September 11 Victim Compensation Fund: A Model for Compensating Terrorism Victims?

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introduction

Terrorism has increased significantly in recent years.\(^{1}\) Terrorism is "premeditated, politically motivated violence perpetrated against noncombatant targets . . . intended to influence an audience."\(^{2}\) The "psychological impact of violence" is used "to effect political change."\(^{3}\) Because the government is the ultimate target of terrorism,\(^{4}\) it is well accepted that the government should provide aid to terrorism's victims.\(^{5}\) Terrorism has traumatic and enduring effects and its victims experience a range of physical, financial, emotional, and legal needs.\(^{6}\)

American recently witnessed the worst terrorist attack in our history. On September 11, 2001, 3,063 people were killed, approximately 4000 people were injured\(^{7}\), and over 70,000 jobs were lost.\(^{8}\) While America was shaken to its core by the September 11 attacks, experts fear a future attack could be worse. With new weapons of mass destruction, such as chemical and biological agents, a terrorist attack in the future could kill thousands, if not millions more.\(^{9}\) Providing just and equitable aid to victims of terrorism poses significant challenges for the government. The government must, however, remain committed to dealing effectively with these challenges. Aid must be provided not only to the community and the state level, but also to the victims directly.\(^{10}\)

Ten days after September 11, in an effort to respond to the victims, Congress established the September 11 Victim Compensation Fund ("Fund").\(^{11}\) The Fund is a dramatic departure from previous methods of compensation used by the federal government. The Fund urges the victims of September 11 to refrain from suing any party potentially responsible for allowing the terrorist attacks to occur and to accept compensation from the government.
While some praise Congress for its benevolence and compassion, many commentators and victims have criticized the Fund. Critics question whether Congress will assume liability for other private corporations' alleged negligences and worry whether victims of other terrorist attacks will also receive compensation from taxpayer funds. Some insist that the claimants should receive compensation commensurate with plaintiffs in court, while others spurn the government's use of their tax dollars. Lastly, there are those who resent the Fund for stealing their opportunity to seek the truth and hold wrongdoers responsible. While victims, legal scholars, and politicians have widely varying responses to this legislation, the only certainty is that the Victim Compensation Fund will set a precedent for compensating victims of future terrorism.

Part I of this article provides a factual background of the horrifying events of September 11, 2001, explains the traditional civil remedies available to the victims of the attacks, and describes the Victim Compensation Fund and the reasons for its enactment. Part II provides a brief overview of the federal aid received by victims of terrorism before September 11, 2001 and discusses the special challenges the victims of September 11 face in receiving appropriate compensation. This part then reviews traditional federal no-fault statutory compensation schemes as a backdrop for making recommendations for improving the Fund. Part III considers these recommendations in light of the concerns of victims of other terrorism events, other industries seeking a government bailout, and the victims of September 11 themselves. Part IV discusses why the proposed changes to the Fund will respond to the American public's concerns. This part also suggests that the federal government consider these changes the next time it must respond to victims of terrorism. In Part V, I will suggest that because the Fund eliminates the tort function of factfinding, the government appoint an independent commission to investigate and report on the aviation security deficiencies that allowed the terrorists to succeed. The commission will provide the public with a vehicle for discovery in an attempt to vindicate the victims' legal rights and interests that have been compromised and will aim to deter negligent behavior in the future. Part I

A. The Tragedy

On Tuesday, September 11, 2001, nineteen members of Osama bin Laden's Al Qaeda terrorist network, planning to hijack four commercial airplanes, made their way through airport security and boarded two United and two American airplanes at three East Coast airports. The first hijacked passenger jet was driven directly into the north tower of the World Trade Center. The second airliner crashed into the south tower of the World Trade Center. The third crashed into the Pentagon. The fourth hijacked airliner crashed in Shankville, Pennsylvania.
Airport security posed no challenges to these terrorists. They were able to purchase tickets while listed on one of the FBI's suspect lists. They were able to check in as foreign nationals with stolen passports and stolen identities. They passed security checkpoints while carrying knives and box cutters. They faced flight attendants who were not trained in dealing with suicide hijackers and then the terrorists finally entered the cockpits through unlocked doors.

Many studies before September 11 indicated that airport security was inadequate to protect against terrorism. Federal tests found that the individuals screening carry-on baggage routinely missed one in five obvious images of bombs or guns. The airline industry was repeatedly warned about these vulnerabilities. September 11 showed the entire nation the vulnerability of airport security. Accordingly, the airlines faced claims in the billions. The Association of Trial Lawyers of America ("ATLA"), urging "restraint and respect", called for a moratorium on all civil lawsuits. Meanwhile, the already financially struggling airlines, began lobbying Congress for an industry bailout that would shield them from liability arising from the crashes. ATLA, along with many members of Congress, demanded that there be no industry bailout without compensation to the victims.

B. Traditional Civil Remedies Available to September 11 Victims

Every terrorist victim has the right to file a civil lawsuit seeking financial compensation from the perpetrator or from other parties whose unreasonable conduct gave rise to conditions that allowed the crime to occur. It is an established premise of American tort law that airlines, as common carriers, have a duty to protect the public from security risks. The airlines have an even higher duty to their passengers. This duty, which is non-delegable, establishes an obligation to protect passengers and property from hijacking by terrorists. Because of this duty, the victims and their survivors are proper plaintiffs in a wrongful death or personal injury action and have the right to sue the airlines. However, the Victim Compensation Fund restricted the traditional rights of the victims and their survivors.

If a victim elects sue, all actions must be brought in the United States District Court for the Southern District of New York and compensation is limited to the air carrier's liability coverage, reported to be $1.6 billion per plane. $1.6 billion is sufficient to compensate all the passengers on the airplanes, however, it is clearly insufficient to pay for the death and destruction on the ground. Furthermore, if a victim elects to sue the airlines, he must waive his right to collect compensation from the government.

C. An Overview of The Victim Compensation Fund

The Fund is an alternative remedy to traditional lawsuits. It is a no-fault administrative process, designed to "provide
compensation to any individuals who was physically injured or killed as a result of the terrorist-related aircraft crashes. . ." (42) The government compensation is contingent upon the waiver of the right to file a civil action against the airlines, (43) the airline manufacturers, the owners of any airport, anyone with a property interest in the World Trade Center, and New York City. (44)

The government compensation is also contingent upon eligibility. An eligible individual is: (1) an individual on the plane at the time of the crash (other than the terrorists); (2) an individual present at the site of the crash at the time or in the immediate aftermath; and (3) a personal representative of a deceased individual who would otherwise be eligible. (45) The individual must have suffered physical harm or death. (46) The harm must cause partial or total "disability, incapacitation or disfigurement." (47) The Fund does not cover losses to property, emotional harm, or risk of future injury; nor does it award punitive damages to punish the parties a court might hold responsible. (48)

Attorney General John Ashcroft appointed Special Master Kenneth Feinberg to administer the compensation program. (49) To collect compensation, an individual need only tell the government three things: Who was there? What was lost? What is left behind? The statute is a pure no-fault reparation scheme. The award will be based on "the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant," including "the financial needs or financial resources of the claimant or the victim's dependents and beneficiaries." (50)

The Special Master has created a presumptive economic and non-economic loss awards for each type of household. (51) Individuals will only be compensated for economic losses up to the 98th percentile of individual income ($231,000.00). (52) Claimants may only recover for economic losses that are compensable under the law in the state that would be applicable to a victim's tort claim. (53) The presumptive amount of non-economic damages for each deceased is $250,000, plus $100,00 for a widowed spouse and for each dependent child. (54)

All awards are tax-free. (55) No family of a deceased individual will receive less than $300,000 and awards of more than $4.5 million will be rare. (56) However, these figures can be reduced and even eliminated by collateral source benefits received by the claimants. (57) Unlike judicially imposed awards, collateral source benefits include all the money that the families received from other sources except charities. (58) All claims must be filed on or before December 21, 2003; the final, non-appealable determination will be made within 120 days after the claim is filed and the government will pay the family 20 days later. (59) Government analysts estimate that families will receive an average award of $1.85 million and that the Fund will cost taxpayers between $6 billion and $10 billion. (60)
D. Why the Fund was Enacted

With a predicted average award of $1.85 million per family, the Fund aims to provide "full, fair, and reasonable compensation for the entire loss suffered by each victim and family." Trial attorneys recognize this concept as they see it every time a judge instructs the jury that its damage award must be "reasonable" and must "fully, fairly, and completely compensate the plaintiff for all economic and noneconomic losses he suffered." Tort damage awards vary depending on the circumstances surrounding the injured plaintiff's life. Because the Fund is a replacement for litigation, the formula the government uses to compensate the victims reflects the values of the tort system, permitting families of higher salaried victim to receive a much more federal aid than that of a lower salaried victim.

While the legislation could have been built upon other models for compensating victims, the Fund replicates tort-based recoveries because Congress wanted to compensate the victims while also saving the airline industry from potential financial ruin brought by thousands of civil lawsuits. To accomplish both feats, the government attempted to offer the victims a damage award comparable to that which they could have recovered in a successful lawsuit against the airlines. However, the Special Master does not guarantee that the compensation granted by the Fund will be commensurate with an award won in litigation. The Special Master also conceded that it is "absolutely" possible, though unlikely, that after required setoffs, a claimant will get nothing at all. The Special Master can, however, guarantee that the Fund will preserve the continued viability of our nation's air transport system. As Congress aimed to remain united in response to the unprecedented attacks, it created legislation that has created legal issues as unprecedented as the attacks themselves.

Part II

Congress acted with the best of intentions in providing for an "unprecedented expression of compassion on the part of the American people to the victims and their families devastated by the horror and tragedy on September 11." While "unprecedented compassion" may seem laudable, one can understand why America is seriously questioning the ultimate fairness and thus effectiveness of the Fund, when the Fund is compared to prior federal laws enacted to assist victims of terrorism. Unfortunately, September 11 was not the first terrorist attack to injure Americans and even more distressfully, it may not be the last. The federal government cannot afford to pay an average of $1.85 million dollars to the families of all the victims of all future
attacks, nor did it offer this much money to victims of past attacks. Victims of past terrorist attacks relied principally on the criminal and civil justice system to seek financial compensation for their losses while the federal government, although providing some monetary aid, concentrated its efforts on helping victims to get their feet back on the ground.

A. Federal Aid Before September 11

Before the creation of the Fund, federal law assisted terrorism victims with two types of statutes: (1) "compensation" statutes, and (2) "restitution" statutes.\(^{68}\) Traditional crime victim "compensation" statutes are "premised on the government's duty to protect its citizens,"\(^{69}\) and provide a direct reimbursement to victims for crime-related expenses such as funeral expenses, medical bills, counseling fees, and lost wages.\(^{70}\) Expanding on traditional crime victim statutes, Congress devised several different ways to aid terrorism victims.\(^{71}\)

1. Compensation Statutes

The first piece of legislation that provided federal assistance to victims of terrorism\(^{72}\) was the Hostage Relief Act of 1980 ("HRA"), enacted in response to the Iranian hostage crisis.\(^{73}\) The bill compensated the hostages for their suffering because the treaty which provided for their release contained a provision that no American hostage could seek tort damages in the U.S. courts against Iran.\(^{74}\) The benefits were provided only to victims who were working for the American government at the time of their captivity\(^{75}\) and included: (1) an interest bearing savings fund for the allotment of the hostage's pay during his captivity; (2) medical and health care expenses caused by the captivity and not covered by insurance; (3) exempting from gross income all compensation received which the individual was in captive status or hospitalized because of the captivity; (4) exclusion of compensation from income tax if the employee died as a result of hostile action; (5) deferral of taxes and penalties; (6) authorization of spouse to file a joint return; and (7) payments for educational expenses of a spouse or child of a hostage\(^{76}\)

The second piece of federal legislation was Victims of Terrorism Compensation Act.\(^{77}\) This act also only aided government employees,\(^{78}\) but the benefits were not limited to victims of a specific terrorist act.\(^{79}\) The Act aids all victims taken hostage after the Iran crisis and, in addition to the benefits described above, the act pays each victim $50 for each day of captivity.\(^{80}\)

The third piece of federal legislation, enacted in response to the bombing of Pan Am Flight 103, provided aid to all citizens rather than only government workers.\(^{81}\) Congress added policy statements, titled United States Response to
Terrorism Affecting Americans Abroad, to Title 22 of the Aviation Security Improvement Act of 1990.\textsuperscript{(82)} The policy statements vow to: (1) send disaster specialists and crisis teams to the site of the terrorist attack; (2) provide an ombudsman to help bereaved families; (3) liaise with foreign governments to arrange to bring home bodies and personal effects; and (4) create guidelines for appropriate ceremonies.\textsuperscript{(83)}

In response to the Oklahoma City bombing, Congress passed the Justice for Victims of Terrorism Act, as an amendment to Title 42 of the Antiterrorism and Effective Death Penalty Act.\textsuperscript{(84)} This Act provided that: (1) the federal government make payments to states, public agencies, and NGOs for relief for terrorism victims; (2) immediate crisis response efforts are offered to the victims; and (3) victims can participate in trial proceeding arising from bombing.\textsuperscript{(85)}

Lastly, Congress enacted the Victims of Terrorism Tax Relief Act.\textsuperscript{(86)} This bill provides tax relief to the families of those who died in the September 11 attacks, the Oklahoma City bombing and the anthrax attacks. The bill: (1) waives income tax liability of a victim who died for both the year of the attack and the previous year; (2) provides tax-free treatment of death benefits; (3) shields the first $8.5 million of a victim's estate from the federal death tax and protects the first $3 million of the estate from state death taxes; (4) facilitates payments by charities to victims' families; and (5) provides that debt forgiveness is not taxable.\textsuperscript{(87)}

These federal compensation statutes are based on the principle that the federal government should come to the rescue of those who suffer by fairly and adequately assisting them.\textsuperscript{(88)} Restitution statutes, on the other hand, are premised on the "principle that the wrongdoer should 'restore' the victim to his or her status quo ante,"\textsuperscript{(89)} and allow "victims or survivors to bring suit themselves."\textsuperscript{(90)} United States laws are the most unique and advanced in the world in providing civil remedies to victims of terrorism.\textsuperscript{(91)} There are three federal laws that allow victims of terrorism to obtain civil remedies against foreign perpetrators in federal court.

2. Restitution Statutes

The Torture Victim Protection Act of 1991 allows U.S. victims of human rights abuses abroad to sue in U.S. courts.\textsuperscript{(92)} The Anti-Terrorism Act of 1992 provides that a U.S. citizen injured by an act of international terrorism may seek triple damages and attorney fees in federal court against the organization or individual responsible.\textsuperscript{(93)} Exceptions to the Foreign Sovereign Immunities Act allow victims to sue foreign governments that sponsor terrorism.\textsuperscript{(94)} These statutes allow victims to use the civil justice system to collect monetary compensation from the perpetrator, while
traditional American tort law allows victims to obtain civil remedies from other parties whose conduct may have allowed the attack to occur.

After the 1993 World Trade Center terrorist bombing, there were 500 personal injury claims against the Port Authority of New York and New Jersey, alleging that the agency had been warned about the WTC's vulnerability to bomb attacks, yet failed to guard against the risks or alert tenants of the danger.\(^{(95)}\) After a bomb hidden in a suitcase, caused Pan Am Flight 103 to explode over Lockerbie, Scotland, the victims' families sued the airlines and recovered $500 million from Pan Am's insurers.\(^{(96)}\) The victims of the Oklahoma City bombing have also filed multi-million dollar lawsuits against the Bureau of Alcohol, Tobacco, and Firearms and other agencies for allegedly failing to take appropriate measures to protect people in and around the building.\(^{(97)}\) Six of the ten largest verdicts in the year 2000 were from civil cases brought on behalf of crime victims.\(^{(98)}\)

Before September 11, the traditional civil justice system coupled with federal "restitution" legislation allowed victims of terrorist attacks and their survivors to obtain monetary compensation from the responsible parties and helped victims to heal by placing blame and punishing the wrongdoers. Federal terrorism "compensation" legislation provides equal aid to all victims of terrorism. The compensation helps victims cope with the immediate shock of the tragedy and provides tax, medical, and educational benefits to victims, demonstrating the nation's resolve to help its citizens. Likewise, the victims of September 11 have received a $40 billion emergency response package to help them deal with the tragic events.\(^{(99)}\) This package provides victims with different types of assistance including: disaster relief, low interest loans, temporary jobs, mental and physical health services, rehabilitation, child counseling, loan forgiveness for student loans, and many tax benefits.\(^{(100)}\) In addition to this federal compensation legislation, some victims have also already filed suit against Osama bin Laden and the Taliban.\(^{(101)}\)

The victims of September 11, however, will not be able to collect judgements from the airlines. Typically, when an airplane crashes in the United States, there is no litigation.\(^{(102)}\) Negligence is easily found through the tort law doctrine of *res ipsa loquitur* which holds that there will be a presumption of negligence on the part of the airline or pilot if the plaintiff can establish that the accident is of a kind that ordinarily does not occur absent someone's negligence. Trying to establish lack of negligence when the law presumes negligence is very difficult.\(^{(103)}\) Moreover, litigating against passengers' families would be a public relations debacle and would direct more attention to the allegations of negligence.\(^{(104)}\) Thus, the airlines buy insurance and settle with the passengers' families.\(^{(105)}\) Each of the four planes that was hijacked on September 11 was carrying $1.6 billion insurance.\(^{(106)}\) This sum is adequate to compensate the 266 people on the airplanes;\(^{(107)}\) however the September 11 crashes
killed and injured thousands of people on the ground as well. The airlines could not compensate all of these people as well. The victims and the airlines were simultaneously in trouble. Accordingly, the government came to the rescue of both the civilians and the airlines by enacting a no-fault federal administrative compensation scheme.

B. Federal No-Fault Compensation Schemes

A no-fault scheme is a method for compensating injury under which claimants may receive compensation, without proof of fault, if they qualify for coverage under the statute. The Victim Compensation Fund differs from typical no-fault schemes in three important ways. First, the Victim Compensation Fund is funded by all U.S. taxpayers. Second, the Victim Compensation Fund only helps eligible victims of a certain terrorist attack. Third, eligible victims receive a wide range of awards under the Fund.

Typically, all U.S. taxpayers are not required to pay to compensate the injured victims.\(^{(108)}\)

For example, the National Childhood Vaccine Injury Act, designed to compensate individuals injured by childhood vaccines, is funded by an excise tax on each vaccine purchased.\(^{(109)}\) Only those vaccines which are covered by the act are taxed.\(^{(110)}\) The Price-Anderson Act, designed to ensure that funds would be available to compensate for injuries sustained by the public in the event of a nuclear accident,\(^{(111)}\) is funded by mandatory insurance obtained by licensed operators\(^{(112)}\) and mandatory contributions to a common fund established after a nuclear accident has occurred at any plant.\(^{(113)}\) Thus, it is understandable that some taxpayers object to the source of funding for the Victim Compensation Fund. Other objections stem from the fact that the Fund does not help all victims of terrorism and that there are wide disparities in awards among the victims that it does assist. The National Childhood Vaccine Injury Act, on the other hand, provides an equal sum of money to the families of an individual who was killed because of the vaccine.\(^{(114)}\)

The Victim Compensation Fund does not provide all victims of terrorism with equal awards. As the devastating psychological and financial impact of a single act of terrorism can last for many years, and as previous federal terrorism legislation pales in comparison to the Fund, many victims of past terrorism want to be included in the Fund's compensation scheme. Will the government use taxpayer funds to mete out equitable compensation to victims of other tragic terrorist attacks?\(^{(115)}\) Part III

Victims of the 1998 American embassy bombing in Nariobi organized by Osama bin Laden are angry that they received no compensation and dismayed at the large sums promised to the victims of the September 11 attacks.\(^{(116)}\) The bombing killed 213
people, including 12 Americans. A simultaneous explosion in the U.S. embassy in Dar es Salaam killed 11 people. While the federal government provided $43 million in relief assistance to fund rehabilitation and health-care projects, it did not directly compensate the victims' survivors. When asked about the possibility of additional compensation, Secretary of State Colin Powell, responded that "a series of lawsuits that are under way and those matters are being dealt with in various court systems." The victims argue that "no one should draw boundaries"; they are all equal and deserve equal compensation. Congress has recently proposed a bill asking the federal government to provide compensation for the U.S. citizen victims of the bombings of U.S. embassies in East Africa "on the same basis as compensation is provided to victims of the terrorist-related aircraft crashes on September 11, 2001."

Several victims of the Oklahoma City Bombing are also seeking more assistance from the federal government. After the bombing, the government paid out an average of $100,000 death or disability benefits to federal employees or their families. They also received approximately $3,200 each under the Oklahoma Crime Victims Compensation statute and tax relief for 1994 and 1995 if they lost a family member in the blast. The victims want an aid package equivalent to the Victim Compensation Fund, contending that "[d]eath, destruction and sorrow are the same, no matter who lights the fuse of terrorism." A bill has been proposed which would provide compensation for the U.S. citizens who were victims of the bombing of the Murrah Federal Building in Oklahoma City "on the same basis as compensation is provided to victims of the terrorist-related aircraft crashes on September 11, 2001." On March 14, 2002, the "1993 World Trade Center Victims Compensation Act" was also introduced.

The families of the victims who died of anthrax also want to be eligible for compensation from the Fund. These Americans also victims of terrorists, yet they must utilize the legal system to win compensation. A bill has been proposed "to expand the September 11th Victim Compensation Fund of 2001 to include individuals diagnosed with anthrax." While House Minority Leader, Dick Gephardt, and House Speaker Dennis Hastert support this idea, the Department of Justice, refused, stating that "this program has been set up just for the disaster of September 11 because Congress determined that the numbers of those impacted required a special kind of approach" and there is "no indication that the program will be extended to cover other terrorist actions, whether domestic or foreign origin, that have or may arise." The Victim Compensation Fund is not only generating conflicts between victims of other terrorist attacks, but between groups of victims of September 11 as well. The Department of Justice has made it clear that the Fund does not help those who have suffered mental trauma and have lost homes, jobs or businesses
because of September 11. Furthermore, there are many victims whose injuries caused them significant pain and suffering, but who are not "disabled, incapacitated or disfigured" and thus are not compensated by the Fund.

All victims of terrorism are equally important and no less deserving. After the Oklahoma City Bombing, the U.S. Department of Justice, along with the Office for Victims of Crime, authored a report entitled Responding to Terrorism Victims: Oklahoma City and Beyond. This report recommended plans for responding to the needs of terrorism victims. The report described how criminal justice agencies and victim assistance professionals can assist victims of terrorism. Before September 11, federal terrorism legislation focused on assisting all the victims and facilitating their access to the civil justice system. After the enactment of the Victim Compensation Fund, many terrorist victims are asking the government to give them millions as well.

On the other hand, many potential defendants are asking the government to shield them from liability. What began in the days immediately after the attacks as an effort to assist two airlines by limiting their liability to their insurance coverage has gradually "cascaded into other areas." Many businesses are taking advantage of the horrible acts of terrorism to seek liability limitations. Drug and vaccine companies are asking Congress to include liability protection in bioterrorism legislation that is under consideration. In October, President Bush signed an executive order giving Health and Human Services Secretary Tommy Thompson the authority to indemnify government contractors, including the manufacturers of drugs and vaccines used to prevent or to respond to bioterrorism. Terrorism victims and potential defendants are begging to become a part of this legislation, however, many of the victims whom the legislation is intended to help are complaining that they are not receiving enough compensation from the government. They argue that they should be entitled to a full tort recovery. Some victims have criticized the fund's awards as "terrible, abhorrent, vastly insufficient." Each time a victim complains about the Fund, criticism against the victims by ordinary taxpayers intensify. Victims have been called "greedy" and disgusting for "trying to profit from a loved one's death." Some taxpayers complain that Congress is using their tax dollars "to make millionaires out of the 9/11 victims" and believe it is unnecessary for the government to pay since "the government didn't kill the people."

The government's generosity towards the victims of September 11 will raise expectations for future aid to dangerous heights since the government can simply not afford nor will taxpayers tolerate paying an average of $1.85 million to victims of future terrorism. It would be very dangerous to use the Fund as a precedent for helping future victims of terrorism or helping future ailing industries. How does the government explain to future and past victims of terrorism that they will not be
receiving an average of $1.85 million tax-free while also explaining to the victims of September 11 that their tort recoveries may be less than victims of individuals who died on other airplane crashes? How does the federal government explain to some industries that they will be left to defend their mistakes in the courtroom? Adopting the following proposals will help ease the public's concern with the Fund while also providing methods by which these types of problems can be avoided in the future.

Part IV

When the government aids victims of terrorism, the aid should be uniform. The families of the bus boy, the janitor, the secretary, the firefighter, the banker and the lawyer should be compensated equally. Our legal system may assign different monetary values to human lives, but our political system should treat everyone equally. In wrongful death lawsuits, expert witnesses assign monetary values to an individual's life every day, but until now, the public at large has not had to watch the government apply this process and its imperfections. Every family member and every citizen can now go on to a Web site and find out how much the government values the mother, father, son, daughter, husband, wife who died in these terrorist attacks. The federal government should not be involved in such a scheme.

Our political system should strive to treat every human life as equally valuable and accordingly, should compensate all victims equally. In a TIME/CNN poll taken in January, 86% of people surveyed answered that all families should receive the same amount of compensation. The principle goal of victim compensation is "to reaffirm a set of values about particular kinds of suffering." The government is compensating the victims because they are members of our community and because as "non-combatant targets," they were victims of a political attack. All victims of terrorism should receive equal compensation to reflect the goals of a democracy and to recognize that all victims suffered in the same horrible fate. What ultimately unites these victims and their survivors is "far greater than the differences in their last paychecks."

Other terrorism legislation does not draw distinctions based on a victim's earnings nor based upon the victims' state of residence. All victims are provided with equal aid. President Bush's remarks surrounding the recent passage of the Victims of Terrorism Relief Act demonstrate the goals of federal terrorism legislation. When President Bush signed the act benefitting the victims of September 11, the anthrax attacks, and the Oklahoma City Bombing, he remarked that the act demonstrated the "federal government's concern for families who suffered such great loss" and hoped that the victims will "find comfort in the knowledge that [their] nation stands with [them]," mourning those lost, and facing the future together. In enacting this legislation, Congress recognized that "the financial strain deepens the emotional and psychological impact of the initial tragedies" and wanted to "ease [the victims'] financial burdens as [they] struggle to cope with the loss of [their] loved
The legislation aimed to establish a sense of safety and security for individuals directly involved and for the entire nation. Aid to terrorism victims should "reassure all who belong to the community that they will not be abandoned should they themselves become victims."[153]

The Victim Compensation Fund does not assure all Americans that the federal government will help them in the unfortunate event that they become victims of terrorism, rather the Department of Justice explicitly states that the Fund has been set up only for the September 11 and will not "be extended to cover other terrorist actions, whether domestic or foreign origin, that have or may arise."[154] While a drastic distinction is being made among victims of terrorism, the September 11 victims are not receiving something for nothing. To receive government compensation, they must give up their right to sue. However, when the government is attempting to provide the victims with damage awards similar to that which they would receive in court, but is eliminating the challenges of litigation, the decision does not seem to be a difficult one to many of the victims who want to be included in the Fund.

To make the Fund more fair and to enable the Fund to be used as a model for compensating future victims of terrorism, the Fund should provide equal pain and suffering awards to all victims of September 11. A compensation award from the federal government should certainly not depend on a choice of law as there are very significant differences in the scope of recovery of damages among various bodies of state law. The Special Master should set an amount and each victim will have the choice to collect an equal sum of money from the federal government or to sue the parties they believe are responsible in the hopes of recovering a tort judgment including pain and suffering along with personal injury and financial losses.

The federal government should not make its citizens prove their self worth. By engaging in this activity, Congress intervened in a matter delegated to the legal system. America has a long history of allowing tort law and not the federal government to provide compensation for injured people and those who suffer property damage. Under the current compensation scheme, the Special Master has strongly discouraged litigation, reminding victims that "to succeed in the courtroom," a victim of the September 11 tragedy "would be compelled to litigate, probably for many years at excessive cost, and with all the uncertainty of result which is part of the litigation process. Among the hazards of such a court proceeding are: Would liability be demonstrated? Against whom? Would sufficient funds be available to pay in full any resulting tort award? Would the verdict, even if favorable, withstand appellate challenge?"[155]
The real reason litigation is being discouraged is because the airlines cannot afford to pay all the victims. Would it be fair to allow crimes of foreign terrorists to destroy two American corporations?\textsuperscript{156} Simply because the airlines cannot afford to pay does not automatically lead to the conclusion that Congress should pay tort judgments. Congress should certainly help the victims, to recognize their pain and suffering, but, it cannot give them each millions. Congress must devise a way where it can afford to help all the victims of terrorism equally. For over twenty years, victims of terrorism have been treated equally and this uniform treatment must continue.

If victims choose not to accept the government compensation, they must be encouraged to use the legal system. Victims have a difficult decision to make. The government will compensate everyone for their pain and suffering whereas the legal system will not hold the airlines financially accountable if they were not responsible for allowing the attack to occur. The chances of winning a lawsuit against the airlines differ depending on who brings the suit.\textsuperscript{157} Some lawyers speculate that victims on the ground will not be able to successfully prove liability against the airlines as a result of the September 11 attacks. Even assuming negligence, the doctrine of "proximate cause" might prove to be an "insuperable barrier."\textsuperscript{158} The courts demand a tight connection between the type of negligence alleged and the type of consequence that occurred so that only those who caused the harm will be required to pay for it.\textsuperscript{159}

The government, on the other hand, is paying for the victims' pain and suffering even though it did not cause such pain. However, the public must understand that the Fund is not using tax dollars for purely charitable purposes. The claimants are striking a bargain by giving up their right to sue in exchange for receiving an award from the government. They are giving up a right to which every terrorist victim in the past has been entitled.\textsuperscript{160} Limiting the government compensation to pain and suffering makes this an even harder bargain to strike.

Victims of other terrorism events will realize that the victims of September 11 have a difficult choice to make and the reason they have to make the choice is not because the government believes that they deserve extraordinary aid unavailable to others, but because they were the victims of unprecedented attacks and because the parties that may have allowed the attacks to occur can not, because of the magnitude of the attacks, compensate all the victims. The attacks would have brought the entire airline industry down in an "apocalyptic" crash if Congress had not enacted the Fund.\textsuperscript{161}

No person could feel entirely complacent about leaving the September 11 victims with nothing which is what they would receive if massive bankruptcies eliminated the awards. Thus, they should all be given an equal sum of money for their pain and suffering and if they choose not to take it, they can use the civil justice system as they please. Because civil lawsuits are strongly discouraged under the current system,
Congress must devise another vehicle for discovery. Congress should appoint an investigation committee to exist along with the Fund. The Committee will not only help the victims, but it was also show other industries that to receive a taxpayer bailout, they must give the public answers.

The Special Master stated that while the "fund . . . can [not] possibly provide a full measure of relief to those who have suffered as a result of September 11, . . [it] will provide appropriate compensation and some measure of comfort to those whose lives have been torn asunder by the events of September 11."(162) To attempt to provide an even fuller measure of relief, a fact-finding commission is necessary. Unlike the Pan Am 103 bombing,(163) the TWA 800 air disaster,(164) or even the challenger disaster,(165) no investigating commission has been appointed to investigate and report on the aviation security conditions and deficiencies that allowed the terrorist attacks to succeed. The commission should investigate the preparedness of the FAA, the airlines, aircraft manufacturers, property owners and others for terrorist attacks.

This could fulfill the objectives of tort law that are not being served with the creation of the Victim Compensation Fund. Tort law seeks to: (1) "compensate victims for injuries suffered by the culpable action or inaction of others; (2) shift the cost of such injuries to the person or persons who are legally responsible for inflicting them; (3) discourage injurious, careless, and risky behavior in the future; and (4) vindicate legal rights and interests that have been compromised, diminished, or emasculated."(166)

The Fund only attempts to compensate the victims. The commission will force Congress to give back some of the rights afforded by the legal justice system that they have, in essence, taken away, and may help make the American public more receptive to the Victim Compensation Fund.

A. The Commission will Discourage Negligent Behavior

Tort law and the legal system helps mold conduct into acceptable patterns of civil behavior by requiring that the party that is found to have caused an accident bear the cost. The threat of having to bear these costs acts deters to accident-causing behavior. In this case, the airlines do not have this threat to deter future negligence. If the government shields corporations from liability, it may affect an industry's incentive to take precautions. For example, the biotechnology companies are seeking liability protections. If they do get protection from the government, they may be less careful in creating new drugs or vaccines. However, if they know that regardless of the legal reality, their behavior will be investigated by a commission that will report its findings to the public, the industries will be forced to maintain the utmost standard of care to the public. To prevent future tragedies, Congress must conduct "a thorough, nonpartisan, independent inquiry into what happened on September 11th, and what we
can do to protect our people and our institutions against the enemies of freedom in the future.\footnote{167} If the problems of aviation security are not fully disclosed, there is a realistic possibility that no improvements will be made. After September 11, the news has reported several instances of individuals who passed through airport security either unscreened\footnote{168} or with illegal objects. If the airlines and the FAA’s errors are made public, they are more likely to develop and provide improved security plans due to pressure from the public as well as fear that consumers will choose airlines with fewer security inadequacies.

\textbf{B. The Commission will Vindicate Legal Rights}

A public punishment or stigma could be likened to punitive damages. If the airlines are investigated and possibly publicly chastised for their action, the public and the victims may be more receptive to the Fund. Throughout the weeks after September 11, the news reported that the hijackers used knives and boxcutters to hijack the planes.\footnote{169} The news also removed blame from the airlines by saying that these were items which the FAA permitted aboard airplanes.\footnote{170} However, an internal FAA report obtained by the families of some victims says American Airlines told the FAA that a flight attendant on Flight 11 "contacted American Airlines Operations Centers and informed that a passenger . . . shot and killed a passenger. The passenger killed was . . . shot. One bullet was reported to have been fired."\footnote{171} Victims and the public deserve to know if the airlines allowed a gun aboard the planes. After a tragedy occurs, the natural human response is to look for someone to blame for its occurrence.\footnote{172} Placing blame makes it easier to understand the tragedy and, thus, easier to cope with its consequences.\footnote{173} It is dangerous to place blame where none lies; the commission is necessary to determine who and what contributed to the occurrence of the September 11 attacks.

\textbf{C. The Commission will Facilitate Public Receptiveness of the Fund.}

If the commission finds that the FAA was responsible for the attacks, then we may better understand why the government is engaging in the unique task of paying compensatory damages to the victims. If the commission finds that the airlines was responsible, other industries who are so readily seeking government protection, may maintain high standards out of fear of being subjected to a public commission as well. Victims, who may have chosen litigation, in an effort to hold the wrongdoers responsible, may now choose the Fund since the commission will attempt to supplement the Fund’s compensatory goals with the fact-finding benefits of litigation.
This article has provided an overview of the Victim Compensation Fund and the many problems it raises. When the bailout was enacted, estimates of September 11 deaths were more than twice what they are today. The Fund, born of a mix of compassion, political expediency, and a desperate need to remain united, came out of an unusual moment in American politics.\(^{174}\) September 11, the worst terrorist attack in our nation's history, was an attack on all Americans. Because unique events demand unique responses, Congress met the horrific tragedy with the September 11 Victim Compensation Fund. Contrary to normal procedure, the legislation was hardly debated on the floors of either the House or the Senate.\(^{175}\) While the Fund was drafted and enacted in only ten days, its ramifications will be felt as long as terrorism continues in America. The federal government should continue to provide aid to victims of terrorism, but the aid must be uniform. In addition to monetary aid, victims deserve answers. They must know what went wrong so they can feel secure that it will not happen again. Federal aid should not generate profuse, critical, and even bitter public comments. Rather, aid should be given fairly and consistently so that Americans are proud to be living in the most generous country in the world.

1. Threat of Terrorism to the United States: Statement for the record before the U.S. Senate committees on Appropriations, Armed Services, and Select Committee on Intelligence (May 10, 2001) (statement of Louis J. Freeh, Director F.B.I.), \textit{at} \url{http://www.fbi.gov/congress/congress01/freeh051001.htm} (There were two terrorist acts recorded in the United States in 1995, three in 1996, four in 1997, five in 1998, and 12 in 1999).


3. \textit{Id.}

4. \textit{Id.}
4 Martha Crenshaw, *Unintended Consequences: How Democracies Respond to Terrorism*, 21 Fletcher F. World Aff. 153, 154 (Summer/Fall 1997). *See also* R. Crelinstein and D. Sazo, Hostage Taking ix (1979) (The authors refer to hostages as "passive" or "secondary" victims of terrorism and labels the government as the "active" or "primary victim" since the government is expected to full the terrorist's demands).

5 See Deborah Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 Brandeis L. J. 83, 84-87 for a discussion of why the federal government aids victims of terrorism.


10. See Mostaghel, *supra* note 5, at 86.


16. See Alex Cukan, *Backlash against WTC Victims*, Washington Times, Jan. 26, 2002 ("The U.S. government was not at fault, and the taxpayers should not have to pay."); Milo Geyelin, *Criticism of Sept. 11 Fund Spurs Backlash*, Wall Street Journal ("taxpayers aren't happy about opening their pocketbooks.").


20. Id.

21. Id.

22. Id.


24. Id.


26. Michael Moss, US Airport Task Starts with Staff, N.Y. TIMES, Nov. 23, 2001, at A1. (“Long before Sept. 11, the federal government knew that the nation's system for screening airport baggage was bad and getting worse.”)

27. Id. at A2.


33. Id.


36. See Andrews v. United Airlines, Inc., 24 F.3d 39, 41 (9th Cir. 1994) (the common carrier must use "the utmost caution characteristic of very careful prudent men."). See also 49 U.S.C.44701 (providing that the duty of an air carrier is to provide service with the highest possible degree of safety).


38. Victim Compensation Fund §408 (b) (3).

39. Id. §408 (a). See also §201 (b) (2) (A) (1) (If a victim opts to sue airplane manufacturers, airport sponsors, anyone with a property interest in the WTC or NYC, their liability will also be limited to the insurance coverage.).


41. See Victim Compensation Fund §405 (c) (3) (B) (i). The waiver of the right to sue does not apply to: (1) actions against the terrorists or their co-conspirators; (2) actions to recover collateral source obligations; or (3) actions against the security companies.

42. Victim Compensation Fund §403.

43. Id. §403 (C) (B) (i).
44. See §201 (b) (2) (A) (1), amended to include these parties in addition to the airlines.

45 Victim Compensation Fund §405 (c) (2)-(B).

46 Id. §405 (c) (2)

47 28 C.F.R. §104.

48 Victim Compensation Fund § 201 (b) (2) (B).

49 28 C.F.R. §104.

50 Victim Compensation Fund § 405 (b) (1) (B) (ii).

51. See 28 C.F.R. §104 (e). The charts are based on national economic statistics produced by the Bureau of Labor Statistics.

52 28 C.F.R. §104.43 (a).

53 28 C.F.R. §104.43 (a).

54 28 C.F.R. §104.

55 Id.

56 Id.

57 See Victim Compensation Fund §402 (4) (Collateral source “means all collateral sources, including workmen's compensation, life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.”).
58. 28 C.F.R. §104.

59. Id.

60. Milo Geyelin, *Criticism of Sept. 11 Fund Spurs Backlash*, wall street journal.


62. 28 C.F.R. §104.


64. Id.


68. See Mostagel, supra note 5 at 87 for an overview of major federal terrorism legislation and a classification of each law as either compensatory or restitutionary.

69. Id. at 89.

70. Id.

71. Id. at 86-87.

73.


74. 5 USC §5561 Sec. 101 (1) (A) & (B).

75. See id. The Act defined an American hostage as any person who is put in captive status, while in the uniformed service of the United States, the Civil Service, or while a resident alien or citizen of the United States rendering personal service to the United States abroad.

76. 5 U.S.C. §5561.

77. *Compensating Victims of Terrorism*, supra note 72 at 387. See also 5 U.S.C. §5569. The legislation was Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act


79. Id.

80. Id. at §802.

81. Mostaghel, *supra* note 5 at 88. See also 22 U.S.C. §64 Section 5501-5513.

82. Id.

83.


84. Responding to Oklahoma city and Beyond, *supra* note 6, at Ch. V.

85. Id.

86. Victims of Terrorism Tax Relief Act, H.R. 2884 (Jan. 23, 2002).


88. Mostaghel, *supra* note 5 at 89.

89. Id.

90.
90 Id. at 98.


92 Id.

93 Id.


100 Id.

101 See Mark Hamblett, *World Trade Center Victim's Wife Sues Taliban, Bin Laden Racketeering*, N.Y.L.J. 1 col. 5 October 12, 2001. (Within a month of the attacks, a widow of a man who died when the North tower collapsed has filed the first lawsuit against Osama bin Laden, the Islamic Emirate of Afghanistan and its ruling Taliban leadership.). See Tom Perrotta & Mark Hamblett Litigation Expected in Attack's Aftermath, N.Y.L.J 1 col. 3 September 17, 2001 (Victims may also be able to sue Iraq and Afghanastin under 1996 and 1998 amendments to the Foreign Sovereign Immunities Act.).

102 See Robert Rabin, *Some Thoughts on the Efficacy of Mass Toxics Administrative Compensation Scheme*, 52 Md. 1. Rev. 951, 953-954 (1993) (The RAND Institute for Civil Justice's Study of the slightly more than 2000 commercial aviation accident deaths arising between 1970 and 1984 indicated that three-quarters were either consolidated in federal courts or settled without a judicial filing.).

103 Anthony Sebok, *Defending the September 11th Victim Compensation Fund: Why in the End, the Plan is Fair to All*. (Feb. 11, 2002), at http://writ.corporate.findlaw.com/sebok/20020211.html
104. Id.

105. Id.

106. See supra note 40 and accompanying text.


108. See 42 U.S.C. §247(b)-(l) (1976) (repealed 1978). The National Swine Flu Act is one of the only no-fault administrative schemes where the United States paid private pharmaceutical companies' tort liabilities for injuries caused by the Swine Flu vaccine. See also Anthony Sebok, A Special Master is Crucial to the New Airline Act, (Oct. 23, 2001), at http://www.cnn.com/2001/LAW/10/columns/fl.sebok.airline.10.23/ (act produced judgments against the government averaging $500,000 the and legislation was criticized for straining the national treasury). See also Janet Benshoof, Protecting Consumers, Prodding Companies, and Preventing Conception: Toward a Model Act for No Fault Liability for Contraceptives, 23 N.Y.U. Rev. of Int’l & Social Change 403, 430 (1997) (act should not be replicated unless costs can be contained).


114. See U.S. Dept. of Health & Human Services, Commonly Asked Questions About the National Vaccine Injury Compensation Program (Jan. 2002), at http://www.hrsa.gov/osp/vicp/qanda.htm. Awards to the estate in a vaccine-related death are limited to $250,000 plus attorney’s fees and costs.

115. Richard Campbell, The View From the Chair: Tort Model Compensation, 31 WTR. BRIEF 4, 6 (Winter 2002).


118. Id.


120. Id.

121. Id.
122. Embassy Employee Compensation Act, H.R. 3375. The bill was ordered to be reported by voice vote on April 24, 2002.


124. Id.


126. Oklahoma City's Victim Compensation Act, H.R. 3633. This bill was referred to the U.S. House of Representative's Subcommittee on Immigration and Claims on March 18, 2002.

127. H.R. 3978.

128. H.R. 3194.


131. Id.

132. See Responding to Oklahoma city and Beyond, supra note 6.

133. Id.

134. Id.

136. Id. (citing statement by Gene Kimmelman, senior director of Consumers Union).


141. Id.

142. Id. at cmt. P000478.


147. See 22 U.S.C.A. §2656f (d) (2), supra note 2, defining terrorism victims as non-combatant targets.


149. See supra Part II. A.

150. Id.


152. Id.

153. Mostaghel, supra note 5 at 86.


155. 28 C.F.R. §104.
156. See Phillip A. Karber, Law and the War on Terrorism, Reconstructing Global Aviation in an Era of the Civil Aircraft as a Weapon of Destruction, 25 Harv. J. L. & Pub. Pol. 781, 813 (Spring 2002). Pan Am and TWA were victimized by forty-eight terrorist attacks during their corporate history for being "flag carrier" symbols. These American corporations that were party destroyed by terrorism because they received little U.S. government support and minimal victimization compensation. See also TWA Name Disappears Forever, AIR TRANSPORT WORLD, Dec. 3, 2001, at http://www.atwonline.com/indexfull.cfm?newsid=1356.

157. Sebok, supra note 103.

158.

159. Id.

160. See supra note 34 and accompanying text.


162. 28 C.F.R. 104.


164. See Steven A. Mirmina, Aviation Safety and Security - Legal Developments, 63 J. Air L. & Com. 547, 548-549 (Feb.-Mar. 1998) (President Clinton directed Vice-President Gore to establish a commission and report forty-five days later on how to deploy the latest technology to detect the most sophisticated explosives.); Exec. Order 13,015, 3 C.F.R. §§ 213 (1997). 165. The Rogers Commission was formed to investigate the disaster. See REPORT TO THE PRESIDENT, PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT (1986).


169. See Hijackers Just like Other Passengers, supra note 25 and accompanying text.

170. See Walter V. Robinson, and Glen Johnson, Airlines fought security changes; Despite warnings, companies wanted to avoid delays, Boston Globe Online, Sept. 20, 2001, at http://www.geocities.com/aviationsafety.geo/bos010920_Security.htm. ("FAA had permitted passengers to carry knives up to four inches long, simply because so many people carry them.").


173. Id.
