As a controversial bill makes its way through Congress, the question is: Did Congressman Jerrold Nadler betray Sandy-stricken shuls?

Back-stabbed in Brooklyn

By Yossi Krausz
A few weeks ago, I stayed with a relative in the hospital over Shabbos, in Oceanside, New York, over the border of Nassau County. In the morning, I walked to the nearest shul to daven. It had snowed, and the Young Israel of Oceanside was about two miles from the hospital, so I was glad when I finally saw other people heading into a building that was obviously the right place.

It wasn’t the coat room; it was actually a small shul. The place was in a state of disarray, with pews and other furniture moved around and obvious signs of construction everywhere. There was something unnerving and a little shocking about the gloom and disorder, and I retreated. Then I realized: Hurricane Sandy had hit.

After a search, I discovered where everyone had gone, up to a heir midrub on the second floor. The congregation had managed to squeeze itself into that smaller space. After davening, the president of the shul stood up. He wished a few families mazal tov, in the manner of all shuls, and then gave an update on the reconstruction.

He said that they were not anticipating more outside funds to help the shul’s rebuilding (although he announced that their shul had won Yeshiva University’s giveaway—sponsored by its annual book sale—of sefarim to a Sandy-affected synagogue, which would help them replace the sefarim they had lost), and he reported on how many families in the congregation had paid their share to the rebuilding fund. Almost all had already done so.

As I slogged my way back to the hospital (after regretfully turning down several invitations to the Shabbos seudah), I wondered about the Oceanside community’s ability to rebuild itself, as well as the ability of many other communities that sit along the shores of New York, New Jersey and other eastern states.

As it turns out, shuls don’t have quite the same resources available to them as individual homeowners, businesses, or even many other nonprofit organizations. Until now, houses of worship were ineligible for emergency funding for repairs from FEMA, the Federal Emergency Management Agency, and ineligible to receive grants in the way that nonprofits are generally allowed to.

A push in Congress to make sure that houses of worship do receive funding has resulted in a bill being passed in the House of Representatives. But the move has proven to be controversial and worrisome. Does the bill violate the separation of church and state, as defined in the First Amendment to the US Constitution? Did the Anti-Defamation League betray the Jews in its initial opposition to the bill? Did Congressman Jerrold Nadler betray his former and present constituents through his opposition?

And with the legislation still up in the air in the Senate, the question remains: Will all our shuls survive?

RELIGION AND RIGHTS

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The first two clauses of the Bill of Rights—in the First Amendment, the establishment and free exercise clauses—form the backbone of the United States’ strong and perhaps unique view on religion and government. In some ways, the establishment clause is more radical than the free exercise clause. Numerous countries have laws guaranteeing religious freedom, but some of those are still happy to have established state religions.

The United Kingdom is one, where all faiths are free to worship but the Church of England receives substantial support from the government. The monarch is not only the titular head of the country, but also the head of a religion. Religion and government are strongly intertwined in the UK.

The truth is that most of the original American colonies also had state religions, some of which existed into the beginning of the nineteenth century. The Supreme Court eventually ruled, in 1947, that the establishment clause applied to state governments as well, despite the language of the First Amendment. That has led to a series of important cases testing the limits of the separation of church and state (a phrase coined by Thomas Jefferson to describe the clauses pertaining to religion in the First Amendment). One case that directly impacted the Jewish community was the 1994 Board of Education of Kiryas Joel v. Grumet, in which the Supreme Court declared Kiryas Joel’s public school district to be unconstitutional.

As with many other legal areas, the Supreme Court’s opinions on the separation of church and state have swung like a pendulum, becoming stricter for periods of time and then more lenient. The question of exactly where the Court currently stands is behind at least some of the conflict that is now going on over this bill.

BENEFIT ARNOLD IN BROOKLYN?

US Representative Jerrold Nadler has been a congressman for 20 years. Due to redistricting, he now represents the tenth congressional district of New York, which includes southern parts of Manhattan and a swath of Brooklyn, including Boro Park. His district previously included more of south Brooklyn and none of Manhattan.

A short, round, talkative man, Nadler comes across as friendly in person.

But many people in affected areas of New York viewed him with less than affection on Wednesday, February 13, when he rose in the House of Representatives to argue against HR 592, the House bill that would make houses of worship eligible for federal disaster grants in the wake of Sandy. Not only was Nadler voting against aid to the houses of worship attended by his present and former constituents, he was making a point of vocally opposing the bill, one of only two congressmen to do so.

Nadler began: “Madame Speaker, I reluctantly rise in opposition to H.R. 592, the Federal Disaster Assistance Nonprofit Fairness Act. The purpose of the bill is laudable. Unfortunately, it has real constitutional problems.”

He went on to praise the initial sponsors of the bill, Representative Chris Smith of New Jersey and Representatives Grace Meng and Peter King of New York. But he said that Supreme Court precedents simply didn’t allow for direct funding of houses of worship.

And he also didn’t like the way the bill had come up in Congress. It was introduced on a Friday and was already being voted on by Wednesday. House Majority Leader Eric Cantor had fast-tracked the bill, and there would be no hearings and no amendments.

Nadler said: “At the very least, given the serious constitutional questions raised by this legislation, I am deeply troubled that it has received no committee consideration, and is being rushed to the floor just a few days after being introduced, under a proce-
dure that allows only 40 minutes of debate, and no amendments. One would think that the crowd was in shock over Nadler’s move.

Nadler himself seemed to realize that he had touched a nerve. A day after his vote, I contacted his office for a comment. They would only forward to me the speech he had delivered in Congress. But several weeks later he wrote an op-ed for the Jewish Press to explain himself. It wasn’t escalatory; instead, he reiterated his arguments, and explained that he was trying to preserve protections for religion. “I have fought to preserve those protections because I believe in them, and because I know how the observant Jewish community can be abused without them,” Nadler wrote. It’s unclear whether anyone was appeased. Two Jews, One Opinion

Nadler’s opposition was all the more disturbing because almost all national Jewish organizations had agreed to support this bill. Everyone—from the Agudath and the Orthodox Union, to the American Jewish Committee, to the Jewish Federations of America—sent letters to Congress urging passage of the law.

One of the few Jewish groups not to endorse it was the Anti-Defamation League. The ADL initially expressed its opposition, citing “real concerns about opening the door to direct government funding for houses of worship,” and stating that “[a] taxpayer should not have to fund a religion or a religious institution with which he or she disagrees.

But apparently the ADL eventually felt lonely. On February 20, a week after the bill passed in the House, it released a statement saying that, “[r]ecognizing that the humanitarian needs in the aftermath of Hurricane Sandy are tragic and significant, the Anti-Defamation League will not oppose pending legislation making funding available through the Federal Emergency Management Agency to help rebuild any institution destroyed or seriously damaged in this storm.” They weren’t ready to support the legislation, but they weren’t going to oppose it either.

I contacted the ADL’s director of media relations and public information, Todd Gutnick, for further comment on their reversal, but he told me they had nothing more to say other than their public statement. One other Jewish group that played a key role with this legislation was the Religious Action Center of Reform Judaism, which refused to issue a definitive statement. I contacted their offices, but they did not answer my request for a statement.

Despite the Reform movement’s apparent official opposition, David Pollock of the Jewish Community Relations Council of New York told me that every affected Reform temple had applied for federal aid. The main body’s rhetoric seemed to be divorced from what their members on the ground wanted. What convinced those groups that are usually wary of violating the establishment clause in similar cases? I spoke to Marc Stern, head legal counsel for the American Jewish Committee, which has in the past been opposed to government funds for religious institutions. He said: “The normal rule is that the government can’t pay to build religious buildings. This is different. This is a form of insurance, in a sense. The government says that if there’s a real disaster that’s beyond human expectations…we will help society rebuild. It’s not a case of transferring responsibility to operate a house of worship from the public to the tax collector.

“It’s one of the common goods our society provides. Just as a church or synagogue doesn’t have to pay property taxes, we don’t have to pay to operate a house of worship. It’s one of the common goods our society provides. Just as a church or shul enjoys sidewalks and roads like everyone else, so too should they get this kind of catastrophic insurance like everyone else. We don’t think it violates the establishment clause. It’s something else entirely.” He told me that there were other considerations, too.

“We all feel that you don’t want to have a system where houses of worship are dependent on the government for support. This just isn’t that. It’s really a once-in-a-lifetime event. I’ve lived in New York and never seen anything like Sandy. No one is depending on the government for floods or hurricanes, because no one expects it to happen. It’s not like a yeshivah expense for a religious institution that you have every year. No one’s asking for support from the government for that. We’ve all come to the conclusion that this instance is different.”

Avi Schick is a lawyer in private practice who previously served as a New York State deputy attorney general and as president of the Empire State Development Corporation. He has been pushing forward efforts to gain funding for houses of worship and recently led a delegation consisting of Orthodox Jewish leaders, African-American clergy, and Cardinal Timothy Dolan to meet with Housing Secretary Shaun Donovan for discussions of the possibility of HUD grants for houses of worship. In explaining the legality of such legislation, he pointed to several factors. “Opposition, led by Congressman Nadler, who represents Boro Park, try to draw analogies from cases from the early ’70s that say that the government can’t fund religious schools. I think there are many

Attorney Avi Schick: “There’s a difference between the government making a decision about which particular religious schools to give money to, and saying that all buildings within a certain area that were hurt by an event that already occurred are entitled to funds for repairs.”

Professor Carl Esbeck: “At most, a judge will say that the law is constitutional without this tiny little complication about funding something like the altar. He might say that all the funding is fine aside from money for that. A house of worship would have to call that a victory.”

Congressman Hakeem Jeffries: “In this instance, by providing assistance to houses of worship that have been impacted by the storm, the government isn’t establishing any state religion or favoring any one religion over another.”

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Sandy: When the evacuation orders were issued, many religious schools were excluded. When water was pumped from the ground and the government had to put down sandbags before the hurricane, they had to evacuate. When the government came to put down sandbags before the hurricane, it was impermissible to exclude religious groups. When water was pumped from the ground, they had to evacuate. When the government is walking down the block who was injured by Sandy and the police had to come in, after the hurricane, they weren't excluded. Now, when the government is coming with funding to clear up the effects of the hurricane, why should they be excluded?

“Look at past history. After the Oklahoma City bombing, legislation was enacted that specifically entitled the churches that were impacted to receive government funding—and they received it. There are other examples as well. After the Seattle earthquake money went to the Hebrew Day School. Money went to Old Mass Church in Boston on a government landmark program to help preserve the building. There are many cases that are much more relevant than the school funding case of the ‘70s that Nadler is pushing.”

ATTACKING THE ALTAR ARGUMENT

The most powerful argument Nadler made against the legislation came in one sentence: “The idea that taxpayer money can be used to build a religious sanctuary or an altar has consistently been held unconstitutional.”

But several experts I spoke to felt that Nadler had taken aim at a straw man. Marc Stern told me: “The aid we’re talking about is very limited. It won’t really help anyone in any significant way to build a sanctuary. They’re only paying any non-profit organization for removal of debris and the cost of getting the building operating—fixing the boiler, setting up the electricity. It’s not even fixing the building. So we’re not talking about building houses of worship here. People shouldn’t think this is a pot of gold at the government’s expense. It will just save a fair amount of money, but nothing to rebuild.”

Professor Carl Esbeck of the University of Missouri Law School was one of the architects of the Bush-era faith-based initiatives policies and is an expert in the area of establishment clause law. He told me that he sees the House bill as constitutional. But he also said that if he were on the other side of the argument, he would bring up the same issue Nadler had: “I’d come up with some type of hypothetical about a tough case—an easy case is fine aside from money for that. A house of worship would have to call that a victory,” Esbeck said.

But it’s still clear that opponents of the bill will be using Nadler’s argument. I spoke to Dena Sher of the American Civil Liberties Union (ACLU), the most prominent group that had sent a letter opposing the legislation. She said that it isn’t only altars that are problematic.

“Even the structure of the building has theological meaning, like stained-glass windows. A church usually has Christian themes, like gothic arches or the shape of the building. These all have significance. You’re not just paying for a building. You’re paying for something that’s inherently religious. It’s not just a building that happens to have an altar in it.”

She also pointed to an educational memo FEMA sent to legislators before the vote on HR 592, which was widely seen as expressing opposition to the bill.

“I think it’s interesting that the FEMA memo also interprets the word ‘facility’ to mean not just the structure but also the contents. In a church you have the altar and in a synagogue you have a bimah. If you have to pay for contents, you have to decide which ones to pay for.”

“Even if they wouldn’t pay for the altar and would only pay for the building, the problems of administration strike me as being extremely challenging.”

LEGAL EAGLES

The truth may be that the Supreme Court rulings allowing this kind of funding may be relatively recent. Short letters to Congress supporting the constitutionality of the legislation came from Professors Douglas Laycock of the University of Virginia and Alan Dershowitz of Harvard University. Both pointed to the “neutral” nature of emergency funding for houses of worship, in that such funding is being provided to all sorts of facilities and is not based on religion.

Professor Esbeck told me that the precedents establishing the so-called “neutrality principle” date back only to Supreme Court cases from the mid-1990s. And he and Ms. Sher clearly argued on whether those cases really overturned earlier ones that would have invalidated this law.

From speaking to both of them it seems that this law may be a battleground between two views of the Supreme Court’s rulings: the view of the ACLU, and the view of those pushing for more support for religious institutions, like Professor Esbeck. And if Professor Esbeck is right, that the Supreme Court really has overturned the earlier cases, the ACLU may see this as an opportunity to try to turn the clock back.
COUNTING THE CATASTROPHE

Interestingly, there was no debate among the congressmen about the added expenditure that covering houses of worship would entail. Democratic Congressman Hakeem Jeffries’ district covers most of the waterfront of south Brooklyn, which was hit hard by the storm, and he cosponsored HR 592. He explained to me why the budget was not a question in this age of fiscal worries.

“The bill under consideration to provide funds to houses of worship relates to eligibility. It doesn’t increase the overall amount of funding FEMA has available, but provides for authorization to direct that funding to houses of worship along with others that have been affected by the storm. The fiscal issues of funding for the storm had already been debated in the House. The overall bottom line won’t be impacted by this.”

But how much will need to be spent? It turns out that even getting an exact number of houses of worship affected by Sandy is hard to come up with.

I asked Congressman Jeffries how many houses of worship were damaged in his district.

“Based on my own personal tour of the district with clergy members who were impacted, I’d estimate that there are easily more than two dozen.”

David Pollock told me, “We have 59 synagogues that have applied to FEMA and 27 yeshivos and day schools in New York State. [Numbers in other states are still unknown. The yeshivos and day schools will be eligible for FEMA funding without passage of legislation.] Some of these 59 have very minor damage and need no government help. Some have major damage.”

Avi Schick told me, “Tens of billions of dollars have been allocated here. It won’t force anyone to go back for new allocations. It’s a teeny portion of overall funds needed and it won’t impact that.”

“But a huge number of houses of worship were impacted—over 150 Christian churches, [and] many dozens of shuls. It really hits every corner of the state and across religious lines.”

Nathan Diamant of the OU, who worked on the legal aspects of legislation, explained to me why the budget was not a question in this age of fiscal worries.

The transcript of his comments also shows that he took the position reluctantly, given that he knew the need that existed. “Congressman Nadler is a constitutional scholar who took his position because he thought it was the right thing to do. The transcript of his comments also shows that he took the position reluctantly, given that he knew the need that existed.”

Both Jeffries and Rabbi Abba Cohen of the Agudah said that they thought Nadler was particularly bothered by the rush to pass the bill. Jeffries said, “Nadler is correct that there were no hearings, and that would have been preferable…so that a full airing of the constitutional concerns would have occurred.” At the same time, he pointed out that the original bill for Hurricane Sandy relief passed in January had an amendment that was originally considered that would have done the same thing as HR 592. So the topic had already been banned about for over a month.

Others I spoke to were less good-natured about Nadler’s opposition. They said that what will happen in the Senate, and will the ACLU challenge the bill if it passes both houses of Congress and is signed by the President?

Rabbi Cohen and Mr. Diamant told me that the Agudah and OU are educating senators about the bill. Senator Gillibrand’s office told me that she is supportive of the legislation and is trying to bring it up before the Homeland Security Committee.

A NUMBER OF THE ASKANIM INVOLVED TOLD ME THAT THE PUBLIC SHOULD CONTACT THEIR SENATORS. (NEW YORK STATE SENATOR CHARLES SCHUMER’S OFFICE WOULDN’T RESPOND TO MY QUERIES ABOUT HIS OPINION OF THE BILL, AND HAS NOT YET MADE ANY PUBLIC STATEMENTS OF SUPPORT.)

But, Avi Schick told me, “We still need a champion for the bill.” And several people, including Congressman Jeffries, pointed out that the House, due both to its procedures and because of its traditions, moves much faster than the Senate.

Mr. Shet told me that the ACLU is also working to educate senators to oppose the bill, and she said that several senators have already expressed concerns about it. She was noncommittal about future lawsuits against any legislation. “We’re taking it one step at a time. Right now, we are focusing on raising awareness of the problems with the bill. If it passes, we first have to see how it is implemented, which we will closely monitor. Then we will figure out the best course of action from there.”

Several observers, including Professor Esbeck, told me that they assume there will be a legal challenge if it passes. A number of the askanim involved told me that the public should contact their senators. (New York State Senator Charles Schumer’s office wouldn’t respond to my queries about his opinion of the bill, and has not yet made any public statements of support.)

For the moment, shuls will have to make do with government loans, for which they are eligible. And many shuls, like the Young Israel of Oceanside, will continue to use their second floors for the foreseeable future.

THE WAY FORWARD

What will Congressman Nadler’s constituents make of his behavior? Congressman Jeffries emphasized to me that while he saw no problem with the legislation (“In this instance, by provid-