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# THE VICTIM COMPENSATION FUND: BORN FROM A UNIQUE CONFLUENCE OF EVENTS NOT LIKELY TO BE DUPLICATED

*Robert S. Peck\**

## INTRODUCTION

The tragic events of September 11, 2001 struck the nation like a series of rapid body blows, each with an increasingly deeper impact. The sunny, placid day that greeted the East Coast that morning quickly turned dark as the tragedy unfolded before our very eyes. As a people, we will continue to experience its ramifications for years to come. A widespread innocence about our place in the world was snatched from us in deadly fashion. The safe haven we knew, far from the terror experienced in other parts of the world, was no more; our world suddenly became a more dangerous place. With the terrorist strikes of September 11th, the country experienced its first foreign-launched attack since Pearl Harbor some sixty years earlier. It seemed clear that we were no longer immune from the ravages of war that befalls so much of the rest of the planet.

The attacks effected a permanent change in America's geopolitical stance. President George W. Bush, on the anniversary of the attacks, told the nation that September 11th launched a "great struggle that tests our strength, and even more our resolve," with a new mission "to rid the world of terror" by pursuing "terrorists in cities and camps and caves across the earth."<sup>1</sup> The President acknowledged that the attacks were an assault "on the ideals that make us a nation," specifically acknowledging our commitment to "liberty and equality."<sup>2</sup> Yet, even as we reconsider our ideas about national security, travel safety and America's place in the world, we have undertaken a course that raises important questions about our approach to those ideas.<sup>3</sup>

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1. President's Remarks to the Nation at Ellis Island (Sept. 11, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/09/20020911-3.html> (last visited Sept. 23, 2003).

2. *Id.*

3. For a discussion of some of those issues, see, for example, Viet Dinh, Erwin Chemerinsky, Christopher Stone & Jeffrey Rosen, *Life After 9/11: Issues Affecting the Courts and the Nation*,

Just as it became necessary for us to rethink how we can combat terrorism while preserving liberty, it was also necessary to rethink how we redress the injuries visited upon people by a terrorist event of the magnitude of September 11th. The establishment of the September 11th Victim Compensation Fund of 2001 just ten days after the tragedy, and three days after it was first discussed, was one possible response.<sup>4</sup> Though some have suggested that it may be a model for future disaster relief or even certain mass tort situations, it was the product of a unique confluence of events not likely to be duplicated. It is not the purpose of this Article to evaluate its wisdom or level of success, but simply to explain, from one person's perspective, how it came about.

## II. THE EVENTS OF SEPTEMBER 11, 2001

For me, as with most Americans, September 11, 2001 began quite normally. My six-year-old son and I left for school from our home in Virginia early that morning, taking our usual route past the west side of the Pentagon. A short stretch of grass that included a helicopter pad was all that separated the highway from the famous building. Soon that side of the building would sport a gaping, smoking hole, having been rammed by American Airlines Flight 77. Our usual morning route would be closed to us for some time thereafter.

As I arrived at my office at 8:45 a.m. that morning, American Airlines Flight 11, heavy with fuel for its transcontinental flight from Boston to Los Angeles, struck the north tower of the World Trade Center, ripping a hole just above the ninety-sixth floor and spewing black smoke and flames.<sup>5</sup> Word of the event quickly circulated throughout the offices of the Association of Trial Lawyers of America (ATLA), where our law firm is located. Colleagues, still not fully understanding that a terrorist event had occurred, huddled around television sets wide-eyed at the pictures being broadcast. As I watched, I vividly recalled when the buildings went up; my father was an electrician on the buildings' construction crew. Then, at 9:03 a.m., United Airlines flight 175, also on a Boston-to-Los Angeles run, flew into the eightieth floor

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51 U. KAN. L. REV. 219 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Michael F. Linz & Sarah E. Meltzer, *Constitutional Issues After 9/11: Trading Liberty for Safety*, FED. LAW, Jan. 2003, at 30.

4. It may not even be a very unique response. See Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289 (2003).

5. CNN, *September 11: Chronology of Terror* (Sept. 12, 2001), available at <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited Sept. 23, 2003).

of the south tower.<sup>6</sup> No longer could this be a mere accident, a conclusion that President Bush confirmed at 9:30 a.m.<sup>7</sup>

Within minutes of the second plane crash, New York's airports, tunnels, and bridges were closed. At 9:40 a.m., for the first time in history, the Federal Aviation Administration (FAA) closed American airspace to nonmilitary traffic.<sup>8</sup> The FAA later diverted transatlantic flights heading for the United States to Canada.<sup>9</sup> First the White House and United Nations, then the State and Justice Departments, as well as World Bank, and finally, all federal office buildings in Washington, D.C. and state office buildings in New York were evacuated.<sup>10</sup>

A muted rumble, audible in the ATLA offices, sent us to our windows overlooking the Potomac River. Despite obstructions that blocked out any view of the Pentagon, billowing black smoke told the story that the news reports would soon validate: American Airlines Flight 77 from Washington's Dulles Airport had smashed into the west side of the Pentagon.<sup>11</sup> We were stunned by these events as we watched repeated replays of the World Trade Center crashes over and over, unable to avert our eyes from the images. Suddenly, at 10:05 a.m., the south tower of the World Trade Center crumbled on screen before our eyes.<sup>12</sup> Within minutes, the outer wall struck at the Pentagon also plummeted to the ground. And then the news reported that another airliner, United Airlines Flight 93, headed from Newark, New Jersey to San Francisco, had crashed near Shanksville, Pennsylvania after making a u-turn toward Washington, D.C.<sup>13</sup> Federal officials speculated then that the plane was likely headed for the White House or the Capitol.<sup>14</sup>

As people wondered aloud how many more airliners might come crashing from the skies, the north tower of the World Trade Center collapsed at 10:28 a.m.<sup>15</sup> Soon, five warships and two aircraft carriers were dispatched from the U.S. Naval Station in Norfolk, Virginia to protect the East Coast from further attack.<sup>16</sup> The Pentagon continued to burn, though the fire was isolated. At 5:20 p.m., another building in

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. CNN, *September 11: Chronology of Terror* (Sept. 12, 2001), available at <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited Sept. 23, 2003).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

the World Trade Center complex, damaged by the collapse of the twin towers, fell, even as firefighters struggled to put out other nearby fires.<sup>17</sup>

Early estimates placed the death toll at nearly 7,000.<sup>18</sup> Emergency rescue workers tragically died, attempting to save others. The nation was transfixed by the effort, which received saturation coverage, enabling all viewers to feel as though they were experiencing the situation first-hand. It was only some time later that more reliable figures established that the death toll was 2,742 in New York,<sup>19</sup> 189 at the Pentagon, and all 44 passengers on the plane that crashed in Pennsylvania.<sup>20</sup>

On the evening of September 11th, in a television address to an anxious nation, President Bush called the attacks “acts of mass murder.”<sup>21</sup> Soon, the country would be plunged into an all-encompassing war on terrorism.

### III. ATLA CALLS FOR A MORATORIUM

With good cause, trial lawyers strongly believe in the ability of lawsuits to deter future harmful behavior. Emblematic of this belief was *Grimshaw v. Ford Motor Co.*,<sup>22</sup> involving exploding fuel tanks in the Ford Pinto. Ford’s own crash tests of their economy car demonstrated that rear-end collisions at as little as twenty-five miles per hour caused a dangerous rupture of the fuel tank, yet Ford chose to make no change.<sup>23</sup> Ford also resisted compliance with existing federal regulations.<sup>24</sup> When the National Highway Transportation Safety Administration (NHSTA) sought to strengthen fuel tank regulations, Ford argued that the new regulations should be abandoned, or at least deferred, because a cost-benefit analysis suggested the retooling re-

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17. CNN, *September 11: Chronology of Terror* (Sept. 12, 2001), available at <http://www.cnn.com/2001/US/09/11/chronology.attack/index.html> (last visited Sept. 23, 2003).

18. See Frank J. Murray, *10 Days That Shook the World*, WASH. TIMES, Sept. 23, 2001, at A1.

19. For more than a year, 2,792 had served as the authoritative figure. On October 29, 2003, New York City officials lowered the death toll by an additional forty, citing incidence of fraud, duplication and people alive, but thought dead. Investigators indicated that the toll could still be lowered by two or three. Grant McCool, *World Trade Center Sept. 11 Death Toll Lowered*, Reuters, Oct. 29, 2003, available at <http://news/s/20031029/securitydeathtolldc.html> (last visited Nov. 16, 2003).

20. *To Our Readers*, ALBUQUERQUE J., Sept. 11, 2002, at A2.

21. Statement by the President (Sept. 12, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010912.html> (last visited Sept. 23, 2003).

22. 174 Cal. Rptr. 348 (Ct. App. 1981).

23. See Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Product Liability*, 60 MO. L. REV. 1, 78-79 (1995) (explaining the facts disclosed in *Grimshaw* prior to the ruling).

24. *Id.* at 78.

quired would not be economically worthwhile.<sup>25</sup> Ford estimated the new regulations would cost the automotive industry \$137.5 million but would only prevent 360 deaths and injuries, which Ford estimated had a value of \$49.5 million.<sup>26</sup>

In essence, Ford argued that the regulations would result in \$88 million in unnecessary costs. The company would rather have paid damages for the deaths the vehicle's flaw would cause than spend the money necessary to fix the problem. The *Grimshaw* decision provided the thumb on the scale that changed that calculation. In upholding a \$3.25 million punitive damage award, reduced from \$125 million, the court stated:

Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to the consuming public.<sup>27</sup>

*Grimshaw* and a slew of other cases<sup>28</sup> provide the paradigm for trial lawyers' faith in litigation. When the regulatory system fails, tort law can make a difference. Even where the regulatory system is functioning well, tort law complements and enhances its functionality.<sup>29</sup> The effectiveness of tort law as a deterrent to wrongful conduct is not based solely on anecdotal evidence. Existing empirical research supports the restraining effect of tort law.<sup>30</sup>

Tort law also has another salutary function besides compensation and deterrence: investigation. Through the process of court-ordered discovery and the adversarial back-and-forth, causes and effects can be exposed that were otherwise unknown.

Trial lawyers' conviction that tort law can accomplish positive outcomes that government investigations cannot was shared by Congress

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25. *Id.* at 79.

26. *Id.* at 78-79.

27. *Grimshaw*, 174 Cal. Rptr. at 384.

28. For a book-length treatment of such cases, see CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA* (2001).

29. See, e.g., Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 384-85 (1994).

30. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987) ("[A]lthough there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters . . .").

on at least one prior occasion when the issue was a remedy for those injured by terrorist acts. The Civil Liability for Acts of State Sponsored Terrorism Act in 1997,<sup>31</sup> also known as the “Flatow Amendment,”<sup>32</sup> creates a cause of action for personal injury or death against an “official, employee, or agent of a foreign state designated as a state sponsor of terrorism” who commits a terrorist act that injures a U.S. national and when U.S. courts can maintain jurisdiction.<sup>33</sup> The Act reflects a market-based solution that avoids the establishment and expenses of another bureaucracy that might be charged with similar responsibilities.

Given this federal endorsement of tort litigation in response to terrorism, coupled with trial lawyers’ own experience, it should not be surprising that some families of the September 11th victims immediately sought representation from lawyers who welcomed them warmly.<sup>34</sup> It should also not be surprising that some lawyers believed that the lapses in security and safety that enabled the hijackers to commandeer the aircraft they used could be exposed and remedied for the future through lawsuits.<sup>35</sup> However, the leadership of ATLA unanimously concluded that a slew of lawsuits at that time of shock and grief was precisely the wrong response. So, for the first time in the Association’s history, just one day after the terrible events, it issued a call for a moratorium on all lawsuits. The call issued by ATLA President Leo Boyle was sufficiently significant that it merits reprinting in full here:

America’s trial lawyers join the nation in mourning the tragic loss we all experienced as a result of coordinated terrorist acts against America. Our sincere condolences go out to the victims and to their families.

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31. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1997) (codified at 28 U.S.C. § 1605 note (Supp. V 2000)).

32. The name is a reference to Alisa Flatow, an American college student killed in a suicide attack in Israel. *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 330 (D.C. Cir. 2003).

33. 28 U.S.C. § 1605 note.

34. See, e.g., Carrie Johnson, *Lawyers Group Wants Moratorium on Attack Lawsuits*, WASH. POST, Sept. 14, 2001, at E3 (indicating that families had begun to contact lawyers); Abdon M. Pallasch, *For Once, Lawyers Reluctant To Sue: Victims’ Relatives Seek Legal Action, but Moratorium Urged*, CHI. SUN-TIMES, Sept. 17, 2001, at 22.

35. See, e.g., Carrie Johnson, *Lawyers May Bypass Victim Fund: Some Consider Filing Suits over Attacks*, WASH. POST, Sept. 26, 2001, at E1. See also *The Fault Line: Lawsuits Wrong Way to Fight Terrorism*, COLUMBUS DISPATCH, Feb. 2, 2002, at 16A (reporting on the efforts of former Transportation Inspector General Mary Schiavo, who believes that there is liability on the part of airlines, airport-security companies, aircraft manufacturers, flight schools, and the Federal Aviation Administration, to use lawsuits for victims of the September 11th tragedy to answer questions and change security).

Today, we must enter a period of national unity that should set us on a course of comfort and care for the families who have experienced this national tragedy in the most personal of ways. It should also be a course of renewal and resolve, where our American ideals continue as our true guideposts and national security is pursued with vigor and purpose.

It is not, as some would have it, a time for finger-pointing among our own people. We, as a nation, must speak with a single voice, a voice of compassion for the victims and a voice of authority to those who would tear down our society.

For this reason, for the first time in our history, the Association of Trial Lawyers of America (ATLA) is calling for a moratorium on lawsuits arising out of the events of September 11. There are greater needs that must be served at this time.

Let this instead be a time for healing, with our anger reserved for the terrorists who perpetrated this tragedy. ATLA is prepared to work with Congress and the administration to help find justice for and assistance to the victims of Tuesday's tragedy. Let us act as one nation in locating those responsible for this heinous act and in taking the necessary steps to prevent its recurrence.<sup>36</sup>

The response to the indefinite moratorium was gratifying. Though ATLA had no coercive authority over its members or the many trial lawyers who were not members, the moral authority of the moratorium was undeniable. The moratorium held for a long time, even then being breached only by a mere handful of lawsuits.<sup>37</sup> One of the first was by an insurer seeking to limit its exposure.<sup>38</sup> Another sought damages from Osama bin Laden and other terrorists.<sup>39</sup> These lawsuits were not within the scope of the moratorium.

ATLA also joined the outpouring of generosity from the public,<sup>40</sup> creating the ATLA-911 Heroes Fund to facilitate contributions from the trial lawyer community.<sup>41</sup>

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36. ATLA President's statement (on file with author).

37. Frank J. Murray, *Lawsuit Freeze Promises Speedy Relief; Moratorium by Lawyers, New Federal Law Stem Rush to Courthouse for Now*, WASH. TIMES, Oct. 10, 2001, at A7; William Glaberson, *4 Suits Filed, Despite Call for Restraint by Lawyers*, N.Y. TIMES, Jan. 15, 2002, at A13 (reporting that four lawsuits had been filed but that the moratorium was still holding up otherwise); *A Matter of Time; So Much for Moratorium on Terror Lawsuits*, SAN DIEGO UNION-TRIB., Jan. 17, 2002, at B16.

38. Stephen Labaton, *A Nation Challenged: Liability; Insurer Sues To Limit Its Payout for World Trade Center*, N.Y. TIMES, Oct. 23, 2001, at B5.

39. Mark Hamblett, *Bin Laden Named in Suit: N.J. Widow Files First Action Stemming from Sept. 11 Attack*, NAT'L L.J., Oct. 22, 2001, at A4.

40. Contributions flowed in from the public at a pace that charities could not handle. In seven weeks' time, the Red Cross collected about \$500 million and then sought to discourage further giving for a time. Jacqueline L. Salmon, *Red Cross Stops Seeking Donations to September 11 Fund*, WASH. POST, Oct. 31, 2001, at A20.

41. Leo Boyle, *President's Page: September 11, 2001*, TRIAL, Oct. 2001, at 9.



## IV. AIRLINE BAILOUT GIVES RISE TO VICTIMS' FUND

On the heels of the tragedy, an already economically strapped airline industry<sup>42</sup> began an immediate campaign for federal assistance. The ban on air traffic in the nation's skies only exacerbated the slide toward bankruptcy that several carriers were experiencing. Although the skies were closed for just two and one-half days, businesses began to explore video conferencing and other alternatives to travel.<sup>43</sup> Families were canceling trips.<sup>44</sup> By early October, the airlines had run up losses of more than \$1 billion.<sup>45</sup>

Specifically, the airlines sought low-interest loans, antitrust relief to allow the companies to coordinate schedule reductions, increased compensation through U.S. Department of Defense contracts, and relief from fuel taxes.<sup>46</sup> Another key component of their lobbying effort was immunity from liability connected with injury and property losses at the World Trade Center and Pentagon, even while accepting liability for loss of life aboard their planes.<sup>47</sup> A \$15 billion package of grants and credit was proposed.<sup>48</sup> Though the need was palpable, there was an unseemly quality to the request for immunity at a time when public concern and sympathy for the victims was still at its apogee. ATLA raised objections to the liability limitations unless something was done for the victims. ATLA President Boyle said the airlines "should refrain from seeking a roll-back of rights of the policemen, firemen, office workers and anyone else that was on the ground."<sup>49</sup>

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42. Before the September 11th attacks, "the airline industry was expecting its worst losses in a decade—about \$2 billion—because of a sharp drop in business travel." Marilyn Adams, *Airlines Edge Near Bankruptcy, Cut Flights*, USA TODAY, Sept. 17, 2001, at B1. Several airlines teetered toward bankruptcy. Laurence Zuckerman, *After the Attacks: Financial Struggles; Airlines, in Search of Relief, Warn of Bankruptcy*, N.Y. TIMES, Sept. 15, 2001, at A1.

43. See Rick Barrett, *Closer to Home; Teleconferencing Offers an Alternative to Costly Travel*, Mil. J. Sentinel, May 13, 2002, at 1D.

44. Susan Levine & Sabrina Jones, *Many Families Revisiting Holiday Travel Tradition: Most Decide Against Skipping the Trip, but Fewer Are Flying for Thanksgiving Get Togethers*, WASH. POST, Nov. 16, 2001, at B1.

45. Edmund Sanders, *Federal Board May Decide Which Airlines Will Survive*, L.A. TIMES, Oct. 6, 2001, at C1.

46. Keith Alexander, *Airlines Consulted on Bailout Package*, WASH. POST, Sept. 18, 2001; Lizette Alvarez & Philip Shenon, *A Nation Challenged: The Lobbying: Airline Industry Confident About Proposed Bailout Plan*, N.Y. TIMES, Sept. 18, 2001, at C3.

47. John D. McKinnon et al., *U.S. Moves Toward Aid Pool of \$40 Billion*, WALL ST. J., Sept. 14, 2001, at A3.

48. Deirdre Shesgreen & Cynthia Wilson, *Congressional Leaders Work on Bailout Plans for Airlines*, ST. LOUIS POST-DISPATCH, Sept. 15, 2001, at 11; Joseph B. Treaster, *After the Attacks: The Liability; Airlines Seek to Limit Lawsuits over Attacks*, N.Y. TIMES, Sept. 14, 2001, at A19.

49. Marilyn Adams, *Airlines Edge Near Bankruptcy, Cut Flights*, USA TODAY, Sept. 17, 2001, at B1.

ATLA realized the dire straits that the airlines were in and that their \$1.5 billion per plane insurance policies would not go very far in compensating personal injury and death, property damage, and business opportunity claimants. It argued that a compensation package for the victims had to be part of any relief package Congress might enact for the airlines.<sup>50</sup> Many believed the federal government bore at least some responsibility for the tragedy, assigning some of the blame to regulatory lapses implicated in the security blunders. The issue of victim compensation, along with New York City's request for federal assistance, delayed consideration of the airlines' initial bailout.<sup>51</sup> As their stocks and financial condition, as well as insurability, continued to plummet, the airlines increased their federal request to \$24 billion.

It became apparent on September 19, 2001 that some type of bailout would occur. The White House was readying a \$5 billion cash package for the airlines that included liability protections, as ATLA President Boyle met with House Minority Leader Richard Gephardt to discuss the victims.<sup>52</sup> Word filtered back to our offices on September 20 that Congress was considering a more generous package than that proposed by the President and that we should begin to draft a proposed victims' compensation system. Something would happen very quickly.

## V. THE ATLA VERSION OF VICTIMS' COMPENSATION TAKES SHAPE

Time was short to get a draft to Capitol Hill. With a premium placed on speed, I was asked to hunker down with ATLA's Director of National Affairs, Daniel Cohen, and Karen Marangi, an associate at Patton Boggs LLP and former Senate Judiciary counsel, to create a possible direction for such legislation.

### A. Models Examined and Considered

There was no time to research existing models that might serve as a basis for a fund. I was familiar with the approach to compensation taken in the Black Lung Benefits Act<sup>53</sup> and rejected that approach as inappropriate. The Act was designed to provide benefits to coal min-

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50. Julie Kosterlitz, *Who Counts?*, NAT'L J., May 4, 2002, at 1296.

51. Frank Swoboda & Martha McNeil Hamilton, *Congress Passes \$15 Billion Airline Bailout*, WASH. POST, Sept. 22, 2001, at A1.

52. Lizette Alvarez & Laura M. Holson, *White House To Seek \$5 Billion as Part of Airline Rescue Plan*, N.Y. TIMES, Sept. 20, 2001, at C1.

53. 30 U.S.C. §§ 901-945 (2000).

ers "totally disabled due to pneumoconiosis and to the surviving dependents of minors whose death was due to such disease."<sup>54</sup> To be eligible for benefits, claimants had to prove total disability based on pneumoconiosis suffered as a result of coal-mine employment.<sup>55</sup> By judicial interpretation, a presumption exists that the elements of eligibility are met when pneumoconiosis is combined with coal-mine employment of at least ten years' duration.<sup>56</sup>

Black-lung claims were once processed by the Social Security Administration and later by the Department of Labor.<sup>57</sup> The benefits paid are very limited. In fiscal year 2001, \$393,177,000 in benefits were paid to 57,140 claimants.<sup>58</sup> The average payout was, thus, just \$6,880.94. For 2003, the monthly benefit rate was \$534.<sup>59</sup>

The Black Lung program has been the subject of considerable criticism.<sup>60</sup> Issues of proof still plague the system.<sup>61</sup> Even from my rough familiarity, it did not seem like a model worth pursuing.

I was also familiar with the Price-Anderson Act.<sup>62</sup> It, particularly as interpreted by the United States Supreme Court, seemed a more promising model. The Act's purposes seemed to match well with the purposes that a victims' compensation system would have. The Price-Anderson Act sought to encourage the development of nuclear energy by private industry,<sup>63</sup> while also ensuring compensation for injuries and damages caused by a nuclear accident.<sup>64</sup>

When the Nuclear Regulatory Commission declares an "extraordinary nuclear occurrence," the Act comes into play. The Price-Anderson Act sets up a system of strict liability in which all defenses are waived.<sup>65</sup> Claimants merely need to prove that their injuries result

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54. *Id.* § 901(a).

55. *Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 141 (1987).

56. *Id.* at 141-42.

57. Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 674 (1989).

58. Catalog of Domestic Federal Assistance, § 17.307: Coal Mine Workers' Compensation, available at <http://www.cfda.gov/static/17307.htm> (last visited Oct. 15, 2003).

59. Dir. of Coal Mine Workers' Compensation, U.S. Dep't of Labor, Black Lung Monthly Benefits Rate for CY 2003, available at <http://www.dol.gov/esa/regs/compliance/owcp/blbene2k.htm> (last visited Nov. 16, 2003).

60. See, e.g., Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025 (2002).

61. William S. Mattingly, *Black Lung Update: The Evolution of the Current Regulations and the Proposed Revolution*, 100 W. VA. L. REV. 601, 601 (1998).

62. 42 U.S.C. § 2210 (2000).

63. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 84 (1978).

64. *Id.* at 86 (citations omitted).

65. *Id.* at 90 (citing 42 U.S.C. §2210(n) (Supp. V 1970)).

from a nuclear power plant accident.<sup>66</sup> The Act limits plants' liability to \$560 million for all claims arising from a single nuclear incident.<sup>67</sup> To be eligible for the benefits of Price-Anderson, nuclear licensees must have \$160 million in private insurance and contribute up to \$10 million per year (up to a total of \$63 million) to a pool of funds that is designed to total \$7 billion.

The constitutionality of the Act was challenged in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>68</sup> One of the arguments propounded by the challengers was that due process requires that "a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."<sup>69</sup> The Court found that it did not have to definitively determine the validity of that argument, even if the Court had articulated such a requirement some sixty years earlier.<sup>70</sup> It said that there was no need to enunciate such a test, if indeed the Constitution mandates that analysis, because the Court held that the Price-Anderson Act "provide[d] a reasonably just substitute for the common-law or state tort law remedies it replaces."<sup>71</sup> The Court took a similar approach a few years later when it upheld the President's authority to substitute a claims tribunal capable of providing meaningful relief for private litigation claims against Iran after the hostage crisis of the mid-1970s.<sup>72</sup>

Two elements were critical to the *Duke Power* Court's conclusion that Price-Anderson constituted "a reasonably just substitute" for tort remedies. First, as already indicated, the Act required that the nuclear industry waive all defenses. Such a provision was sufficiently similar to workers' compensation statutes, which abolished negligence liability and certain damages for employers while entitling workers to compensation for economic losses without regard to fault.<sup>73</sup>

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66. *Id.*

67. *Id.* at 65.

68. 438 U.S. 59.

69. *Id.* at 88.

70. See *New York Central Railroad Co. v. White*, 243 U.S. 188, 201 (1917), in which the Court stated that the government may not, "without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability . . . without providing a reasonably just substitute." It reached that conclusion even while adhering to the notion that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *Id.* at 198.

71. *Duke Power Co.*, 438 U.S. at 88.

72. *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981).

73. *Duke Power Co.*, 438 U.S. at 93 (citing *N.Y. Cent. R.R. Co.*, 243 U.S. 188).

This type of quid pro quo requirement is often found in state constitutional analysis.<sup>74</sup> Moreover, and significantly, Congress established itself in Price-Anderson as a guarantor against liability in excess of the \$560 million ceiling,<sup>75</sup> assuring full compensation of each injured claimant.

The Court's vision of the Price-Anderson Act was utterly appealing for the task of creating a compensation program. It assured that plaintiffs who might give up their right to trial by jury would still have an opportunity to seek full compensation without needing to prove fault in a manner that was constitutionally sound. With that idea in mind, the drafting process was quickly undertaken.

### B. Article I Court or Special Master?

Following the Price-Anderson model, the ATLA draft<sup>76</sup> created a non-adversarial proceeding where only two issues existed: eligibility and the amount of damages suffered. To hear those issues, the draft created an Article I court.<sup>77</sup> Congress instead opted for a special master within the Justice Department.

The decision to create an Article I court was premised on the idea that a special court, created for that singular purpose, was most likely to serve the needs of the victims without the distractions and demands of its regular docket. It would also be capable of some flexibility of procedure attuned to the sole issues of eligibility and damage. Such a court could also justifiably consolidate all claims before it.<sup>78</sup> Congress had long employed its Article I authority to establish "legislative courts."<sup>79</sup> In one of the leading cases, a plurality of the Supreme

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74. See, e.g., *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985); *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973); *State ex rel. Yapple v. Creamer*, 97 N.E. 602, 607 (Ohio 1912). See also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("[T]here are limits on governmental authority to abolish core common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.").

75. *Duke Power Co.*, 438 U.S. at 65, 66-67, 85-87.

76. This draft, which was more on the order of an outline, is reproduced in the Appendix to this Article.

77. See attached appendix.

78. For a survey of the use of such courts, see Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377.

79. See, e.g., *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (recognizing authority to establish legislative courts by "virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States"); see also *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929) ("[I]t long has been settled that Article III does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution.").

Court recognized “three narrow situations” in which jurisdiction may properly be vested in legislative courts.<sup>80</sup> First, Congress may create courts for territories, because within a federal territory the federal government remains the sovereign.<sup>81</sup> Second, it may create military courts pursuant to congressional power to maintain and set rules for the armed forces of the United States.<sup>82</sup> Third, it may create courts “to adjudicate cases involving ‘public rights.’”<sup>83</sup> It was within that realm that the ATLA draft would have established a September 11th compensation court.

The public rights doctrine of adjudication was first recognized by the Court in 1856 in *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>84</sup> There, the Court said:

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.<sup>85</sup>

At the same time, the Court recognized that Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.<sup>86</sup>

Essentially, the doctrine recognizes that where “Congress would be free to commit such matters completely to nonjudicial executive determination, . . . there can be no constitutional objection to Congress’s employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.”<sup>87</sup>

Concurring in that decision, then-Justice Rehnquist noted that the jurisprudence surrounding legislative courts does not admit of easy synthesis.<sup>88</sup> Several years later, the Court relaxed the standards of review further. First, in *Thomas v. Union Carbide Agricultural Products Co.*,<sup>89</sup> the Court approved an adjudicatory scheme that put a federal

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80. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion).

81. *Id.* at 64-65.

82. *Id.* at 66.

83. *Id.* at 67.

84. 59 U.S. (18 How.) 272 (1856).

85. *Id.* at 284.

86. *Id.*

87. *N. Pipeline Const. Co.*, 458 U.S. at 68 (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

88. *Id.* at 91 (Rehnquist, J., concurring).

89. 473 U.S. 568 (1985).

arbitrator in charge of determining compensation for a registrant with the Environmental Protection Agency when a subsequent registrant made use of the prior person's data submission. The arbitrator's determinations were subject to review by an Article III court only for "fraud, misrepresentation, or other misconduct."<sup>90</sup> The Court made much of congressional intent to assure the quick resolution of claims and a process that was fundamentally fair.<sup>91</sup> A reflection of that fundamental fairness was found in the provision for limited review in an Article III court.<sup>92</sup>

Then, in *Commodity Futures Trading Commission v. Schor*,<sup>93</sup> the Court approved adjudication of a state law cause of action, as a counterclaim, before the Commodity Futures Trading Commission. Because Congress had asserted an interest in providing an "inexpensive and expeditious alternative" to litigation in courts or arbitration<sup>94</sup> and the parties had submitted themselves to the tribunal's jurisdiction, thereby waiving any constitutional objection,<sup>95</sup> the Court found any intrusion on judicial interests to be "*de minimis*."<sup>96</sup>

*Schor* enunciated four guidelines to evaluating the use of an Article I court: (1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts";<sup>97</sup> (2) "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts";<sup>98</sup> (3) "the origins and importance of the right to be adjudicated";<sup>99</sup> and (4) "the concerns that drove Congress to depart from the requirements of Article III."<sup>100</sup>

It seemed patently clear that a September 11th compensation court would satisfy these guidelines. Before such a court, a nonadversarial system of paying claims from taxpayer funds would be established that is different from the traditional form of courtroom adjudication; jurisdiction for the court would be extremely circumscribed; the origins of the events that gave rise to the claims heard were peculiarly unique;

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90. *Id.* at 573-74 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii) (2000) (internal quotation marks omitted)).

91. *Id.* at 592-93.

92. *Id.*

93. 478 U.S. 833 (1986).

94. *Id.* at 836, 855.

95. *Id.* at 848.

96. *Id.* at 856.

97. *Id.* at 851.

98. *Id.*

99. *Schor*, 478 U.S. 833 (1986).

100. *Id.*

and the likelihood that the normal processes might be incapable of redressing these injuries was palpable.

Moreover, the court's purpose was, similarly, to create an "inexpensive and expeditious alternative" to traditional litigation—litigation that was likely to be unsatisfactory to anyone. After all, the airlines had only \$1.5 billion in insurance on each of the four airplanes hijacked. With the wealth of injury, property damage, and business opportunities claims on those funds existent, the available compensation would be doled out quickly and the remaining assets of the airlines would similarly disappear rapidly, long before the claims were satisfied.

The ATLA draft anticipated that the President would appoint a person to serve as the presiding judge of the court, subject to the advice and consent of the Senate, for a term of not more than five years. The judge was subject to removal by the Attorney General for good cause. The judge also had all necessary authority to promulgate the procedural and substantive rules necessary to dispose of claims. Instead, Congress created a Special Master appointed by the Attorney General.

We assumed that no single person could hear all the claims likely to inundate the tribunal.<sup>101</sup> Thus, the presiding judge was responsible for hiring an appropriate number of hearing officers and other necessary administrative staff to oversee the work of the court. In line with already-existing congressional sentiment, the court was to be located within and be affiliated with the United States District Court for the Southern District of New York.

### C. *Funding the Compensation*

The ATLA draft imagined full compensation for the victims, though the drafters had no confidence that the legislation would end up there. As a result, we made no attempt to define that compensation. Congress, however, endorsed the full compensation approach. Rather than create a budget for the Fund and subsequently appropriate

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101. After Congress designated a Special Master, rather than an Article I court, to hear claims, Washington lawyer Kenneth Feinberg was appointed to the daunting task. He personally undertook responsibility to hear as many claims as possible and provide a final level of review in all cases, while also reaching out publicly to the victims and victims' families. For a profile of that outreach, see Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, *NEW YORKER*, Nov. 25, 2002, at 42. Perhaps the claims had begun to reach the levels we anticipated a year after his appointment. In September 2002, Feinberg announced that he had invited forty-one prominent retired judges, lawyers, and professors to serve as hearing officers. David W. Chen, *Legal Heavyweights To Help Decide Sept. 11 Fund Appeals*, *N.Y. TIMES*, Sept. 24, 2002, at B1.



funds, it created the first federal entitlement program in decades. Through its act in creating the Fund, Congress deemed whatever compensation awards made by the Special Master to be “the obligation of the Federal Government.”<sup>102</sup> Congress also enumerated the compensable damages.

Compensable economic loss embraced “any pecuniary loss . . . including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss . . . burial costs, and loss of business or employment opportunities . . . .”<sup>103</sup> Compensable noneconomic loss included “physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium . . . hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.”<sup>104</sup> The breadth of damages endorsed, particularly the inclusion of hedonic damages, was stunning.

Although the ATLA draft provided that compensation received from the Fund was to be in addition to any other compensation for which the recipient was eligible due to the injury or death sustained, Congress provided for the reduction of awards by collateral source benefits, such as life insurance, pension funds, and other government payments.<sup>105</sup> Still, supporters of the Fund were confident that it provided a better alternative than a lawsuit, a possibility the law left unimpaired if a claimant did not choose the Fund option. The Fund’s superiority was the result of its promise of full compensation without the need for proof of causation and liability and without the difficulties that collection of any judgment would present.

#### D. Eligibility for Benefits

Like Congress, the ATLA draft provided broad eligibility for the benefits established by the Victim Compensation Fund. The draft simply permitted any individual who suffered injuries due to the terrorist-related airline attacks on September 11, 2001, or their spouses, children, parents and other dependents, to seek compensation from this Fund.<sup>106</sup> Congress extended eligibility to physical injury or wrongful death claims of individuals or relatives of someone killed “as a result of the terrorist-related aircraft crashes of September 11,

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102. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §406(b), 115 Stat. 230, 240 (2001).

103. *Id.* § 402(5).

104. *Id.* § 402(7).

105. *Id.* § 405(b)(6).

106. *See* attached appendix.

2001.”<sup>107</sup> The Special Master subsequently ruled that “relatives” could include same-sex partners.<sup>108</sup>

### E. Procedure

Under the system we proposed, the staff of the September 11th compensation court would make an initial determination of the applicant’s eligibility for compensation and appropriate level of compensation within ninety days of having received the application. Under the statute, the Special Master has 120 days to make a written determination of the claim.<sup>109</sup> Although we provided for review by a hearing officer at the September 11th compensation court with witnesses and other evidence and a subsequent final appeal to the district court, Congress determined that the Special Master’s decision was “final and not subject to judicial review.”<sup>110</sup>

## VI. ATLA CREATES MASSIVE PRO BONO EFFORT TO SUPPORT FUND

Even as the Fund was taking shape, ATLA was considering other ways in which it might respond to the tragedy of September 11th. In a telephone conference call, without hesitation, its Executive Committee agreed that it would begin a massive recruitment effort to obtain volunteer lawyers to represent victims before the Fund. When passage of the Fund became a certainty and efforts to enact limitations on attorneys fees had failed, ATLA unveiled its pro bono effort by sending a letter to the Senate that Senator Harry Reid read on the floor during debate on the legislation.<sup>111</sup> Along with state trial lawyer associations in the affected areas, ATLA incorporated “Trial Lawyers Care” (TLC) as a massive pro bono program<sup>112</sup> to represent victims before the Fund.<sup>113</sup> To undertake this representation, TLC opened offices in New York and developed a significant training program for the volunteer lawyers representing victims.<sup>114</sup>

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107. Air Transportation Safety and System Stabilization Act, §403.

108. See Steve Vogel, *U.S. Awards Lesbian 9/11 Benefits for Loss of Partner*, WASH. POST, Jan. 23, 2003, at B1.

109. Air Transportation Safety and System Stabilization Act § 405(b)(3).

110. *Id.*

111. Leo Boyle, *A Defining Moment*, TRIAL, Nov. 2001, at 9.

112. Trial Lawyers Care may be the largest pro bono program every undertaken. Leo V. Boyle, *Victims Fund Will Work, but Don't Toss Torts*, LEGAL TIMES, Jan. 28, 2002, at 53.

113. See Diana B. Henriques, *Lawyers Offer Free Advice in Tapping Federal Fund*, N.Y. TIMES, Oct. 15, 2001, at B11.

114. For information about Trial Lawyers Care, see <http://www.911lawhelp.org> (last visited Sept. 23, 2003).

## VII. CONCLUSION

The September 11th Victim Compensation Fund of 2001 represents one response to a national tragedy that inimitably touched all American lives. Some have raised questions about why such a response to disaster should not be extended to victims of the bombings in Oklahoma City and Nairobi or the downing of Pam Am Flight 103.<sup>115</sup> Others have suggested that the Fund holds promise as a model for resolving certain mass torts.<sup>116</sup> This seems unlikely. The origin of the need, the outpouring of public sympathy, and the necessity for a rapid response to save a failing airline industry combined to make possible something that was otherwise unthinkable and appears unlikely to be established again. Even if the future brings another mass-murder perpetrated by foreign terrorists, it is difficult to imagine the event searing the soul as did September 11th, now a part of our everyday lexicon. Would such an event also threaten a critical industry and provide the motivation for federal intervention? That, of course, is possible. Yet, a program of full compensation at public expense seems unlikely to pass again. Let us pray that we do not have to find out.

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115. See, e.g., Diana B. Henriques & David Barstow, *A Nation Challenged: Victims' Compensation; Fund for Victims' Families Already Proves Sore Point*, N.Y. TIMES, Oct. 1, 2001, at A1.

116. See, e.g., Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265 (2002).

## APPENDIX

## DRAFT

**PROPOSED PLAN FOR THE ESTABLISHMENT OF  
A SEPTEMBER 11th COMPENSATION FUND***Creation of the September 11th Compensation Fund*

- Congress shall authorize and appropriate such funds as may be necessary, up to \_\_\_\_ billion, to compensate any individuals, and/or their spouses, children, parents, or other dependents, who were injured or killed as a result of the terrorist-related airline crashes in the United States on September 11, 2001.
- Such funds shall be appropriated to a “September 11th Compensation Fund” (hereinafter “the Fund”) to be established by the U.S. Treasury and to be managed by a newly created “September 11th Compensation Court” on or before October 30, 2001.
- The Fund shall also be authorized to receive contributions from any insurance companies or any other entity that seeks to contribute.
- Individuals who suffered harm due to the terrorist-related airline attacks on September 11, 2001, or their spouses, children, parents and other dependents, shall have the right to seek compensation from this Fund.
- The liability of the airlines involved in the terrorist-related airline crashes on September 11, 2001 shall be limited to the amount of insurance coverage they have for such incidents. The U.S. government will have the right to seek subrogation against any airline, insurance company or other entity found to be responsible for payment of compensation to the victims and their families.
- Congress shall also authorize and appropriate the necessary funds to create and run the September 11th Compensation Court so it may carry out its duties, as outlined below. This shall be carried out as a separate appropriation.
- The Fund shall first pay out any monies contributed by airlines, insurance companies or other entities to the Fund. (Possible favorable tax treatment to encourage payment into the Fund. Also payees could be immunized from claims of subrogation from other insurers.)

*Creation of the September 11th Compensation Court to Administer the Fund*

- The President shall appoint a person to serve as the Presiding Judge of a newly created “September 11th Compensation Court”

(hereinafter “the Court”). Such appointment shall be subject to the advice and consent of the Senate and shall be made according to Article I of the Constitution.

- The Presiding Judge of this newly established Court shall serve for a term of not more than five years, and may be removed by the Attorney General only for good cause. The Presiding Judge shall have the authority to promulgate all procedural and substantive rules necessary to administer the Fund.
- The Presiding Judge shall be charged with hiring an appropriate number of hearing officers and other appropriate administrative staff to oversee the work of the Court.
- This Court shall be located within the Southern District of New York, and shall be affiliated with the United States District Court for the Southern District of New York.
- The Presiding Judge shall have the authority to seek additional funds from Congress, as appropriate, to administer the Fund.

### *Claims for Compensation*

- Any individual who suffered injuries as a result of the terrorist-related airline crashes on September 11th, 2001 may apply to the Fund for compensation for such injuries. In addition, any spouse, child, parent and/or other dependent of an individual who was injured or killed as a result of the terrorist-related airline crashes on September 11th, 2001 may also apply to the Fund for compensation.
- Any such compensation received from the Fund shall be in addition to any other compensation for which the individual or family member is eligible due to the injury or death sustained.
- Applicants for compensation must apply to the Fund on or before September 11, 2003. The Presiding Judge shall develop an appropriate application form to be used by all such applicants which shall be made available through appropriate government offices and online, if possible.
- To be eligible for compensation, applicants will need to provide adequate proof of the harm they or their family member suffered or adequate proof of death linked to the terrorist-related airline crashes on September 11, 2001. Applicants will not be required to prove causation or negligence.
- The application form will request information regarding any possible economic and non-economic damages that the claimant suffered due to the terrorist-related airline crashes.

### ***Initial Determination of Eligibility for Compensation and Initial Review***

- The staff of the September 11th Compensation Court shall make an initial determination of the applicant's eligibility for compensation and appropriate level of compensation within 90 days of having received the application.
- The applicant shall have 60 days from notification of this proposed award of compensation to seek a review of this determination and a hearing before a hearing officer at the September 11th Compensation Court. If requested, any such hearing shall be held promptly.
- At any such hearing, the applicant shall have the right to have counsel present, the right to present evidence (including, but not limited to witnesses and documents), and any other due process rights determined appropriate by the Presiding Judge of the Court.
- Applicants shall retain their right to collect the initial compensation offered by the Fund, regardless of whether they seek a review or appeal of the initial determination.

### ***Right of Appeal to the U.S. District Court***

- The applicant shall have 60 days from the date they are notified in writing of the hearing officer's decision to appeal any such decision to the appropriate U.S. District Court.
- Any determination of the applicant's eligibility for and level of compensation by the U.S. District Court shall be a final decision with no rights of further appellate review, except as otherwise provided by law.

### ***Payment of Compensation and Use of Funds***

- The Fund shall promptly pay the compensation it is determined they owe any applicant. In all cases, the compensation shall be paid within 45 days of the final determination or exhaustion of appellate rights.
- The monies in the Fund shall only be used to provide compensation for the individuals who were injured or killed as a result of the terrorist-related airline crashes on September 11, 2001, and to compensate the spouses, children, parents and other dependents of these individuals.
- Reasonable attorneys' fees shall be available, as approved by the Court.

***Other Issues***

- Precise definition of terrorism exemption from prospective claims to be determined.