☞ 79  
92k79 Most Cited Cases

[11] Sentencing and Punishment ☞ 1625  
350Hk1625 Most Cited Cases  
(Formerly 203k351)

Statute which permits prosecution to present nonstatutory aggravating factors when seeking death sentence against defendant accused of intentionally

killing while engaging in or working in furtherance of continuing criminal enterprise is not "delegation of legislative authority" to prosecutor, and thus, does not violate separation of powers doctrine; prosecutor's advocacy of death sentence does not involve prosecution in fixing of sentence, as that remains exclusively jury's function. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j), 21 U.S.C.A. § 848(j); U.S.C.A. Const. Art. 1, § 1.

[12] Criminal Law ☞ 4  
110k4 Most Cited Cases

In ordinary criminal case, Congress' power to fix sentence is absolute, as reflected in its ability to legislate mandatory sentences.

[13] Constitutional Law ☞ 62(5.1)  
92k62(5.1) Most Cited Cases  
(Formerly 92k62(5))

[13] Sentencing and Punishment ☞ 1625  
350Hk1625 Most Cited Cases  
(Formerly 110k1206.1(2))

Even if delegation of legislative power were involved in statute permitting federal prosecutors to rely on nonstatutory aggravating factors in prosecution in which death penalty is sought under continuing criminal enterprise statute, such delegation would be constitutional; nondelegation doctrine does not bar Congress from obtaining assistance from coordinate branches of government as long as it articulates "intelligible principle" by which authorized body is to exercise its delegated powers. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j), 21 U.S.C.A. § 848(j); U.S.C.A. Const. Art. 1, § 1.

[14] Constitutional Law ☞ 203  
92k203 Most Cited Cases

[14] Sentencing and Punishment ☞ 1632  
350Hk1632 Most Cited Cases  
(Formerly 203k357(5))

In prosecution in which government sought death penalty for intentionally killing while engaging in or working in furtherance of continuing criminal enterprise, ex post facto clause would not be violated by government reliance, in aggravation of those homicides, on other murders defendant may have committed prior to passage of statute pursuant to which death penalty was sought; consideration of those crimes neither exposed defendant to conviction for

criminal conduct of which he was not given fair notice nor subjected him to further punishment for earlier crimes. U.S.C.A. Const. Art. 1, § 9, cl. 3; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A).

[15] Sentencing and Punishment ☞ 1625  
350Hk1625 Most Cited Cases  
(Formerly 203k357(4), 203k351)

Enumerated mitigating factors in statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise do not impermissibly limit what defendant may present at sentencing hearing; statute expressly provides that defendant may proffer any enumerated mitigating factor or any other mitigating factor. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j, m), 21 U.S.C.A. § 848(j, m).

[16] Sentencing and Punishment ☞ 1751  
350Hk1751 Most Cited Cases  
(Formerly 203k358(1))

Federal Rules of Evidence did not apply to capital sentencing hearings under statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise; while rules are critical to conduct of singular focus of criminal trial, i.e., whether defendant is guilty of criminal conduct of which he has been specifically accused, individualized consideration of sentence, by contrast, necessitates broader inquiry into all aspects of defendant's life and crime committed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j), 21 U.S.C.A. § 848(j).

[17] Sentencing and Punishment ☞ 1627  
350Hk1627 Most Cited Cases  
(Formerly 203k351)

Statute permitting death sentence for person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise provides for constitutionally sufficient appellate review; statute mandates appellate consideration of whether capital sentence was infected by "any arbitrary factor," statute requires exhaustive review of capital sentence, and if any feature reveals sentencing decision may be arbitrary, remand is contemplated. Comprehensive Drug Abuse Prevention and Control Act of 1970, §

408(q), 21 U.S.C.A. § 848(q).

[18] Sentencing and Punishment ☞ 1655  
350Hk1655 Most Cited Cases  
(Formerly 110k1208.1(4.1), 110k1208.1(4))

Government's decision to file death penalty notice against defendant, but not against various codefendants, was not arbitrary; defendant was purported head of significant drug enterprise while codefendants were, at best, subordinate members of that enterprise, and defendant was alleged to have personally committed seven of nine murders charged in indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A); U.S.C.A. Const.Amend. 8.

[19] Criminal Law ☞ 37.15(2)  
110k37.15(2) Most Cited Cases

[19] Sentencing and Punishment ☞ 1649  
350Hk1649 Most Cited Cases  
(Formerly 110k1208.1(4.1), 110k1208.1(4))

Evidence did not support claim that death penalty was sought in vindictive response to defendant's rejection of government plea offer and demands for his cooperation; defendant's attorney offered only defendant's hearsay statement attributing offensive government conduct to unnamed officials and, invited at oral argument to provide more particulars, defense declined. U.S.C.A. Const.Amend. 8.

[20] Sentencing and Punishment ☞ 1624  
350Hk1624 Most Cited Cases  
(Formerly 110k1213.8(8))

Defendant prematurely claimed it was cruel and unusual for Congress not to provide means for implementation of death sentence under statute permitting such sentence for person who intentionally kills while engaging or working in furtherance of continuing criminal enterprise; defendant had been charged with capital crime, but had not been convicted or sentenced of one. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A).

[21] Constitutional Law ☞ 203  
92k203 Most Cited Cases

[21] Sentencing and Punishment ☞ 1634  
350Hk1634 Most Cited Cases  
(Formerly 203k351)

Defendant against whom government sought death penalty pursuant to statute permitting such penalty against person who intentionally kills while engaging in or working in furtherance of continuing criminal enterprise, but which does not provide means of execution, had fair warning of consequences of his conduct at time he allegedly committed murders, and thus, any subsequent legislation implementing means of execution would not violate ex post facto clause. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1)(A), 21 U.S.C.A. § 848(e)(1)(A); U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

\*550 Andrew J. Maloney, U.S. Atty., E.D. New York, Brooklyn, N.Y. by David W. Shapiro, Linda B. Lakhdar, Asst. U.S. Attys., for U.S.

Mathew J. Mari, New York City, Ruhnke & Barrett, West Orange, N.J. by David A. Ruhnke, Cheryl Hamer Mackell, New York City, for Thomas Pitera.

Ass'n of the Bar of City of New York, New York State Defenders Ass'n, Nat. Ass'n of Criminal Defense Lawyers, New York State Ass'n of Criminal Defense Lawyers, Nat. Legal Aid and Defender Ass'n, and New York Criminal Bar Ass'n, Cravath, Swaine & Moore, New York City by Paul M. Dodyk, Patricia Perlmutter, for amici curiae.

#### MEMORANDUM AND ORDER

RAGGI, District Judge:

Thomas Pitera stands before the court charged in a twenty count indictment with racketeering, drug trafficking, and various firearms violations. Count Three of the indictment accuses Mr. Pitera of killing two persons, Richard Leone and Solomon Stern, while engaging in or working in furtherance of a continuing criminal enterprise. Such conduct carries a possible sentence of death. 21 U.S.C. § 848(e)(1)(A). The government has served notice of its intent to seek the death penalty if Mr. Pitera is found guilty of Count Three. [FN1]

FN1. This case is the first in the Second Circuit in which the United States seeks the death penalty pursuant to § 848(e)(1). It is one of five such cases brought by the Justice Department since 1989.

(1) In *United States v. Cooper*, separate juries sitting in the Northern District of Illinois found defendants Alexander Cooper and Anthony Davis guilty of violating 21 U.S.C. § 848(e)(1)(A) but declined to impose the death penalty. The defendants are instead

each serving terms of life imprisonment. The trial court's opinion upholding the constitutionality of the death penalty statute is reported at 754 F.Supp. 617 (N.D.Ill.1990).

(2) In *United States v. Chandler*, 90 CR 266, a jury in the Northern District of Alabama found defendant guilty of violating 21 U.S.C. § 848(e)(1)(A) and recommended the death penalty. The court rejected defendant's constitutional challenge without published opinion, relying on *United States v. Cooper*, *supra*. This conviction and sentence are presently on appeal.

(3) In *United States v. Villarreal*, 91 CR 004, a jury sitting in the Eastern District of Texas found defendants Baldemar Villarreal and Reynaldo Villarreal guilty of violating 21 U.S.C. § 848(e)(1)(B). It was not persuaded, however, of the presence of certain statutory aggravating factors required to impose the death penalty. Accordingly, Baldemar Villarreal is now serving a term of life imprisonment while Reynaldo Villarreal is serving a term of 30 years imprisonment. Constitutional challenges were denied without opinion.

(4) Most recently, the trial of *United States v. Pretlow*, in the District of New Jersey, ended without verdict as a result of defendant's suicide. The trial court's opinion upholding the constitutionality of § 848(e)(1)(A) is reported at 779 F.Supp. 758 (D.N.J.1991).

Mr. Pitera challenges the constitutionality of § 848(e)(1)(A)'s death penalty provision. Joining in the attack as *amici curiae* are the Association of the Bar of the City of New York, the New York State Defenders Association, the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, and the New York Criminal Bar Association. Defendant and/or *amici* advance the following arguments:

I. any form of capital punishment violates the eighth amendment's prohibition of cruel and unusual punishment;

II. the particular federal statute at issue fails adequately to ensure that the death penalty will not be imposed in an arbitrary and capricious manner in that:

A. the capital crime itself is both vague and irrational,

\*551 B. the sentencing scheme relies on duplicative and vague statutory aggravating factors,

C. the sentencing scheme permits reliance on unlimited non-statutory aggravating factors,

D. the sentencing scheme impermissibly limits consideration of mitigating factors,

E. the sentencing hearing is not governed by the Federal Rules of Evidence, and

F. meaningful appellate review is not ensured;

III. Mr. Pitera was singled out for arbitrary and vindictive prosecution; and

IV. Congress's failure to provide a means of execution is inevitably cruel and unusual and violative of the *ex post facto* clause.

Defendant asks the court to address these constitutionality challenges before trial since jury selection as well as defense trial strategy may differ considerably in a capital versus a non-capital case. See, e.g., Fed.R.Crim.P. 24(b) (providing twenty peremptory challenges per side if a defendant is charged with a crime punishable by death); 18 U.S.C. § 3432 (capital charge requires disclosure to defendant of a list of veniremen and place of abode three days before commencement of trial). This court has therefore carefully considered all arguments advanced by the parties and *amici*. It rejects the constitutional attack on 21 U.S.C. § 848(e)(1)(A). The parties were advised orally of this ruling on April 27, 1992. This memorandum details the reasons for the court's decision.

#### Statutory Background: The Anti-Drug Abuse Act of 1988

The Anti-Drug Abuse Act of 1988 makes it a capital offense intentionally to kill another person in connection with the commission of serious federal drug crimes. Specifically, 21 U.S.C. § 848(e)(1)(A) provides:

[A]ny person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years and which may be up to life imprisonment, or may be sentenced to death.... [FN2]

FN2: The statute provides the same possible penalties for an individual who, in the course of committing certain drug offenses, intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of a law enforcement officer. 21 U.S.C. § 848(e)(1)(B). That section is not at issue in this case.

The Act details procedures to be followed before a defendant can be executed. Initially, the government must serve notice "a reasonable time before trial" of its intent to seek the death penalty. 21 U.S.C. § 848(h)(1). If a defendant is found guilty of violating § 848(e)(1)(A), a separate sentencing hearing must be

conducted, generally before the same jury that determined guilt. 21 U.S.C. § 848(i)(1)(A). The purpose of the hearing is to permit consideration of any "aggravating" and "mitigating" factors relevant to whether or not the defendant should be sentenced to death. 21 U.S.C. § 841(j). The information adduced need not conform to the Federal Rules of Evidence, so long as the court is convinced that its "probative value is [not] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." 21 U.S.C. § 848(j).

The process by which a jury is to consider sentencing factors is specific. Preliminarily, the government must prove beyond a reasonable doubt and to the unanimous satisfaction of the jury at least two of the aggravating factors expressly set forth in the statute (hereinafter referred to as "statutory aggravating factors"). 21 U.S.C. § 848(j) and (k). Moreover, it must advise the defendant a reasonable time before trial of which statutory aggravating factors it intends to prove. 21 U.S.C. § 848(h)(1). One of these must be from among the four listed in § 848(h)(1). The \*552 other must be from among those listed in § 848(n)(2)-(12). Absent proof of these statutory aggravating factors, a jury cannot vote to impose the death penalty. 21 U.S.C. § 848(k).

If a jury is satisfied that at least two such statutory aggravating factors have been proved, it may then consider any mitigating factors established by the defendant, whether from among those listed in § 848(m) or not, and any other aggravating factors of which the government gives notice in advance of trial (hereinafter referred to as "non-statutory aggravating factors"). 21 U.S.C. § 848(h)(1)(B), (j), and (k). Although non-statutory aggravating factors must be proved to the jury's unanimous satisfaction beyond a reasonable doubt, mitigating factors need only be established by a preponderance of the evidence. Moreover, any juror persuaded of a mitigating factors may consider it in reaching a sentencing decision; unanimity is not required. 21 U.S.C. § 848(j) and (k).

A jury that finds the required statutory aggravating factors proved must consider whether these factors, along with any non-statutory aggravating ones, so outweigh any mitigating factors as to justify a sentence of death in the discrete case. 21 U.S.C. § 848(k). Even absent any mitigating factors, a jury must still be unanimously satisfied beyond a reasonable doubt that the proved aggravating factors are themselves sufficient to justify capital punishment before a sentence of death can be imposed. *Id.*

Invidious factors cannot influence a jury's determination as to the death penalty. Indeed, each juror must sign a certificate attesting that neither the defendant's nor the victim's "race, color, religious beliefs, national origin, or sex" played any part in the deliberations. 21 U.S.C. § 848(o)(1).

Although a jury cannot vote for the death penalty absent the required findings and certifications just detailed, a jury is *never* required to impose a death sentence even if it finds sufficient grounds to do so under the applicable law. Indeed, a court must specifically so instruct the jury. 21 U.S.C. § 848(k).

The statute labels a jury's finding in favor of the death penalty a "recommendation." 21 U.S.C. § 848(l). In fact, it is determinative, for upon such a "recommendation" the trial court "shall sentence the defendant to death." *Id.* Absent a recommendation of death, the court must sentence a defendant to a minimum of 20 years and a maximum of life imprisonment. *Id.*; 21 U.S.C. § 848(e)(1)(A).

Appellate review of a death sentence is expressly provided by the law. 21 U.S.C. § 848(q)(1). Such appeal may be consolidated with a challenge to the judgment of conviction, and the case is to be given priority on the appellate docket. *Id.*

#### Discussion

##### I. The Death Penalty as Cruel and Unusual Punishment

[1] Mr. Pitera contends that the death penalty is, under all circumstances, cruel and unusual punishment violative of the eighth amendment. He concedes, however, that this argument has been rejected by all current members of the Supreme Court who have had occasion to consider the issue. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 178, 96 S.Ct. 2909, 2927, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citing to two centuries of case law upholding the constitutionality of capital punishment); *accord McCleskey v. Kemp*, 481 U.S. 279, 300-01, 107 S.Ct. 1756, 1771-72, 95 L.Ed.2d 262 (1987). Moreover, he cites no objective indicia of any change in public opinion about this punishment that might warrant reconsideration of its constitutionality. *See Gregg v. Georgia*, 428 U.S. at 173, 96 S.Ct. at 2925 (opinion of Stewart, Powell, and Stevens, JJ.); *Weems v. United States*, 217 U.S. 349, 378, 30 S.Ct. 544, 553, 54 L.Ed. 793 (1910). This court is, therefore, compelled to follow controlling case law and to reject

the broad constitutional attack on the death penalty. See *United States v. Pretlow*, 779 F.Supp. at 777-78 (rejecting similar challenge to § 848(e)(1)(A)).

\*553 Instead, the court considers the specific challenges made to the capital statute here at issue. In so doing, it is mindful of Justice Holmes's admonition that constitutionality challenges to an act of Congress engage a court in "the gravest and most delicate duty" of the judicial branch. See *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 107, 72 L.Ed. 206 (1927). A due respect both for the magnitude of the task and for the independence of Congress, which presumably "legislates in the light of constitutional limitations," makes it appropriate to construe a challenged statute so as to avoid a conflict with the Constitution if reasonably possible. *Rust v. Sullivan*, 500 U.S. 173, ---, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991); *Communication Workers v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988); *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). These principles guide the court's analysis.

## II. Arbitrary and Capricious Sentencing

[2] The majority of the arguments advanced by defendant and *amici* contend that the statute at issue fails to ensure that the death penalty is imposed in a consistently reasoned manner. The single most important principle to be derived from the Supreme Court's recent death penalty jurisprudence, beginning with the various opinions in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), is that capital punishment is unconstitutionally cruel and unusual if it is imposed arbitrarily or capriciously. Thus, statutes must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). "[R]ational criteria" must be articulated "that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case" meet the "threshold below which the death penalty cannot be imposed." *Payne v. Tennessee*, --- U.S. ---, ---, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991) (quoting *McCleskey v. Kemp*, 481 U.S. at 305, 107 S.Ct. at 1774). Moreover, when, as in this case, a jury generally inexperienced in sentencing decisions is entrusted with "so grave [a] determination" as "whether a human life should be taken or spared, that discretion

must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of Stewart, Powell, and Stevens, JJ.).

The means by which sentencing discretion can be narrowed and directed are varied. See *id.* at 195, 96 S.Ct. at 2935 (opinion of Stewart, Powell, and Stevens, JJ.). For example, a legislature can limit the types of murders for which capital punishment may be imposed. See *Lowenfield v. Phelps*, 484 U.S. 231, 244-45, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988). Alternatively, it can require proof of specific aggravating factors. *Id.* In this case, Congress appears to have done both: limiting the type of homicide for which the death penalty can be imposed to intentional murders committed in relation to a serious drug crime, and providing for specific aggravating factors that must be found before a sentence of death can be considered. See *United States v. Pretlow*, 779 F.Supp. at 772. Nevertheless, Mr. Pitera and *amici* contend that the statutory scheme is constitutionally inadequate. The court addresses in turn the particular cited deficiencies.

### A. Vagueness of the Crime

*Amici* submit that the crime outlined in 21 U.S.C. § 848(e)(1)(A) is unconstitutionally vague. Specifically, they argue that the statute, in failing to specify the relationship to be proved between the defendant and the killing, between the enterprise and the killing, and between the defendant and the enterprise, risks arbitrary imposition of the death penalty. *Amici* further suggest that the statute violates due process in singling out certain drug-related murders for capital punishment when other equally or more heinous murders are not so punished. Neither argument has merit.

#### \*554 1. Eighth Amendment Vagueness

Generally, a vagueness challenge to a criminal statute invokes due process and focuses on the adequacy of notice to a *defendant* that certain conduct is prohibited. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). An eighth amendment vagueness challenge to a capital punishment statute has a different focus. The critical inquiry is whether the statute so poorly informs the *jury* as to what it "must find to impose the death penalty" that there is a risk that it is left "with the kind of open-ended discretion that was held invalid in *Furman v. Georgia*." See *Maynard v. Cartwright*, 486 U.S. 356, 361-62, 108 S.Ct. 1853, 1857-58, 100 L.Ed.2d 372

(1988) (citations omitted).

[3] This case presents no such risk. The statute plainly states the relationship that must be established between a defendant and the charged murder: a defendant must have himself "intentionally kill[ed] the victim or he must have "counsel[ed], command[ed], induce[d], procure[d], or cause[d] the intentional killing." The latter clause, far from being ambiguous, as *amici* argue, parallels 18 U.S.C. § 2 and states principles on which juries are routinely instructed. In any event, the court understands the government's position to be that Mr. Pitera himself committed the two murders charged in Count Three. Thus, no jury confusion about his alleged involvement will arise.

[4] The court further rejects *amici's* suggestion that § 848(e)(1)(A) is fatally vague in failing to define the relationship that must be proved between a defendant's efforts on behalf of a continuing criminal enterprise and the alleged killing. A common sense reading of the statute supports the conclusion that a defendant faces federal prosecution only for homicidal acts committed "[while he was] engaging in or working in furtherance of a continuing criminal enterprise...." *Amici's* speculation that the statute would permit federal prosecution of a drug kingpin who killed his spouse in a domestic dispute unrelated to his drug dealing is not only fanciful, it is jurisdictionally suspect. As between two possible interpretations of a statute, a court is, quite simply, obliged to adopt that which is not constitutionally defective. See *Rust v. Sullivan*, *supra*. The government, moreover, concedes that it must prove a relationship between the murders alleged and Mr. Pitera's involvement in the charged enterprise. The court understands this to be akin to that "vertical" relationship that must be proved between predicate acts and enterprises in racketeering cases. See, e.g., *United States v. Minicone*, 960 F.2d 1099 (2d Cir.1992), *reh'g granted in part, denied in part*, 1992 WL 15269 (1992). It will charge the jury accordingly.

[5] Finally, the court finds no impermissible vagueness in the statute's description of the involvement a defendant must have in the charged enterprise. The government must prove that defendant was "engaging in or working in furtherance of a continuing criminal enterprise." How one "engages in" a continuing criminal enterprise is expressly defined in § 848(c). Moreover, courts routinely consider whether a defendant's actions are "in furtherance" of other criminal activity when applying Fed.R.Evid. 801(d)(2)(E) (co-conspirator hearsay exception). See

*United States v. Cooper*, 754 F.Supp. at 627 (rejecting vagueness challenge to this aspect of § 848(e)(1)(A)).

*Amici* contend that "working in furtherance of a continuing criminal enterprise" can mean aiding and abetting it. They note that the Second Circuit has rejected aiding and abetting as a basis for finding a defendant guilty of violating 21 U.S.C. § 848(a) and (b). See *United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir.1987), *cert. denied*, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988); cf. *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.) (en banc), *cert. denied*, 493 U.S. 901, 110 S.Ct. 260, 107 L.Ed.2d 209 (1989) (person supervised by drug kingpin cannot be guilty as aider and abettor of § 848(a) charge; but person not under kingpin's supervision who aids and abets the enterprise may be guilty pursuant to 18 U.S.C. § 2). This argument ignores the different concerns addressed \*555 by § 848(a) and (b) on the one hand, and § 848(e)(1)(A) on the other. The former sections focus on individuals who head significant continuing drug enterprises. Section 848(e)(1)(A) focuses on individuals who commit murders in connection with the most serious drug crimes, specifically, in connection with continuing drug enterprises or in connection with the importation or distribution of significant quantities of drugs. While, as the Second Circuit noted in *Amen*, there is something illogical about convicting an aider and abettor for criminal conduct that focuses directly on the leadership role a defendant plays in a continuing criminal enterprise, that incongruity is not present in Congress's express decision to punish severely anyone who actually kills or who counsels, commands, induces, procures, or causes the intentional killing of a human being in connection with large-scale drug trafficking.

In any event, this case does not require the court to resolve the scope of a defendant's liability under § 848(e)(1)(A) for homicides committed while "working in furtherance of a continuing criminal enterprise." The government here contends that Mr. Pitera did, indeed, head the drug enterprise. In short, this case will be presented to the jury on the theory that Mr. Pitera committed the charged homicides while "engaging in" a continuing criminal enterprise. Proper instructions pursuant to § 848(c) will ensure that the jury understands this concept.

## 2. Due Process/Equal Protection

[6] *Amici* further argue that § 848(e)(1)(A) violates the equal protection guarantee implicit in the due process clause of the fifth amendment by irrationally singling

out for possible execution a class of persons whose homicidal conduct may be no more, and possibly less, serious than that engaged in by others.

A party raising an equal protection challenge to a criminal statute proscribing conduct that does not implicate a fundamental right bears a heavy burden. At issue is not "whether the legislature made a correct judgment, but only whether it made a rational one." *United States v. Richards*, 737 F.2d 1307, 1310 (4th Cir.1984); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir.1984). Particularly when a challenge is to the punishment chosen for a given crime, courts must be mindful that " 'these are peculiarly questions of legislative policy.' " *Gregg v. Georgia*, 428 U.S. at 176, 96 S.Ct. at 2926 (quoting *Gore v. United States*, 357 U.S. 386, 393, 78 S.Ct. 1280, 1284, 2 L.Ed.2d 1405 (1958)) (opinion of Stewart, Powell, and Stevens, JJ.).

In this case, the choice Congress made is rational. Drug trafficking is recognized as "one of the greatest problems affecting the health and welfare of our population." *Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 1392, 103 L.Ed.2d 685 (1989). To address the concern, Congress has already provided for a potential sentence of life imprisonment for large scale traffickers. See 21 U.S.C. §§ 841(b), 848(a) and (b), 960(b). The Supreme Court has rejected the argument that such a severe sentence is cruel and unusual. See *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (upholding state sentence of mandatory life imprisonment for person trafficking in large amount of cocaine). One of the most troubling aspects of drug trafficking is, of course, the frequency with which it spawns crimes of violence, particularly murder. See *id.* at ---, 111 S.Ct. at 2706 (Kennedy, J., concurring) (citing to studies linking drug trafficking to crimes of violence); see also *United States v. Crespo*, 834 F.2d 267, 271 (2d Cir.1987) (recognizing firearms as tools of the drug trade), *cert. denied*, 485 U.S. 1007, 108 S.Ct. 1471, 99 L.Ed.2d 700 (1988). In this context, Congress could reasonably have concluded that, when the risk of drug-related violence translates into the reality of an intentional murder, the death penalty is an appropriate sanction.

*Amici* are correct that drug-related violence is widespread, and not limited to large traffickers. Congress, however, may attack problems one step at a time. See *Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976); *United States v. Holland*, 810 F.2d 1215, \*556 1219

(D.C.Cir.) (rejecting equal protection challenge to statute prohibiting drug trafficking within 1000 feet of school), *cert. denied*, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 (1987); *United States v. Agilar*, 779 F.2d 123, 126 (2d Cir.1985) (Congress acted rationally in increasing penalties for drug trafficking near schools "in hope of providing further deterrence, whether or not such success is thereby achieved"), *cert. denied*, 475 U.S. 1068, 106 S.Ct. 1385, 89 L.Ed.2d 609 (1986). Congress could reasonably have concluded that the penalty of death was so severe that it should only apply to those whose homicidal acts occurred in the context of the sort of large-scale drug trafficking already punishable by life imprisonment.

Insofar as *amici* strain to read the statute to cover defendants peripherally linked to the drug enterprise who only aid in the commission of a homicide, this court need not address such hypotheses. As already noted, Thomas Pitera is alleged to have headed the significant drug enterprise charged in the indictment. He is alleged to have personally committed the homicides at issue. His prosecution for such conduct pursuant to § 848(e)(1)(A) does not violate equal protection.

#### B. Statutory Aggravating Factors

The government has advised Mr. Pitera that, if he is convicted of Count Three, it will seek to prove three statutory aggravating factors. [FN3] To satisfy its requirement under § 848(n)(1), it expects to prove that Mr. Pitera "intentionally killed Richard Leone and Solomon Stern." 21 U.S.C. § 848(n)(1)(A). To satisfy its requirement under § 848(n)(2)-(12), the government expects to prove that "defendant committed [the Leone/Stern murders] after substantial planning and premeditation," 21 U.S.C. § 848(n)(8), and that he committed these murders "in an especially heinous, cruel, or depraved manner in that [they] involved torture or serious physical abuse to the victims," 21 U.S.C. § 848(n)(12).

FN3. The government's motion to amend its death penalty notice to permit treatment of certain previously identified non-statutory aggravating factors as statutory aggravating factors is denied for reasons stated in a separate memorandum and order filed today.

Mr. Pitera argues that the "intentional killing" factor is merely duplicative of an element of the charged crime, and thus serves no real narrowing function. *Amici* join in this argument and contend that the same defect pertains to the "heinous, cruel or depraved ..." factor.

Mr. Pitera challenges the latter factor as too vague to permit rational narrowing. [FN4]

FN4. No challenge is raised to the premeditation and planning factor. 21 U.S.C. § 848(n)(8). See *United States v. Cooper*, 754 F.Supp. at 623 (rejecting argument that this factor was vague and duplicative of the intent elements of the underlying crime).

### 1. Intentional Killing

[7] This court agrees that the "intentional killing" factor stated in § 848(n)(1)(A) mirrors the *mens rea* element of the charged crime. Defendant's suggestion that this duplication mandates a finding of unconstitutionality misperceives the purpose of statutory aggravating factors in a capital sentencing scheme. In *Lowenfield v. Phelps*, *supra*, the court explained that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion." 484 U.S. at 244, 108 S.Ct. at 554. In that case, the only aggravating factor proved, defendant's specific intent to kill or inflict great bodily harm upon more than one person, also duplicated an element of the charged homicide. Because the element itself narrowed the class of murderers that could be sentenced to death, the Court upheld imposition of the death penalty, noting that such narrowing could be achieved "by jury findings at either the sentencing phase of the trial or the guilt phase." *Id.* at 245, 108 S.Ct. at 554; accord *Bertolotti v. Dugger*, 883 F.2d 1503, 1527 (11th Cir.1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990).

As with the statute in *Lowenfield*, § 848(e)(1)(A) significantly narrows the class of murderers eligible for the death \*557 penalty at the guilt phase. A jury must be persuaded that a defendant intentionally committed homicide and that he did so in connection with large-scale drug trafficking. *United States v. Pretlow*, 779 F.Supp. at 772 (applying *Lowenfield* to identical challenge here at issue); *United States v. Cooper*, 754 F.Supp. at 622 (same). Moreover, Congress requires the finding of at least one other aggravating factor drawn from the list in § 848(n)(2)-(12) before the death penalty can be considered. This further defines and limits the class of persons eligible for capital punishment. *United States v. Pretlow*, *supra*; *United States v. Cooper*, *supra*.

Defendant nevertheless seeks to distinguish this case from *Lowenfield* because § 848(k) requires juries to

weigh aggravating and mitigating factors, whereas such weighing was not an aspect of the statute at issue in *Lowenfield*. The difference between "weighing" and "non-weighing" capital statutes involves more than "semantics." See *Stringer v. Black*, 503 U.S. 222, ---, 112 S.Ct. 1130, 1137, 117 L.Ed.2d 367 (1992). But the difference goes not so much to narrowing the capital class as it does to guiding the jury's individualized sentencing determination. Thus, in *Stringer*, the Supreme Court held that jury consideration of an unconstitutionally vague aggravating factor was particularly problematic under a weighing statute because "it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Id.* 112 S.Ct. at 1139.

Mr. Pitera's challenge to § 848(n)(1)(A), however, is not vagueness. See *id.* (distinguishing *Lowenfield* as not involving a vague factor). Indeed, the Supreme Court has expressly held that a "highly culpable mental state ... may be taken into account in making a capital sentencing judgment." See generally *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 1687- 88, 95 L.Ed.2d 127 (1987) (even reckless disregard for human life can support imposition of death sentence). Mr. Pitera's complaint is simply that the factor is duplicative. A duplicative factor, unlike a vague one, does not risk the injection of an "illusory circumstance" into the sentencing process.

Defendant's real complaint is that a duplicative factor unfairly tips the sentencing balance by permitting the government to argue something in aggravation that really adds nothing new to the crime of conviction. This concern is easily assuaged by an instruction telling the jury that § 848(e)(1)(A) duplicates an element of the crime, and stressing the importance of the quality of the information adduced at the sentencing hearing rather than its quantity. The jury will, of course, also be instructed that it cannot recommend the death penalty unless it finds the aggravating factors to outweigh--in terms of severity not raw number--any mitigating factors. It will be told that even in the absence of any mitigating factors, the death penalty cannot be imposed unless the aggravating factors are themselves serious enough to warrant capital punishment. Finally, it will be told that it is never required to recommend a defendant's execution. The court is satisfied that these instructions are sufficient to safeguard against imbalance at the sentencing hearing. See *United States v. Pretlow*, 779 F.Supp. at 773.

(Cite as: 795 F.Supp. 546, \*557)

2. Especially Heinous, Cruel or Depraved Manner Involving Torture or Serious Physical Abuse to the Victim

[8] Defendant argues that the statutory factor permitting consideration of whether a defendant committed murder in "an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim" is too vague to constitute a real narrowing of the class of persons subject to the death penalty. The court must decide whether the provision adequately informs a jury as to what it must find to impose the death penalty or whether it invites the exercise of open-ended discretion. See *Maynard v. Cartwright*, 486 U.S. at 361-62, 108 S.Ct. at 1857-58.

By itself, the term "especially heinous, cruel or depraved," is too vague to narrow \*558 a jury's discretion in the manner required by the Constitution. See *id.* at 362-63, 108 S.Ct. at 1858-59; *Godfrey v. Georgia*, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). Its modification in § 848(n)(12) by the phrase "in that it involved torture or serious physical abuse to the victim" does, however, provide sufficient specificity to withstand challenge. [FN5] See *United States v. Pretlow*, 779 F.Supp. at 773 (rejecting similar challenge to § 848(n)(12)); *United States v. Cooper*, 754 F.Supp. at 623 (same).

FN5. *Amici* argue that § 848(n)(12) duplicates the crime because "[a] person of ordinary sensibility could fairly characterize almost every murder as [heinous, cruel or depraved]." See *Godfrey v. Georgia*, *supra*, "[T]orture or serious physical abuse," however, are not necessarily present in every murder. Thus, this court rejects the argument that § 848(n)(12) serves no real narrowing function.

The conclusion derives directly from the Supreme Court's "expressed approval" of a definition that would limit an "especially heinous, atrocious, or cruel" aggravating circumstance to murders involving 'some kind of torture or physical abuse.' " *Walton v. Arizona*, 497 U.S. 639, ---, 110 S.Ct. 3047, 3058, 111 L.Ed.2d 511 (1990) (quoting *Maynard v. Cartwright*, 486 U.S. at 364-65, 108 S.Ct. at 1859-60); see *Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968-68, 49 L.Ed.2d 913 (1976) ("especially heinous, atrocious, or cruel" factor not unconstitutionally vague when limited to "conscienceless or pitiless crime which is unnecessarily torturous to the victim"). Mr. Pitera notes that in *Walton* the court, rather than the jury, made the capital punishment determination. The distinction has no bearing on his vagueness challenge. The prior approval of a narrowing definition referred to

in *Walton* was in the context of a jury sentencing decision. *Walton v. Arizona*, 497 U.S. at ---, 110 S.Ct. at 3058 (citing *Maynard v. Cartwright*, 486 U.S. at 362-65, 108 S.Ct. at 1858-60); cf. *Shell v. Mississippi*, 498 U.S. 1, ---, 111 S.Ct. 313, 314, 112 L.Ed.2d 1 (1990) (Marshall, J., concurring) (acknowledging that a sufficiently precise instruction by the court to a jury can be used to give content to a vague statutory factor).

Moreover, in *Walton*, the cited aggravating factor was vague on its face. Defendant was simply alleged to have committed murder "in an especially heinous, cruel or depraved manner." The Supreme Court nevertheless upheld the death sentence imposed because (1) it was persuaded that the Arizona Supreme Court had, in previous decisions, construed the factor narrowly to meet constitutional requirements, and (2) it assumed that trial judges know and apply controlling law. *Walton v. Arizona*, 497 U.S. at ---, 110 S.Ct. at 3057. By contrast, § 848(n)(12) suffers no facial infirmity. By statutorily requiring proof of "torture or serious physical abuse to the victim," Congress has expressly narrowed the term "heinous, cruel or depraved manner" in a way specifically approved by the Supreme Court. See *United States v. Pretlow*, 779 F.Supp. at 773; *United States v. Cooper*, 754 F.Supp. at 623.

This court will, of course, instruct the jury as to its duties with respect to § 848(n)(12). The parties will have the opportunity to comment on the instruction to ensure against vagueness. Mr. Pitera already cites authority supporting an instruction that brutal conduct only qualifies as "torture" or "serious physical abuse" if it was inflicted before, rather than after, the death of a victim. See *Godfrey v. Georgia*, 446 U.S. at 431-32, 100 S.Ct. at 1766-67; *United States v. Pretlow*, *supra*; *United States v. Cooper*, *supra*. At oral argument, the government advised that the conduct on which it would rely in seeking to prove this factor would have occurred before the victims' death.

Relying on the statutory requirement that "torture or serious physical abuse be proved," and confident that a sufficiently specific charge can be fashioned as to these elements, the court rejects defendant's vagueness challenge to § 848(n)(12).

### C. Non-Statutory Aggravating Factors

Defendant and *amici* challenge that part of § 848(j) permitting the prosecution to select the non-statutory aggravating \*559 factors that it will present for jury consideration at the sentencing hearing. *Amici*

contend that the use of such factors always injects arbitrariness and capriciousness into the sentencing process. Mr. Pitera submits that, if non-statutory aggravating factors are weighed against mitigating factors, "proportionality review" by an appellate court is constitutionally mandated. He further argues that the discretion here afforded federal prosecutors constitutes an impermissible delegation of Congress's legislative powers and runs afoul of the *ex post facto* clause. The court is unpersuaded by these arguments.

#### 1. Non-Statutory Aggravating Factors Always Arbitrary and Capricious

[9] *Amici's* contention that any consideration of non-statutory aggravating factors is constitutionally suspect has been squarely rejected by the Supreme Court in *Zant v. Stephens*, *supra*. In that case, the Court held that the invalidation of one of three statutory aggravating factors did not require reversal of a death sentence since the two remaining statutory aggravating factors supported the sentence, and since the information received pursuant to the invalid factor was properly considered as a non-statutory aggravating factor. The Court explained the different purposes served by statutory and non-statutory aggravating factors:

[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

462 U.S. at 878-79, 103 S.Ct. at 2743-44 (emphasis in original).

The statutory scheme here at issue similarly involves a congressional narrowing of the class of persons eligible for the death penalty, both as a result of the limited homicidal acts that Congress has labeled "capital" and by the required proof of statutory aggravating factors. Non-statutory aggravating factors are considered only after a defendant's membership in this narrow class is established beyond a reasonable doubt and only as a part of the jury's individualized sentencing consideration. Thus, although non-statutory

aggravating factors cannot serve both to identify the class of capital defendants and to inform a jury's individualized sentencing decision, where, as in this

case, the non-statutory factors perform only the latter task, their consideration does not render a capital sentencing decision arbitrary or capricious. See *Barclay v. Florida*, 463 U.S. 939, 957, 103 S.Ct. 3418, 3428, 77 L.Ed.2d 1134 (1983) ("[I]t is clear that ... [there is] no constitutional defect in a sentence based on both statutory and non-statutory aggravating factors").

#### 2. Need for "Proportionality Review"

[10] In capital punishment jurisprudence, "proportionality review" refers to appellate inquiry into whether imposition of the death penalty in a particular case is proportionate to the punishment imposed on others convicted of the same crime. See *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). In *Pulley*, the Supreme Court held that such review, while often useful, is not constitutionally required in all capital cases. *Id.* at 50-51, 104 S.Ct. at 879-80. Defendant, however, insists that proportionality review is imperative whenever a jury weighs non-statutory aggravating factors. He cites in support of this argument a statement in *Zant v. Stephens*, *supra*, suggesting that the Court's approval of non-statutory aggravating factors in that case was conditioned "in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." 462 U.S. at 890, 103 S.Ct. at 2749.

Defendant overemphasizes *Zant's* reference to proportionality review. The Supreme \*560 Court's focus in the quoted passage was not so much on any particular aspect of the Georgia review process as on the fact that Georgia guaranteed meaningful appellate review in every capital case, thereby ensuring against arbitrary and capricious sentencing. See *Stringer v. Black*, 503 U.S. at ----, 112 S.Ct. at 1136 (emphasizing importance of "close appellate scrutiny" without reference to any particular type of review); *United States v. Pretlow*, 779 F.Supp. at 769 (rejecting argument that proportionality review is required in every case involving non-statutory aggravating factors).

This court is satisfied, for the reasons stated in Part II-F of this memorandum, that Congress has provided for full appellate review of death sentences imposed under § 848(e)(1)(A). Indeed, the court is convinced that the scope of this review is broad enough to permit appellate consideration of proportionality in an

appropriate case, even though it is not required in every case. The government concurred in this suggestion at oral argument. To this extent, should Mr. Pitera be sentenced to death and should that sentence be premised on any non-statutory factor, he will be able to urge an appellate court to engage in proportionality review if that is necessary to ensure against an arbitrary sentence.

### 3. Delegation of Legislative Powers

[11] Article I, section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Mindful of the Constitution's separation of powers among the branches of government, the Supreme Court has derived from the quoted passage a "non-delegation" doctrine prohibiting Congress from transferring its legislative powers to other governmental branches. See *Mistretta v. United States*, 488 U.S. 361, 371, 109 S.Ct. 647, 654, 102 L.Ed.2d 714 (1989). Defendant and amici submit that Congress has impermissibly delegated a part of its legislative power to fix sentence by permitting the prosecution to select the non-statutory aggravating factors on which it will rely at a capital sentencing hearing. The court finds no impermissible delegation in this case.

In identifying and presenting non-statutory factors for the jury's consideration, the prosecution does not intrude upon the legislative prerogative either to define the capital crime or to narrow the class of persons eligible for the death penalty. As already noted, that constitutionally-mandated narrowing has been achieved by Congress in limiting the types of homicides for which the death penalty may be imposed and in requiring proof of certain statutory aggravating factors. The prosecution's role is limited to that phase of the proceeding wherein the jury makes an individualized sentencing determination as to the defendant on trial. In the course thereof the prosecution engages in advocacy, not legislation.

This conclusion, which differs from that stated in the thoughtful opinion of Judge Harold Ackerman in *United States v. Pretlow*, 779 F.Supp. at 766-67 (prosecution's ability to select non-statutory aggravating factors constitutes a delegation of legislative authority), derives from a consideration of both Congress's power to fix sentences and the executive's power to enforce the criminal laws.

[12] In an ordinary criminal case, Congress's power to fix sentence is absolute, as reflected in its ability to

legislate mandatory sentences. See *Harmelin v. Michigan*, 501 U.S. at ---, 111 S.Ct. at 2701-02. Historically, however, Congress has rarely enacted mandatory sentences. Mindful of the general benefits of individualized sentencing, it had for many years delegated "almost unfettered discretion" to the district courts to determine what sentence should be imposed within a wide statutory range in a given case. See *Mistretta v. United States*, 488 U.S. at 364, 109 S.Ct. at 650; *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) ("... in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes"). Indeed, so commonplace had the exercise of such judicial discretion become that it was \*561 difficult to think of sentencing as a matter assigned by the Constitution to the exclusive jurisdiction of any one branch of government. *Mistretta v. United States*, *supra*. Of course, judicial discretion with respect to sentencing has been curbed somewhat of late through the enactment of sentencing guidelines. See 18 U.S.C. § 3553. Not insignificantly, these guidelines are not promulgated by Congress, but rather by a hybrid entity, the Sentencing Commission, to which Congress has further delegated a portion of its power to fix sentences. See 28 U.S.C. § 991 *et seq.*; *Mistretta v. United States*, 488 U.S. at 367-70, 109 S.Ct. at 652-54.

Integral to Congress's delegation of a portion of its sentencing authority to the courts, whether before or after the advent of the sentencing guidelines, is the statutory requirement that sentencing decisions be based on a full and careful consideration of all relevant factors. Thus, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Pursuant to this statute, both the prosecution and defense routinely cite and argue factors that they think are relevant to the court's sentencing decision. See Fed.R.Crim.P. 32(a). The prosecution, in engaging in such advocacy, exercises discretion derived from the executive's enforcement powers, not from any delegated legislative powers. Such discretion is not static. In the first instance, it requires the selection from among different cases of those most appropriately prosecuted. It next requires the identification and presentation of evidence most likely to persuade a jury to convict. Finally and in the same vein, it involves a proffer to the court of further facts, sometimes not even admissible at trial, *see, e.g.*, Fed.R.Evid. 404(b), about the character of the

defendant or the crime committed, that may assist the court in exercising its congressionally- delegated sentencing discretion. The distinction between such prosecutorial conduct and the exercise of legislative powers is significant, for many statutes "depend[ ] on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." *Field v. Clark*, 143 U.S. 649, 694, 12 S.Ct. 495, 505, 36 L.Ed. 294 (1892) (quoting *Moers v. City of Reading*, 21 Pa. 188, 202 (1853)).

These principles are even more pertinent in the context of capital sentencing, for the individualized consideration that Congress has favored generally in the criminal law is constitutionally mandated when a defendant faces the death penalty. Quite simply, death is the one sentence that Congress cannot make mandatory. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); accord *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); see also *Harmelin v. Michigan*, *supra*. It must delegate a portion of its sentencing authority, whether to the courts or to a jury, in order to ensure that a capital defendant is treated as a unique human being. Indeed, individualized sentencing is so important to the constitutional scheme that any legislative attempt to limit a defendant's ability to advocate mitigating circumstances to a jury is unconstitutional. See *Lockett v. Ohio*, 438 U.S. at 605, 98 S.Ct. at 2965. Neither Mr. Pitera nor *amici* suggest that the defense exercises "legislative" powers when it selects the mitigating factors to be presented and, indeed, there would be no reasonable basis for so viewing such conduct.

Although the Supreme Court has not required legislatures to permit jury consideration of all relevant aggravating factors in pursuing individualized capital sentencing, it clearly favors procedures that do "not ... impose unnecessary restrictions on the evidence that can be offered at [a capital] sentencing hearing.... We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. at 203-04, 96 S.Ct. at 2939 (opinion of Stewart, Powell, and Stevens, JJ.). The \*562 Court recently reiterated this preference for full consideration of the defendant's character and the circumstances of the crime by overruling one of its own capital decisions curbing the use of aggravating factors. See *Payne v. Tennessee*, 501 U.S. at ----, 111 S.Ct. at 2607 (limitation on prosecution's ability to offer victim impact evidence

"unfairly weighted the scales in a capital case" in favor of the defense).

In enacting § 848(j), Congress both satisfies its constitutional obligation to provide for individualized capital sentencing and expressly endorses full jury consideration of all relevant factors, whether in mitigation or aggravation. The requirement that the prosecutor advise the defendant in advance of the aggravating factors to be presented is more reflective of a desire to ensure fairness to the defendant than to limit the jury's access to relevant information.

In identifying non-statutory aggravating factors pursuant to § 848(j), the prosecution plays virtually the same role in a capital sentencing proceeding as it does in a non-capital one. See Fed.R.Crim.P. 32(a) (prosecution entitled to be heard at sentence). It brings relevant facts to the sentencer's attention and urges it to reach a particular result. In a capital case, this advocacy will, in no small part, reflect the prosecution's considered judgment as to why the case was a "proper occasion" for serving a death penalty notice in the first place: an enforcement, not a legislative, decision. See *Field v. Clark*, *supra*. Such advocacy does not, however, involve the prosecution in the fixing of sentence. That remains exclusively the jury's function. Indeed, the jury remains free to reject imposition of the death penalty even if fully persuaded of the prosecution's position. The court thus finds no delegation of legislative authority to the prosecutor in § 848(j).

[13] Even if § 848(j) did involve a delegation of legislative power, it would not be unconstitutional. See *United States v. Pretlow*, 779 F.Supp. at 767-68 (upholding § 848(j) as a permissive delegation of legislative power). The non-delegation doctrine does not bar Congress from obtaining assistance from coordinate branches of government so long as it articulates an "intelligible principle" by which the authorized body is to exercise its delegated powers. *Mistretta v. United States*, 488 U.S. at 372, 109 S.Ct. at 654 (quoting *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928)). Although defendant and *amici* suggest that these principles must be "specific" when Congress delegates its criminal legislative powers, the Supreme Court has never formally adopted this standard. See *Touby v. United States*, 500 U.S. 160, ----, 111 S.Ct. 1752, 1756, 114 L.Ed.2d 219 (1991) (Court finds "specific guidance" provided, without holding that such is required). *Touby* involved Congress's power to define crimes, an area where delegation has been both

infrequent and circumspect. By contrast, as already noted, Congress has traditionally delegated its sentencing powers quite broadly. Thus, in *Mistretta*, the Court held that a delegation in this area need only set forth "broad general directives" to guide a coordinate branch. *Mistretta v. United States*, 488 U.S. at 372, 109 S.Ct. at 654.

The court is satisfied that Congress has adequately provided such directives in this case. Although § 848(j) plainly contemplates a full individualized sentencing hearing, the law permits only non-statutory factors that are "more probative than prejudicial" to be submitted to the jury. In the capital context, probative information has generally been held to pertain either to a defendant's character or to the circumstances of the charged crime. *E.g.*, *Zant v. Stephens*, 462 U.S. at 878-79, 103 S.Ct. at 2743-44. There is no reason to think that Congress intended any other meaning. It is, moreover, the trial court that determines whether proffered factors are more probative than prejudicial to exploration of a defendant's character and the charged crime. Such judicial review "perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *See Touby v. United States*, 500 U.S. 160, 111 S.Ct. at 1758 (Marshall, J., concurring); *see United States v. Cooper*, 754 F.Supp. at 623 (prosecutorial \*563 discretion in selecting non-statutory aggravating factors under § 848(j) not unlimited given judicial determination of what is relevant).

The court thus rejects defendant's and amici's delegation challenge to the statute's provision for consideration of non-statutory aggravating factors finding (1) that if the jury finds proved both the crime of conviction and the statutory aggravating factors, the prosecution's presentation of non-statutory factors is an exercise in advocacy derived from the executive's discretion to prosecute, not the legislature's power to fix sentence, and (2) that, even if this limited exercise of prosecutorial discretion were deemed to constitute a legislative delegation, its exercise is sufficiently circumscribed, both by the statute and by judicial review, to ensure against overbroad application.

#### 4. Ex Post Facto Implications

[14] Article I, section 9 of the Constitution prohibits *ex post facto* laws. The Supreme Court has interpreted the clause to proscribe any legislation (1) making illegal that which was legal at the time of the alleged criminal activity, (2) increasing the punishment for a crime after its commission, or (3) depriving the

accused of any legal defense available at the time the crime was committed. *Collins v. Youngblood*, 497 U.S. 37, ---, 110 S.Ct. 2715, 2724, 111 L.Ed.2d 30 (1990). Mr. Pitera contends that any government reliance, in aggravation of the homicides charged in Count Three, on other murders he may have committed prior to passage of § 848(e)(1)(A) violates the *ex post facto* clause.

The argument is flawed in several respects. First, Count Three does not involve, as Mr. Pitera urges, a "straddle" crime. Such a crime holds a defendant accountable for conduct that occurs in part before and in part after the enactment of the relevant law. In straddle crimes--for example, racketeering charges involving one predicate act occurring prior to passage of the statute, and another after enactment--a defendant must be given clear statutory notice of what continuing conduct can resurrect his past misdeeds, for the earlier acts are themselves elements of the crime of conviction. *See, e.g., United States v. DeStafano*, 429 F.2d 344, 347 (2d Cir.1970), *cert. denied*, 402 U.S. 972, 91 S.Ct. 1656, 29 L.Ed.2d 136 (1971); *United States v. Field*, 432 F.Supp. 55, 59 (S.D.N.Y.1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801, 99 S.Ct. 43, 58 L.Ed.2d 94 (1978). In this case, the government's reliance on other homicides in aggravation of those charged in Count Three does not make those earlier murders any part of the crime of conviction.

Neither does the government here seek to increase the punishment for any of the earlier homicides, as defendant also suggests. At most, it uses this earlier conduct as evidence of Mr. Pitera's character to assist the jury in determining whether it should impose the maximum sentence of death for Count Three. In *Gryger v. Burke*, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948), the Supreme Court upheld, against an *ex post facto* challenge, a statute permitting enhancement of sentence for crimes committed before passage of the crime of conviction. The enhanced penalty was "not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* at 732, 68 S.Ct. at 1258; *Covington v. Sullivan*, 823 F.2d 37, 39-40 (2d Cir.1987) (relying on *Gryger* to uphold enhanced sentencing provision of New York law against *ex post facto* challenge), *see also United States v. Minicone*, 1992 WL 15269, 1992 U.S.App. LEXIS 7630 (1992) (upholding guideline sentence for RICO conspiracy offender who committed no predicate acts after date of

guidelines because he did not withdraw from conspiracy) (on rehearing).

Moreover, this case differs from *Gryger* in that the death penalty is not an *enhanced* punishment dependent upon the proof of non-statutory aggravating factors. It is the *maximum* penalty, which a jury can recommend in the complete absence of \*564 any proof of non-statutory aggravating factors if it is satisfied that statutory aggravating factors outweigh any mitigating factors. Similarly, the jury is always free to reject the death penalty even if persuaded beyond a reasonable doubt that defendant committed all the non-statutory aggravating factors proffered.

Viewed in this light, a jury's consideration of these prior crimes not only does not implicate the *ex post facto* clause; it comes squarely within the broad review of all relevant facts and circumstances that ideally characterizes individualized sentencing. Indeed, in a non-capital context, the Second Circuit has specifically upheld a sentencing court's consideration of prior criminal conduct to which defendant pleaded guilty but had not yet been formally sentenced. See *United States v. Sturgis*, 869 F.2d 54, 56-57 (2d Cir.1989) (affirming upward departure). Such conduct was found relevant to a defendant's character, since it suggested he was more likely to commit other crimes. *Id.* So in this case, a jury is entitled to consider whether Mr. Pitera may not only have intentionally killed Messrs. Leone and Stern, but also other individuals, which murders may have involved torture or serious physical abuse to the victims. These factors are relevant to his character and his propensity to commit violent crimes. Because such consideration neither exposes him to conviction for criminal conduct of which he was not given fair notice nor subjects him to further punishment for earlier crimes, the court finds no *ex post facto* defect in the statutory scheme.

#### D. Mitigating Factors

[15] *Amici's* contention that the enumerated mitigating factors in § 848(m) impermissibly limit what a defendant may present at a sentencing hearing merits little discussion. Section 848(j) expressly provides that a defendant may proffer "any ... mitigating factors set forth in [§ 848(m)] ... or any other mitigating factor...." (emphasis added). Thus, Congress has ensured compliance with those Supreme Court cases holding that a capital defendant cannot be precluded from proffering any factors relevant to his character or the circumstances of the crime "which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. at 605,

98 S.Ct. at 2965; accord *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

#### E. Evidentiary Standard

[16] The Federal Rules of Evidence do not apply at a capital sentencing hearing. 21 U.S.C. § 848(j). Mr. Pitera contends that this omission invites an evidentiary "free for all" lacking the heightened reliability essential to a death penalty proceeding. This issue may never surface in this case since the government advises that its proof as to aggravating circumstances will likely duplicate its evidence at trial and, thus, necessarily conform to the Federal Rules. Nevertheless, because it neither concedes the point nor expressly limits its presentation, the court considers defendant's argument.

It is undisputed that "[i]n capital proceedings generally, [the Supreme Court] has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986). Should this case require a sentencing hearing, this court will be obliged to ensure such heightened reliability. The court is unpersuaded, however, that the standard can be met only through rigid adherence to the Federal Rules of Evidence.

The Federal Rules of Evidence are critical to the conduct of criminal trials to enable "truth [to] be ascertained and proceedings [to be] justly determined." Fed.R.Evid. 102. But the focus of a trial is singular: "whether a defendant is guilty of having engaged in criminal conduct of which he has been specifically accused." *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949). An individualized consideration of sentence, by contrast, necessitates a broader inquiry \*565 into all aspects of the defendant's life and the crime committed. A simple example best illustrates why the concerns of the two proceedings are not always best served by the Federal Rules of Evidence. At trial, a jury generally cannot consider evidence of a defendant's past criminal conduct in deciding whether he has committed the charged offense. Fed.R.Evid. 404(b). That precise evidence is, however, deemed highly probative at sentencing. See U.S.S.G. § 4A1.1.

In *Williams v. New York*, *supra*, a capital case, the Supreme Court held that a sentencer should "not be denied an opportunity to obtain pertinent information

(Cite as: 795 F.Supp. 546, \*565)

by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." 337 U.S. at 247, 69 S.Ct. at 1083. *Williams* was, of course, decided before *Furman v. Georgia*, *supra*. Some care must therefore be taken not to read it so broadly as to impinge on a capital defendant's particular interest in the reliability of his sentencing proceedings. Thus, in *Gardner v. Florida*, 430 U.S. 349, 355-59, 97 S.Ct. 1197, 1203-05, 51 L.Ed.2d 393 (1977), the Supreme Court rejected an argument that *Williams* permitted the use of confidential information at a capital sentencing proceeding. The reliability of information not subject to defense scrutiny and challenge simply could not be assumed. But neither *Gardner* nor any other case retreats from the basic holding of *Williams*: that the Federal Rules of Evidence do not control sentencing hearings.

Indeed, *Williams* was cited in *Lockett v. Ohio*, *supra*, to support the conclusion that no limitation can be placed upon a capital defendant's ability to present mitigating evidence. *Lockett* was extended in *Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151, 60 L.Ed.2d 738 (1979), to preclude courts from mechanically applying rules of evidence to deny capital defendants the right to offer otherwise reliable information in a sentencing proceeding. Common sense suggests that Congress, in enacting that portion of § 848(j) expressly eliminating the need for strict compliance with the Federal Rules of Evidence, was seeking to bring the federal capital statute within the constitutional parameters outlined in *Green* and *Williams*.

This conclusion is not undermined by Supreme Court cases permitting different rules to apply to the parties at capital sentencing hearings. *E.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (fact that state required unanimous finding as to aggravating factors did not permit it to require unanimity as to mitigating factors). [FN6] The Court's concern has been less with the precise rules that legislatures apply to capital sentencing proceedings than with ensuring that any factfinding thereunder is highly reliable.

FN6. The distinctions that have been drawn have not gone uncriticized. *See, e.g.*, *Walton v. Arizona*, 497 U.S. at ----, 110 S.Ct. at 3058 (Scalia, J., concurring) (suggesting that different treatment of aggravating and mitigating factors in various cases enhances the likelihood of random capital sentencing); *Lockett v. Ohio*, 438 U.S. at 629, 98 S.Ct. at 2973 (Rehnquist, J., dissenting). *But see Walton v. Arizona*, 497 U.S. at ----, 110 S.Ct. at 3089-92 (Stevens, J., dissenting)

(distinguishing between arbitrary definition of capital class and discretion to show mercy to those who come within properly-narrowed class).

This court expects that in many circumstances reference to the Federal Rules of Evidence will be useful in deciding whether information proffered at a capital sentencing hearing is sufficiently reliable to be more probative than prejudicial. The Rules will not, however, be determinative. For example, they tolerate multiple layers of hearsay, without requiring judicial inquiry into reliability. *See* Fed.R.Evid. 805. The heightened standard applicable to capital sentencing proceedings may, however, demand further indicia of reliability before a court can say that the probative value of any such hearsay outweighs its prejudicial potential. Because of this heightened standard, a court's consideration of the probative value of information compared to its prejudicial impact may yield different results under § 848(j) than under Fed.R.Evid. 403. By way of contrast, certified judgments of prior convictions are highly reliable evidence and may be admissible at a capital sentencing hearing as probative \*566 proof of a defendant's character regardless of the limitations of Fed.R.Evid. 404(b).

The constitutional mandate is for a sentencing proceeding that ensures heightened reliability. The court is convinced that such a standard can adequately be factored into a consideration of whether proffered evidence is more probative than prejudicial. The court accordingly rejects defendant's challenge to the statute's evidentiary standard.

#### F. Meaningful Appellate Review

[17] Mr. Pitera and *amici* both contend that meaningful appellate review is an essential element of any capital punishment scheme and that the review provided under § 848(q) is constitutionally inadequate. The government initially meets this argument by insisting that there is no constitutional right to appellate review. *E.g.*, *United States v. MacCollom*, 426 U.S. 317, 323, 96 S.Ct. 2086, 2090, 48 L.Ed.2d 666 (1976); *Ross v. Moffitt*, 417 U.S. 600, 610, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974). While this may be true generally, it cites to no instance where a capital sentencing scheme without appellate review has been upheld. In case after case, the Supreme Court has identified meaningful appellate review as a critical element in ensuring against arbitrary and capricious capital sentencing. *E.g.*, *Stringer v. Black*, 503 U.S. at ----, 112 S.Ct. at 1136; *Parker v. Dugger*, 498 U.S.

308, --- - ---, 111 S.Ct. 731, 739-40, 112 L.Ed.2d 812 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 749, 110 S.Ct. 1441, 1448, 108 L.Ed.2d 725 (1991); *Pulley v. Harris*, 465 U.S. at 54, 104 S.Ct. at 881 (Stevens, J., concurring); *Zant v. Stephens*, 462 U.S. at 890, 103 S.Ct. at 2749; *Gregg v. Georgia*, 428 U.S. at 198, 96 S.Ct. at 2936 (opinion of Stewart, Powell, and Stevens, JJ.). Thus, if the issue were really in dispute, it would by no means be obvious that the instant statute could survive an eighth amendment challenge in the absence of any provision for appellate review. See *United States v. Pretlow*, 779 F.Supp. at 763 (a capital statute that failed to provide for direct appellate review would be unconstitutional). [FN7]

FN7. Indeed, the government conceded at oral argument that there would be a serious equal protection issue presented if Congress were to provide a right to appeal for all criminal defendants except those facing the death penalty. Since the capital statute in fact provides for appellate review, this court does not further discuss this point, which was argued by *amici*.

In this case Congress has provided for appellate review. 21 U.S.C. § 848(q). The issue is thus whether the scope of that review is so limited as to cause the entire capital scheme to run afoul of the eighth amendment. Mr. Pitera cites a portion of § 848(q)(3) as evidence of such impermissible limitation:

[T]he court shall affirm the sentence if it determines that--

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special findings of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

Not insignificantly, the section further provides that "[i]n all other cases, the court shall remand the case for reconsideration under this section." *Id.* (emphasis added). Nevertheless, Mr. Pitera contends that, since no express provision is made for review of legal errors that may occur at the sentencing hearing, the law impermissibly requires affirmance of a death sentence even in the face of plain errors such as inflammatory prosecutorial remarks, improper jury instructions or unsuitable jury behavior.

Defendant's argument depends on a crabbed reading of the statute that ignores two important points. First, Congress has mandated appellate consideration of whether a capital sentence was infected by "any

arbitrary factor." The term "arbitrary" has particular meaning in modern death penalty jurisprudence. As the Supreme Court cases relied on in this memorandum amply demonstrate, although the death penalty, *per se*, is not violative of the eighth amendment, any imposition that is \*567 arbitrary and capricious is impermissibly cruel and unusual. An arbitrary factor must perforce include errors of law that are not harmless, for such errors, particularly in the context of a weighing statute, may impermissibly tip the scales in favor of death. See *Stringer v. Black*, *supra*. Indeed, *amici* suggest that this is a reasonable interpretation of the statute and the government concurs. See *United States v. Pretlow*, 779 F.Supp. at 764 (review of "arbitrary factors" under § 848(q)(3) includes harmful errors of law).

Second, defendant overlooks the section immediately preceding § 848(q)(3), wherein Congress makes plain that appellate review of a capital sentence is to be exhaustive.

On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

21 U.S.C. § 848(q)(2). This court thus concludes that no aspect of a capital sentencing proceeding is impervious to appellate review. If any feature--whether the vagueness of a factor, or the sufficiency of the information adduced, or a court's instructions, or a prosecutor's remarks, or a jury's conduct--reveals that the sentencing decision may have been arbitrarily arrived at, remand is contemplated.

The precise form of review to be undertaken pursuant to § 848(q) is not specified. The statute is thus fairly interpreted to permit whatever review is reasonably necessary to ensure against arbitrary decisionmaking. At oral argument this court suggested, and the government concurred, that this could even include proportionality review in a case where the appellate court thought such was essential to ensuring that a capital sentence was not arbitrary. Although Congress has not expressly required proportionality review in § 848(q) for every capital case, neither has it forbidden it in any case.

Because this court finds no basis for thinking that the court of appeals will be limited in its power fully to review any sentence imposed, this court rejects this aspect of defendant's and *amici*'s constitutional challenge.

### III. Arbitrary and Vindictive Prosecution

Defendant contends that he has been arbitrarily and vindictively singled out for capital punishment in violation of the due process clause. The claim is without merit.

#### A. Arbitrary Prosecution

[18] Mr. Pitera's arbitrariness complaint hinges on the government's failure to seek the death penalty against co-defendants Richard David, Frank Martini, and William Bright, all of whom were also charged with homicidal acts linked to drug trafficking. [FN8] The facts alleged in the case demonstrate that the four men are not, in fact, similarly situated. Mr. Pitera is the purported head of a significant drug enterprise. His three co-defendants are, at best, subordinate members of the enterprise. Mr. Pitera is alleged to have personally committed seven of the nine murders charged in the indictment, including the two that are the subject of Count Three. While various co-defendants assisted Mr. Pitera in one or more of these homicides, he is alleged to have been the principal actor. Moreover, the government contends that it was Mr. Pitera who instigated both the torture to which various victims were subjected before their deaths and the dismemberment that followed. Under the totality \*568 of these circumstances, this court cannot say that the government made an arbitrary decision in selecting Mr. Pitera alone, among the defendants in this case, for possible capital punishment.

FN8. Messrs. David, Martini, and Bright have all entered guilty pleas in the pending case. Mr. David pleaded guilty to racketeering, admitting participation in a marijuana distribution conspiracy and in the murder of Talal Siksik. He faces a maximum term of 20 years incarceration, pursuant to the pre-guideline sentencing scheme. Mr. Bright pleaded to drug conspiracy and racketeering, admitting involvement in the Leone/Stern homicides. Mr. Martini pleaded guilty to racketeering, confessing his involvement in the Acosta/Aguilera murders and in cocaine trafficking. The Bright and Martini pleas were entered pursuant to Fed.R.Crim.P. 11(e)(1)(C) and, subject to court approval, expose each defendant to a maximum of 204 months incarceration without parole. Mr. Martini has, however, applied to the court to withdraw his guilty plea, which motion is still pending.

Insofar as defendant and *amici* contend that any exercise of discretion by the prosecutor in selecting the defendants who will be charged with capital crimes necessarily implicates the eighth amendment's ban on arbitrary and capricious imposition of the death

penalty, they pursue an argument explicitly rejected by the Supreme Court in *Gregg v. Georgia*, *supra*. There simply is no constitutional requirement that "prosecuting authorities charge a capital offense whenever arguably there [has] been a capital murder...." *Id.* at 199 n. 50, 96 S.Ct. at 2937 n. 50 (opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 225, 96 S.Ct. at 2949 (opinion of White, J., Burger, C.J., and Rehnquist, J., concurring). Thus, whether the crime is capital or not, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in its discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978); *United States v. Stanley*, 928 F.2d 575, 580-81 (2d Cir.), *cert. denied*, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991). Deference to the prosecutor "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985). Moreover, undue inquiry into prosecutorial decisions "delays the criminal proceeding, threatens to chill law enforcement [efforts] ... and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Id.* Concededly, due process will not tolerate a prosecutor's selection of defendants based on invidious factors. *Bordenkircher v. Hayes*, 434 U.S. at 364, 98 S.Ct. at 668; *United States v. Stanley*, 928 F.2d at 581. But the defense does not contend that any such factors are here at issue.

The court therefore finds that the decision to file a death penalty notice against Mr. Pitera, but not against various co-defendants, was not arbitrary.

#### B. Vindictive Prosecution

[19] Mr. Pitera claims that the death penalty was sought in this case in vindictive response to his rejection of a government plea offer and demands for his cooperation. Although due process prohibits judges or prosecutors from vindictively retaliating against defendants who properly invoke their constitutional rights, including the right to a jury trial and the right to appeal, *see North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), there is simply no "objective evidence" before the court to support a finding of vindictiveness in this case. *See United States v. Goodwin*, 457 U.S. 368, 380 n. 12 and 384, 102 S.Ct. 2485, 2492 n. 12 and 2494, 73 L.Ed.2d 74 (1982).

The chief prosecutor, David Shapiro, has filed an affirmation that (1) details his limited contact with Mr. Pitera on the day of the arrest, (2) denies any threat to pursue capital charges if defendant did not cooperate, and (3) recounts his conversations with Mathew Mari, defendant's original retained counsel, as to both the possibility of capital charges being filed, and the opportunity that would be afforded the defense to persuade the United States Attorney that such charges were unwarranted. In response, Mr. Mari files an affirmation that does not dispute these aspects of Mr. Shapiro's submission. Instead, it proffers a hearsay statement by Mr. Pitera attributing the offensive government conduct to unnamed officials other than Mr. Shapiro. Invited at oral argument to provide more particulars, the defense declined. Such vague hearsay is not the sort of objective evidence of vindictiveness referred to in *Goodwin*. See *id.*

Neither does defendant's claim give rise to a presumption of vindictiveness. Such a presumption has been applied to defendants who, after successfully pursuing appeals, are charged with more serious crimes on remand or are sentenced more \*569 severely after retrial. E.g., *North Carolina v. Pearce*, *supra*. The presumption in such cases derives from a candid recognition of the "institutional bias against retrial..." *United States v. Goodwin*, 457 U.S. at 376, 102 S.Ct. at 2490.

No such obvious bias supports a pre-trial presumption of vindictiveness when charges are amended or increased. To the contrary, the Supreme Court has held that "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." *Id.* at 382, 102 S.Ct. at 2493. Thus, in *Bordenkircher v. Hayes*, *supra*, the Court upheld against a vindictive prosecution claim the filing of additional charges against a defendant who was threatened with same as the consequence of rejecting a plea offer. The Court explained that no "element of punishment or retaliation" was present since defendant was "free to accept or reject the prosecutor's offer." 434 U.S. at 363, 98 S.Ct. at 2483; accord *Spinkellink v. Wainwright*, 578 F.2d 582, 608 (5th Cir.1978) (applying *Bordenkircher* to capital case), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); see also *Brady v. United States*, 397 U.S. 742, 749-51, 90 S.Ct. 1463, 1469-70, 25 L.Ed.2d 747 (1970) (guilty plea to charge carrying life sentence not involuntary because prompted in part by fear of death penalty).

In contrast to *Bordenkircher*, it is not even clear in this case that Mr. Pitera was ever threatened with increased charges. As noted, he has declined the court's invitation to supplement his lawyer's hearsay submission in this regard. The matter is of no import. If Mr. Pitera was aware that by rejecting a plea offer he exposed himself to a capital charge, *Bordenkircher* precludes a finding of vindictive prosecution. If the notice was filed without any warning as to the possibility of a capital count, defendant's vindictiveness claim would be purely speculative. In *Goodwin*, the Court rejected such a basis for presuming vindictiveness, finding it lacking even the *Bordenkircher* predicate. *United States v. Goodwin*, 457 U.S. at 382 n. 15, 102 S.Ct. at 2493 n. 15. Such a sequence of events may evidence an "opportunity for vindictiveness," but absent more is insufficient to give rise to a presumption. *Id.* at 384, 102 S.Ct. at 2494.

Mr. Pitera contends that his case is somehow different from *Bordenkircher* and *Goodwin* because the prosecutor purportedly knew all relevant facts at the time it first charged him. In fact, in *Bordenkircher*, the prosecution was similarly informed. Moreover, as the court noted in *Goodwin*, an informed prosecutorial decision depends not only on possessing the evidence, but on fully appreciating its significance and on carefully assessing "the proper extent of prosecution." *United States v. Goodwin*, 457 U.S. at 381, 102 S.Ct. at 2492. Little would be gained from a holding that encouraged prosecutors prematurely to file all possible charges in a criminal case. See *id.* at 378 n. 10, 102 S.Ct. at 2491 n. 10 (noting potential prejudice to defendant). The claim of vindictive prosecution is rejected.

#### IV. Failure to Provide Means of Execution

The capital sentencing scheme at issue provides no means for its implementation. This omission is without congressional explanation. [FN9] The one federal judge who has actually pronounced a death sentence pursuant to § 848(e)(1)(A) has thus concluded that it cannot presently be implemented. See *United States v. Chandler*, 90-CR-266, slip op. at 4 (N.D.Ala. May 30, 1991). The executive branch, which is traditionally charged with the responsibility for carrying out sentences, is, after all, obliged to do so in accordance with enacted law. See, e.g., \*570 18 U.S.C. § 3621 (court to commit sentenced prisoners to the custody of the Bureau of Prisons).

FN9. Prior federal death penalty law had provided for a defendant to be executed in whatever local facilities

were available in the state where the defendant was convicted. If local law did not permit capital punishment, the court was to designate an alternate forum. See 18 U.S.C. § 3566 (repealed 1984). 18 U.S.C. § 3596, pending in Congress, provides for similar implementation. See H.R. 3371, 102nd Cong., 1st Sess. (1991), reprinted in H.R. Conf. Rep. No. 405, 102nd Cong., 1st Sess. 9 (1991).

*Amici* contend that Congress's oversight is more than an embarrassment, it is a constitutional defect because (1) the prospect of an indefinite term of imprisonment, terminable only by some future execution provision, itself constitutes cruel and unusual punishment, and (2) the subsequent enactment of any implementing legislation will violate the *ex post facto* clause. Although this court is perplexed, both by Congress's failure to provide a means of execution, and by the executive's pursuit of a punishment before a means of carrying it out is specified, it must reject *amici's* contentions because they either lack merit or are premature.

#### A. Cruel and Unusual Punishment

[20] *Amici's* claim that the uncertainty inherent in Congress's failure to enact implementing legislation is itself constitutionally cruel and unusual relies on *In re Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890). In that case, the Supreme Court observed that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty ... as to the precise time when his execution will take place." *Id.* at 172, 10 S.Ct. at 388. At issue in *Medley* was legislation passed after a capital defendant was sentenced permitting the warden to withhold from him the exact date of his execution. The new statute was declared unconstitutional, but not because it was cruel and unusual. Rather, the new level of uncertainty constituted an increased punishment that violated the *ex post facto* clause. *Id.*

Assuming that *Medley* is pertinent to *amici's* eighth amendment claim, the challenge is simply premature. Mr. Pitera has been charged with a capital crime. He has not been convicted or sentenced of one. Even if such were to be the outcome of this case, defendant would have the right to appeal. Conceivably, before such events run their course, Congress may pass implementing legislation. Under such circumstances, Mr. Pitera would not be subject to the kind of uncertainty forecast by *amici*.

More troubling to the court is the possibility that Congress will not address the issue in the near future, such that a capital defendant, even after having pursued all appeals, could be incarcerated for several years before implementing legislation is enacted. Double jeopardy, however, proscribes multiple punishments for the same crime. See *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). This potential concern is not ripe for consideration before the capital trial is concluded. Whether it ever needs to be addressed will depend both on the outcome of the trial and on Congress.

#### B. Ex Post Facto

[21] *Amici* argue that any subsequent implementing legislation will violate the *ex post facto* clause. They contend that, at present, the maximum sentence that can be imposed on Mr. Pitera is life imprisonment. Any change in this situation will constitute an impermissible increase in punishment. See *Collins v. Youngblood*, *supra*. The court disagrees. The maximum possible sentence that can presently be imposed upon the defendant is death. Indeed, § 848(l) requires a court to impose such a sentence if the jury recommends it. Thus, in *United States v. Chandler*, *supra*, that is the sentence that was imposed.

The fact that such a sentence cannot presently be implemented does not mean that subsequently enacted procedures will violate the *ex post facto* clause. Congress, in enacting § 848(e)(1)(A), has already served plain notice on those who would commit intentional murders in connection with significant drug dealing that they face a possible sentence of death. Thus, Mr. Pitera had fair warning of the consequences of his conduct at the time he allegedly committed the Leone/Stern homicides. See *Collins v. Youngblood*, 497 U.S. at ---, 110 S.Ct. at 2724.

In *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Supreme \*571 Court held that such fair warning was sufficient to defeat an *ex post facto* challenge. The defendant in that case was sentenced to death pursuant to a new statutory scheme enacted after *Furman v. Georgia*, *supra*, to cure defects in the capital statute in effect at the time he committed the crime. The Supreme Court held that the original statute adequately served "fair warning" upon defendant of the state's intent to punish murder with a sentence of death. *Dobbert v. Florida*, 432 U.S. at 297, 97 S.Ct. at 2300. Thus, statutory changes that do not increase "the quantum of punishment attached to the crime," but that simply specify the methods by

(Cite as: 795 F.Supp. 546, \*571 )

which an imposed sentence is effected, do not implicate the *ex post facto* clause. *See id.* at 294, 97 S.Ct. at 2298 (statutory change was procedural and therefore not violative of *ex post facto* ).

*Amici* suggest that subsequent implementing legislation may provide for means of execution that are themselves cruel and unusual. Should any implementing legislation be subject to an eighth amendment challenge, a defendant will be heard. This court cannot, however, engage in a speculative consideration of the issue.

#### Conclusion

For the reasons stated in this memorandum and order, the court finds (1) that the death penalty does not constitute cruel and unusual punishment in all cases, (2) that the capital statute here at issue does not risk arbitrary and capricious imposition of the death penalty, (3) that defendant was not arbitrarily and vindictively singled out for prosecution, and (4) that the present inability to implement a death sentence does not preclude capital prosecution. The motion challenging constitutionality is, therefore, denied.

SO ORDERED.

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United States District Court,  
E.D. New York.

EVELYN V.; Hubert B.; Roberta S.; Jill B.; Daniel  
H.; and Sara R.,  
individually and on behalf of all others similarly  
situated, Plaintiffs,

v.

KINGS COUNTY HOSPITAL CENTER; Bernard  
Rose, as Executive Director of Kings  
County Hospital Center; New York City Health and  
Hospitals Corporation; J.  
Emilio Carrillo, as President of the Board of Directors  
of the New York City  
Health and Hospitals Corporation; The Board of  
Directors of the New York City  
Health and Hospitals Corporation; Cesar Perales, as  
Commissioner of the New  
York State Department of Social Services; and Lorna  
McBarnette, as Acting  
Commissioner of the New York State Department of  
Health, Defendants.

No. CV 91-1108 (RR).

April 21, 1993.

Class of patients eligible for Medicaid assistance brought suit under civil rights statute against municipal and state officials, challenging deficiencies in standard of care afforded in municipal hospital. On motion by city defendants to dismiss, the District Court, Raggi, J., held that no privately enforceable right was shown allowing civil rights suit for alleged deficiencies in standard of care afforded at accredited health care provider under state's approved Medicaid plan.

Motion granted.

#### West Headnotes

[1] Civil Rights ☞ 108.1  
78k108.1 Most Cited Cases

Class of patients eligible for Medicaid assistance could not maintain cause of action under civil rights statute, § 1983, against city officials responsible for alleged deficiencies in standard of care afforded at municipal hospital which was an accredited health care provider under state's approved Medicaid plan; patients could not seek relief in terms of "necessary, adequate and timely" health care where no statute or regulation used

such phrase and it was used by patients to synthesize the requirements of various federal and state standards for Medicaid care, and none of the specific statutes invoked unambiguously conferred rights as against the municipal defendants. Social Security Act, §§ 1863, 1902(a)(9, 13, 19), as amended, 42 U.S.C.A. §§ 1395z, 1396a(a)(9, 13, 19); 42 U.S.C.A. § 1983.

[2] Social Security and Public Welfare ☞ 241.66  
356Ak241.66 Most Cited Cases

Although courts generally accord considerable deference to findings of Joint Commission on Accreditation of Health Care Organizations, its accreditation serves only as prima facie evidence of compliance with Medicaid standards, especially where accreditation is only "conditional." Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[3] Civil Rights ☞ 108.1  
78k108.1 Most Cited Cases

Two-prong test under which court first determines whether case really involves a federal court "right" as opposed to simply a claimed violation of federal law, and then determines whether Congress has foreclosed its enforcement under civil rights statute, § 1983, is a useful tool in considering whether private plaintiff can sue under § 1983 to enforce statutory rights, but in applying this test, courts must look carefully at precise language of any statute relied on by plaintiffs as source of right they seek to enforce, and right at issue must be unambiguously conferred by the statute. 42 U.S.C.A. § 1983.

[4] Civil Rights ☞ 108.1  
78k108.1 Most Cited Cases

Section of Social Security Act requiring state's Medicaid Plan to provide for state agency to be responsible for establishing and maintaining health standards for institutions in which recipients of assistance may receive care or services cannot mandate any action by municipal official responsible for operation of municipal hospital, and thus could not serve as basis for statutory claim under civil rights statute against those officials. Social Security Act, § 1902(a)(9), as amended, 42 U.S.C.A. § 1396a(a)(9); 42 U.S.C.A. § 1983.

[5] Civil Rights ☞ 108.1

78k108.1 Most Cited Cases

Boren Amendment to Social Security Act does not impose any requirement on Medicaid providers but is directed exclusively to the states and pertains to means by which they set reimbursement rates for Medicaid providers, and thus did not provide federally enforceable right which Medicaid recipients could assert against provider under civil rights statute. Social Security Act, § 1902(a)(9, 13), as amended, 42 U.S.C.A. § 1396a(a)(9, 13); 42 U.S.C.A. § 1983.

[6] Civil Rights ☞ 108.1

78k108.1 Most Cited Cases

Section of Social Security Act requiring Secretary of Health and Human Services (HHS) to impose higher state hospital standards as condition for payment for services to an institution in such state is directed to the Secretary and not the health care providers, and thus did not establish statutory right which Medicaid recipients could sue to enforce against municipal hospital under civil rights statute. 42 U.S.C.A. § 1983; Social Security Act, § 1863, as amended, 42 U.S.C.A. § 1395z.

[7] Civil Rights ☞ 108.1

78k108.1 Most Cited Cases

State regulations such as requirements that patients receive emergency health care that "meets generally accepted standards of medical care" and that hospital respond in "reasonable manner" to patient's request for services were too general to permit judicial enforcement on behalf of Medicaid recipients under civil rights statute. 42 U.S.C.A. § 1983; Social Security Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.

[8] Civil Rights ☞ 108.1

78k108.1 Most Cited Cases

Section of Social Security Act requiring that state Medicaid plans provide necessary safeguards to assure that health care is provided in manner consistent with best interests of recipients would not support statutory rights claim under civil rights statute, § 1983, by recipients against municipal hospital; statutory terms were too general and vague to permit judicial enforcement and regulations thereunder were not promulgated to particularize patient rights privately enforceable under § 1983, but were relevant to consideration by the Secretary of Health and Human Services (HHS) of whether accredited hospital

qualified for participation in Medicaid or Medicare program. Social Security Act, § 1902(a)(19), as amended, 42 U.S.C.A. § 1396a(a)(19); 42 U.S.C.A. § 1983.

\*184 The Legal Aid Society, New York City, by Jean T. Schneider, Constance P. Charden, Susan Sternberg by Jane E. Booth, Leah Hill, Civil Appeals & Law Reform Unit, Brooklyn Legal Services Corp. B, Brooklyn, NY by Jane Greengold Stevens, Lauren Shapiro, Timothy Bradley, Cardozo Bet Tzedek Legal Services, New York City by Toby Golick, for plaintiffs.

\*185 O. Peter Sherwood, Corp. Counsel for the City of New York, New York City, by Robert Katz, Muriel Goode-Trufant, for defendants Kings County Hosp., Bernard Rose, New York City Health and Hospitals Corp., J. Emilio Carrillo, and The Board of Directors of the New York City Health and Hospitals Corp.

Robert Abrams, Atty. Gen. for State of NY, New York City by Susan Watson, for defendants Cesar Perales and Lorna McBarnette.

Mary Jo White, U.S. Atty., E.D.N.Y., Brooklyn, NY, by Richard Goldstein, Asst. U.S. Atty., by Linda Ruiz, Office of General Counsel, Department of Health and Human Services, for amicus curiae Secretary of Health and Human Services.

MEMORANDUM and ORDER

RAGGI, District Judge:

Kings County Hospital Center, its director Bernard Rose, the New York City Health and Hospitals Corporation, its Board of Directors, and the President of its Board, J. Emilio Carrillo, (referred to collectively herein as "the City defendants"), move to dismiss that portion of plaintiffs' proposed class action brought under 42 U.S.C. § 1983 (1988), for violations of Title XIX of the Social Security Act, more commonly referred to as Medicaid. 42 U.S.C. § 1396 *et seq.* (1988 & Supp. III 1991). [FN1] The Commissioner of the New York State Department of Social Services, Cesar Perales, and the acting Commissioner of the New York State Department of Health, Lorna McBarnette, (referred to collectively herein as "the State defendants"), have not joined in this motion. At issue is whether hospital patients can maintain a § 1983 action against the City defendants for alleged violations of Medicaid. Having carefully considered the submissions of the parties, as well as a brief filed by the Secretary of Health and Human Services, as amicus

(Cite as: 819 F.Supp. 183, \*185)

curiae, in support of the City defendants' position, the court hereby grants the motion to dismiss.

FN1. The motion does not address that part of plaintiffs' complaint alleging that Kings County Hospital discriminates against patients infected with the Human Immunodeficiency Virus ("HIV"), in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988 ed. & Supp. II 1990), and denies them equal protection in violation of the Fourteenth Amendment to the United States Constitution and various state laws.

#### Factual Background

##### A. Kings County Hospital Center

Kings County Hospital Center (referred to herein as "Kings County Hospital" or "the Hospital"), which is operated by the New York City Health and Hospitals Corporation, is one of the largest municipal hospitals in the United States, and the primary medical care provider for hundreds of thousands of low-income people in Brooklyn. Founded in 1831 as a one-room infirmary, it now admits as many as 37,000 patients each year, treating another 800,000 as part of its outpatient program. On average, 400 people per day seek assistance at the Hospital's emergency room. See Mireya Navarro, *Treating AIDS: One Hospital's Struggle*, N.Y. Times, Nov. 11, 1991, at A1.

##### B. The Medicaid Program

Many patients seeking treatment at Kings County Hospital are financially dependent upon the federal Medicaid program for the care they receive. Medicaid, which was enacted in 1965, does not require the federal government itself to provide health care. Instead, it finances approved state health care programs, thereby enabl[ing] each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.

42 U.S.C. § 1396 (1988).

In order to participate in the Medicaid program, a state must submit a health care \*186 plan to the Secretary of Health and Human Services (referred to herein as the "Secretary" or "HHS"). *Id.* To be approved, that plan must comply with 58 conditions set forth in 42 U.S.C.

§ 1396a (1988 & Supp. III 1991). The Secretary is further empowered to set standards of review for hospitals providing care under either an approved Medicaid or Medicare plan. See 42 U.S.C. § 1395x(e)(9) (1988) (empowering Secretary to set such standards for Medicare providers); 42 C.F.R. § 482.1(a)(3) (1992) (hospitals participating in Medicaid program must meet standards for participation in Medicare). These are detailed at 42 C.F.R. § 482.1 *et seq.* (1992).

##### C. Plaintiffs and their Complaint

Plaintiffs are six individuals who are eligible for Medicaid assistance and who have, on various occasions, sought treatment at Kings County Hospital. They claim that the Hospital routinely fails "to provide necessary, adequate, and timely care" to its patients. Complaint ¶ 214. Plaintiffs submit that the Medicaid statute, as well as various federal regulations and state laws and rules, guarantee their right to such care.

In their complaint, plaintiffs point to three subsections of 42 U.S.C. § 1396a as the source of their right to "necessary, adequate, and timely care." The first, § 1396a(a)(9), requires a participating state to make the health care agency administering its Medicaid plan "responsible for establishing and maintaining health standards for private or public institutions" serving Medicaid patients. The second, § 1396a(a)(19), requires a participating state to "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients." Finally, § 1396a(a)(13), commonly referred to as the Boren Amendment, requires in subpart (A)--a clause that defies diagramming if not comprehension--that a participating state provide

*for payment* (except where the State agency is subject to an order under section 1396m of this title) of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan *through the use of rates (determined in accordance with methods and standards developed by the State* which, in the case of nursing facilities, take into account the costs (including the costs of services required to attain or maintain the highest practicable physical, mental, or psychosocial well-being of each resident eligible for benefits under this chapter) of complying with subsections (b) (other than paragraph (3)(F) thereof), (c), and (d) of section 1396r of this title and

provide (in the case of a nursing facility with a waiver under section 1396r(b)(4)(C)(ii) of this title) for an appropriate reduction to take into account the lower costs (if any) of the facility for nursing care, and which, in the case of hospitals, take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs and provide, in the case of hospital patients receiving services at an inappropriate level of care (under conditions similar to those described in section 1395x(v)(1)(G) of this title) for lower reimbursement rates reflecting the level of care actually received (in a manner consistent with section 1395x(v)(1)(G) of this title)) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards* and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to inpatient hospital services of adequate quality; and such State makes further assurances, satisfactory to the Secretary, for the filing of uniform cost reports by each hospital, nursing facility, and intermediate care facility for the mentally retarded and periodic audits by the State of such reports.

\*187 42 U.S.C. § 1396a(a)(13)(A) (1988) (emphases added). [FN2]

FN2. In their briefs opposing the City defendants' motion to dismiss, plaintiffs further cite to 42 U.S.C. § 1395z (1988). The court considers this section as well as § 1396a in its discussion of plaintiffs' statutory rights claims. *See infra* Part III.

Relying on the reference in § 1396a(a)(13) to "applicable State and Federal laws, regulations, and quality and safety standards," plaintiffs cite a host of other federal and state statutes and regulations, which they claim are not being complied with at Kings County Hospital, thereby depriving them of "necessary, adequate, and timely care." Plaintiffs claim that they are denied:

(1) adequate emergency room care, in violation of 42 U.S.C. § 1395dd (1988 ed. & Supp. III 1991); 42 C.F.R. §§ 482.12(a), (c), (f), 482.22(b), 482.55(a)(2), (b) (1992); N.Y.Pub. Health Law § 2805-b(1) (McKinney Supp.1992); and N.Y.Comp. Codes R. & Regs. tit. 10, §§ 405.2(f), 405.7(b)(4), (14) (1988);

(2) adequate nursing services, in violation of 42 C.F.R. §§ 482.12(a), (c), 482.22(b), 482.23 (1992); and N.Y.Comp. Codes R. & Regs. tit. 10, §§ 405.3(b)(5), 405.5 (1988);

(3) adequate preparation and administration of drugs, in violation of 42 C.F.R. § 482.23(c)(4) (1992);

(4) adequate dietary services, in violation of 42 C.F.R. § 482.28(b) (1992);

(5) a clean and safe physical environment, in violation of 42 C.F.R. §§ 482.41, 482.42 (1992); and N.Y.Comp. Codes R. & Regs. tit. 10, § 405.7(b)(3) (1988);

(6) adequate information about their diagnoses, treatment, and prognoses, in violation of N.Y.Comp. Codes R. & Regs. tit. 10, § 405.7(b)(6), (8)--(11), (14) (1988); and

(7) adequate plans for discharge and post-hospital follow-up care, in violation of 42 C.F.R. § 482.21(b) (1992); and N.Y.Pub. Health Law § 2803-i(1), (3)(a) (McKinney Supp.1992); and N.Y.Comp. Codes R. & Regs. tit. 10, § 405.9(f) (1988).

As relief, plaintiffs seek a judicial declaration that:

(1) Kings County Hospital fails to "provide necessary, adequate, and timely care pursuant to the statutes and regulations cited;"

(2) the State defendants have failed in their duty to ensure that the Hospital provides "necessary, adequate, and timely care pursuant to the statutes and regulations cited;"

(3) the Hospital's failure to provide emergency room care "in accordance with acceptable standards of practice" and to permit family members or companions to stay with patients seeking emergency care violates federal and state laws;

(4) the Hospital's failure (a) to provide patients with "nursing care that is adequate to meet [their] needs ... in accordance with nursing practices," (b) "to provide nursing aides, housekeeping services, and other ancillary support services sufficient to meet patient care needs and to prevent adverse impacts on the delivery of medical and nursing care," and (c) "to establish and maintain working relationships among medical staff, nursing staff, and staff of other

departments or services to assure that all patients' needs are met" violates federal and state laws;

(5) the Hospital's failure "to prepare and administer drugs in accordance with accepted standards of practice" violates federal law;

(6) the Hospital's failure "to provide adequate dietary services to patients, including assistance in eating for those who need it," violates federal law;

(7) the Hospital's failure "to provide a clean and safe environment that ensures the well-being and safety of patients" and to maintain "an active program to avoid sources and transmission of infections and communicable diseases" violates federal and state law;

(8) the Hospital's failure to provide patients with "complete, current information about their diagnoses, treatment, and prognoses, and consequent failure to provide adequate information" to give informed consent to treatment violates federal and state law; and

(9) the Hospital's failure "to provide effective discharge planning" to facilitate "adequate \*188 follow-up care" violates federal and state law.

Plaintiffs ask the court to issue an injunction ordering defendants "to provide necessary, adequate, and timely care" to patients at Kings County Hospital; "to establish and implement an effective plan to insure that [patients] receive and continue to receive necessary, adequate, and timely care at Kings County Hospital pursuant to law;" and to appoint a special master to evaluate the proposed plan, make recommendations to the court as to the steps necessary to ensure that patients receive "necessary, adequate, and timely care at Kings County Hospital," and then to monitor implementation of the plan.

#### *D. The Hospital's History of Problems Providing Health Care*

Concern with the level of care afforded by Kings County Hospital did not originate with plaintiffs' lawsuit. Since 1986, surveys of the Hospital conducted by the State Department of Health, the New York agency responsible for monitoring institutions participating in the State's Medicare and Medicaid plans, have noted serious deficiencies. The 1989 survey found that Kings County Hospital failed to comply with Medicaid eligibility requirements in a number of areas: (1) physical environment, (2) quality assurance, (3) medical staff, and (4) emergency

services. Although the hospital did endeavor to correct most of the cited deficiencies, the Health Care Financing Administration of HHS insisted that the State Department of Health closely monitor the Hospital's proposed plan of correction.

In January 1991, the State Department of Health again declared Kings County Hospital out of compliance with Medicaid standards. Fifty-six pages of deficiencies were cited, including inadequacies in the Hospital's Departments of Medicine, Pediatrics, Rehabilitation Medicine, and Orthopedics. Errors in the administration of medication and failures in the maintenance of patient charts, the sanitization of equipment, and the dietary assessment of high-risk patients were among the myriad of problems noted. On March 19, 1991, HHS advised the Hospital that because the state survey revealed it to be out of compliance with 42 C.F.R. §§ 482.12 (regarding its governing body), 482.21 (regarding quality assurance), 482.22 (regarding medical staff), 482.41 (regarding physical environment), and 482.55 (regarding emergency services), it was being terminated from further participation in the Medicaid program, effective May 19, 1991. The Hospital was, however, given the opportunity to apply for a re-survey before the termination date if it "corrected the deficiencies."

A re-survey, conducted on April 11-19, 1991 by the State Department of Health, revealed that the Hospital had achieved "Condition level compliance" with respect to the defects in its governing body, its quality assurance, its medical staff, and its emergency services. Accordingly, on May 8, 1991, HHS rescinded its earlier order of termination, permitting the Hospital "to correct the remaining deficiencies in accordance with a plan of correction" to be submitted to the State Department of Health. Because the Hospital had been unable to sustain compliance with federal standards in the period between 1989 and 1991, HHS did require it to remain subject to periodic reviews of its eligibility for federal funds.

In the summer of 1991, the City of New York, confronted with serious budget problems, proposed cutting \$89.2 million from the funds allocated to its Health and Hospitals Corporation. Among the services at Kings County Hospital to be reduced were inpatient nursing, housekeeping, maintenance, and dietary controls. More significantly, the budget cuts would require the Hospital to eliminate its walk-in clinics and evening and weekend outpatient clinics, which relieved pressure on the heavily-burdened emergency room. Defendant Bernard Rose, in

deposition testimony in this case, acknowledged that at then-current funding levels, the Hospital was struggling to comply with applicable federal and state health care standards. With the proposed cuts, it would "be very difficult" for the Hospital to maintain compliance.

Plaintiffs in this action therefore sought a preliminary injunction barring the City defendants from implementing the budget cuts \*189 at Kings County Hospital. After numerous conferences and, at the court's request, a review of the effects of the budget cuts on health care services by the State Department of Health, the matter was resolved informally. [FN3] Plaintiffs nevertheless submit that the specter of budget cuts only aggravates the problems at issue in this lawsuit.

FN3. The court has not been as successful in helping the parties move toward a settlement of the entire case. A suggestion that the City defendants meet with plaintiffs' representatives to discuss constructive proposals for improving health care services at Kings County Hospital was rejected out of hand by the City's Corporation Counsel.

Later in 1991, Kings County Hospital was the subject of further public criticism. A special investigation, ordered by New York City Mayor David Dinkins after a number of patients died at the hospital, criticized "miscommunication, mismanagement, and chaos" at the Hospital. See Lisa Belkin, *More Suspicious Deaths Cited at Brooklyn Hospital*, N.Y. Times, Nov. 6, 1991, at B3; Mitch Gelman & Gale Scott, *Special Counsel: Hospital Gravely Ill*, Newsday, Nov. 6, 1991, at 8. The State Department of Health also noted a host of problems, ranging from residents working longer hours than allowed by law, doctors performing procedures for which they had not been certified, nurses failing to notify doctors of important changes in patients' conditions, and staff failing to conduct proper diagnostic tests. See Lisa Belkin, *Disorder Involved in Deaths at Kings County, Study Says*, N.Y. Times, Nov. 8, 1991, at B3.

In April 1992, the Joint Commission on Accreditation for Health Care Organizations, a private group that annually reviews more than 5,000 of the nation's hospitals, gave Kings County Hospital only a conditional accreditation. While certain areas of performance, including emergency services, apparently passed inspection, others were criticized for inadequate internal controls. See Lisa Belkin, *Lincoln Fails After Review of Hospitals*, N.Y. Times, April 16, 1992, at B2.

Most recently, in December 1992, yet another commission appointed by Mayor Dinkins released a report suggesting reforms of the City Health and Hospitals Corporation itself. Specifically, the report recommends a strengthening of the powers of both the Board of Directors of the Health and Hospitals Corporation and the executive directors of individual hospitals, and an expansion of the cooperative relationship between the City's hospitals and various medical schools. See Mitch Gelman, *HHC Reform Urged*, Newsday, December 8, 1992, at 25.

#### Discussion

[1] The legal issue before this court is simply stated: can a class of patients eligible for Medicaid assistance maintain a cause of action under § 1983 against these City defendants for alleged deficiencies in the standard of care afforded at Kings County Hospital, an accredited health care provider under New York's approved Medicaid plan. The issue arises, of course, in a disturbing and complex factual context: (1) Kings County Hospital is an institution that daily strains to cope with a staggering number of medical demands; (2) it is unlikely that the Hospital could survive without Medicaid funds; (3) no party thinks that the community would benefit from the closing of the Hospital; (4) in recent years, the Hospital has either fallen short of, or barely satisfied, various federal, state, and private standards of care; and (5) federal and state agencies and private entities have regularly surveyed the Hospital and repeatedly cautioned administrators about perceived deficiencies.

#### I. Preclusive Effect of Accreditation

[2] The City defendants submit that dismissal of this action is appropriate because the continued accreditation of Kings County Hospital by the Joint Commission on Accreditation of Health Care Organizations necessarily evidences compliance with Medicaid's standards of care. See *Concerned Citizens for Creedmoor, Inc. v. Cuomo*, 570 F.Supp. 575, 576 (E.D.N.Y.1983). The court is not persuaded that accreditation by the Joint Commission is determinative. Although courts generally accord considerable deference to the findings of the Joint Commission, its accreditation serves only as "prima facie" evidence of compliance with Medicaid standards. \*190 A plaintiff may still rebut this showing of compliance by specific evidence to the contrary. See *Woe v. Cuomo*, 729 F.2d 96, 106-07 (2d Cir.), cert. denied, 469 U.S. 936, 105 S.Ct. 339, 83 L.Ed.2d 274 (1984). In this case, where plaintiffs have cited specific deficiencies in their

complaint, where it is undisputed that the Hospital has long struggled to meet the standards set for Medicaid providers, and where the Joint Commission's accreditation has been only "conditional," this court cannot say as a matter of law that no set of facts could be adduced to evidence noncompliance. [FN4]

FN4. The opinions in *Concerned Citizens* and *Woe* do not otherwise assist this court in resolving the issue before it since both these cases involved constitutional, rather than statutory, challenges to the health care being provided.

## II. Section 1983 Actions to Enforce Statutory Rights: The Relevant Supreme Court Authority

42 U.S.C. § 1983 provides a private cause of action against any person who under color of state law deprives another of "any rights, privileges, or immunities, secured by the Constitution and laws [of the United States]." Although the cause of action dates back over 120 years, originating in Section 1 of the Civil Rights Act of 1871, 17 Stat. 13 (commonly referred to as "the Ku Klux Klan Act"), it is only in the last fifteen years that litigants have invoked it as a vehicle to vindicate federal statutory, as opposed to constitutional, rights.

The Supreme Court's sanctioning of § 1983 actions based on statutory rights has not come without considerable debate. One need only look to the thoughtful discussions of the legislative history of § 1983 in the concurring opinions in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), to understand how reasonable people might differ in their conclusions. Justice Powell's meticulous review of the statute's lineage leads him to find that "the phrase 'and laws' was intended as no more than a shorthand reference to the equal rights legislation enacted by [the Reconstruction] Congress." *Id.* at 625, 99 S.Ct. at 1920. On the other hand, Justice White's equally painstaking analysis supports his opinion that § 1983 applies to "all rights secured by federal statutes unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intent." *Id.* at 672, 99 S.Ct. at 1944.

The following year, the Court seemingly resolved the issue in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). Focusing on the "plain language" of the "and laws" clause, it concluded simply that the statute "means what it says." *Id.* at 4-6, 100

S.Ct. at 2504-05. Its scope is not "limited to civil rights or equal protection laws." *Id.* at 6, 100 S.Ct. at 2505. Rather, it applies to "any right secured by any law of the United States." *Id.* at 7, 100 S.Ct. at 2505.

While it is thus beyond dispute that a § 1983 action can be maintained to vindicate purely statutory rights, the courts have continued to struggle with the question of what constitutes a statutory "right" and whether there are any limits to the cause of action. It is a debate that actively engages the Supreme Court to this day and yields opinions sometimes difficult for lower courts to reconcile.

For example, in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), the Court held that "rights" recognized by Congress in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (1976 ed. & Supp. III 1979), were not enforceable under § 1983 because they were not express conditions for the receipt of federal funds. The Developmentally Disabled Act, like the Medicaid Act, provides financial assistance to the states to aid them in creating certain programs. Participating states are required (1) to submit a plan for the approval of the Secretary of HHS, 42 U.S.C. § 6009, and (2) to provide the Secretary with "satisfactory assurances that each program ... which receives funds from the State's allotment ... has in effect for each developmentally disabled person who receives services from or under the program a *habilitation plan*," 42 U.S.C. § 6011(a) (emphasis added). \*191 Congress spoke to the question of habilitation in the statute's "bill of rights," 42 U.S.C. § 6010, the section at issue in *Pennhurst*.

Congress makes the following findings respecting the rights of persons with developmental disabilities:

....

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

42 U.S.C. § 6010(2).

Despite the fact that 42 U.S.C. § 6010(2) was labeled a "right," the Court held that it was not enforceable in a § 1983 action. Then-Justice Rehnquist, writing for the majority, explained that when Congress enacts legislation pursuant to its spending power, it creates a contract between itself and the participating states, and "in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17.

"Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* The rights set forth in 42 U.S.C. § 6010 were simply not unambiguous conditions for the receipt of funds.

The Court further held that the terms used in articulating the "right"-- "appropriate treatment" and "least restrictive" setting--were too general to serve notice to the states as to the obligations imposed, and, therefore, could not be deemed enforceable in a private action under § 1983. *Id.* at 24- 25.

Soon thereafter, the Court recognized a further limitation: § 1983 actions based on statutory rights could not be maintained when Congress had itself provided in the statute for "remedial devices" so "comprehensive" as to demonstrate an intent to preclude private actions under § 1983. *Smith v. Robinson*, 468 U.S. 992, 1011-13, 104 S.Ct. 3457, 3468-69, 82 L.Ed.2d 746 (1984). *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 10-20, 101 S.Ct. 2615, 2621-27, 69 L.Ed.2d 435 (1981).

In *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), however, the Court emphasized that not every administrative scheme for enforcement bars private actions under § 1983. In that case, plaintiffs were residents of federally-funded public housing projects who complained that they were being charged rent in excess of the 30% of income maximum set by 42 U.S.C. § 1437a (1982 ed. & Supp. III 1985). Although the Secretary of Housing and Urban Development (referred to herein as "HUD") was charged with supervising such housing projects and was, indeed, empowered to withhold funding from errant participants, the Court ruled that such administrative enforcement did not bar plaintiffs' suit. With minimal discussion, it held that 42 U.S.C. § 1437a was a mandatory limitation on the amount that a family could be charged for public housing and that Congress was undeniably intending to benefit tenants when it passed this legislation. *Id.* at 430, 107 S.Ct. at 773.

Justice O'Connor, joined by the Chief Justice and Justices Powell and Scalia in dissent, did not disagree with these conclusions. Where the Court split, however, was on the scope of the statutory right conferred. Plaintiffs claimed that public housing projects violated 42 U.S.C. § 1437a if they failed to comply with a HUD regulation requiring a "reasonable" amount for utilities to be included in

calculating a tenant's rent. 24 C.F.R. § 860.403 (1982). The majority found that such regulations could indeed define an enforceable right because they have the force of law. *Id.* at 431, 107 S.Ct. at 774. Moreover, agency guidelines for establishing utility allowances protected against vagueness. *Id.* at 431-32, 107 S.Ct. at 774-75. The dissent, however, was troubled by recognition of a "right" with respect to utilities when nothing "[o]n the face of the statute" suggested that Congress intended the inclusion. *Id.* at 433-34, 107 S.Ct. at 775-76 (O'Connor, J., dissenting).

I am concerned ... that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the \*192 statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

*Id.* at 438, 107 S.Ct. at 778 (emphasis in original). Moreover, the dissent found the guidelines cited by the majority for calculating reasonable utility rates too indefinite to permit judicial review. *Id.* at 438-39, 107 S.Ct. at 778-79.

Two years later, in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989), the Court endeavored to derive from these various cases a logical framework for analyzing § 1983 claims. A two-step formula was pronounced. In the first step, a court would have to decide if the case really involved a federal "right," as opposed to simply a claimed violation of federal law. On this first point, plaintiff would bear the burden. Among the factors pertinent to resolution of this issue would be (1) whether the statutory provision in question created obligations binding on the governmental unit as opposed to stating a congressional preference for certain conduct; (2) whether the interest plaintiff asserted was sufficiently specific and definite to be within the competence of the judiciary to enforce; and (3) whether the provision in question was intended to benefit the plaintiff. *Id.* at 106, 110 S.Ct. at 448. If a court were satisfied that plaintiff had asserted an enforceable right, the second step of the inquiry would require consideration of whether Congress had foreclosed its enforcement under § 1983. On this issue, defendant would bear the burden and would have to point to a remedial scheme so comprehensive that allowing plaintiff to sue under § 1983 would be inconsistent with Congress's carefully tailored scheme. *Id.* at 106-07, 110 S.Ct. at 448-49.

This formula, when applied in *Wilder v. Virginia*

(Cite as: 819 F.Supp. 183, \*192)

*Hosp. Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), led the Court to hold that Medicaid health care providers could sue state authorities pursuant to § 1983 to compel compensation for services rendered in accord with the "reasonable rate" standard articulated in the Boren Amendment to the Medicaid Act. 42 U.S.C. § 1396a(a)(13)(A). Because the statute made specific reference to various health care providers as the entities to which a reasonable rate was to be paid, the Court had "little doubt" that they were the "intended beneficiaries of the Boren Amendment." *Id.* at 510, 110 S.Ct. at 2517. Further, because the reasonable rate standard was "cast in mandatory rather than precatory terms: the state plan 'must' 'provide for payment,'" the Court was satisfied that an obligation was actually imposed, as opposed to a mere preference stated. *Id.* at 512, 110 S.Ct. at 2518 (citations omitted) (emphasis in original). Although the four member dissent, led by the Chief Justice, argued that the only thing that was made mandatory by the Amendment was a state's obligation to make findings as to the reasonableness and adequacy of its rates and then to provide assurances to the Secretary, *id.* at 527-28, 110 S.Ct. at 2526-27 (Rehnquist, C.J., dissenting), the majority held that plaintiffs were entitled to pursue a broader right.

It would make little sense for Congress to require a State to make findings without requiring those findings to be correct....

....

[T]he statute and regulation set out factors which a State must consider in adopting its rates.... That the Amendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the Amendment, but it does not render the Amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.

*Id.* at 514, 519-20, 110 S.Ct. at 2519, 2522-23 (emphasis in original).

Were *Wilder* the last word as to § 1983 actions to enforce statutory rights, this court would not have catalogued in such detail the Supreme Court's § 1983 statutory rights jurisprudence. It would have simply applied the two-prong test enunciated in *Golden State*, mindful of the expansive view of statutory rights recognized by the *Wilder* majority. \*193 The viability of that approach has, however, been put into question by the Supreme Court's decision in *Suter v. Artist M.*,

503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), wherein seven members of the Court, led by the Chief Justice, held that private individuals could not sue under § 1983 to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § § 620-628, 670-679a (1988 ed. & Supp. I 1988).

The Adoption Act is yet another federal funding statute. It reimburses states for expenses incurred in providing foster care and adoption services. To be eligible for funding, a state must submit the ubiquitous "plan" for approval by the Secretary of HHS. The statute lists sixteen requirements for state plans, including one providing that

in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15). The *Suter* plaintiffs complained that officials at the Illinois Department of Children and Family Services failed to make such reasonable efforts, in large part because they failed promptly to assign caseworkers to children in their custody and promptly to reassign cases when caseworkers were on leave. The district and appellate courts, applying *Wilder*, agreed that plaintiffs could pursue their 42 U.S.C. § 671(a)(15) claim under § 1983. *Artist M. v. Johnson*, 726 F.Supp. 690 (N.D.Ill.1989), *aff'd*, 917 F.2d 980 (7th Cir.1990), *rev'd sub nom. Suter v. Artist M.*, 498 U.S. 1, 112 S.Ct. 1360, 112 L.Ed.2d 1 (1992).

In holding to the contrary, the Supreme Court did not reverse *Golden State*, *Wright*, or *Wilder*. But neither did it apply the two-prong analysis recommended in those cases. Instead, the Chief Justice emphasized a point not heard since *Pennhurst*, namely, that when legislation is enacted pursuant to Congress's spending power, any conditions imposed on the grant of federal monies must be stated "unambiguously." *Id.* at ---, 112 S.Ct. at 1366. At first glance this might not seem inconsistent with *Wright* and *Wilder*. But whereas those cases suggest that any provision that Congress mandates be a part of a plan necessary to receive funding is an unambiguous-- and therefore privately enforceable--condition, *Suter* adopts a narrower approach. Returning to a theme prominent in the *Wilder* dissent, *Suter* highlights the importance of "examin[ing] exactly what is required of States" as conditions to the receipt of federal funds. *Id.* at ---, 112 S.Ct. at 1367. It holds that the only unambiguous requirement of 42 U.S.C. § 671(a) is that "a State have

a plan approved by the Secretary which contains the 16 listed features." *Id.* But the features themselves, particularly § 42 U.S.C. § 671(a)(15), are deemed too general to qualify as privately enforceable rights. *Id.* at ---, 112 S.Ct. at 1370. Such "generalized dut [ies are] ... to be enforced not by private individuals, but by the Secretary." *Id.*

The dissent complains that the majority "by resurrecting arguments decisively rejected less than two years ago in *Wilder*, ... has changed the rules" with respect to § 1983 statutory rights claims. [FN5] *Id.* at ---, 112 S.Ct. at 1377 (Blackmun, J., dissenting). Endeavoring \*194 to distinguish *Wilder*, the majority notes that the "reasonable" rate requirement there at issue was supplemented by other provisions of the statute and regulations that "set forth in some detail the factors to be considered in determining the methods for calculating rates." *Id.* at ---, 112 S.Ct. at 1368. By contrast, "[n]o further statutory guidance is found as to how 'reasonable efforts' [to maintain a child in or return a child to his home] are to be measured." *Id.* The dissent remains unpersuaded, finding the statutory requirements in *Suter* indistinguishable from those in *Wilder*. *Id.* at ---, 112 S.Ct. at 1377.

FN5. Some commentators have also found *Suter* and *Wilder* irreconcilable. *E.g.*, Leo Smith, Reducing State Accountability to the Federal Government: The *Suter v. Artist M.* Decision to Dismiss Section 1983 Claims for Violating Federal Funding Mandates, 1992 Wis.L.Rev. 1267; Martin A. Schwartz, Reviewing Federal Statutes Under § 1983, Revisited, N.Y.L.J., June 16, 1992, at 3. The tension between the two cases has not escaped Congress's attention. In the fall of 1992, legislation was proposed to reverse so much of *Suter* as held that the only enforceable requirement of a federal funding statute is that a state have an approved plan. See 138 Cong.Rec. S17,689-01 (daily ed. Oct. 8, 1992) (statement of Sen. Riegle); 138 Cong.Rec. H12,227-01 (daily ed. Oct. 5, 1992) (text of amendment). The bill containing this provision was vetoed by President George Bush on November 4, 1992. See *President Vetoes Tax Bill, Saying Urban Aid was Outweighed by Special Interests*, 1992 Daily Rep. for Executives (BNA) 215 (Nov. 5, 1992) (text of President's veto message). The legislation seeking to overturn *Suter* has since been reintroduced in the Senate and is currently pending. See 139 Cong.Rec. S3, 173-01 (daily ed. March 18, 1993) (statement of Sen. Riegle); 139 Cong.Rec. S2,917-03 (daily ed. March 16, 1993) (text of bill).

### III. Applying Relevant Law to this Case

[3] This court is, of course, bound by both *Suter* and *Wilder*. In considering the pending motion, it must

endeavor to reconcile their holdings, as well as those from earlier § 1983 statutory rights cases. A few principles are discerned: (1) the two-prong test first articulated in *Golden State*, and not expressly repudiated by *Suter*, remains a useful tool in considering whether a private plaintiff can sue under § 1983 to enforce statutory rights; but (2) in applying this test, courts must look carefully at the precise language of any statute relied on by plaintiffs as the source of the right they seek to enforce; and (3) the right at issue must be unambiguously conferred by the statute.

Applying these principles to this case, the court begins by noting that, throughout their complaint, plaintiffs contend that defendants have failed to provide them with "necessary, adequate, and timely" health care. Indeed, they seek declaratory and injunctive relief framed in those broad terms. To the extent this is the "right" plaintiffs sue to enforce, the court must dismiss their action. No statute or regulation cited by plaintiffs makes reference-- in either mandatory or precatory language--to "necessary, adequate, and timely care." Instead, this is a general, conclusory phrase used by plaintiffs to synthesize the requirements of various and sundry federal and state standards for Medicaid care. Such a sweeping approach to statutory rights is not sanctioned by *Wilder* and is expressly rejected by *Suter*. *Id.* at ---, 112 S.Ct. at 1367 & n. 8 (court must "examine exactly what is required of States" and "each statute must be interpreted by its own terms"). This court dismisses so much of plaintiffs' complaint as seeks relief in terms of "necessary, adequate, and timely care." See *Alexander v. Choate*, 469 U.S. 287, 303, 105 S.Ct. 712, 721, 83 L.Ed.2d 661 (1985) (rejecting argument that benefit conferred by Medicaid is the amorphous right to "adequate health care" in any given case).

That conclusion hardly ends the inquiry, for plaintiffs do point to a number of federal and state statutes and regulations that, in more particular terms, relate to the Medicaid program. The court examines these to determine if unambiguous rights are conferred vis-a-vis the City defendants. The court focuses on four statutory sections: 42 U.S.C. § 1396a(a)(9), (13), (19) (1988 ed. & Supp. III 1991), and 42 U.S.C. § 1395z (1988 ed. & Supp. III 1991).

[4] Section 1396a(a)(9) does require a state's Medicaid plan to "provide" for a state agency to "be responsible for establishing and maintaining health standards for private or public institutions in which recipients of medical assistance under the plan may receive care or

services." Logic dictates that the intended beneficiaries of such a requirement are the "recipients of medical assistance under the plan" expressly mentioned therein. See *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. at 510, 110 S.Ct. at 2517 (express reference to health care providers in Boren Amendment supports finding that requirement imposed therein was for their benefit). Plaintiffs are such recipients. The requirement is, moreover, mandatory in that a state "must ... provide ... that the State health agency shall be responsible for establishing and maintaining health standards." 42 U.S.C. § 1396a(a)(9). In this case, there is no question that New York has designated its Department of Health for this purpose.

The crux of plaintiffs' complaint, however, is that the State Department of Health has not established, or more significantly, maintained standards of adequate care at Kings County Hospital. Whether or not this statutory requirement creates enforceable rights against the State defendants is not, however, \*195 the issue before this court on this motion. It is the City defendants who move for dismissal. Nothing in § 1396a(a)(9) mandates any action by the City defendants. Thus, it cannot serve as the basis for a § 1983 statutory claim against these defendants. See *Suter v. Artist M.*, 503 U.S. at ---, 112 S.Ct. at 1367 (court must look to "exactly" what is required in statutory language to determine scope of any right); see generally *Stowell v. Ives*, 976 F.2d 65, 69 (1st Cir.1992) (where statutory mandate is directed to one party (federal authorities), it is not enforceable against another (state)); accord *Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1053 (5th Cir.1993) (statutory directive to HUD not enforceable against City housing authority).

[5] Plaintiffs further cite 42 U.S.C. § 1396a(a)(13), the Boren Amendment, as a source of their statutory rights claim. This provision does state a congressional mandate. See *Wilder v. Virginia Hospital Assoc.*, 496 U.S. at 512, 110 S.Ct. at 2518.

A State plan for medical assistance must--

....

(13) provide--(A) for payment ... of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates ... which the State finds, and makes reasonable assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and

Federal laws, regulations, and quality and safety standards....

42 U.S.C. § 1396a(a)(13). Plaintiffs urge the court to focus exclusively on the phrase "efficiently and economically operated facilities ... in conformity with applicable State and Federal laws, regulations, and quality and safety standards" in support of their contention that any federal or state law, regulation, or standard applicable to Medicaid health care providers is a federally-enforceable statutory right. The court rejects this approach. The phrase relied upon cannot be divorced from the actual mandate that it modifies.

The plain language of the Boren Amendment simply does not impose any requirement *on* Medicaid providers. Congress's mandate is directed exclusively to the states and pertains to the means by which they set reimbursement rates *for* Medicaid providers. Thus, as the Supreme Court held in *Wilder*, it is providers who are the beneficiaries of the Amendment. It is they who can invoke § 1983 to enforce a state's statutory duty to set rates at a level reasonable and adequate to permit them to operate consistently with their obligations under federal and state law. Obviously, the requirement imposed by Congress upon the states for setting reimbursement rates facilitates a provider's ability to meet its obligations under federal and state law, something that Congress undoubtedly wished to encourage. But that is not the same as legislating such compliance. The Boren Amendment simply cannot be parsed to support plaintiffs' argument that every federal and state law and regulation pertaining to Medicaid providers is a statutory right that patients can enforce against providers in a § 1983 action.

[6] In their brief, plaintiffs also point to 42 U.S.C. § 1395z to support their contention that state regulations for Medicaid and Medicare providers are privately enforceable under § 1983. That statute requires the Secretary of HHS to consult with "appropriate State agencies and recognized national listing or accrediting bodies" in setting standards for hospitals participating in Medicaid and Medicare programs. The final sentence-- emphasized by plaintiffs--provides that, "in the case of any State ... which imposes higher requirements on institutions ... under a State plan ... the Secretary shall impose like requirements as a condition to the payment for services ... in such institutions in such State." Plaintiffs argue that because providers are thus statutorily mandated to meet state standards as a condition for federal funding, such state standards are transformed into federally-enforceable statutory rights. The court is not persuaded.

42 U.S.C. § 1395z is directed to the Secretary of HHS, not to health care providers. See *Stowell v. Ives*, *supra*, *Resident Council \*196 of Allen Parkway Village v. HUD*, *supra*. Moreover, § 1395z, as a whole, does not so much reflect an intent to turn state regulations into privately enforceable federal rights as it does an intent not to have federal regulations supersede stricter state ones for participating hospitals. Such deference to the states is consistent with Congress's express directive that Medicaid and Medicare not become vehicles for federal "supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. § 1395. Neither did Congress intend federal authorities to exercise any direct "supervision or control over the administration or operation" of any health care institution. *Id.*

[7] Not surprisingly then, the Secretary has carried out the directive in § 1395z (that compliance with state standards be a condition of federal funding) by promulgating a regulation requiring hospitals participating in Medicaid or Medicare programs to be "[a]pproved as meeting standards for licensing established by the agency of the State or locality responsible for licensing hospitals." 42 C.F.R. § 482.11(b)(2). In short, the Secretary carries out the requirement of § 1395z by leaving the enforcement of state standards to the states. So long as a participating hospital is licensed by the state in which it operates, it is eligible for federal funding under § 1395z. Such a scheme simply does not reflect an unambiguous congressional intent to give Medicare and Medicaid recipients a federally-enforceable right of action with respect to state standards of care. [FN6]

FN6. In any event, the vast majority of the state regulations cited by plaintiffs are too general to permit judicial enforcement. N.Y.Comp.Codes R. & Regs. tit. 10, § 405.1 *et seq.* (1988). For example, the requirement that every hospital patient "receive emergency health care that meets generally accepted standards of medical care," § 405.19(e)(1), necessarily turns on the facts of the particular patient's case. Similarly general are the requirements that a hospital respond "in a reasonable manner to [a] patient's request for services customarily rendered by the hospital consistent with the patient's treatment," § 405.7(b)(14), or that it provide "support services in a manner sufficient to meet patient care needs and to prevent adverse impact on the delivery of medical and nursing care," § 405.3(b)(5). These are only a few examples of state regulations that plaintiffs seek to enforce through a § 1983 action.

[8] Finally, plaintiffs rely on § 1396a(a)(19), which

requires state plans to provide "such safeguards as may be necessary" to assure that health care is provided "in a manner consistent with simplicity of administration and the best interests of the recipients." By itself, the section would not support a statutory rights claim, for the terms "safeguards as may be necessary" and "best interests of the recipients" are too general and vague to permit judicial enforcement. See *Suter v. Artist M.*, 503 U.S. at ---, 112 S.Ct. at 1370; *Pennhurst State Sch. Hosp. v. Halderman*, 451 U.S. at 24-25, 101 S.Ct. at 1543-44; *Fulkerson v. Commissioner, Maine Dep't of Human Serv.*, 802 F.Supp. 529, 534 (D.Me.1992) (Cohen, Mag. J.) (finding § 1396a(a)(30)(A) requirement that Medicaid plans provide methods for payment "consistent with efficiency, economy, and quality of care" too vague to be enforceable); *cf. Kam Shing Chan v. City of New York*, 803 F.Supp. 710, 725 (S.D.N.Y.1992) (Housing and Community Development Act requirement that laborers on federally funded projects be "paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act," creates a sufficiently "unambiguous, specific benchmark" advising contractors "exactly what wage rates will need to be paid" to be enforceable under § 1983). But plaintiffs contend that § 1396a(a)(19) is given specific meaning--in much the same way as the "reasonable rate" requirement in *Wilder* was given meaning--by federal regulations that detail the standards of hospital care thought to be in the best interests of Medicaid recipients. *Cf. Suter v. Artist M.*, 503 U.S. at ---, 112 S.Ct. at 1368 (absence of regulations defining vague statutory terms precludes private enforcement).

Once again, the court must reject plaintiffs' argument. Although the Medicaid regulations pertaining to hospitals, reported at 42 C.F.R. § 482.1 *et seq.*, are extensive, they were not promulgated to particularize patient rights privately enforceable under § 1983. 42 C.F.R. § 482.1(3)(b) specifically states \*197 that the "scope" of these regulations is to "serve as the basis of survey activities for the purpose of determining whether a hospital qualifies for a provider agreement under Medicare and Medicaid." An accredited hospital is generally considered to meet all of the conditions for participation in Medicare and Medicaid programs. 42 C.F.R. § 488.5 (1992). Nevertheless, the Health Care Financing Administration of HHS "may require a survey of an accredited hospital" to validate the findings of the accreditation process. Surveys are conducted on a random basis, but also "in response to substantial allegations of significant deficiencies." 42 C.F.R. § 488.6(a) (1992). In short, such surveys, and

the regulations that pertain to them, are relevant to the Secretary's consideration of whether an accredited hospital qualifies for participation in a Medicaid or Medicare program.

It is worth noting that surveys are conducted by health care professionals designated by the state health care agency supervising the state's Medicaid plan. 42 C.F.R. §§ 488.10(a)(1), 488.26(b)(3) (1992). Although some of the standards articulated in 42 C.F.R. § 482.1 *et seq.* for surveyor consideration are specific, e.g., § 482.12(c)(3) (doctor of medicine or osteopathy must be on duty or on call at all times); § 482.23(b)(3) (a registered nurse must supervise and evaluate the nursing care for each patient); § 482.23(b)(4) (a nursing care plan must be developed and maintained current for each patient), others are quite general, e.g., § 482.23(b) (requiring "adequate numbers" of licensed registered nurses, licensed practical nurses, and other personnel to provide nursing care to all patients "as needed"); § 482.28 (requiring "organized dietary services" directed and staffed by "adequate qualified personnel"). [FN7] Not surprisingly then, surveyors are called upon to exercise their professional "judgment", in determining whether a hospital is in compliance with these standards. § 488.26(3). Judgments are reached, moreover, only after on site review of a hospital over a period of several days. Surveyors are required to conduct an "in-depth" review of the treatment afforded a representative number of patients, including first-hand observation of treatment, observation of the preparation and administration of drugs, and personal interviews. § 488.26(e). Surveyors are required to report any and "all deficiencies found during the survey." The Health Care Financing Administration then reviews the report to determine whether a provider may participate in a Medicaid program. § 488.12.

FN7. As with the state regulations referred to in footnote 6, *supra*, the general nature of many of the federal standards cited by plaintiff is a further basis for rejecting them as a source of enforceable statutory rights. Plaintiffs seek to avoid this conclusion by arguing that courts have considerable experience applying general medical principles in malpractice actions. Malpractice actions, however, involve discrete challenges to specific treatment that has already occurred and presumably caused injury. Courts and juries are only required to evaluate that particular treatment in light of reasonably accepted standards of medical practice. Here plaintiffs seek to involve the court in the overall evaluation and monitoring of countless treatment, personnel, and maintenance decisions affecting a major metropolitan hospital. In short, it is one thing to say that the court

system is competent to address a malpractice claim based on a single incident of "inadequate nursing care." It is quite another to expect the court to define the boundaries of "adequate nursing care" for a hospital that treats tens of thousands of patients annually.

The fact that a hospital survey may reveal deficiencies with respect to one or more of the standards set forth in the federal regulations does not, however, mandate its exclusion from the Medicaid program. The regulations permit a hospital to submit a "plan of correction for achieving compliance within a reasonable period of time acceptable to the Secretary." § 488.28(a). Kings County Hospital operates pursuant to such a plan of correction.

The court does not cite to this survey scheme or the opportunity to submit a plan of correction to suggest that this constitutes a means of enforcing Medicaid standards so comprehensive as to bar Medicaid patients from suing under § 1983 to enforce statutory rights. The court need not reach this second prong of the *Golden State* test. Rather, the court cites the survey regulations to illustrate why plaintiffs have failed to demonstrate that there is any statutory right of the type enforceable under § 1983 here at issue. To summarize: (1) 42 U.S.C. § 1396a(a)(19), \*198 insofar as it requires states to provide safeguards to ensure that health care is consistent with the best interests of Medicaid patients, is by itself too vague to state an enforceable right; (2) 42 C.F.R. § 482.1 *et seq.*, setting standards for hospitals providing care to Medicaid patients, do not particularize § 1396a(a)(19) and thereby make each standard a right enforceable by Medicaid patients under § 1983 against participating hospitals; rather (3) § 482.1 *et seq.* serve the far more limited purpose of providing "the basis of survey activities" to assist federal officials in exercising *their* oversight responsibilities for hospitals operating under an approved state Medicaid plan.

Concededly, plaintiffs have amply demonstrated why federal and state officials have, over the years, closely surveyed Kings County Hospital and monitored its attempts to correct problems in the delivery of patient health care. What they have not done is pointed to an unambiguous statutory right that they may have to enforce under § 1983 any federal or state regulations pertaining to such hospitals. Accordingly, the City defendants' motion to dismiss is granted.

#### Conclusion

Plaintiffs having failed to demonstrate that any section

(Cite as: 819 F.Supp. 183, \*198)

of the Medicaid Act relied upon by them unambiguously confers an enforceable statutory right as against the City defendants, the motion of the City defendants to dismiss plaintiffs' § 1983 claim is hereby granted.

SO ORDERED.

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United States District Court,  
E.D. New York.

RICHMOND BRO GUN CLUB, INC., National  
Rifle Association of America, New York  
State Rifle and Pistol Association, Inc., and John Does  
I Through VI,  
Plaintiffs,  
v.  
CITY OF NEW YORK, New York, and Lee P. Brown  
in his official capacity as Police  
Commissioner for the City of New York, Defendants.

No. CV 92-151(RR).

Aug. 10, 1995.

Gun club, national and state rifle associations, and six city residents, sought declaratory judgment and injunctive relief against enforcement of city's local law criminalizing possession of assault weapons and ammunition feeding devices within city limits. The District Court, Raggi, J., held that New York City local law restricting possession of assault weapons was valid.

Ordered accordingly.

#### West Headnotes

[1] Constitutional Law ⚡250.1(2)  
92k250.1(2) Most Cited Cases

[1] Constitutional Law ⚡258(3.1)  
92k258(3.1) Most Cited Cases

[1] Weapons ⚡3  
406k3 Most Cited Cases

It was not arbitrary or irrational for city to include semiautomatic rifles and shotguns in definition of prohibited "assault weapons," and, therefore, such definition did not violate rifle owners' rights to due process and to equal protection; although true assault rifles used by military were selective fire weapons that fire in fully automatic mode, modern military rifles contained variety of physical features and characteristics designed for military applications which distinguished them from traditional sporting rifles and which were carried over to the semiautomatic versions of original military rifles. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law ⚡250.1(2)

92k250.1(2) Most Cited Cases

[2] Weapons ⚡3  
406k3 Most Cited Cases

City had legitimate governmental purpose for enacting local law prohibiting possession of semiautomatic weapons, and, thus, local law did not violate equal protection rights of semiautomatic weapon owners; there was a disturbingly large number of homicides annually caused by gunfire within city's borders, and risk to public safety increased when persons were armed with semiautomatic weapons. U.S.C.A. Const.Amend. 14.

[3] Municipal Corporations ⚡595  
268k595 Most Cited Cases

Promotion of public safety is unquestionably at the core of municipality's police power.

[4] Constitutional Law ⚡48(5)  
92k48(5) Most Cited Cases

Legislation enacted pursuant to police power is entitled to a strong presumption of validity.

[5] Municipal Corporations ⚡63.15(3)  
268k63.15(3) Most Cited Cases

So long as law does not infringe on fundamental rights or discriminate against suspect classes, the court must accord wide latitude to legislature's judgment as to circumstances warranting exercise of city's police power.

[6] Municipal Corporations ⚡595  
268k595 Most Cited Cases

On constitutional challenge to ordinance promulgated under city's police power, question for court is not whether city can establish genuine public need for the ordinance, but rather, whether plaintiffs can demonstrate that there is no rational connection between the regulation and the promotion of safety of persons and property; indeed, to succeed on claim, plaintiffs must demonstrate that ordinance is so irrational that it is arbitrary.

[7] Constitutional Law ⚡251.3  
92k251.3 Most Cited Cases  
Relation

Legislation need not be supported by precise empirical evidence to survive rational scrutiny.

[8] Constitutional Law ☞ 211(2)  
92k211(2) Most Cited Cases

Statute is not invalid under Constitution merely because it might have gone farther than it did; legislatures are free to attack problems of public safety one step at a time and in such order as they deem appropriate.

[9] Municipal Corporations ☞ 53  
268k53 Most Cited Cases

[9] Weapons ☞ 3  
406k3 Most Cited Cases

Federal laws and regulations establishing the Civilian Marksmanship Program (CMP) did not preempt city's local law restricting possession of semiautomatic and automatic weapons within city limits, despite gun owners' contention that local law conflicted with federal law authorizing them to buy military type weapons from the government; local law did not prohibit city residents from receiving CMP-issued rifles, but rather, required only that such rifles be stored and used outside city limits. U.S.C.A. Const. Art. 6, cl. 2; 10 U.S.C.A. § 4307; 32 C.F.R. §§ 543.9(1)(d)(iii)(D), 543.17(g)(5)(ii), 543.17(g)(5)(v), 543.21(a)(2), 543.22(a)(i, ii).

[10] States ☞ 18.1  
360k18.1 Most Cited Cases

State laws that interfere with or are contrary to laws of Congress, made in pursuance of the Constitution, will not stand. U.S.C.A. Const. Art. 6, cl. 2.

[11] Municipal Corporations ☞ 53  
268k53 Most Cited Cases

Well-established presumption is against federal preemption of local law unless court is absolutely certain that such was the intent of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[12] Municipal Corporations ☞ 53  
268k53 Most Cited Cases

On federal preemption challenge to local law concerning public safety, proper assumption is that historic police powers of the states were not to be superseded by federal law unless that was the clear and

manifest purpose of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[13] Municipal Corporations ☞ 53  
268k53 Most Cited Cases

Intent to preempt local law can be expressed in various ways: most plainly, it can be stated in federal statute, but it can also be evidenced by pervasive scheme of federal regulation that leaves no room for any state or local control. U.S.C.A. Const. Art. 6, cl. 2.

[14] Municipal Corporations ☞ 53  
268k53 Most Cited Cases

[14] States ☞ 18.5  
360k18.5 Most Cited Cases

Local law is preempted to the extent that it actually conflicts with federal law, but such conflict must be real; thus, for a conflict to warrant preemption, compliance with both federal and state laws must be a physical impossibility, or compliance with the local law must stand as an obstacle to accomplishment and execution of the purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[15] Constitutional Law ☞ 258(3.1)  
92k258(3.1) Most Cited Cases

[15] Weapons ☞ 3  
406k3 Most Cited Cases

Local law defining "assault weapon" and restricting possession of such weapons, implicated no constitutionally protected conduct, and therefore could not be so vague on its face as to deny due process, absent showing that law was impermissibly vague in all of its applications. U.S.C.A. Const. Amend. 14.

[16] Constitutional Law ☞ 251.4  
92k251.4 Most Cited Cases

It is a basic principle of due process that enactment is void for vagueness if its prohibitions are not clearly defined. U.S.C.A. Const. Amend. 14.

[17] Constitutional Law ☞ 82(4)  
92k82(4) Most Cited Cases

Concern animating the void for vagueness doctrine is two-fold: does law give person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly, and does law provide

reasonable standards to law enforcement authorities to ensure against arbitrary and discriminatory application. U.S.C.A. Const.Amend. 14.

[18] Constitutional Law ⚖️ 251.4  
92k251.4 Most Cited Cases

Law is not "impermissibly vague" if it requires person to conform his conduct to imprecise but comprehensible normative standard; what due process will not tolerate is law that specifies no standard of conduct at all. U.S.C.A. Const.Amend. 14.

[19] Constitutional Law ⚖️ 82(4)  
92k82(4) Most Cited Cases

Facial vagueness challenge to statute cannot succeed as to law which implicates no constitutionally protected conduct, unless the law is impermissibly vague in all of its applications; as long as the law clearly encompasses at least some core of conduct in which plaintiffs engage, court will not entertain facial vagueness challenge to other conduct, whether real or hypothetical, by plaintiffs or by others.

[20] Constitutional Law ⚖️ 253(1)  
92k253(1) Most Cited Cases

Violations of state law generally do not give rise to substantive federal due process claims. U.S.C.A. Const.Amend. 14.

[21] Federal Courts ⚖️ 43  
170Bk43 Most Cited Cases

[21] Federal Courts ⚖️ 46  
170Bk46 Most Cited Cases

When constitutional claim depends upon interpretation of uncertain state statutory scheme, and when state law is susceptible to interpretation that could avoid or modify the constitutional claim, federal court will, in interests of comity and federalism, abstain from exercising its jurisdiction to afford parties an opportunity to seek resolution of state law question in local forum.

[22] Constitutional Law ⚖️ 258(3.1)  
92k258(3.1) Most Cited Cases

Local law did not violate rifle owners' right to procedural due process, even if state laws gave rise to some liberty or property right which was placed at stake by local law restricting possession of assault

weapons, absent showing that New York courts were unavailable to hear declaratory judgment actions challenging the legality of local law in light of State Constitution and laws. U.S.C.A. Const.Amend. 14; N.Y.McKinney's Civil Rights Law § 4; N.Y.McKinney's General Municipal Law § 139-d; N.Y.McKinney's Penal Law §§ 265, 400.

[23] Constitutional Law ⚖️ 251.7  
92k251.7 Most Cited Cases

When legislative, as opposed to administrative, action is at issue in context of procedural due process claim, the only procedure required by the Constitution is judicial review. U.S.C.A. Const.Amend. 14.

[24] Constitutional Law ⚖️ 251.7  
92k251.7 Most Cited Cases

Due process clause was not the source of any prohibition against city's delegation of rule-making authority to its police commissioner; rather, any such claim had to be based on state law. U.S.C.A. Const.Amend. 14.

[25] Federal Courts ⚖️ 14.1  
170Bk14.1 Most Cited Cases

District court would not exercise pendent jurisdiction over question whether state law preempted local law governing possession of assault weapons. N.Y.McKinney's Civil Rights Law § 4; N.Y.McKinney's General Municipal Law § 139-d; N.Y.McKinney's Penal Law §§ 265, 400.

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Paul Crotty, Corporation Counsel for City of New York by Albert Fredericks, Gabriel Taussig, Mordecai Newman, Assistant Corporation Counsels, New York City, for defendants.

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Fried, Frank, Harris, Shriver & Jacobson by Ira S. Sacks, Teresa A. Pesce, Lisa E. Brody, Jocelyn L. Jacobson, Gregory J. Ikonen, New York City, Dennis A. Henigan, Washington, DC, for amici curiae Center to Prevent Handgun Violence Legal Action Project, et al.

(Cite as: 896 F.Supp. 276, \*279)

Jerold E. Levine, Valley Stream, NY, for amici curiae Federation of New York State Rifle and Pistol Clubs, Inc.

# MEMORANDUM and ORDER

RAGGI, District Judge:

Plaintiffs, Richmond Boro Gun Club, Inc., the National Rifle Association of America ("NRA"), the New York State Rifle and Pistol Association, Inc., and six New York City residents identified simply as "John Does I through VI," bring this action for declaratory judgment and injunctive relief against the City of New York and its Police Commissioner. At issue is New York City Local Law 78 of 1991, which amends the city's Administrative Code to criminalize the possession or transfer of certain "assault weapons" and "ammunition feeding devices" within the five boroughs. N.Y.C. Administrative Code, Ch. 1 § 10-131, and Ch. 3 § 10-301 *et seq.* (Supp.1992).

Plaintiffs raise the following federal and state law challenges to the local law: (1) it is preempted by those federal laws and regulations establishing the Civilian Marksmanship Program, (2) it deprives them of rights to liberty and property without due process, (3) it is preempted by New York State law, (4) it is unconstitutionally vague, (5) it serves no rational purpose and thus violates the Constitution's Due Process and Equal Protection Clauses, and (6) it grants excessive rule-making authority to New York City's Police Commissioner in further violation of the Due Process Clause. They further complain (7) that the Commissioner has exercised his authority in an arbitrary and capricious manner.

Plaintiffs initially sought a preliminary injunction barring enforcement of Local Law 78. This application was referred to Chief Magistrate Judge A. Simon Chrein who, on April 16, 1992, recommended that no injunction be entered. The court adopted this recommendation on May 29, 1992. In the interim, defendants moved for summary judgment. This motion was also referred to Chief Magistrate Judge Chrein. On February 23, 1994, he filed his report recommending that the court grant defendants' motion. Plaintiffs have filed objections to this report and defendants have responded.

This court has carefully reviewed all papers filed since the inception of this case. [FN1] It \*280 holds that summary judgment is appropriately entered in favor of defendants on all federal claims. Plaintiffs' state claim

is dismissed for lack of independent federal jurisdiction.

FN1. In addition to the parties' submissions, three briefs were filed by amici: (1) the Federation of New York State Rifle and Pistol Clubs, Inc., supporting plaintiffs; (2) the Center to Prevent Handgun Violence, the Police Conference of New York Inc., the Metropolitan Police Conference of New York State, Inc., the New York State Association of Chiefs of Police, Inc., the Detectives' Endowment Association, the Captains Endowment Association, the Lieutenants Benevolent Association, the Sergeants Benevolent Association, and the New York City Transit PBA, supporting defendants; and (3) twelve individuals (Charles E. Schumer, Gary L. Ackerman, Eliot L. Engel, Floyd H. Flake, Thomas J. Manton, Major R. Owens, Charles B. Rangel, James H. Scheuer, Jose E. Serrano, Edolphus Towns, Stephen J. Solarz, and Ted Weiss) then serving as Representatives to the United States Congress for various districts in New York City, in further support of defendants. The United States Attorney declined the court's invitation to file any papers on behalf of the United States government or any branch or agency thereof.

## Factual Background

On July 30, 1991, at the request of then-Mayor David W. Dinkins and with the support of then-Police Commissioner Lee P. Brown as well as various other city officials, the New York City Council enacted Local Law 78 prohibiting the possession or transfer within New York City of "assault weapons" and certain ammunition feeding devices. Administrative Code §§ 10-303.1(a), 10-306, 10-131(i)(6).

The rationale for the legislation, which went into effect January 11, 1992, is stated in its preamble:

Legislative intent. It is hereby declared and found by the council that certain guns, commonly referred to as semiautomatic "assault weapons," are generally recognized as particularly suitable for military and not sporting purposes. The council further finds and declares that ammunition feeding devices which are capable of holding more than five rounds of ammunition and which are capable of being used in assault weapons are particularly suitable for military and not sporting purposes. The council further finds and declares that because assault weapons and such ammunition feeding devices pose a grave threat to law enforcement officers and to the public, it is necessary to impose restrictions on the possession, sale and use of such weapons and ammunition feeding devices. It is not, however, the council's intent to place additional restrictions on the

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possession, sale or use of rifles and shotguns which are primarily designed and intended for hunting, target practice or other legitimate sports or recreational activities.

The ordinance defines "assault weapons" to include these items:

(a) Any semiautomatic centerfire or rimfire rifle or semiautomatic shotgun which has one or more of the following features:

1. folding or telescoping stock or no stock;
2. pistol grip that protrudes conspicuously beneath the action of the weapon;
3. bayonet mount;
4. flash suppressor or threaded barrel designed to accommodate a flash suppressor;
5. barrel shroud;
6. grenade launcher; or
7. modifications of such features, or other features, determined by rule of the commissioner to be particularly suitable for military and not sporting purposes. In addition, the commissioner shall, by rule, designate specific semiautomatic centerfire or rimfire rifles or semiautomatic shotguns, identified by make, model and/or manufacturer's name, as within the definition of assault weapon, if the commissioner determines that such weapons are particularly suitable for military and not sporting purposes.

(b) Any shotgun with a revolving-cylinder magazine.

(c) Any part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon.

(d) "Assault weapon" shall not include any rifle or shotgun modified to render it permanently inoperative.

#### § 10-301(16).

The law provides for New York City's Police Commissioner to promulgate a list of specific firearms that fall within the assault weapon ban. § 10-301(16)(a)(7). Pursuant to this authority, the Commissioner established a Firearms Review Committee comprised of individuals within the Police Department with expertise in firearms. Based on the recommendations of this Committee, the Commissioner issued a list of firearm makes and models to be treated as assault weapons.

Local Law 78 defines "ammunition feeding devices" as "[m]agazines, belts, feedstrips, drums or clips capable of being attached to or utilized with firearms, rifles, shotguns or \*281 assault weapons." §

10-301(17). The law bans possession or disposition of any such feeding devices capable of holding more than five rounds of ammunition if designed for use with a rifle or shotgun, § 10-306, or capable of holding more than seventeen rounds of ammunition if designed for use with a handgun, § 10-131(i)(6).

The law makes any illegal possession or transfer of an assault weapon or any of the proscribed ammunition feeding devices a criminal misdemeanor punishable as a first unaggravated offense by imprisonment of not more than fifteen days and/or a fine of up to \$300. Subsequent offenses are also deemed misdemeanors, but expose a defendant to imprisonment of up to one year and/or a fine of up to \$5,000. §§ 10-303.1(b), 10-310. Possession or transfer of ammunition feeding devices not designed for use with a handgun and holding more than seventeen rounds of ammunition is punishable by a fine of not more than \$1000 and/or by imprisonment of not more than one year. § 10-131(i)(14). The same conduct carries a possible civil penalty of up to \$1,000 for an unaggravated first violation and up to \$10,000 for each violation thereafter. §§ 10-303.1(c), 10-131(i)(15).

Certain exceptions apply to the local law's prohibitions against assault weapons and specified ammunition feeding devices. § 10-305. Most notably, the prohibitions do not apply to state and city police or peace officers carrying such items in the lawful performance of their duties. § 10-305(c). Neither do they apply to members of the federal or state armed forces who are authorized by law to carry these weapons. § 10-305(c) and (d). The law does not, however, exempt persons participating in the federal government's Civilian Marksmanship Program. § 10-305(1).

Local Law 78 provides no "grandfather clause" protection for those already in possession of the proscribed assault weapons or ammunition feeding devices. It did, however, grant those persons holding permits for such devices a grace period of ninety days from the effective date of the law either to surrender them to the appropriate authorities or lawfully to remove them from New York City. In January of 1992, the Police Commissioner notified all permit holders that the deadline for compliance was April 18, 1992.

Persons holding assault weapons or proscribed ammunition feeding devices without permit were expected to surrender these immediately to authorities, but the law immunized those who complied with this

provision from prosecution for unlawful possession. § 10-305(f), 10-131(16). Indeed, the option for such voluntary surrender without prosecution remains available under the law. *Id.*

### Discussion

#### I. Summary Judgment

Summary judgment is appropriate only when there are no genuine issues of material fact requiring resolution at trial and when it can be said that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309 (2d Cir.1994). The movant bears the initial burden of demonstrating the absence of any genuine issue of fact. *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d at 309. A party opposing summary judgment must then come forward with specific evidence that, if credited, would support a verdict in its favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). In this case, the court finds that the evidence proffered by plaintiffs in opposition to defendants' motion for summary judgment, even if credited, is not sufficient to support the federal challenges they raise to the enforcement of Local Law 78.

#### II. Rationality of the Ordinance

[1] Plaintiffs contend that Local Law 78 is irrational and arbitrary and, therefore, violative of due process and equal protection in that (1) it defines semiautomatic rifles and shotguns as assault weapons when, in fact, only automatic weapons are accurately categorized as such; (2) it finds that semiautomatic weapons are suited for military purposes when all armed services rely only on \*282 automatic weapons; and (3) it serves no legitimate governmental purpose. The challenge is patently without merit and can be rejected as a matter of law.

[2] Plaintiffs' first two arguments are disposed of easily. As the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") noted when it banned the importation of certain semiautomatic rifles in 1989, although "[t]rue assault rifles are selective fire weapons that will fire in a fully automatic mode," certain semiautomatic rifles are nevertheless also "often referred to as 'assault rifles,' 'assault-type rifles,' 'military style rifles,' or 'paramilitary rifles.'" Report and Recommendation of the ATF Working Group on

the Importability of Certain Semiautomatic Rifles 6 (1989) ("ATF Report") (Exh. F to Defendants' Notice of Motion). This is because certain semiautomatic rifles are "versions of true selective fire military assault rifles." *Id.* Modern military rifles contain "a variety of physical features and characteristics designed for military applications which distinguish[ ] [them] from traditional sporting rifles. These military features and characteristics (other than selective fire) are carried over to the semiautomatic versions of the original military rifle." *Id.* In light of these common features, it cannot be said that the City Council acted irrationally in concluding that certain semiautomatic rifles and shotguns were more suited to military rather than sporting purposes. Neither can it be said that its decision to label such arms as assault weapons was arbitrary.

Defendants also easily explain the legitimate governmental purpose behind Local Law 78: the promotion of public safety. They note the high density of New York City's population and the disturbingly large number of homicides annually caused by gunfire within its borders. They submit that the risk to public safety increases when persons are armed with weapons such as semiautomatic rifles or shotguns capable of firing large amounts of ammunition at close range in a short period of time. Under such circumstances, they contend that it was a rational exercise of the city's police power to enact legislation restricting the possession of such weapons within the city. The court agrees.

[3][4][5][6] The promotion of public safety is "unquestionably at the core" of a municipality's police power. See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 1445-46, 47 L.Ed.2d 708 (1976). Legislation enacted pursuant to this power is entitled to a strong presumption of validity. *Id.* So long as a law does not infringe on fundamental rights or discriminate against suspect classes, a court must accord "wide latitude" to a legislature's judgment as to the circumstances warranting exercise of a city's police power. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations...."). Thus, the question for this court is not whether New York City can "establish" a 'genuine public need' " for the challenged ordinance. *Kelley v. Johnson*, 425 U.S. at 247, 96 S.Ct. at 1445-46. Rather it is whether plaintiffs can demonstrate that there is "no rational connection between the regulation ... and the promotion of safety

of persons and property." *Id.* Indeed, to succeed on their constitutional claims, plaintiffs must demonstrate that the ordinance is "so irrational that it may be branded 'arbitrary.'" *Id.* at 248, 96 S.Ct. at 1446.

Plaintiffs cannot meet this heavy burden. The rational link between public safety and a law proscribing possession of semiautomatic rifles and shotguns is so obvious that it would seem to merit little serious discussion. But the court does note that the record of proceedings before the City Council prior to its enactment of Local Law 78 provides strong support for its action. For example, Manhattan District Attorney Robert M. Morgenthau reminded the Council that, in 1991, the city had its highest number of homicides--2,250--of which 69% involved the use of a gun. While most of these homicides were committed with handguns, Mr. Morgenthau nevertheless sounded this caution:

The use of high-powered assault weapons is growing at an alarming rate. Drug dealers, organized crime and other gang members covet them because they are \*283 powerful, have a rapid firing mechanism, are quick to reload and can be equipped with detachable magazines that carry 30 or more rounds.

Hearings before the Comm. on Public Safety of the New York City Council, June 26, 1991 (Exh. E to Defendants' Notice of Motion).

The point was echoed by Brooklyn District Attorney Charles J. Hynes:

Assault weapons may not have outpaced handguns as the weapons of choice on Brooklyn streets, but they are of great concern to my office because of the danger that they pose to innocent bystanders. Assault weapons can spray a crowd with up to 100 rounds of ammunition. Their bullets can penetrate steel doors, as well as several walls and ceilings....

*Id.*

Joining his colleagues in urging the Council to take action was Bronx District Attorney Robert T. Johnson:

These military-style weapons, designed for no other purpose than to take human life as efficiently as possible, are becoming common on our streets. They are particularly attractive to drug dealers, who used them to increase their firepower as well as ... to intimidate each other and the community at large. Last month, my Office executed a series of search warrants ... into the operation of a major Bronx narcotics ring. The raids netted some 23 assorted firearms, including seven assault weapons of various

types. The presence of such lethal hardware in the hands of narcotics dealers and other criminals poses a significant threat to the public safety. It is also of grave concern to law enforcement personnel, who more and more often are finding themselves outgunned as well as overburdened.

*Id.*

Not insignificantly, the Council was aware of the 1989 ATF ban on the importation of 43 specific models of semiautomatic assault rifles into the United States. This step was taken, at least in part, because of "the growing problem presented by semiautomatic assault-type rifles and their use in crime in the United States," particularly "the illicit drug trade." See Affidavit of then-ATF Director Stephen E. Higgins ¶¶ 6, 12 (Exh. D to Defendants' Notice of Motion). The proliferation of such weapons was evidenced by agency importation statistics, which indicated that in 1985 and 1986 approximately 4,000 semiautomatic assault-type rifles were approved for importation into the United States. By 1987, that figure had jumped to approximately 39,000. By the third month of 1989, when ATF suspended importations, the agency had applications pending to import over 111,000 assault-type rifles and outstanding permits to import over 420,000 more. *Id.* at ¶ 11. Of course, as Mayor Dinkins pointed out to the City Council, the federal prohibition against the importation of semiautomatic assault rifles did not affect domestic production of such weapons, which were readily available to the public. See Hearings before Comm. for Public Safety of the New York City Council, June 26, 1991.

Plaintiffs nevertheless insist that the statistical and anecdotal evidence presented to the City Council in support of the local law was flawed and overstated the risk to public safety from the semiautomatic rifles and shotguns proscribed by Local Law 78. For example, plaintiffs note that certain studies cited to the Council did not distinguish between fully automatic and semiautomatic weapons or between semiautomatic handguns and rifles. Plaintiffs consider the latter omission particularly troublesome because most homicides are still committed with handguns, possession of which is not prohibited by the local law. They further submit that certain of the shooting incidents involving semiautomatic rifles that were cited to the Council would have been just as tragic in result if the perpetrator had been armed with a different weapon.

[7][8] Even assuming the correctness of plaintiffs'

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statistical analysis, [FN2] they have not \*284 demonstrated that Local Law 78 is irrational. See generally *Gun South, Inc. v. Brady*, 877 F.2d 858, 866 (11th Cir.1989) (rejecting rationality challenge to federal ban on importation of semiautomatic rifles). Legislation need not be supported by precise empirical evidence to survive rational scrutiny. See *Vance v. Bradley*, 440 U.S. 93, 110-111, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979); *Disabled American Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 143 (2d Cir.1992). Indeed, the fact that weapons other than those proscribed by Local Law 78 also pose risks to public safety is of no constitutional import. A "statute is not invalid under the Constitution because it might have gone farther than it did." *City of New Orleans v. Duke*, 427 U.S. at 305, 96 S.Ct. at 2517-18 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828 (1966)). Legislatures are free to attack problems of public safety one step at a time and in such order as they deem appropriate. *Id.* at 303, 96 S.Ct. at 2516-17. At the time Local Law 78 was enacted, various federal and New York State statutes addressed automatic weapons and handguns. While some city officials were of the view that this legislation was not strong enough, it was certainly reasonable for the Council to focus its attention on what it perceived to be an otherwise unaddressed problem. Plaintiffs have simply failed to demonstrate that, on the evidence before it, the Council could not reasonably have believed that the weapons proscribed in Local Law 78 presented a real and growing risk to public safety. See *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 463, 108 S.Ct. 2481, 2490, 101 L.Ed.2d 399 (1988).

FN2. Although plaintiffs submit that the link between semiautomatic assault rifles and crime is more speculative than real, the most cursory research calls this conclusion into question by confirming the frequency with which semiautomatic rifles figure in federal criminal cases. See, e.g., *United States v. Webb*, 49 F.3d 636, 637 (10th Cir.1995) (defendant convicted of possession of 142 cultivated marijuana plants and .22 caliber semiautomatic rifle with homemade silencer); *United States v. Garrett*, 45 F.3d 1135, 1136 (7th Cir.) (semiautomatic sawed-off assault rifle used to protect drug enterprise), *cert. denied*, 514 U.S. 1134, 115 S.Ct. 2015, 131 L.Ed.2d 1013 (1995); *United States v. James*, 40 F.3d 850, 857 (7th Cir.1994) (loaded Luger .44 caliber semiautomatic rifle found during raid on cocaine and heroin traffickers), *cert. denied*, 513 U.S. 1132, 115 S.Ct. 948, 130 L.Ed.2d 891 (1995), and *cert. denied*, 513 U.S. 1177, 115 S.Ct. 1160, 130 L.Ed.2d 1116 (1995); *United States v. Lopez*, 37 F.3d 565, 567 (9th Cir.1994) (loaded AK-47 assault rifle discovered in

trash can during arrest of heroin traffickers), *cert. denied*, 515 U.S. 1102, 115 S.Ct. 2246, 132 L.Ed.2d 254 (1995); *United States v. Arocena*, 778 F.2d 943, 948 (2d Cir.1985) (terrorist convicted of first degree murder and two conspiracies to murder diplomats used two AR-15 rifles), *cert. denied*, 475 U.S. 1053, 106 S.Ct. 1281, 89 L.Ed.2d 588 (1986).

Indeed, a number of other cities and states have enacted legislation prohibiting the possession of semiautomatic assault-type rifles. See *Robertson v. Denver*, 874 P.2d 325, 335 (Colo.1994) (upholding Denver ordinance banning possession and disposition of semiautomatic rifles and shotguns, but severing provision pertaining to semiautomatic pistols); *Citizens for a Safer Community v. Rochester*, 164 Misc.2d 822, 826, 627 N.Y.S.2d 193, 197 (Sup.Ct. Monroe Co. 1994) (finding portion of Rochester ordinance criminalizing sale and possession of semiautomatic rifles or shotguns capable of using ammunition feeding devices holding more than six rounds to be constitutional); *Arnold v. Cleveland*, 67 Ohio St.3d 35, 49, 616 N.E.2d 163, 173 (1993) (holding Cleveland ordinance prohibiting possession and sale of "assault weapons," including semiautomatic rifles and handguns, to be reasonable exercise of city's police power). Moreover, in 1994, Congress decided that semiautomatic rifles and shotguns akin to those proscribed by Local Law 78 presented a sufficient risk to national public safety that it enacted legislation limiting their possession and transfer. 18 U.S.C. § 921(a)(30)(B) (1988 & Supp.1995). The fact that New York City is not alone in limiting the possession of these weapons further undermines plaintiffs' rationality challenge.

The court recognizes that there is room for responsible public debate on the subject of gun control. Certainly, persons with strong views both for and against such legislation have actively lobbied national and local lawmakers for over twenty years. But the mere fact that persons may hold different opinions on a subject or that evidence can be marshalled in support of different views does not make an ultimate legislative choice between the two positions "irrational" or "arbitrary." To the contrary: it is precisely when facts and policies are arguable that courts must defer to legislative judgment. *Vance v. Bradley*, 440 U.S. at 112, 99 S.Ct. at 950. \*285 Summary judgment is entered in favor of defendants on this claim.

### III. Federal Preemption

[9] Plaintiffs ask this court to find Local Law 78 preempted by those federal laws and regulations

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establishing the Civilian Marksmanship Program ("CMP").

[10] The concept of federal preemption derives, of course, from the Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2. The significance of the Clause was made plain by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824): state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" will not stand. *Id.* at 211.

[11][12] Precisely because the Supremacy Clause does afford Congress "extraordinary power in a federalist system," courts do not readily assume its exercise. See *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400-01, 115 L.Ed.2d 410 (1991). To the contrary, the well-established presumption is against federal preemption of local law unless a court is "absolutely certain" that such was Congress's intent. *Id.* at 464, 111 S.Ct. at 2402-03; *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128-29, 68 L.Ed.2d 576 (1981). Such certainty is particularly warranted when a challenged local law concerns public safety since the proper "assumption [is] that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); accord *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989).

[13] Congress's intent to preempt local law can be expressed in various ways. Most plainly, it can be stated explicitly in a federal statute. See, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990) (discussing explicit preemption provision of ERISA). It can also be evidenced by a pervasive scheme of federal regulation that leaves no room for any state or local role. See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) (finding F.A.A. and E.P.A. regulation of aircraft noise so pervasive as to exclude state and local regulation).

Plaintiffs concede that, in providing for the CMP, Congress has nowhere used express language to preempt state and local gun control laws. Neither has it established a scheme of regulation so comprehensive as to displace state and local law. To the contrary, compliance with certain local safety law is expressly required under the CMP. See, e.g., 32 C.F.R. §§

543.9(1)(d)(iii)(D); 543.17(g)(5)(ii); 543.17(g)(5)(v); 543.21(a)(2); 543.22(a)(i), (ii) (1994). Instead, plaintiffs urge preemption on the ground that Local Law 78 conflicts with the federal laws and regulations pertaining to the CMP.

[14] Courts have recognized that local law is appropriately preempted "to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). Such a conflict, however, must be real; it will not be "implied." *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275, 63 S.Ct. 617, 623-24, 87 L.Ed. 748 (1943). Thus, for a conflict between federal and local laws to warrant preemption, " 'compliance with both federal and state regulations' " must be " 'a physical impossibility,' " *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, *supra* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963)), or compliance with the local law must stand " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " *id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). The key question is whether the consequences of complying with the local law "sufficiently injure the objectives of the federal program to require nonrecognition." *McCarty v. McCarty*, 453 U.S. 210, 232, 101 S.Ct. 2728, 2741, 69 L.Ed.2d 589 (1981) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583, 99 S.Ct. 802, 809, 59 L.Ed.2d 1 (1979)).

In order to determine whether there is such a conflict between the CMP and Local Law 78, this court must examine both the objectives of this federal program and the statutes and regulations pertaining to it.

The CMP was established by Congress in 1904 to familiarize young men with the use of firearms and to develop their marksmanship proficiency should they ever be called to duty in the armed forces. See Senate Report No. 1852, 58th Cong.2d Session (1904) (endorsing recommendation of the National Board for the Promotion of Rifle Practice that it "qualify[ ] as finished marksmen those individuals who may be called upon to serve in time of war ..."). From time to time, critics have questioned the continuing need for the program, particularly as military technology grows more sophisticated. Nevertheless, Congress has continued to support the CMP. This court must respect its judgment that the program has a place in the

country's larger defense plan. [FN3]

FN3. In fiscal year 1994, the CMP was allocated \$2.48 million. The total defense budget that year exceeded \$250 billion. Budget of the United States Government, Fiscal Year 1996 (U.S. Government Printing Office) (reporting 1994 actual amount).

To promote civilian marksmanship proficiency, Congress has authorized the President to "detail a commissioned officer of the Army or of the Marine Corps as director of civilian marksmanship, to serve under the direction of the Secretary of the Army." 10 U.S.C. § 4307 (1988). The Secretary of the Army is in turn directed to provide, among other things, for (1) the operation and maintenance of rifle ranges; (2) the instruction of citizens in marksmanship; (3) the promotion of practice in the use of rifled arms, as well as "the maintenance and management of matches or competition in the use of those arms, and the issue without cost, of the arms, ammunition, targets and other supplies and appliances necessary for those purposes"; (4) the award of prizes to competitors; (5) the loan or sale of various weapons, including "caliber .30 rifles" to approved gun clubs; and (6) the sale of surplus M-1 Garand rifles to citizens over 18 who are members of approved gun clubs. 10 U.S.C. § 4308(i)-(6) (1988 & Supp.1995).

32 C.F.R. § 621.2 (1994) establishes the requirements for the sale of surplus weapons to civilians, presumably including the sale of the M-1 Garand rifles referred to in § 4308(6). It states that such sales "will be limited to quantities ... which authorized purchasers can put to their own use. It is not intended that property be sold under the provisions of this section for the purpose or [sic] resale or other disposition." § 621.2(a)(3).

Other regulations implementing the CMP are found at 32 C.F.R. § 543.1 *et seq.* (1994). Pursuant thereto, local shooting clubs, such as plaintiff Richmond Boro Gun Club, are approved for participation in the program by the Director of Civilian Marksmanship. 32 C.F.R. § 543.9. Approval will not be granted if any adult club member has been convicted of or has charges pending against him for any "violation of Federal, State, or local firearms regulations." 32 C.F.R. § 543.9(1)(d)(iii)(D). Approved clubs may receive marksmanship training materials subject to availability. 32 C.F.R. § 543.10(a). Based on the number of members, clubs can also be loaned certain caliber .22 and caliber .30 rifles. 32 C.F.R. § 543.10(b) and (d). Richmond Boro Gun Club has received a number of weapons from the federal

government pursuant to these regulations.

Responsibility for any government-issued property rests with club officers. 32 C.F.R. § 543.17(a). Weapons supplied by the government may, however, be issued to the custody of individual adult members who can provide the security required by regulation. 32 C.F.R. § 543.17(g)(3). The pertinent security regulation states that "[a]rms may be stored in the homes of the club custodian and of individual members" so long as they are not in view and are kept in a locked container as specified. 32 C.F.R. § 543.17(g)(5)(ii) (emphasis added). There is, however, a further mandate that "[s]torag[e] will, in addition, conform to local ordinances and regulations, if any." 32 C.F.R. § 543.17(g)(5)(v). As is apparent, the regulation only permits and does not require that government-issued \*287 firearms be stored in private homes. Indeed, the regulation states that "[s]torage at a military or law enforcement facility is encouraged when deemed feasible by the club." 32 C.F.R. § 543.17(g)(5)(vi).

Participating clubs "must conduct an active rifle marksmanship training program (firing and nonfiring) for a reasonably permanent membership for at least nine months each year." 32 C.F.R. § 543.13. At least once a year, each club member must fire a rifle course prescribed by the Director of Civilian Marksmanship. 32 C.F.R. § 543.14(a). The regulations do not require this course to be completed at any particular site. Although private ranges can be used, the regulations also contemplate that approved club members will be permitted to practice marksmanship on military bases "subject to local range regulations," 32 C.F.R. §§ 543.21(a)(2), and in "compliance with local safety and other regulations." 32 C.F.R. § 543.22(a)(1)(ii). [FN4]

FN4. Plaintiffs point out that such military facilities as exist within New York City, for example, Fort Hamilton, do not have firing ranges. That, however, may say more about the proper concern even the organized armed forces have for firing rifles in an urban area than it does about the propriety of preempting Local Law 78.

By statute, the Secretary of the Army is required to conduct annual marksmanship competitions called the National Matches. 10 U.S.C. § 4312. These are generally held at Camp Perry, Ohio. 32 C.F.R. § 544.9. A host of regulations prescribe the policies and procedures for the National Matches. These same policies and procedures apply to other competitive matches, which are permissive rather than mandated. For example, they apply to any matches "established"

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by the armed services "in which civilians may participate." 32 C.F.R. § 544.4(c). Similarly, civilian clubs "may conduct similar matches in conjunction with NRA Regional and State Championships" with the approval of the Director of Civilian Marksmanship. 32 C.F.R. § 544.4(d) (emphasis added). Both the mandated National Matches and any discretionary local matches are recognized as "part of the CMP" and "are intended to promote the national defense." 32 C.F.R. § 544.4(b).

The regulations applicable to the National Matches (and any others conducted pursuant to the CMP) provide for various competitive categories, some of which plainly pertain only to individuals directly associated with the military, such as (1) regular service members, (2) members of the reserve branches, (3) members of the National Guard, and (4) individuals enrolled in the service academies or an ROTC unit. 32 C.F.R. § 544.34(a)-(d). Another competitive category applies to police officers. 32 C.F.R. § 544.34(e). There are two competitive categories for civilians, one for persons under 20 years of age, the other for persons 20 or older. 32 C.F.R. § 544.34(f)-(g). It is presumably in these that CMP members would most often participate.

The arms to be used in the National Matches and any other competitions governed by the applicable regulations are specifically set forth: (1) a US rifle, caliber .30 M1 as issued by the Army or a commercial rifle of the same type and caliber; (2) a US rifle, caliber 7.62mm M14 series or a commercial rifle of the same type and caliber; (3) a US rifle, caliber 5.56mm M16 series or a commercial equivalent; and (4) a US pistol, caliber .45M1911 or M1911A1 or a commercial equivalent. 32 C.F.R. § 544.52(a)-(d).

In urging this court to find Local Law 78 preempted by the federal laws and regulations just outlined, plaintiffs emphasize that decisions pertaining to the proper defense of this country rest exclusively with the national government and cannot be impeded by the states. This is obvious. What is not so plain, however, is plaintiffs' contention that the enforcement of Local Law 78 will in any way hinder that part of the national defense strategy represented by the CMP.

Plaintiffs attempt to identify a conflict in the fact that Richmond Boro Gun Club has already been issued various rifles pursuant to the above-referenced CMP regulations while Local Law 78 prohibits the continued possession of these weapons. Similarly, they complain that club members either have bought or wish to buy

M-1 Garand rifles from the government, which conduct is also violative of the local law. Plaintiffs are mistaken in their analysis.

\*288 Local Law 78 does not prohibit city residents from receiving CMP-issued rifles nor from purchasing M-1 Garand rifles. It requires only that they store and use these weapons outside city limits. Nothing in the applicable federal laws or regulations requires a CMP club or its members to store or practice with these rifles in New York City or at any particular site. Plaintiffs' real complaint then is not conflict between federal and local law but personal inconvenience, since they are barred from keeping assault weapons in their homes and from practicing with them at their club's Staten Island rifle range. But such inconvenience is of no legal import. Home storage of government-issued weapons is only permitted under federal regulation; it is not mandated. 32 C.F.R. § 543.17(g)(5)(ii). The only storage site actively "encouraged" by federal regulation is storage at military or police facilities. 32 C.F.R. § 543.17(g)(5)(vi). Since such storage would necessarily require civilians to travel at least some distance from their homes to gain access to their rifles, and since such access might further be limited by the hours when such facilities are open to the public, it necessarily follows that no link exists between the federal interest in promoting civilian marksmanship and the site where persons store their weapons. Similarly, since federal law does not require CMP clubs to maintain their own ranges, the fact that plaintiffs will not be able to use assault rifles on their Staten Island range but will have to use some other facility does not evidence a conflict requiring preemption.

Plaintiffs cite as a further conflict New York City's ban on three rifles--the M1, M14, and M16--specifically prescribed by federal regulation for use in CMP matches. 32 C.F.R. § 544.52(a)-(c). Here again, there is no real conflict. Local Law 78 does not prohibit city residents from using such weapons in CMP matches. It simply stands as a practical bar to any such matches being held in New York City and to city residents practicing with M1, M14, or M16 rifles within the five boroughs. The applicable federal laws and regulations nowhere require that any CMP matches be held in New York City. Indeed, they do not specifically require that any CMP matches be held other than the National Matches at Camp Perry, Ohio. The regulations merely provide that regional and state CMP matches *may* be held in conjunction with NRA championships. 31 C.F.R. § 544.4(d). The court is convinced that the federal interest in promoting civilian

marksmanship does not depend on competitive matches being held in New York City. Thus Local Law 78's prohibition against possession of M1, M14, and M16 rifles within the city is not in conflict with the CMP.

Those plaintiffs who have purchased M-1 Garand rifles from the federal government claim that they cannot possibly comply with both federal and local law since, at the time of acquisition, they signed a sworn statement that they were acquiring the weapon for personal use and not for resale or disposition. 32 C.F.R. § 621.2(a)(3). They submit that it is impossible for them to dispose of these guns and bring themselves into compliance with Local Law 78 without thereby violating federal regulations. In fact, plaintiffs could comply with both federal and local law by either returning their Garand rifles to the federal government or by storing them out of New York City. The federal government's obvious concern that Garand rifles not be acquired for resale or transfer to unauthorized persons is in no way undermined by Local Law 78.

As noted at the outset, the primary objective of the CMP is the promotion of marksmanship skills among civilians who may be called upon to serve in the armed forces in time of war. Nothing in the record indicates that the development of accurate marksmanship is dependent upon the exclusive use of semiautomatic weapons or ammunition firing devices that store large numbers of rounds. Civilian marksmanship can thus still be practiced by plaintiffs within New York City in a real and meaningful way so long as they do not use proscribed weapons. To the extent plaintiffs do wish to use assault weapons, whether to complete their annual CMP certification or to prepare for or participate in certain competitive matches, their continued ability to do so outside New York City suffices to ensure that the federal goals of the CMP and the public safety concerns of Local Law 78 can both be realized without conflict. \*289 Summary judgment is entered in favor of defendants on plaintiffs' claim of federal preemption.

#### IV. Vagueness

[15] Plaintiffs contend that the definition of "assault weapon" in Local Law 78 is so vague on its face as to deny due process.

[16][17][18] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayne v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). The concern animating the vagueness

doctrine is two-fold: (1) does the law give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"; and (2) does the law provide reasonable standards to law enforcement authorities to ensure against arbitrary and discriminatory application. *Id.* at 108-09, 92 S.Ct. at 2298-99. A law is not impermissibly vague simply because it "requires a person to conform his conduct to an imprecise but comprehensible normative standard." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 7, 102 S.Ct. 1186, 1191 n. 7, 71 L.Ed.2d 362 (1982) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971)). What due process will not tolerate is a law that specifies "no standard of conduct ... at all." *Id.*

[19] As plaintiffs concede, Local Law 78 implicates no constitutionally protected conduct. As a result, their facial vagueness challenge can succeed "only if they demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 495, 497, 102 S.Ct. at 1191-92, 1193 (emphasis added); *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir.1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1283, 122 L.Ed.2d 676 (1993); *Brache v. County of Westchester*, 658 F.2d 47, 50 (2d Cir.1981). As long as the law clearly encompasses at least some core of conduct in which plaintiffs engage, a court will not entertain a facial vagueness challenge to other conduct, whether real or hypothetical, by plaintiffs or others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 495, 501-02, 102 S.Ct. at 1191-92, 1194-95; *Brache v. County of Westchester*, 658 F.2d at 51-54.

Plaintiffs have failed to frame their attack in light of this standard. Instead, they hypothesize some ambiguous application for each factor used by New York City to identify the semiautomatic rifles and shotguns that will be deemed assault weapons under Local Law 78. But such conjectures hardly suffice to establish vagueness in all applications of the law.

For example, plaintiffs complain that defining assault weapons to include rifles or shotguns with a "folding or telescoping stock or no stock" is vague because some person might unwittingly violate the law by removing a stock for a brief period to clean or transport a weapon. This possibility ignores the "core" category of weapons within this factor that are clearly intended to be the focus of the legislation: those either equipped with

folding stocks or with permanently-removed stocks. The governmental concern is that such weapons can be discharged in a way that is characteristic of military and not sporting weapons. Since persons have plain notice of the applicability of the law to this core group of weapons, there is no facial vagueness in this factor.

Plaintiffs further complain that defining an assault weapon by reference to "a pistol grip that protrudes conspicuously beneath the action of the weapon" is impermissibly vague because it is unclear what is meant by "conspicuously." The argument is disingenuous. As is made plain in the earlier-cited ATF Report prepared in connection with that agency's ban on the importation of assault weapons, most sporting firearms "employ a more traditional pistol grip built into the wrist of the stock of the firearm." ATF Report at 7 (emphasis added). By contrast, "[t]he vast majority of military firearms employ a well-defined pistol grip that protrudes conspicuously beneath the action of the weapon." *Id.* (emphasis added). The latter design is favored in military weapons because it aids in "one-handed firing" at hip \*290 level, a technique sometimes required in combat, but "not usually employed in hunting or competitive target competitions" where a firearm is held with two hands and fired at shoulder level. *Id.* Although plaintiffs argue that any rifle can be shot with one hand and at hip level, that is hardly the point. This factor aims to identify those rifles whose pistol grips are designed to make such spray firing from the hip particularly easy. Even a cursory review of the photographs submitted by the parties demonstrates that a sufficient number of assault rifles are so plainly equipped with grips that protrude conspicuously that it cannot be said that the factor is vague in all applications. Indeed, the court notes that Congress itself chose the very same formulation as a defining term for assault weapons in federal legislation. 18 U.S.C. § 921(a)(30)(B)(ii).

Plaintiffs submit that defining assault weapons with reference to features such as a "bayonet mount," "a flash suppressor or threaded barrel designed to accommodate a flash suppressor," a "barrel shroud," or a "grenade launcher," violates due process because a host of items exist that, although not specifically intended to serve these purposes, could arguably do so, thereby subjecting an unsuspecting gun owner to criminal liability. This argument, however, defeats itself. As already noted, when a statute is challenged for facial vagueness, the issue is not whether plaintiffs can posit some application not clearly defined by the legislation. The issue is whether all applications are impermissibly vague. Certainly, there is no vagueness

when the statute is applied to firearms advertised to include parts identified as bayonet mounts, flash suppressors, barrel shrouds, or grenade launchers.

Finally, plaintiffs complain that Local Law 78 is impermissibly vague in defining as an assault weapon "[a]ny part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon." They submit that a rifle manufacturer's intent in designing a gun may not easily be discernable from the mere appearance of a weapon.

The Supreme Court has, however, already rejected vagueness challenges to similar language in other statutes. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, the Court upheld a local ordinance requiring businesses to obtain licenses if they sold items "designed or marketed for use with illegal cannabis or drugs." The "designed" standard was held to encompass "at least an item that is principally used with illegal drugs by virtue of its objective features." 455 U.S. at 501, 102 S.Ct. at 1195. Although application of this standard might, in some cases, be ambiguous, it was sufficient to cover "at least some of the items" sold by Flipside and, thus, to preclude a facial vagueness challenge. Similarly, the vagueness challenge to the "marketed" standard was rejected in light of the implicit scienter element, "since a retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.* at 502, 102 S.Ct. at 1195. See also *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, ---, 114 S.Ct. 1747, 1750, 128 L.Ed.2d 539 (1994) (upholding federal statute that defined drug paraphernalia as items "primarily intended ... for use" or "designed for use" with controlled substances, although holding that neither standard required proof of scienter).

Applying the same analysis to this case, this court is persuaded from many of the submitted advertisements for semiautomatic rifles that the objective features of at least some of these firearms clearly bring them within the "designed" standard of Local Law 78. Whether the "intended to convert" standard does or does not require proof of scienter is a question that can be left for the New York courts. The fact remains that plaintiffs have failed to show that all applications of Local Law 78 are unconstitutionally vague.

#### V. Due Process

[20] Plaintiffs claim that New York State law creates a liberty and property interest in the people to bear arms.

See N.Y.Civ.Rights Law, art. 2, § 4 (McKinney 1992); N.Y.Gen.Mun.Law, art. 6, § 139-d (McKinney 1989); N.Y.Penal Law, arts. 265, 400 (McKinney 1987). Insofar as Local Law 78 deprives them of this interest, they assert it violates the due process guaranteed by the Fourteenth Amendment. The court assumes that \*291 plaintiffs invoke procedural due process since violations of state law generally do not give rise to substantive due process claims. See *Weimer v. Amen*, 870 F.2d 1400, 1405-06 (8th Cir.1989).

In fact, it is far from clear that the state laws cited by plaintiffs do create a liberty or property interest in possessing semiautomatic weapons. Plaintiffs' argument in this respect depends largely on their pendent claim of state law preemption. For the reasons stated by Chief Magistrate Judge Chrein in his report, the merits of this claim are dubious at best. If they were presented to New York's highest court and rejected, there would be no basis for a federal due process claim. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971) (existence of liberty or property right entitled to protection of procedural due process depends on right being recognized under state law); accord *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989); *West Farms Assocs. v. State Traffic Comm'n*, 951 F.2d 469 (2d Cir.1991).

[21] When a federal constitutional claim is so dependent upon the interpretation of an uncertain state statutory scheme, and when state law is susceptible to an interpretation that could avoid or modify the constitutional claim, a federal court will, in the interests of comity and federalism, abstain from exercising its jurisdiction to afford the parties an opportunity to seek resolution of the state law question in the local forum. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645-46, 85 L.Ed. 971 (1941); see, e.g., *Greater New York Metro. Food Council v. McGuire*, 6 F.3d 75, 77 (2d Cir.1993).

[22][23] In this case, the court need not simply abstain from hearing plaintiffs' procedural due process claim. Assuming *arguendo* that some liberty or property right is here at stake, plaintiffs have totally failed to demonstrate that they have been denied appropriate procedural safeguards. When legislative as opposed to administrative action is at issue, the only procedure required by the Constitution is judicial review. See *Bowles v. Willingham*, 321 U.S. 503, 519-20, 64 S.Ct. 641, 649-50, 88 L.Ed. 892 (1944); accord *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 142 (2d Cir.1994). Since New York courts are available to

hear declaratory judgment actions challenging the legality of municipal ordinances in light of the state constitution and laws, N.Y.Civ.P.Law § 3017 (1991); e.g., *Jancyn Manuf. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 95, 524 N.Y.S.2d 8, 9, 518 N.E.2d 903, 903-04 (1987); *Sonmax, Inc. v. City of New York*, 43 N.Y.2d 253, 257-58, 401 N.Y.S.2d 173, 176, 372 N.E.2d 9, 11-12 (1977), plaintiffs' procedural due process challenge must be rejected as a matter of law and summary judgment entered in favor of defendants.

#### VI. Delegation of Rule-Making Powers to Police Commissioner

[24] Plaintiffs claim that Local Law 78's delegation of rule-making authority to the Police Commissioner violates the Fourteenth Amendment's Due Process Clause. They further contend that the Commissioner has exercised this authority in an arbitrary and capricious manner in further violation of due process.

The latter claim is based on plaintiffs' argument that no one--whether the City Council or the Police Commissioner--could rationally categorize any semiautomatic rifle or shotgun as an assault weapon suitable for military purposes since no armed forces use such weapons. The court has already rejected this rationality challenge to Local Law 78 generally. For the same reasons, it rejects the argument as made more specifically against the Police Commissioner's exercise of rule-making authority under the law.

Plaintiffs' delegation challenge simply fails to state a cognizable federal claim. Article I, section 1 of the Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Mindful of the Constitution's separation of powers among the branches of the federal government, the Supreme Court has derived from the quoted language a "non-delegation doctrine" prohibiting Congress from transferring its legislative powers to other governmental branches. See *Mistretta v. United States*, 488 U.S. 361, 371, 109 S.Ct. 647, 654, 102 L.Ed.2d 714 (1989); *United States v. Pitera*, 795 F.Supp. 546, 560 (E.D.N.Y.1992). But nothing in the federal Constitution speaks to the delegation of legislative powers by state and local governments. Any such claim must be based on state law. See *Friedman v. Beame*, 558 F.2d 1107, 1111 (2d Cir.1977). Since plaintiffs invoke only the Fourteenth Amendment in support of this claim, judgment is entered in favor of defendants.

#### VII. State Law Preemption

(Cite as: 896 F.Supp. 276, \*292)

[25] Plaintiffs claim that Local Law 78 is preempted by New York State law, specifically N.Y.Civ.Rights Law, art. 2, § 4; N.Y.Gen.Mun.Law, art. 6, § B9-d; and N.Y.Penal Law, arts. 265, 400. This court, having granted judgment in favor of defendants on all federal claims, declines to exercise pendent jurisdiction over this state law question. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Gelles v. TDA Indus., Inc.*, 44 F.3d 102, 106 (2d Cir.1994).

#### *Conclusion*

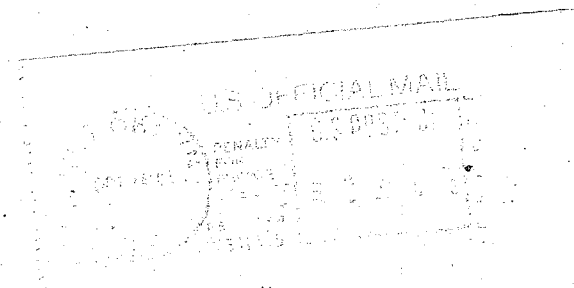
The court rejects as a matter of law plaintiffs' challenge to the rationality of Local Law 78 and to the Police Commissioner's exercise of rule-making

authority under that law. It further rejects as a matter of law plaintiffs' claim that the local law is facially vague in all its applications and their claim that the law is preempted by federal laws and regulations pertaining to the Civilian Marksmanship Program. It finds that plaintiffs have failed to state a federal claim for denial of procedural due process or for impermissible delegation of legislative powers. Accordingly, summary judgment is entered in favor of defendants on all federal claims. The sole remaining claim--alleging state law preemption of Local Law 78--is dismissed for lack of independent federal jurisdiction.

*SO ORDERED.*

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CHAMBERS OF REENA RAGGI  
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