

COMPENSATING VICTIMS OF TERRORISM



COMPENSATING VICTIMS OF TERRORISM WORKSHOP REPORT

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The workshop discussion was not for attribution. The views expressed in this report are those of various individual discussants and do not reflect the official policies of their respective agencies, governments, or private sector organizations.

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Compensating Victims of Terrorism Project

Workshop Report – May 2011

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EXECUTIVE SUMMARY

This report reflects the efforts of a group of experts on compensating victims of terrorism assembled by Syracuse University's Institute for National Security and Counterterrorism. These experts gathered to begin the creation of a blueprint for Congress to work from should it once again have to consider proposals to take special care of persons injured or killed in a significant terrorist attack. The experts' thinking and this Report were developed in the shadow of the September 11th Victim Compensation Fund of 2001 (the "9/11 Fund").

The report first considers why a special compensation fund is a desirable way for Congress to take such care of the victims of a terrorist attack. The precise components of any future fund must reflect the particular rationales for providing such 'special' compensation to those injured or killed in a terrorist attack and those closely related to the dead and injured. This report finds such rationales in the strong public desire to respond promptly and empathetically to the needs of persons most directly hurt by an attack directed at our nation, and in the strategic importance of denying terrorists the calamitous impact on Americans' lives which they had hoped to achieve in the attack.

In its section on the Scope and Exclusivity of Compensation for victims, the report recommends that those compensated include persons whose relationships with those directly injured or killed were familial in nature, even if not in form. Such persons should be compensated in two tiers, or phases. Tier One compensation would be provided, perhaps in a pre-set amount, as emergency assistance to help victims get back on their feet quickly. The full and final Tier Two compensation would be guided in its amounts by the principles of victim need and their feelings of fair treatment. While the amount of such compensation should be guided by the value of what was taken from the victim by the terrorist attack, the report cautions against providing "full" compensation to victims whose pre-attack earnings were extremely high. The report concludes that victims should be able to choose, intelligently, whether to seek their compensation from this special Fund or from the tort system. To serve the goal of intelligent choice, the Fund's awards need to be predictable. That concern leads the report to recommend that the Fund administrators establish schedules of compensation for particular kinds of injuries. However, victims who felt that such schedules would not meet their unusual needs or did not treat their needs fairly would be able to choose to have more individualized hearings at which they could present fuller information about their injuries to Fund decision makers. In keeping with its view that the Fund's payouts should be sufficiently generous so as to provide most victims with little incentive to choose to use the tort system, the report suggests that payments to victims from collateral sources should not be deducted from the sums they otherwise would receive from the Fund, except insofar as such collateral payments are from tort awards. Victims' receipts of substantial charitable aid would be taken into consideration only if that could be done in a manner which would not discourage such charitable assistance to victims.

In its section on The Claiming Process, the report recommends that Congress institute a means to assure that a core top echelon of administrators for the fund be chosen and trained before the next terrorist attack occurs. It also recommends that the Fund have a distinguished and particularly capable Principal Administrator, chosen by the President or other high executive branch official and confirmed by the United States Senate. Once created, the Fund administration would operate independently from direct governmental control in order to assure speedy response to victims' needs. Recognizing that some terrorist attacks would be so small and some perhaps so calamitous that creation of a Fund would not

be the appropriate national response, the Report suggests that the President or other high-ranking government official would have to designate the terrorist attack as a “Significant Terrorist Attack” before the Fund would begin to operate. Following brief recommendations as to how the Fund should operate efficiently and with sensitivity for the victims, the Report concludes that there should be streamlined judicial review as to whether the Fund administration is following Congressional mandates and ongoing internal review systems within the Fund itself to assure consistency and fairness in awards to victims.

Finally, with respect to Financing the Compensation Program, the Report concluded that the initial financing of the Fund should come from Congressional appropriations, but that the Fund should retain subrogation rights for the amounts it pays to victims, and that the Fund should pursue those rights aggressively by suing responsible wrongdoers for their fair contribution for the amounts paid to the victims.

Recognizing the full scope of further issues which would arise with the establishment of a Fund, the expert members of the INSCT working group encourage additional steps to develop and refine the recommendations contained herein.

INTRODUCTION

Less than two weeks after the terrorist attacks of September 11, 2001 killed and injured thousands of people, the U.S. Congress enacted and President W. Bush signed legislation which, among other things, created the September 11th Victim Compensation Fund of 2001 (hereinafter, “9/11 Fund”).¹ Within three years, the 9/11 Fund had distributed nearly \$6 billion to 2,880 persons filing claims on behalf of individuals who had died from the attacks, and slightly more than \$1 billion to 2,682 individuals directly injured thereby.²

Because there seems no end to the desire of many in the world to again launch some sort of terrorist attack on persons or places within the United States, many national security experts anticipate that future attacks will occur and cause significant injury and loss of life. No one – at least no one who is communicating with the American public – seems to know the nature of such attacks, nor is able to predict the scope of the harm which will result. Nevertheless, some sorts of attacks seem likely.³

If such an attack is accompanied by significant loss of life, Congress will face significant pressure to provide some sort of compensation to the dead, the injured, and their close relations. Congress faced such pressure in the immediate aftermath of the September 11 attacks, especially in light of its efforts to stabilize the aviation industry through measures which included immunizing the industry from tort liability. The result was the generous 9/11 Fund. With that precedent firmly etched in the consciousness of both the public and members of Congress themselves, it seems very likely Congress will seriously consider providing some mechanism for compensating victims of future terrorist acts against Americans, especially if such acts occur in the United States.

In the belief that events probably will occur as suggested in the two preceding paragraphs – while hopeful that they will not – the Institute for National Security and Counterterrorism (INSCT) at Syracuse University on October 15 and 16, 2010 convened a workshop with experts to discuss what should be the principal components of future national efforts to compensate the victims of terrorist attacks. Members of the group included: several full-time law faculty from the four time zones of the U.S. who have thought and written about compensation for terrorism victims; the Deputy Special Master of the 9/11 Fund; the Senior Vice-President and Reinsurance Counsel for a major international reinsurance broker; and the lead lawyer for the “9/11 Families United to Bankrupt Terrorism,” who has represented substantial numbers of 9/11 victims who either opted into the 9/11 Fund or opted to pursue tort litigation to obtain compensation. They were joined throughout the two days of meetings at Syracuse

¹ Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42 (2001), 115 Stat. 230 (2001) (codified at 49 U.S.C.A § 40101 (West 2003))[hereinafter “ATSSA”].

² Kenneth R. Feinberg, *What Is Life Worth: The Unprecedented Effort to Compensate the Victims of 9/11*, at 164 (Public Affairs, NY 2005). After this workshop, President Obama signed The James Zadroga 9/11 Health and Compensation Act of 2010 (P.L. 111-347), committing up to law a \$4.3 billion to help ailing 9/11 responders and volunteers.

³ See, e.g., Deborah Jerome, “Growing Terrorism Threat, Postmarked Yemen,” *Analysis Brief* (Council on Foreign Relations, Nov. 1, 2010) (available at: http://www.cfr.org/publication/23281/growing_terrorism_threat_postmarked_yemen.html).

University by the Assistant Director of INSCT and the conference reporter, a Syracuse University College of Law professor specializing in torts and compensation systems. Additional invited participants – distinguished law professors who have published on victim compensation in the context of 9/11 – were unable to attend the Syracuse meetings, but have commented on the ideas presented in this Report.

The workshop participants dealt with the following questions in their efforts to sketch the principal parameters for the optimal congressional approach to compensation for victims of terrorist attacks:

- (1) Why would the nation, through Congress, want to provide a special compensation program for victims of terrorist attacks separate and apart from the compensation provided to persons injured or killed in other circumstances?
- (2) What should be the scope of the compensation provided? Who among the injured should receive such compensation? In what measure? Should a fund be the exclusive source of compensation for terrorism victims?
- (3) What should be the nature of the claiming process by which victims obtain compensation from whatever source is created?
- (4) How should the fund be financed?

Participants arrived at a considerable degree of consensus both about the salient issues necessary to resolve in order to establish a program for compensating victims, and about the best means by which to resolve these issues. These areas of consensus, and the most significant lines of thought which led to such consensus are outlined herein, along with identification of principal issues which remain for resolution.

CHAPTER 1: THE REASONS TO COMPENSATE

The workshop participants agreed that it was necessary first to explore rationales for the establishment of any sort of special compensation fund for the victims of terrorism. They felt this was necessary because: (a) Congress will need to explain why it will provide special funding for persons injured by terrorist acts but will not provide any such funding for persons injured by non-terrorist acts; and (b) the dimensions of any compensation fund will depend to a significant degree on the fund's particular rationales.

The argument that other persons – perhaps many other persons – should receive government assistance similar in its generosity to that provided the victims of 9/11 was made shortly after the establishment of the 9/11 Fund by some of the victims of the 1995 Oklahoma City bombing.⁴ The 9/11 Fund's Special Master, Kenneth Feinberg acknowledged the strength of this argument in an article detailing, among other things, letters he had received from the victims of Oklahoma City and other terrorist actions, asking why they had not received similar compensation:

“And the final question, which flows from the first two, heaven forbid it happens again, should we replicate this program in some way? . . . 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.”⁵

Several scholars – including one of the expert scholars participating in this INSCT project – have questioned whether victims of terrorism have a special claim on compensation from the government greater than those of victims of other misfortunes.⁶

The workshop participants viewed the decision to provide special governmental compensation to victims of certain events or kinds of events as peculiarly the province of the legislature. Their belief – influenced by the national response to the 9/11 attacks – was that this country needed to have a

⁴ See, e.g., “A Nation Challenged: The Victims; Oklahomans Questioning Sept. 11 Aid,” N.Y. Times, Dec. 23, 2001, available online at <http://www.nytimes.com/2001/12/23/us/a-nation-challenged-the-victims-oklahomans-questioning-sept-11-aid.html?scp=9&sq=September%2011%20Victim%20Compensation%20+%20Oklahoma%20City&st=cse>.

At 9:02 am on April 19, 1995, a large bomb decimated the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring more than 650 others. The bomb was planted by Timothy McVeigh as an action in opposition to the United States government.

⁵ Kenneth R. Feinberg, *Speech: Negotiating the September 11 Victim Compensation Fund of 2011: Mass Tort Resolution Without Litigation*, 19 *Journal of Law and Policy* 21, 29 (2005).

⁶ See, e.g., Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model*, 53 DePaul L. Rev. 769, 788 (2003). Professor Rabin was invited to participate in the INSCT workshop, but was unable to travel from California. The Conference reporter spent about an hour meeting with Prof. Rabin at his office the week following the Conference in order to elicit some of his views about the issues discussed there.

mechanism which satisfied the desire of the American people to respond quickly to a significant terrorist attack ["STA"]. Some sort of compensation fund would aptly serve that purpose. It would create a process which significantly helps the people injured by a terrorist attack. Equally, if not more, importantly, it constitutes a form of retaliation against the terrorists, by ameliorating the harm they are able to inflict, by expediting the return to the pre-attack status quo, and by displaying to the terrorists, the world and ourselves the strength, courage and indomitability of American government and society in the face of attacks intended to terrorize.

Such a fund is particularly important in the aftermath of an STA because the existing systems for compensation of injured persons – especially the tort system – are quite likely to perform poorly. Governments' "safety net" programs are increasingly frayed. While they might allow qualifying victims to subsist, such programs are unlikely to provide any significant redress for victims.

The tort system provides more robust compensation to the injured. In the event of an STA, however, civil litigation alone frequently will provide an inadequate path to such aid. Often, there will be no responsible party from whom massive numbers of injured persons can obtain compensation through lawsuits. If there is one or more financially capable defendants, actual compensation would likely come to victims quite inconsistently. Some victims, such as the passengers on one of the planes flown into the World Trade Center, might succeed pursuant to basic tort doctrines. Others, such as the people working in the Center, might find themselves unable to succeed in a suit because of other basic tort doctrines, such as that of proximate cause. Even those victims who did succeed in obtaining any sort of tort judgment or settlement would ordinarily receive their compensation exceedingly slowly, and too late to make immediately necessary repairs to their broken lives. Plus, the adversarial nature of tort proceedings makes it likely that victims' claiming experiences would be just the opposite of what they need, and what the nation most likely would want them, to have: treatment with respect, empathy and understanding.

In an unusual STA, where tort law might provide compensation satisfactorily, tort damages for the many victims of an STA could well threaten the continued financial stability of state/local governments or private industries. The mere existence of such a vast liability threat could result in the sort of additional social and economic dislocation from an STA that Congress sought to avoid by enacting the Air Transportation Safety and Security Act (ATSSA), to protect the airline industry, within 11 days after the 9/11 attacks. While the fund envisioned by the workshop participants would not preclude victims from pursuing tort remedies, they believed that its existence – along with a requirement that victims eventually choose to pursue either a claim from the fund or through civil litigation – would dramatically reduce the threat of vast, unknowable liability that valuable institutions might otherwise face.

These perceived difficulties with the tort system highlighted for the workshop participants the importance of having a fund which could respond quickly to the harms of a terrorist attack, get victims back on their feet, and also treat those victims as the American people would want them to be treated: with fairness, respect, and the opportunity to be heard. Included in the participants' sense of the treatment such persons would deserve was recognition of their autonomy – the feeling that the dead, the injured and their loved ones should not be deprived of the rights available to most persons harmed by the action or inaction of others. Rather, a compensation fund should provide them with an additional channel through which to seek redress for their injuries.

The workshop participants believed that a fund would serve also as a tangible vehicle for expression of national solidarity with and compassion for the victims of an attack on the nation, one that is part of an ongoing war being waged against the United States. They felt that, as with the 9/11 Fund, a compensation fund for victims of future terrorist attacks would be understood by Americans as an important response to those who had attacked the country. While there would undoubtedly be other responses, a fund can be established relatively quickly and its operation would not depend on the location or behavior of a largely invisible enemy. Moreover, by providing prompt and substantially full compensation to the victims, a fund would help significantly to repair the harm done by a terrorist attack. It would help to serve as a statement of resolve by the nation that the United States will not allow itself to be permanently injured by the efforts of those who wish to harm it.

Finally, the workshop participants felt that the Fund should be an aid – and certainly not a barrier – to efforts to discover the truth of what actually happened in an STA, which would include efforts to understand and make transparent the nature of the harms visited upon people by the attack.

CHAPTER 2: THE SCOPE AND EXCLUSIVITY OF COMPENSATION

There were considerable areas of consensus about the kind of compensation which should be made available to the victims of an STA. However, significant controversial issues were left unresolved.

1. Who Receives Compensation

The workshop participants agreed that persons directly injured or killed in the STA should receive compensation from the fund. Similarly, persons in the immediate family of those injured or killed should presumptively receive compensation.⁷ In light of the experiences of the administrators of the 9/11 Fund, the workshop participants were aware that any compensation fund could face requests for compensation from persons who had a quite common relationship (e.g., monogamous marriage, traditional child-parent) with a directly injured/killed victim and from persons in less common relationships (e.g., polygamous marriage, functional child-guardian) with direct victims. The participants felt that significant discretion should be left in the hands of the fund's administrators, who would face and could best individually examine the realities of myriad kinds of relationships. Such discretion would allow the fund's administrators to accommodate the real needs of even those persons whose relationships with the victim were familial in nature but which might not receive formal legal recognition in other areas of law.

The participants did not discuss in detail who else – such as first responders – might suitably receive compensation from the fund. While they did not directly address the eligibility of non-citizen victims for compensation from the fund, the participants did note that their inclusion in the 9/11 Fund's compensation generated little controversy.

Tier-One Compensation. There was widespread agreement that the Fund should provide a kind of “emergency assistance” compensation to victims very quickly after an STA. This assistance should be of an amount – quite possibly a set amount – which would reflect Congress's or the fund's administrators' best judgment as to how much compensation would need to be provided rapidly to different kinds of victims to enable them to “get back on their feet” following the STA. It was anticipated that these quick, one-time payments would be much less attentive to the particulars of the situations of individual victims than would later, probably more “full,” compensation that would focus on each victim's overall needs and losses. Some degree of individuation could be expected even with these “emergency” funds, but that would probably be done by putting victims into broad categories of need⁸, with all persons in a particular category receiving the same Tier-One amount.

2. The Measure of the Compensation Provided

There was agreement that need should be a primary measure of the amount of money to be awarded to victim-claimants from the fund and that the victims should both be and feel fairly treated. At the same time, there was strong sentiment that particularly high awards, reflecting the lost earnings of persons

⁷ The participants' focus throughout their discussions was on individual personal injury, not injury to business.

⁸ Such broad categories might differentiate, for example, on the basis of the number of dependent children in the household of someone killed in the STA, or, within broad ranges, on the basis of monthly housing payments.

who would be regarded by the society as “rich,” should not be as freely made as they would be in a tort system which aims to place injured persons back into the particular positions they would have occupied in the world had it not been for the wrongful conduct of one or more others.⁹ While there was little focus in the workshop on precisely what percentage of victims should obtain their compensation from the Fund, as opposed to civil litigation, the participants clearly anticipated that the levels of compensation provided by the Fund should be sufficiently generous such that only a modest number of victims would choose to pursue tort litigation rather than commit to obtaining their compensation from the fund. It was anticipated that the fund would provide compensation for victims’ economic and non-economic injuries.¹⁰

a. Individual versus Scheduled Compensation

There was recognition among the participants that most, if not all, American no-fault compensation schemes provide compensation through the use of some sort of a schedule – e.g. a set amount for each person who has received a certain kind of physical injury or a set percentage of one’s average weekly salary, up to a set maximum, for a worker who has become totally disabled. Nevertheless, the participants had the sense that victims’ needs should be a primary determinant of compensation, and that fairness to the victims precluded treating facially similar but substantively different victims’ experiences the same. These views led the group to reject the idea that the fund should strive to create schedules of payments that were the same either for all victims or for all victims who fall into certain categories. There would need to be individualized consideration of victims’ situations in determining their compensation.

While the conference participants considered a variety of more precise meanings of this “individualized consideration,” they neither reached nor focused on reaching a consensus about what exactly that would mean. They recognized the value and justice of some of the approaches of the 9/11 Fund, including clear guidelines with respect to compensation amounts for non-economic injuries, which are among the most difficult to translate into money with any degree of consistency. However, the participants also responded favorably to reports that the 9/11 Fund administrators would occasionally deviate from scheduled amounts of compensation in order to account for particularly compelling circumstances – e.g. persons who had lost multiple family members or children who had been orphaned.

At the same time, the participants valued predictability in any future fund for victims of an STA. They agreed that, if victims were to have to choose whether to pursue compensation through the Fund rather than other sources, they must be able accurately to predict what that compensation will be. Relatively clear guidelines would help the victims make that determination, particularly if the fund’s decision-

⁹ A couple of participants emphasized that this sentiment wanes if the financing of the fund comes principally or solely from insurers of those whose conduct contributed to the occurrence of the STA.

¹⁰ ‘Economic’ injuries include expenses, such as medical bills, which victims incur as a result of the attack and income which they reasonably expected to receive, but which has been or will be denied them because of the attack. ‘Non-economic’ injuries include all the other negative experiences victims undergo due to the attacks, such as grief, fear, pain and the like.

makers were transparent as to the kinds of factors which would guide their determinations to depart from scheduled compensation amounts in “particularly compelling circumstances.”¹¹

In the end, the participants were more willing to have schedules of compensation for particular types of injuries if the victims could choose to by-pass those schedules in favor of a more individuated hearing which would allow them to present fuller information to the fund’s decision-makers.

b. Collateral Sources

There appeared to be consensus among the participants that payments to victims from sources collateral to the fund should not be deducted from the sums they otherwise would receive from the fund, at least where the tort law of the victim’s state would not deduct such payments from a claimant’s ultimate tort award. While recognizing that there thus could be situations in which victims of STAs might obtain a recovery from the fund greater than what would be the fund administrators’ judgment about that victim’s actual losses, the workshop participants believed this approach was demanded by the web of relationships¹² which exist in every state to determine the circumstances under which collateral sources of compensatory payments to STA victims have subrogation rights against other sources of funds provided to the victims (such as those from the fund). It was believed that deviation from existing collateral source rules in a state’s tort system posed too great a risk either of unintentionally inadequate compensation or of forcing insurers and other common sources of such collateral compensatory payments to make wholesale changes to their existing subrogation policies.

In line with the group’s consensus about the fund’s treatment of collateral source payments from government or private sources legally obliged to make such payments, the workshop participants thought it important for the fund’s compensation rules not to undermine charitable giving by persons and organizations eager to rally around victims of a STA. Such charitable donations pose a more serious risk that some victims will already be well-compensated, if not fully compensated, economically for their losses by the time the fund’s administrators make a decision about those victims’ deserved amounts of compensation. Because charitable donors traditionally do not demand subrogation rights against payments from sources such as the fund, victims’ compensation from the fund should not be reduced in light of any charitable payments victims have received. However, with victims’ needs in mind as their primary guide for what amounts the fund should provide victims, the workshop participants felt some inclination that the fund should not pay as much to persons who had received substantial payments from charitable sources as to similarly situated victims who had received no or insubstantial donations. Yet, the participants were clear that the fund’s compensation rules should not significantly deter charitable giving. The participants did not reach a consensus as to how those competing considerations should be reconciled in the rules governing the amounts of victims’ compensation from the fund.

3. Choice for the Victims

¹¹ This predictability had particular importance where the decision made by the fund’s administrators effectively would be the final word about a victim’s compensation for his/her injuries.

¹² Such relationships include those between insured victims and their insurers or between government programs and their beneficiaries, e.g., Medicaid providers and beneficiaries.

There was considerable consensus that any compensation fund should exist as an alternative source of compensation for the victims of an STA. Each victim should have the ability to choose whether to obtain compensation from the Fund or through other processes, such as tort litigation. While claimants would ultimately have to choose among various means of compensation, they should not have to do so until they have progressed sufficiently far in the fund's processes such that they or their representatives are reasonably able to develop a strong sense about the amount of compensation they would likely receive from the fund.

CHAPTER 3: THE CLAIMING PROCESS

There was broad agreement among the participants at the workshop that the core group of future funds' administrators should be chosen and trained before the next STA occurs. Governments and other organizations have experience creating and preparing Emergency Response or Crisis Management Teams comprised of persons designated in advance by the organization to respond to unclearly foreseen emergencies/crises when they occur. The top echelon of the fund's administrators should similarly be chosen and trained in advance so that they can be called into action as soon as an incident is designated a STA. These administrators – like the team that ran the 9/11 Fund – will determine the details of the criteria and procedures for compensation from the fund.

The process by which the fund delivers compensation must be a critical consideration, both in terms of effectively providing victims with the ultimate compensation they deserve and in terms of providing victims respect, compassion, and the perception and reality of having been fully and fairly heard.

1. The Independent Fund Administration

Because it is so important to address STA victims' needs quickly, the workshop participants were unanimous in their recommendation that the administrative leadership of any future compensation fund be selected and prepared for a rapid ramping up of administrative performance well in advance of an STA.

The participants were quite comfortable with the fund's having one person – a "Principal Administrator" – wielding authority in the administration of the fund, much as department secretaries and agency directors do. The Principal Administrator will have to make decisions – often controversial decisions – about the allocation of compensation to persons injured in an event which will probably have generated intense public interest and concern. Therefore, it is important that the Principal Administrator enjoy substantial support within the federal executive and legislative branches of government, if s/he is to do the job which the nation asks of him/her. Accordingly, the workshop participants felt that the Principal Administrator should be nominated for the position by the President and confirmed by the Senate.¹³

There was some discussion during the workshop of the characteristics which should be possessed by a fund's Principal Administrator. Given the intensity of feelings with which the Principal Administrator is sure to be dealing in the compensation determination process, a person should be chosen who has substantial ability to be flexible in his/her dealings with a wide range of persons and situations. The participants felt it would be advantageous if the Principal Administrator was well-respected and well-

¹³ Or, at the very least, chosen through a process in which leaders of both political parties participated and supported the candidate chosen. The participants felt that considerable bipartisan support for the Principal Administrator was necessary at least at the outset of his/her work in that position. Without such support, it would be difficult for the Administrator to move the Fund Administration quickly through the substantial numbers of decisions that would have to be made in order for compensation to start reaching victims quickly.

connected in political circles, was not a polarizing figure, had some previous exposure to mass-tort litigation and settlement, and had “thick skin”, among many other desirable qualities.¹⁴

Since the people working in the administration of the fund will be working and making decisions quickly and dealing with emotionally raw, traumatized persons, it was felt that all persons chosen to administer the fund should undergo significant training on dealing with victims of disasters very soon after being chosen. Perhaps such training would resemble that provided to Disaster Relief or Emergency Response teams.

Finally, as the above suggests, the workshop participants concluded that the need for compensation to be delivered rapidly and certainly to the victims mandated that the fund operate independent of direct political control.¹⁵ It is important that the fund be understood by departments of the government as an ally in the efforts to combat terrorism, so that agencies will offer their expertise and resources to assist in the work of the fund – assistance that a start-up fund is likely to need in order to move as quickly as will be necessary. Nevertheless, the fund must maintain “arm’s length” relationships with interested government agencies in order to ensure a stream-lined dispatch that is not characteristic of government bureaucracy.

2. When the Compensation Fund Is Called Into Existence

The discussion earlier in this Report that the Fund would come into existence in order to provide compensation for victims of an STA presupposes some definition of what is and what is not an STA. After substantial discussion, the workshop participants recognized some terrorist attacks might involve so few injuries – e.g. the attack on the home of the Danish cartoonist who had drawn a newspaper-published cartoon depicting the Prophet Mohammed – that the fund probably should not be called into operation. Similarly, the participants recognized that some such attacks might be so catastrophic – e.g. the detonation of a “dirty bomb” in a major city – that the normal processes of individuated compensation decisions envisioned for the fund would be similarly inappropriate. In short, the participants recognized that the decision to call a ready compensation fund into existence to respond to a particular terrorist attack would be a classically political decision, one which should be made by a political leader accountable to the American public, whose pulse s/he is well suited to discern. That leader – most likely the President or his designee, from a high governmental position – would make the decision as to whether the terrorist action which had taken place qualified as an STA. The decision would be made in the context of an actual attack, at which point the political decision-maker would be well suited to assess the scope of physical damage, consider the extent of personal injury to victims, and determine if the attack had captured the attention and sympathy of the American public sufficiently to warrant calling the special compensation fund into operation for the benefit of the victims of the attack.

3. A Two-Tier Payment Process

¹⁴ Insofar as possible, the Administrator should be free of apparent conflicts of interest during the period when s/he serves in that position.

¹⁵ The expectation of the participants was that the fund’s principal administrator would and should be accountable to Congress, as are agency heads. The fund and Administrator should not, however, be placed under the day-to-day control of any government entity.

As mentioned briefly above, the participants concluded that the Fund should provide compensation in two stages, each of which would have distinct processes. The Tier-One process would provide emergency compensation, with the goal of getting victims quickly “back on their feet.” Within broad, easily defined categories, all victims would receive the same one-time payment. The participants felt that speed was of the essence – that victims should receive assistance during the early weeks after the STA as they were perhaps struggling the most to cope with the shock of injury and loss. While these payments might be modest, perhaps in the vicinity of \$25,000 to \$50,000, they should be sufficient to permit injured persons and families to cope with the necessities of living during the immediate aftermath of STA and to provide a floor on which they can begin rebuilding their lives and work.¹⁶

While aware that there needs to be some check on the possibility of fraud in Tier One by persons claiming to be STA victims, the workshop participants did not address at any length how such screening should be done by the fund’s administrators.

Tier Two of the process would encompass the more deliberate – but still rapid – and individualized determinations as to the final amounts of compensation to be provided to each victim of the STA.

4. The Nature of the Compensation Determination Process For The Victims

The actual operation of the fund’s compensation determination process would need to occur both efficiently and sensitively.

a. Operate with Efficiency

The workshop participants concluded that there were several features necessary to the effective operation of any fund aiming to compensate victims in the aftermath of an STA. First, it is critical that the fund mount an effective outreach campaign in order: (1) to make victims aware of the availability of financial help from the fund, and (2) to encourage victims to go through enough of the fund’s claims process to develop a strong sense about: (a) what the process does (or will) feel like for them, and (b) what levels of financial compensation they can expect to receive. Most persons, including most traumatized persons, are unlikely to know about or understand the fund unless they are effectively reached.

Related to this, the participants knew that lawyers – particularly the kinds of lawyers who frequently represent plaintiffs in tort lawsuits – will have both financial and emotional interests in representing victims of such a significant blot on the national psyche as an STA. These lawyers, familiar with compensation systems and the kinds of documentation necessary to prove damages, may provide substantial assistance to victims in the presentation of their evidence to the fund’s administrators concerning their losses and needs. These lawyers’ involvement should be encouraged, for all concerned. However, in a setting in which there are no issues about liability and in which substantial compensation is assured for most claimants, there is little need for the inducements to represent claimants which are provided by traditional contingency fees of 33% to 45% of a claimant’s award in many tort lawsuits. If such fees were permitted, the participants concluded, there would be significant

¹⁶ In order to receive these Tier One payments, a victim would not be required to choose between proceeding through the fund system or the tort system. However, the final payment in either system would be reduced by the Tier One compensation.

reduction in the levels of compensation ultimately received by the victims – whose needs the fund is intended to meet – without serving any significant countervailing interest.

Time limits were deemed necessary to assure that the fund would deliver compensation when it is most important: during the period right after the STA when victims' lives will have been severely disrupted.

Finally, the workshop participants felt that the operation of the fund must include ongoing quality control mechanisms to assure that compensation is provided accurately and consistently. Along with such mechanisms, and related to an assurance that such quality control would be well done, the fund's claims process should be as transparent as possible, consistent with concerns for victims' privacy and vulnerability.

b. Operate with Sensitivity

This term – “sensitivity” – reflects the category of concerns, commonly expressed and addressed by the workshop participants, about how victims should be treated in the course of the compensation determination process. There was considerable agreement among the group with the sentiment (expressed by the one participant who had worked on the inside of the 9/11 Fund) that, “Process is everything.” The experts understood that the fund would not merely distribute money, but also be one of the principal responses of American society to an attack on its people. Indeed, it may be the principal such response in the eyes of many victims. The workshop participants thought it vital, therefore, that the fund be understood by those victims who do go through its claims processes as an expression of national solidarity with their plight.

This means first and foremost that the victims should be provided a process which treats them with respect and empathy. In addition to providing the victims a choice as to the forum in which they present their claims, they must be provided a forum in which those claims are fully heard and addressed. All the workshop participants concluded that the victims should be encouraged to “tell their stories” and given the opportunity to do so – stories about what happened in the attack; stories about the nature of the loss suffered by the claimant; stories about the victim him/herself, if the claimant's loss arose out of his/her relationship to a person killed or seriously injured in the attack; and, in such cases, stories about the relationship between the claimant and the person killed or seriously injured. While not all victims will wish to be heard in detail about such matters, it is important that persons in positions of authority at the fund – sometimes including the Principal Administrator – be available to meet with and listen carefully to victims. The victims should receive feedback from the fund's administrators about the rationale for decisions they make.

Overall, the workshop participants understood that there are many different ways to skin the proverbial cat in administering a claims process. They felt that a compensation fund for victims of a terrorist attack should be pervaded by an “ethic of care.” Victims should be and feel cared for and about as they seek compensation for their losses. A significantly richer, “thicker” process should be available to persons with serious injuries/losses than is necessary for persons harmed less seriously.

This need not mean that there be no administrative checks on the realities of important parts of victims' claims. As much as is feasible, those checks should occur behind the scenes, in the work of the fund's fact-checkers, who can retrieve a great deal of information from publicly available records and from material such as income tax and other similar forms which claimants can be required to include with their claims. The 9/11 Fund apparently took few steps which claimants could have experienced as

adversarial. The 9/11 Fund's administrators were able to investigate claims without confronting the victim directly. Where doubts arise as to the accuracy or viability of certain compensation claims, an "ethic of care" might require an opportunity for victims to explain any information which seems to cast doubt on some part of their claims. As one participant put it, "decency and respect" should characterize all the fund's administrators' direct dealings with those who have suffered significant loss from the STA.

5. A Review Process

There was consensus among the workshop participants that some kind of review process was necessary as a check on the work of the Principal Administrator and his/her staff. All were conscious that the admirable work of Kenneth Feinberg and his deputies as policy and rules-makers for the 9/11 Fund might not be repeated in the administration of subsequent funds.

Even within the administration of the 9/11 Fund, which earned relatively high marks from those familiar with its operations and the context in which it had to operate, serious questions were raised as to whether the compensation policies adopted in its regulations complied with its authorizing legislation. Some of those concerns were ameliorated by the regulations' expedited Notice and Comment procedure in the Federal Register. Moreover, in the course of implementing its own regulations, decision-makers working in the administration of claims through the 9/11 Fund often discovered new information relevant to its awards. The 9/11 Fund's Administrators needed to take steps to assure that information revealed at any stage of the Fund's administration was applied to all relevant claims, even those earlier decided, in order to assure the horizontal equity of all awards.

These factors called for, first, an expedited period of public notice and comment for the Fund's regulations; second, judicial review of whether the agency was following the Congressional mandates laid down in its authorizing legislation; and, third, ongoing review of all compensation awards by persons working within the 9/11 Fund itself to ensure consistency and fairness in its treatment of the victims. Similar such review should be established in any compensation fund responding to any STA, the workshop participants concluded. Moreover, they felt it critical that some sort of expedited judicial review of the fund's policies be provided for persons who feel that the fund's administrators are not complying with some aspect of either the United States Constitution or the fund's authorizing legislation. Because any future fund would have to make dramatic changes with respect to victims' compensation if a court overturned one or more of its significant policies, it was regarded as essential that prompt judicial review by one designated court take place early in the operation of the fund.

CHAPTER 4: FINANCING THE COMPENSATION PROGRAM

The workshop participants devoted little direct attention to the question of how much funding should be provided for any future compensation fund. Their discussions proceeded on the assumption that a successful terrorist attack of the sort that a terrorist organization would like to achieve in the United States would cause a tremendous amount of injury. Therefore, the workshop discussions took place under the presumption that a large amount of money would need to be available to the fund. While they settled on no specific amount, the workshop participants did expect that the amounts of compensation provided to each victim of an STA would accord with the purposes behind the creation of a compensation fund and would thus meet the needs of each victim. Most likely, such needs would be determined as they were in the administration of the 9/11 Fund, by relating them substantially to what had been taken away from the victims by the terrorists. Just as with the 9/11 Fund, the amounts of compensation provided per victim by any new compensation fund could be expected to be substantial.

Therefore, in the minds of the workshop discussants, the compensation fund would require significant capital. Moreover, such capital would need to be quickly accessible.

The only body capable of providing those amounts of money with such speed is the Congress, in the minds of the workshop participants. Private entities, understandably, would resist paying until lengthy judicial proceedings – proceedings that would undoubtedly take years – ordered them to do so. So, the funding should come from Congressional appropriation. Such appropriation took fewer than two weeks after 9/11. Similar speed should be feasible following any future STA, particularly if a compensation fund already is in place.

However, the workshop participants were adamant that Congress, and the American taxpayers, should not solely bear the ultimate burden of compensation for the victims. Participants noted that many entities – e.g. the airlines whose planes were crashed into the World Trade Center towers – bore some responsibility for the vast amount of harm caused on 9/11. Those entities had substantial liability insurance which was not tapped by the 9/11 Fund. The workshop participants saw no reason why responsible entities which had obtained substantial amounts of insurance against the possibility that their actions/inactions would cause large amounts of harm to other persons, or who had created self-insurance reserves, should not have to contribute the money available from such insurance to help compensate the victims of their injury-producing misconduct.¹⁷ Therefore, the participants recommended that any future compensation fund retain rights of subrogation for what it pays to compensate victims, and that the fund's administrators aggressively exercise such rights to sue responsible wrongdoers for their fair contribution to the harms inflicted by the STA. If the government believes the public has a strong interest in certain entities' or industries' not being required to make such substantial contributions to recompense the fund, then it may decide not to seek such subrogation.

CHAPTER 5: THE WAY AHEAD

¹⁷ Participants considered briefly, but reached no consensus regarding, the possibility that Congress might require certain industries to carry terrorism insurance.

Participants in the INSCT workshop recognized the need for continued work in developing more concrete suggestions which could help the country arrange something like the 9/11 Fund before another 9/11 happens. Initial steps include:

1. Developing a legal framework for compensation funds for future terrorist attacks, which would ultimately provide assistance to Congress and/or the Executive in the event of another STA.
2. Determining the best way to put into place a capable group of persons to administer such a fund, along with guidelines and funding for those administrators.

Considering the complexity of the issues, the lack of consensus on many issues, and the short time frame the group had to cover all of the topics, the participants suggested arranging a larger, broader, invitation-only symposium of experts to capture more information regarding, e.g., the fund being operated (again under the direction of Kenneth Feinberg) to distribute compensation to the victims of the 2010 BP oil spill in the Gulf of Mexico. Such a symposium might include participants with backgrounds and experiences related to public compensation funds different from those who participated in the first INSCT workshop. As an interim step, INSCT will capture and archive the institutional memory and perspective of fund administrator, Deborah Greenspan, and continue to stimulate dialogue about victims' issues through scholarship and public lectures.

Taking care of victims of terrorist attacks is about more than providing compensation. It is a reflection of our counterterrorism policy, the role of U.S. citizens in security policy and our national character. The purpose of the workshop was to analyze compensation schemes and their mechanisms in order to recommend ways forward in improving and developing our response. We owe this to the victims. We owe it to ourselves.

APPENDIX I: LIST OF WORKSHOP PARTICIPANTS

Workshop Moderator

Stephan Landsman / Stephan Landsman is a Professor at DePaul University College of Law and is an expert on the civil jury system. He has written numerous articles on the 9/11 Victim Compensation Fund, empirical and historical pieces regarding the jury, and an examination of legal responses to human rights abuses. He has successfully advocated in the Supreme Court of the United States, and is a member of the leadership of the American Bar Association Litigation Section.

Workshop Rapporteur

Peter Bell / Peter Bell, Professor of Law at the College of Law at Syracuse University, teaches and writes extensively on tort theory, tort law, tort and science, tort recovery for emotional distress, and the significance of tort lawsuits in the area of health care. After graduation from law school, where he was an editor of the Stanford Law Review, Professor Bell served as a law clerk to U.S. District Court Judge Joseph S. Lord, III, in Philadelphia. He then practiced law for a leading Washington, D.C. law firm, Wilmer, Cutler & Pickering. Professor Bell consulted in D.C. with the transition team creating the Legal Services Corporation and then moved to Rochester, NY, where he worked as a lawyer for poor people throughout New York State as an attorney with the Greater Upstate Law Project, a statewide legal services backup center.

Academic Workshop Participants

Deborah Greenspan / Deborah Greenspan joined Dickstein Shapiro in January 2005 as a partner in the Antitrust & Dispute Resolution and Business & Securities Law Groups. Her practice focuses on class action, mass tort, and bankruptcy law and procedure with particular experience in mass torts and products liability, analysis of damages and future liability exposure, negotiation, alternative dispute resolution (ADR), claims evaluation and dispute analysis, settlement distribution design and implementation, claims management and risk analysis, and general litigation. As Deputy Special Master for the *September 11th Victim Compensation Fund of 2001*, she developed the overall design of the congressionally-created program and was responsible for implementation of the program—including determination of policy, supervision of all activities, conducting hearings, and final review of all awards—that ultimately distributed more than \$7 billion to victims and families of victims of the September 11 terrorist attacks.

Betsy Grey / Professor of Law, Faculty Fellow, Center for Law, Science & Innovation at Sandra Day O'Connor College of Law at Arizona State University. She publishes and teaches on issues of tort law, products liability and mass tort litigation, as well as neuroscience and law. Her recent scholarly work has focused on the study of no-fault compensation systems in the United States. Before joining College faculty, Professor Grey was a commercial litigator at the Washington, D.C., law firm of Shea & Gardner, and a trial attorney for the Civil Division of the U.S. Department of Justice where she represented federal agencies and officials in litigation involving constitutional, statutory and regulatory issues. Professor Grey clerked for Judge Frank M. Johnson Jr. of the 5th U.S. Circuit Court of Appeals.

Robert Katz / Robert Katz holds a joint appointment with the Indiana University School of Law and the Indiana University Center on Philanthropy at IUPUI, and is on the Affiliate Faculty of the Indiana University Center for Bioethics. Prior to his appointment, he served as a Bigelow Teaching Fellow and Lecturer in Law at the University of Chicago Law School. He received his bachelor's degree from Harvard College and his Juris Doctor from the University of Chicago Law School, where he served as comment editor for the University of Chicago Law Review. He clerked for the Honorable Stephen G. Breyer, formerly Chief Judge of the U.S. Court of Appeals for the First Circuit

Don Migliori/ As co-leader of Motley Rice's aviation team, Mr. Migliori has played a central role in the extensive discovery, mediations and settlements of over 50 cases of 9/11 aviation liability and damages against numerous defendants. He also represented families of the victims of the September 11, 2001, attacks who opted-out of the Victims Compensation Fund and served as liaison counsel for the wrongful death and personal injury cases in the 9/11 aviation security litigation. He is a lead attorney of the 9/11 Families United to Bankrupt Terrorism, litigation designed to bankrupt the financiers of al Qaeda.

Keli Perrin / Assistant Director, Institute for National Security and Counterterrorism (INSCT) at and an adjunct professor at the Maxwell School of Citizenship and Public Affairs, Syracuse University. Perrin served for two years as law clerk to the Honorable David N. Hurd, United States District Judge for the Northern District of New York.

Marshall Shapo / Marshall S. Shapo, the Frederic P. Vose Professor at Northwestern University School of Law, is a nationally recognized authority on torts and products liability law. Professor Shapo is the author of several articles and a book, *Compensation for Victims of Terror*, on victim compensation for terrorist attacks. Professor Shapo's other books include the magisterial two-volume treatise, *The Law of Products Liability*..

Peter Szendro / Senior Vice President & Reinsurance Counsel of Willis Re Inc. Peter has worked in the insurance and reinsurance industries for over twenty years, advising insurers, reinsurers and brokers regarding a broad spectrum of legal, compliance and risk issues. He has also analyzed emerging issues and risk trends, including those related to national security, within the insurance and reinsurance context. Peter is a graduate of Syracuse University College of Law, where he focused on International Law and holds degrees in Biology and History from Binghamton University."

APPENDIX II: INSCT'S VICTIMS COMPENSATION PROJECT OVERVIEW

Modern terrorism has forced policy makers to reexamine the ways in which society has traditionally compensated the victims of catastrophic harm. The purpose of this project is to analyze alternative compensation schemes and their mechanisms in order to recommend ways forward in improving and developing compensation policies. The policy options range from complex, government-funded compensation schemes like the September 11 Victims Compensation Fund (9/11 Fund), to tort suits against charities serving people in the Middle East. This project highlights victims' evolving role, their compensation, and their contributions to securing the nation. In fact, victims of terrorism play a major role in policy making, particularly since 9/11. Long after the attacks, victims toil in the court systems seeking accountability and compensation. **The Victim Compensation Project** focuses on three areas of inquiry.

- 1 **Programmatic Alternatives.** This project area addresses questions of how and to what extent to provide compensation for victims of terrorism – through the generosity of charitable organizations, a publically-funded compensation scheme, private insurance, tort suits or some combination. In the case of programmatic funding schemes like the 9/11 Fund, experts will analyze the best administrative models for allocating and distributing funds. Mindful of the effects of related tort suits against businesses that provide for the security and safety of citizens, participants will consider liability standards and accountability mechanisms alongside grants of immunity carefully in order to strike the right balance between security needs and commerce.
- 2 **Litigation under FSIA: Victims Caught Between the Branches.** The terrorism exception to the Foreign Sovereign Immunity Act permits victims to sue states designated by the executive branch for supporting terrorism. This relatively new area of litigation is problematic for victims and all three branches of government: victims rarely recover their judgments, congressional support of victim suits is regularly thwarted by the executive, the suits threaten the executive branch's diplomatic efforts, and the courts suffer administrative burdens and frustrations in managing the litigation. In order to guide congressional and executive decision makers, scholars and practitioners will debate the utility of these lawsuits, and how to make the suits more effective.
- 3 **Suing the Supporters: Banks, Charities and Boim.** This project area addresses the law and policy effects of victims' suits against terrorists, terrorist organizations, and their supporters. Experts will analyze the nature and scope of liability of entities that support terrorists, the deterrence value of suits, the effect of such victims' suits on foreign relations, the constitutional limits on such claims that may exist, and the effects of the claims on global philanthropy.

The INSCT website, at <http://insct.syr.edu>, publishes updated project information, including a regularly updated news page that tracks law and policy developments related to victim compensation issues.

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