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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	Under the laws of the State of New York… [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	2	N.D.	
002	Draft	Under the laws of the State of New York… [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	2	N.D.	
003	Draft	All of the airlines… [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	N.D.	
004	Draft	All airlines also fear… [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	N.D.	

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
[Airline Tort Liability]

FRC ID:
9804

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(1) National security classified information [(b)(1) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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This document was prepared on Friday, September 12, 2025

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006	Email	Draft [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Courtney Elwood - From: Brett Kavanaugh	1	09/16/2001	
007	Draft	Airline Tort Liability - Background [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	N.D.	
008	Draft	Title IV - Liability of Air Carriers… [Pages 9-12] [4 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	4	N.D.	

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SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	Under the laws of the State of New York…	2	N.D.	P5;
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003	Draft	All of the airlines…	1	N.D.	P5;
004	Draft	All airlines also fear…	1	N.D.	P5;
005	Draft	Under the laws of the State of New York…	1	N.D.	P5;
006	Email	Draft - To: Courtney Elwood - From: Brett Kavanaugh	1	09/16/2001	P5;
007	Draft	Airline Tort Liability - Background	1	N.D.	P5;
008	Draft	Title IV - Liability of Air Carriers… [Pages 9-12]	4	N.D.	P5;

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Under the laws of the State of New York and most other states, negligence is the legal standard of care by which the airlines' security practices would be assessed in any tort suit arising out of the September 11 hijackings. A suit alleging that the airlines were negligent (for example, by failing to ensure sufficient screening of passengers or to provide secure cockpit doors) may have some chance of success, depending on what facts emerge in litigation about the airlines' security practices and procedures. ~~If so,~~ damages, including punitive damages, could exceed any reasonable amount that the airlines could earn. In addition, Suits may be brought not only against the two airlines – United and American – but also against other firms, notably Boeing, that may be alleged to have designed aircraft without sufficiently secure cockpit doors.

There are two possible options to reduce the airlines' exposure: legislation eliminating any ~~tort suits or recovery~~ recovery of damages by the plaintiffs ~~against the airlines~~ or legislation whereby the federal government would assume the cost of any damages awards against the airlines.

According to Counsel's Office The fist option is constitutionally problematic: Courts have held that a tort cause of action is a property right that the government cannot take away after the right has vested -- that is, after the injury giving rise to the cause of action has occurred -- without just compensation to the plaintiffs.

The second option, whereby the federal government would become responsible for any damages for which ~~the airlines are~~ otherwise would be liable, likely would survive constitutional challenge. And ~~There is precedent for this approach, for example,~~ In cases involving accidents arising out of private companies' weapons testing programs, for example, ~~and the~~ courts have upheld substitute federal remedial schemes that retroactively displaced state tort suits. This option would require federal legislation to substitute the Federal Tort Claims Act for state tort suits and thereby make the federal government responsible for any compensatory damages to which the plaintiffs are otherwise entitled. (Punitive damages are not available under the FTCA and thus would not be available to plaintiffs if this option were ~~selected~~ pursued.)

All of the airlines bear the ~~consequences~~ financial consequences ~~The possibility of future accidents, and~~ state tort liability for ~~such~~ any future accidents~~, may affect airlines' insurance costs~~. ~~One of Several options~~ There are several options that could help to ensure that a single accident does not threaten an airline's continued financial viability. One option is legislation overriding state tort law in cases where a hijacking, terrorism, or war ~~caused~~ causes an injury. A

~~approach~~

of the poss of

second option is legislation precluding state tort suits in cases where the airlines complied with all applicable federal security standards. A third option is legislation imposing damages caps in suits against the airlines arising out of accidents.

We ask your concurrence for the principle that, given the facts now available, that the federal government, not the airline industry, should assume liability for tort actions brought as a result of last Tuesday's events.

______ Agree with principle that the government, not the airline industry should assume liability.

______ Disagree with this principle.

Under the laws of the State of New York and most other states, negligence is the legal standard of care by which the airlines' security practices would be assessed in any tort suit against the airlines arising out of the September 11 hijackings. A class action suit alleging that the airlines were negligent -- for example, by failing to ensure sufficient screening of passengers or to provide secure cockpit doors -- has a real chance of success, or at least of inducing a massive settlement before jury verdict, depending on what facts emerge in litigation about the airlines' security practices and procedures. Damages, including punitive damages, could exceed any reasonable amount that the airlines could earn. In addition, suits may be brought not only against the two airlines – United and American – but also against other firms, notably Boeing, that may be alleged to have designed aircraft without sufficiently secure cockpit doors.

There are two possible options to reduce the airlines' exposure: (i) legislation eliminating any suits or damages against the airlines for their alleged negligence in these accidents or (ii) legislation under which the federal government in essence would assume the risk and cost of any damages awards against the airlines.

According to Counsel's Office, the first option is constitutionally problematic: Courts have held that a tort cause of action is a property right that the government cannot take away after the right has vested -- that is, after the injury giving rise to the cause of action has occurred -- without just compensation to the plaintiff.

The second option, whereby the federal government would become responsible for plaintiffs' compensatory damages, likely would survive constitutional challenge. In cases involving accidents arising out of private companies' weapons testing programs, for example, courts have upheld substitute federal remedial schemes that retroactively displaced state tort suits. This option would require congressional action in the form of federal legislation that substitutes the Federal Tort Claims Act for state tort suits against the airlines and thereby makes the federal government responsible for any compensatory damages to which the plaintiffs otherwise would be entitled. (Punitive damages are not available under the FTCA and thus would not be available to plaintiffs if this option were pursued.)

All of the airlines also fear the consequences of state tort liability for future accidents. There are several options that would ensure that a future accident does not threaten an airline's continued financial viability. One option is legislation overriding state tort law in cases where a hijacking, terrorism, or war causes an injury. A second option is legislation precluding state tort suits in cases where the airlines have complied with all applicable federal security standards. A third option is legislation imposing damages caps in suits against the airlines arising out of accidents.

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to help

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2/AF

Brett M. Kavanaugh
09/16/2001 02:41:48 PM

Record Type: Record

To: Courtney S. Elwood/WHO/EOP@EOP, Noel J. Francisco/WHO/EOP@EOP
cc:
Subject: draft

the e-mail attachment function is not working, so this is in text; please give me any comments

Airline Tort Liability -- Background

The airline industry has submitted proposed legislation that would limit the liability of airlines and airports from lawsuits arising out of the terrorist attack on the World Trade Center. In particular, the legislation would foreclose any federal or state lawsuit brought by or on behalf of any individuals other than the passengers or crews on the airplanes involved in the recent terrorist attack. The net effect of this would be to foreclose all lawsuits brought by or on behalf of the individuals who were on the ground at the time of the attack.

The

(The proposed legislation would similarly limit liability for suits arising out of the attack on the Pentagon)

NJF

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Under applicable law, the airlines and airports are potentially liable for any harm caused to those in the World Trade Center arising out of the airlines' and/or airports' negligence. Any lawsuit brought in connection with the World Trade Center attack would likely be brought under the laws of either New York or Massachusetts, because any security breach that might have occurred would have taken place in Massachusetts (where both flights originated), and the actual harm took place in New York. New York, like all but a small handful of states, applies the negligence standard to damages caused on the ground as a result of an airplane crash. *See Faby v. Air France,* 449 N.Y.S.2d 1018, 1021 (Civil Ct. 1982); *Crist v. Civil Air Patrol,* 278 N.Y.S.2d 430, 433-435 (Sup. Ct. 1967); *Wood v. United Airlines,* 223 N.Y.S.2d 692, 695-698, *aff'd.,* 226 N.Y.S.2d 1022 (App. Div. 2d Dept. 1962). The same appears to be true of Massachusetts according to two federal district court decisions, *see Brown v. United States,* 230 F. Supp. 774, 776 (1964); *Lund v. United States,* 104 F. Supp. 756 (1952), though no Massachusetts state court has addressed the issue.

In practice, this means that liability can be established if two steps are met. First, a potential plaintiff would have to demonstrate that the airlines' and/or airports' negligence in maintaining airport security allowed the highjackers to board and highjack the airplanes. For example, the plaintiffs may allege inadequate security in background checks of passengers or the failure to ensure that cockpit doors were secure, as they are in other countries such as Israel. Second, the plaintiff would have to demonstrate that the harm to the individuals in the World Trade Center was a foreseeable consequence of that negligence – that it was foreseeable that, as a result of lax security, highjackers would take control of an airplane and crash it, causing damage to those on the ground. Whether such lawsuit would be successful would turn on the evidence of negligence that could be adduced in a given case, as well as the court's or jury's assessment of foreseeability.

There has been some concern expressed that under New Jersey law, airlines and airports would face much higher liability exposure. Were New Jersey law applicable to any lawsuits related to the World Trade Center, this concern would be well founded, for New Jersey is one of a handful of states that holds airlines "absolutely liable" for damages caused on the ground as a result of an airplane crash. *See* N.J. Stat. § 6:2-7. This is true, moreover, even if the airplane causing the damage was stolen from its owner – a circumstance analogous to damage resulting from a highjacking. *See Torchia v. Fisher,* 95 N.J. 43, 47 (Sup. Ct. 1983). However, it is very unlikely that New Jersey law would apply to any World Trade Center lawsuits, for, as discussed above, any wrongful conduct related to the World Trade Center took place in New York and/or Massachusetts, not New Jersey. ~~(New Jersey law could, however, apply to lawsuits brought by individuals injured as a result of the attack on the Pentagon, for that flight originated in Newark).~~

⊛ inaccurate; Pentagon flight originated directors, employees or agents, shall be liable for damages of any kind or amount in connection with any claim of injury to property other than the aircraft involved or death or injury of persons other than aircraft passengers or crew that arises from an act of war or terrorism. Nothing in the foregoing sentence limits in any way the liability of air carriers for loss of or injury to the aircraft involved or injury or death of aircraft passengers or crew.

WHAT ABOUT OTHER DEFS??

What abt code shares?

TITLE IV—LIABILITY OF AIR CARRIERS FOR INJURIES CAUSED BY ACTS OF TERRORISM COMMITTED ON SEPTEMBER 11, 2001

SEC. 401. SUBJECT MATTER JURISDICTION.

The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction to the full extent permissible under the Constitution of all civil actions against an air carrier for injury, loss of property, personal injury, or death resulting from the September 11, 2001, terrorist attacks. The United States shall be a necessary party-defendant in any such action.

defined as above?

any loss

~~claims~~ ~~precluded~~ IC claims

Do we have a deal w/ ~~Counsel for~~ Airlines that U.S. controls litigation?!!

SEC. 402. REMOVAL.

Any civil action against an air carrier for [injury, loss of property, personal injury, or death] resulting from the

Agmt w/ other defs to give U.S. the lead and control over settlement? We don't want one other party blocking a settlement.

Limit contingency fees!!

Is this right, i.e. is it really "pursuant to"? I'm not sure that §1441 contemplates this.

September 11, 2001, terrorist attacks that is filed in state court shall be removable to the United States District Court for the Southern District of New York pursuant to section 1441 of title 28.

SEC. 403. CONSOLIDATION.

Any civil action against an air carrier filed in any federal court other than the United States District Court for the Southern District of New York for injury, loss of property, personal injury, or death resulting from the September 11, 2001, terrorist attacks shall be dismissed. The United States District Court for the Southern District of New York shall consolidate all civil actions against air carriers subject to this section.

Subject to (b) below.

shall?

SEC. 404. RESPONSIBILITY OF UNITED STATES.

This is unnecessary and appears to be an incomplete summary of (b)

(a) GENERAL.—The United States may be responsible for payment of money damages awarded against an air carrier in a civil action subject to this section ~~if~~ to the extent the combined sum of money damages awarded against the air carrier exceeds or has already exceeded the air carrier's applicable insurance coverage.

(b) AMOUNT OF DAMAGES.—In determining the amount of money damages for which the United States shall be responsible, the court shall calculate the plaintiff's any policy of insurance maintained by or for the benefit of

damages, offset by:

(1) that amount, if any, covered by the air carrier~~'s insurance policy~~;

(2) any amount received by the plaintiff from the United States or any federal agency pursuant to any emergency or disaster relief program as a result of the September 11, 2001, terrorist attacks; and

What abt "in kind" relief from FEMA, etc.? What abt private payments from charities etc?

Suppose ~~they~~ don't file claims? ~~don't have claims?~~

(3) any amount received by or owed to the plaintiffs under any insurance policy.

Bankrupt insurers? - Slow pay? - Lit over War exclusion?

SEC. 405. LIMITATION ON PUNITIVE DAMAGES.

Punitive damages, exemplary damages, and other damages not intended to compensate the plaintiff for actual losses shall not be available in any civil action subject to this section.

TITLE VI—LIABILITY OF AIR CARRIERS FOR INJURIES CAUSED BY FUTURE ACTS OF TERRORISM COMMITTED ON OR TO AIR CARRIERS

SEC. 601. LIMITATION ON LIABILITY.

Any air carrier certified as a victim of an act of terrorism under this section shall not be liable in any civil action or proceeding, state or federal, for injury, loss of property, personal injury or death resulting from that act of terrorism, except in actions brought by passengers or employees on the airplane, or their survivors.

SEC. 602. DISCRETION OF THE SECRETARY.

For acts of terrorism committed on or to air carriers for 180 days after enactment of this Act, the Secretary of Transportation, in his discretion, may certify that the air carrier was a victim of an act of terrorism and in the Secretary's judgment should not be responsible for losses suffered by parties other than the passengers and employees on the airplane.

based on his analysis of the facts regarding the incident.

- What review? APA?
- What standards should Secy apply? Should standards be promulgated in advance?