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Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation

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Speech:[†] Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation

Kenneth R. Feinberg^{*}

Thank you very much. Most of you have some idea about the September 11th Victim Compensation Fund, but let me remind everybody about this federal law.¹ Established by Congress within two weeks after 9/11, the law states that anybody who is eligible, who lost a loved one on 9/11, or who was physically injured on 9/11 could voluntarily elect to come into the fund by the deadline, which was December 22, 2003. You do not have to, but if you elect to come into the fund, the law sets out a calculation of dollars that you are entitled to tax-free, averaging about two million dollars per claim. If you would rather litigate against the airlines, the World Trade Center, the security guards, Massport, the Port Authority, Boeing, go ahead. You can do that, but if you do, you must litigate in federal court in New York City, and there is a cap on the aggregate damages that the airlines and the World Trade Center will have to pay. It is not worth it, says Congress. Come into this program voluntarily. Virtually all families took advantage of the opportunity. Ninety-seven percent of all eligible families came into the program. There are today only eighty people litigating 9/11 death claims in federal court. About ten families did nothing—paralyzed with grief, clinically depressed. They did not come into the fund, and they did not litigate. But there

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1. See September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42 tit. IV, 115 Stat. 230, 237-41 (2001); 28 C.F.R. pt. 104 (2004).

has never been a program as generous and as all-encompassing as this, and the proof is in the statistics.

When the law was passed, it created a tremendous delegation of authority to one person—the Special Master—appointed by the Attorney General. And there was no appropriation of money. Whatever it costs, the U.S. Treasury will pay for it out of petty cash. (Seven billion dollars out of petty cash!) The Special Master will review the claims and authorize the checks. The Treasury will cut the check, tax-free. For death claims, we paid anywhere from \$500,000 to \$7.1 million tax-free. For injury claims, we paid anywhere from \$500 for a broken finger, to about \$8.7 million to a surviving individual with third-degree burns over eighty-five percent of her body. Those are the range of the payments. The average payment was \$2 million; the median payment was \$1.8 million. These two numbers, the average and the median, tell you a lot about how I exercised my discretion under the program.

What did Congress say and not say about this program? First, you have to be eligible. Who is eligible? Somebody who lost a loved one as a result of the 9/11 terrorist attacks or somebody who was physically injured. Pure mental or emotional distress is not compensable. (There would have been seven million people from New York just looking at CNN that would have filed a claim.) There has to be a physical injury, but if there was a physical injury in the vicinity of the terrorist attacks—“vicinity” to be worked out by the Special Master—you are eligible. What will you receive in compensation? The statute laid out a four-part formula.

First, the Special Master shall calculate the “economic loss” suffered as a result of the death of the victim or physical injury of the victim. That is simply tort law, a surrogate for what juries in St. Louis do every day. I have to calculate what a victim would have earned over a lifetime. That is not an easy thing to do, especially when families are convinced that the victim would have been a star in any number of chosen professions, but that is the first part of the test. Of course, that is very provocative, because the minute you have economic loss, that is a guarantee that everybody is going to get a different amount of money, and that fuels division among the very people you are trying to help. But that is the law.

Second, the statute says add to economic loss “non-economic loss.” That is tort law, too. Pain and suffering and emotional distress are tort concepts replicated in the statute. I made a very provocative decision with regard to non-economic loss—I said everybody will get the same amount. I am not going to get in the business of trying to distinguish somebody’s pain and suffering from another’s pain and suffering. I am not Solomon—everybody eligible will get \$250,000 for the death of the victim and \$100,000 for each surviving spouse and dependent. That is the non-economic component.

Third, the statutory formula said to subtract from economic loss plus non-economic loss any collateral sources of income, such as life insurance. The latter is not tort law. It is a social welfare safety net. That is Congress saying the taxpayers should not be subsidizing these families if they have received ten million dollars worth of life insurance, pensions and 401(k)s. So the law required that I deduct from any net award collateral sources of income. What constitutes a collateral source of income? This is a *big* emotional issue.

And Congress in its infinite wisdom added a fourth requirement: the Special Master will exercise his discretion to see that justice is done. Congress delegated to me: “Make sure that this works. Use your discretion to make it work. We do not know what we are getting into, so take it from here.” I exercised my discretion, and you all can tell, if you look at the statistics, how I exercised my discretion. I ran all the numbers, and then I brought down the aberrational top numbers which might be ten, twenty, thirty million, and brought up the bottom numbers. I followed Senator Kennedy and Senator Hagel’s advice and made sure that fifteen percent of the eligible claimants did not receive eighty-five percent of the taxpayers’ money, much to the chagrin of some high-end wage earners who ran the model and could not understand why they did not receive fifteen or twenty million.

We added some very important regulations. The law said you cannot appeal a finding of the Special Master. We read that to mean no *judicial* appeal, but we did have an *administrative* appeal so that families could have an opportunity to come in and be heard. I would listen and adjust the award based on what they said. Never underestimate the importance of due process in these compensation schemes—if you give families an opportunity to be heard, there is a

certain degree of psychological closure that comes with the family coming in and meeting me face-to-face. It was a wonderful addition to the program, the administrative appeal.

Now, what was not in the statute? What was left blank in the statute that caused great difficulty in the administration of the program? There is not one phrase in the statute that tells the Special Master who files the claim and who gets the money. Does the first spouse? The second spouse? One sibling? Another sibling? The granddaughter? The parents? The same-sex partner? The fiancée? Who files the claim? Who binds the family and who is awarded the money? This is not an easy issue.

“Mr. Feinberg, I lost my brother on 9/11. Make sure my sister doesn’t get a nickel. The victim hated his sister.” Then in comes the sister: “Did my brother say that my other brother hated me? He hated *him*. Make sure *he* doesn’t get any money.”

“Mr. Feinberg, I’m the fiancée. We were going to be married October 11th. I should be treated like a spouse.” Then in come the parents of the victim: “That marriage was never going to take place. My son told me on September 10th he was calling it off. Don’t you dare give a nickel to her.”

“Mr. Feinberg, I’m the same-sex partner of the victim. We were living together for eleven years. I ought to be treated like a spouse.” The parents of the victim: “They were breaking up. My daughter told me she was moving home. She was tired of living with her. It wasn’t going to happen.”

What am I supposed to do? I do not know the truth. I have no idea what these families are doing. I do not know these families. I cannot make rulings and still serve the purpose of getting the money out efficiently. How do I know what is going on with these families? So we worked out most of them using mediation:

“Will you give some money to the fiancée?”

“No, I won’t.”

“I think you ought to give her \$300,000.”

“No.”

“What if I *add* \$300,000?”

“Well, then we’ll think about it.”

We worked out almost all of these claims. Where we could not get an agreement, we did the only sensible thing: we looked to state tort

law and the state's estate law of the victim's domicile. If somebody gets killed in an automobile accident in St. Louis, there is law that has been tested to see who takes the money. That is what we did. Usually half to the spouse and the other half to the children. Same-sex partner? Go fight in the surrogates' court if we cannot resolve the dispute. I cannot be all things to all people. I have got to *move* on this program, and that is how we dealt with this problem.

What I am asked all the time is what were the most difficult aspects of administering the fund? I conducted personally over 900 hearings with these families, and the angst and terror and tragedy were overbearing.

A widow comes to see me: "Mr. Feinberg, I lost my husband. He was a fireman on 9/11. He rescued thirty people from the World Trade Center and brought them to safety across the street to lower Broadway. The battalion chief ordered him to stay put—too dangerous. He said: 'No, there are ten more people over there. I've got to go get them.' Running across the World Trade Center Plaza to rescue the ten people, he was killed by someone who jumped from the 103rd floor and landed on him."

A father comes to see me: "Mr. Feinberg, I lost my son at the Pentagon. He got out of the building. He escaped. Thinking his sister was trapped, he went back in to look for her. She had escaped out a side door. He died looking for her."

And people would come in with photograph albums, videos, and CDs. One lady came to see me in New Jersey and played a song about her husband sung by Bruce Springsteen. She said: "Mr. Springsteen's from New Jersey, and he read about my husband's death and wrote and recorded this song, and I want to play it for you. Also, Mr. Feinberg, if you think it will help, Mr. Springsteen is at this phone number. Feel free to call him." "It's all right. I don't have to call Bruce Springsteen."

And, a husband: "Mr. Feinberg, I want you to hear my wife die."

"What?"

"She made a 9/11 call that I've kept. I want you to listen."

"Mr. Jones, it's not necessary—"

"I want you to listen."

"Go ahead, Mr. Jones. Whatever you want."

We had stories that test the wisdom of Solomon. In comes a distraught twenty-five-year-old woman, crying. She lost her husband, a fireman, and she has three children—six, four and two. “Mr. Feinberg, I can’t cope. My husband was *Mr. Mom*. Everyday that he wasn’t at the firehouse, he was home teaching the kids how to read, teaching them how to play baseball, reading them stories at night. He was my right arm. He cooked. He was everything to me. He was *Mr. Mom*. I’m lost without him. I need money.”

She leaves. The next day I get a call from a lawyer in Queens. “Mr. Feinberg, did you hear from Mrs. Jones yesterday? Mr. Mom? The three little kids?”

“Yes.”

“Now, look. I’m not looking to cause any trouble, but Mr. Mom also had two other children with his girlfriend that this lady doesn’t even know about. Now, may the memory of her husband live with them forever but I’ve got two other mouths to feed here.”

We thought it over. We cut one check to the widow with the three children. We never told her about the girlfriend. Why? What would be the point of telling her? Then we cut a second check for the two other biological children. That is an example of a problem that Congress never contemplated.

We made sure we marketed the program. Instead of just staying in Washington and issuing regulations, we went out into the field. We went and met the families with all of their angst, hurt, anger and grief. We went to England and explained the program to foreign claimants. They are all eligible, from sixty-five foreign countries. We met with undocumented-worker families whose loved ones had worked in the World Trade Center, and told them they were all eligible. They did not believe it.

“You’ll put us in jail.”

“No, you’ve got immunity.”

“Well, you’ll fine us.”

“No, we won’t.”

“Well, you’ll deport us.”

“No.”

Finally, they all came in. All of the undocumented workers—as far as we know—came in. Who did not come into the program? Eighty people decided to sue. I met with each of them. “Mr.

Feinberg, we're not suing for the money. We are suing to make the airlines safer. My husband would want us to make the airlines safer." And I would say: "Ma'am, you're not going to make the airlines any safer by suing. Sue Amtrak, maybe, or ports where ships arrive. The airlines are as safe as they are going to be. Your bringing a lawsuit isn't going to make them safer, and even if you think it's going to make them safer, let the other seventy-nine people litigate."

Or: "We're suing because my wife would want me to sue so we could find out what really happened on 9/11, who's really responsible. We'll find that out in a lawsuit."

You are not going to find that out in a lawsuit. That is why there is a 9/11 Commission. That is why you have the Senate and House Intelligence Committees. You are not going to get that information. National security will be an obstacle. A judge is not going to be able to get you the information you seek.

And then there were the ten people that did nothing. I went to see these people also:

"Mrs. Jones, you better file with the Fund. You only have another two weeks."

"Go away."

"Mrs. Jones, just sign here. You'll get about two and a half million dollars. Put it in a foundation in memory of your son."

"Mr. Feinberg, I have no use in living. Go away."

I saw some of these people's relatives. I said: "Make sure she files! This program will never be extended. The deadline is approaching."

That is my biggest frustration, that we were not able to get to these people to file. I tried every way possible.

So that, in a capsulized form, is the way the program worked. The recipe for success was pretty clear: make very generous payments; outreach to the families; keep going after them and corral them; let them know that there are no tricks, and that there is nothing hidden here. This is a transparent attempt by the American people to help. Offer due process considerations. Give everybody the opportunity to be heard. Make yourself available. Reach out to these people. It worked.

It is easy to look back and see how it worked and why it worked. I think that there will be a great deal written about the Fund, and I

believe everybody will agree it was a successful program. It worked out well, but there are three questions that I want to pose to each of you to think long and hard about. Not only as to torts, but also as to philosophy, political science, and your day-to-day living, because these three questions lie at the heart of the debate about this program.

First, was the program a good idea? Was it sound public policy? Before you say it *is*, understand that when you talk about a fund like this, you better be prepared to deal with letters that I received:

“Dear Mr. Feinberg, my son died in Oklahoma City. Where’s my check?”

“Dear Mr. Feinberg, my daughter died in the Kenya embassy bombings in ’97. Where’s my check?”

“My husband died in the *first* World Trade Center attack in 1993, committed by the very same people! How come I’m not eligible for a check?”

“My daughter was the victim of a hit-and-run, drunk driver. Where’s my check?”

In other words, how do we justify carving out for very special, generous treatment a very small segment of a democracy’s population, leaving everybody else ineligible? It is a very profound question. It is a public interest question. It is a social policy question. It is a political question. It is a philosophic question. It is something for anybody interested in our democracy to think about.

Second, equally, if not more, complex, did Congress do the right thing in making sure that everybody would get a *different* amount of money? Would Congress have done much better in saying if you are eligible, a flat amount for everybody—single, married, kids, no kids, stockbroker, firefighter, military, waiter, busboy, bond trader, you all get the same.

That is a very difficult question to answer. That question could be debated in a seminar here for an entire semester. Giving people different amounts fueled an incredible amount of divisiveness among the very families you were trying to help. Problems such as economic loss and collateral sources of income pose tremendous difficulties that we overcame by sheer effort and explaining to people. I would explain to the 9/11 families: “The people in Oklahoma City aren’t getting anything, and you’re better off coming into the Fund because if you litigate these claims, you’re going to get nothing, and if you

think you're going to win, you're mistaken, and if you do win, it'll be ten years from now and you will give forty percent off the top to your lawyers."

And the final question, which flows from the first two, heaven forbid it happens again, should we replicate this program in some way?

That is up to Congress. You justify a program like this not by examining the status of the victim but by looking at the nation's response, the collective will of the people concerning 9/11, and the impact of 9/11 on the country. This is like Pearl Harbor, the assassination of President Kennedy, or the American Civil War. 9/11 was unique and gave rise to a unique response. That is the only way, I think, to explain it.

Finally, permit me to leave all of you with this thought: the legal profession stands tall in the design and the implementation of this program. Over 1400 families were represented by lawyers pro bono. Another 800 were represented by lawyers who took a fee of five to ten percent. In our chosen profession we get mocked and maligned and criticized, sometimes with justification. But if anybody wants to examine what a noble profession we are engaged in, and what you are working towards, just examine this program. *Of course* I worked this program pro bono. How could I ever expect to get paid for helping these families receive compensation after what they have been through? It would have been a terrible mistake to expect to get paid for this. Millions of people, including most people in this room, would have done the same thing. If the President asks you to do this, you say, "yes, Mr. President." The Attorney General says, "You're going to take a lot of heat. I'll back you up." "That's fine, Mr. Attorney General. Back me up as best you can." And he did. I had tremendous support from the Attorney General and the President and the Congress, and it was bipartisan.

This program had many great benefits. One, of course, is the pride that I have in the way we did this and in the success of the program, and especially the pride I take in all of us being in such a great profession. If anybody gives you a hard time about law and what law means to people's lives, take a look at the 9/11 fund and how the law and our profession came to the rescue. Be very proud and hold your

head high as being part of our chosen profession. Thank you all very much.