

## RELIGION LAW

# Security for Houses of Worship: The Law, and Practical Steps To Take

As houses of worship face more and more threats and attacks, government officials are offering various forms of assistance and religious leaders are pondering what they can do. In this edition of their Religion Law column, Barry Black and Lane Paulsen discuss the First Amendment implications of these government actions, and offers a guide for steps that institutions can take themselves.

By **Barry Black** and

**Lane Paulsen**

**S**ix people killed at the Sikh Temple of Wisconsin in Oak Creek. Nine killed in an attack on the Emanuel African Methodist Episcopal Church in Charleston. Eleven at the Tree of Life Synagogue in Pittsburgh. More than two dozen at the First Baptist Church in Sutherland Springs, Texas. An untold number wounded, physically and emotionally.

Churches, mosques, temples, synagogues, and other houses of worship around the country—including in New York—are facing more and more threats and attacks on their parishioners and congregations.

Federal, state, and local officials have noticed, and have announced steps intended to offer some measure of protection to those who come together to pray. They must act, of course, in accordance with the parameters of the law, including especially the Establishment Clause of the First Amendment.

Meanwhile, religious leaders wonder what they can do. Obviously, they too must act within specific legal constraints.



**Barry Black and Lane Paulsen**

After briefly highlighting some of the recent actions proposed or taken by the government, this column will explore the key Establishment Clause ground

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rules within which policymakers must act. It concludes by setting forth a variety of practical steps that houses of worship can consider adopting in an effort to enhance their own security.

### **A Sample of Government Actions**

It is only just about two months into the new year, but already all levels

of government have taken some steps with the goal of addressing the problem of attacks on religious institutions.

For example, on the federal level, the bipartisan “Protecting Faith-Based and Nonprofit Organizations From Terrorism Act” has been enacted. The law authorizes \$75 million annually for five years, from fiscal years 2020 to 2024, for the U.S. Department of Homeland Security’s Nonprofit Security Grant Program (NSGP). The program provides grants to faith-based organizations and non-profits to help secure their facilities against a potential terrorist attack.

Of the \$75 million total, \$50 million will be available for non-profits located within high-risk urban areas,

and the remaining \$25 million will be available for organizations that fall outside of those areas. Under the legislation, funding may be used for target-hardening activities, training for personnel, and any other appropriate activity, as defined by the Federal Emergency Management Agency (FEMA). See “Nonprofit Security Grant Program Ensures Synagogues, Religious & Cultural Institutions and Nonprofits Have Resources & Training to Secure Their Facilities, Help Prevent Attacks,” available at <https://www.congress.gov>.

Around the same time as that bill became law, Chad Wolf, the acting secretary of the Department of Homeland Security, directed department leaders to explain how they will seek to prevent violent crime targeting religious groups. In his memorandum, Wolf wrote, “The right to practice religion free of interference or fear is one of our nation’s most fundamental and indelible rights. As such, the targeting of houses of worship by violent extremists of any ideology is particularly abhorrent and must be prevented.” See “Memorandum for DHS Component Heads,” available at <https://www.dhs.gov/>.

At the state level, the budget proposed by Gov. Andrew M. Cuomo at the end of January for the upcoming fiscal year included \$25 million for security grants to religious and non-religious non-profit organizations that are vulnerable to hate crimes. See “Governor Cuomo Outlines FY 2021 Budget: Making Progress Happen,” available at <https://www.governor.ny.gov/>.

And, at the local level, New York City is installing 100 new security cameras in Williamsburg, Crown Heights, and Borough Park with the stated purpose of preventing anti-Semitic hate crimes. See “Mayor de Blasio Announces 100 Security Cameras to be Installed in Brooklyn,” available at <https://www1.nyc.gov/>.

As will be evident, these (and similar) steps all clearly comply with the First Amendment.

## The First Amendment

The First Amendment to the U.S. Constitution states that, “Congress shall make no law respecting an establishment of religion.” It is, of course, also applicable to the states.

Although Establishment Clause jurisprudence in the U.S. Supreme Court is in a state of disarray (according to some) or reformulation (as others contend), in the most common challenges to government action or inaction, the result remains quite clear.

The Establishment Clause prohibits “excessive government entanglement with religion.” *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970). Accordingly, it does not permit direct government funding of religious activities. It does, however, allow the government to provide certain forms of financial support to faith-based institutions. Thus, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the court rejected a challenge to federal aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, providing construction grants for buildings and facilities used exclusively for secular educational purposes.

The court also has decided that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds.

*Widmar v. Vincent*, 454 U.S. 263 (1981), presented the question whether a state university, which made its facilities generally available for the activities of registered student groups, could close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

The court agreed that the interest of the university in complying with its constitutional obligations could be characterized as “compelling,” but said that it did “not follow” that an “equal access” policy was incompatible with the Establishment

Clause. The court reasoned that the policy had a secular legislative purpose, its principal or primary effect was neither to advance nor to inhibit religion, and it did not foster “an excessive government entanglement with religion.”

Significantly, the court declared in *Widmar* that if the Establishment Clause barred the extension of general benefits to religious groups, “a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.”

The court was even more direct about the importance of not excluding religious entities from benefits generally applicable to other groups in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), its seminal opinion directly addressing standards governing aid to religious schools.

In that case, the court declared that there was no Establishment Clause issue with “such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.” These “benefits of public welfare legislation,” the court observed decades later in *Mitchell v. Helms*, 530 U.S. 793 (2000), citing favorably to *Everson*, “were the paradigms of advantages that religious organizations could enjoy consistently with the prohibition against aid, and that governments could extend without deserting their required position of neutrality.”

More recently, the court has gone further and specifically rejected discrimination against religious institutions by the government. As Chief Justice John Roberts stated for the court in *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. \_\_\_ (2017), which involved legislation providing grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires but which categorically disqualified churches and other religious organizations from

receiving any grants, the exclusion of a church from a public benefit for which it is otherwise qualified, solely because it is a church, is “odious to our Constitution.”

Simply put, as the court concluded in *Lynch v. Donnelly*, 465 U.S. 668 (1984), when a benefit to one faith or religion, or to all religions, is indirect, remote, or incidental, there is no Establishment Clause violation.

Elected officials and regulators who act within these constraints, as the examples of recent government actions noted above all do, are not violating the Establishment Clause.

### Steps To Take

Houses of worship need not simply rely on the authorities for protection but, instead, can consider enacting a variety of precautions themselves. Here are five categories of possible actions to take.

First, a house of worship can establish a committee charged with assessing security and planning appropriate steps to take. The committee should be led by someone with the influence and authority to make satisfactory recommendations on policy and should include members with different interests and experiences, including involvement with children’s programs. It is advisable to perform background checks on committee members.

Second, a house of worship can establish a relationship with local authorities. Local police and firefighters should tour the building, be given copies of floor plans, and be told about special events such as major holidays. They can make suggestions as to steps to take to enhance security and safety.

A house of worship also might consider hiring off-duty police officers for security and signing up for NY-Alert, <https://alert.ny.gov/>, to receive information and emergency alerts on what is happening in the surrounding neighborhood.

The third general area of action is to assess risks to the building, clergy, and members of the congregation and

to take specific steps to address those risks.

The factors to consider include the building’s size and location, the specific groups and activities occurring at the facility (for example, children’s classes, pre-teen and teen groups, and seniors or special needs groups), and the different goals the facility has for different days (such as large events and holidays, normal service times, and regular office hours).

A house of worship should consider installing a security system, limiting access to the property and to keys, investing in an automatic access system, identifying public areas and off-limit areas, and requiring identification for staff, volunteers, and members of the congregation. Some of these measures may be eligible for federal or state funding.

The fourth important area is safety training. This can be provided to members of the security team, congregation leaders, staff, and volunteers. Among other things, it is important to provide basic training in screening and proper procedures for reporting suspicious incidents as well as to conduct drills and to make announcements about the location of exits. Many local police and fire departments offer such training at no cost.

Finally, all of these steps should be reflected in formal, thoughtful policies adopted by the security committee and the institution’s leadership. These policies need not be limited to active shooter or terrorist threats but also can include medical incident, natural disaster, and shelter-in-place scenarios. Outside resources including legal counsel, insurance carriers, and security consultants can assist in the preparation of these policies.

Once prepared, policies should be regularly revisited and revised, ideally annually and certainly after any incident, no matter how large or how small.

The house of worship’s bylaws should reference these (and other) policies and should clearly establish a system for drafting, enacting, implementing and enforcing them. Importantly, counsel should review the bylaws for compliance with applicable law.

### Conclusion

Religious leaders, members of congregations, and all others who participate in prayer or other activities at houses of worship are justifiably concerned about the increase in violence targeted at them and their buildings. While the authorities are offering funding, advice, and some measure of protection, there are actions that everyone can take now with the goal of increasing safety for all.

*Barry Black* is a partner in the religion law firm *Nelson Madden Black*, which serves the legal needs of religious institutions and individuals. *Lane Paulsen* is counsel with the firm. Resident in the firm’s offices in Midtown Manhattan, they can be reached at [bblack@nelsonmaddenblack.com](mailto:bblack@nelsonmaddenblack.com) and [lpaulsen@nelsonmaddenblack.com](mailto:lpaulsen@nelsonmaddenblack.com), respectively.