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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Analysis of Legislative Proposals Pertaining to Liability Resulting from Terrorism [. . .] [12 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/02/2025 JLS] - To: Robert D. McCallum Jr. - From: Paul Clinton Harris Sr.	12	09/20/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Terrorism Insurance - Liability: Working Group

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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]
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SUPERSEDED

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September 20, 2001

MEMORANDUM

TO: Robert D. McCallum, Jr.
Assistant Attorney General
Civil Division

FROM: Paul Clinton Harris, Sr.
Deputy Assistant Attorney General
Civil Division

Subject: Analysis of Legislative Proposals Pertaining to
Liability Resulting from Terrorism; Alternative Proposal for
General Immunity/Administrative Compensation System

I. Overview

Two separate legislative proposals drafted, and perhaps submitted, in response to the tragic events of September 11, 2001, have come to the attention of the Torts Branch. The Department of State has proposed to OMB enactment of an amendment to the Federal Tort Claims Act. The second proposal is a draft "Terrorist Attack Liability Act of 2001." Apparently, these proposals are moving on a very fast track. In my view, they warrant your immediate attention.

II. Drawbacks to Consenting to Federal Tort Liability

a. General.

Applying the traditional, fault-based tort system to terrorist-related damages claims would be bad for America.

Tort litigation here would lead to a cycle of finger-pointing and fault-finding. Wounds would not heal because the litigation would drag on for years. For various reasons, some victims may not recover at all. Given the vagaries of tort litigation, most victims would not be adequately compensated for the simple reason that the resources of potential defendants and their insurers are wholly inadequate. Moreover, extreme differences in awards to similarly situated persons could feed bitterness and resentment.

Our traditional, fault-based tort system is particularly ill-suited for resolving compensation questions arising from the September 11 terrorist attacks on the World Trade Center and the Pentagon. The potential, non-terrorist defendants do not have the resources to pay damages on all valid claims, assuming they were found to be liable. The process of resolving liability would be extremely complex, involving a myriad of factual issues, conflicts of law questions, theories of liability, legal defenses, and civil discovery which would include depositions of victims' family members. The massive number of cases would impose unprecedented burdens on the judiciary. Delays in resolving these cases would be lengthy; other, more traditional cases would be slowed. Based upon past experience, the transactional costs of resolving the cases, including attorneys fees, transcripts, and evidence, could well consume forty to fifty percent of the money actually paid by defendants.

b. Disaster of Unprecedented Magnitude.

It is hard to overstate the potential for gigantic, unprecedented jury verdicts as jurors attempt to provide compensation for the pre-death fright and terror of the hapless airline passengers; or the trade center occupants who were burned to death; or those who jumped hundreds of feet to their deaths; or those who ran down scores of flights of smoke-filled stairways, only to be crushed to death in the collapse. With five thousand known fatalities, survived by many thousands of grieving relatives, and countless thousands of other injured plaintiffs, the magnitude of damages cases and awards staggers the imagination. There could easily be 10,000 to 20,000 separate cases, seeking incalculable billions of dollars of damages.

c. Impact on the Judicial System

Cases, settlements, and trials numbering in the tens of thousands would overwhelm and cripple the federal court system. The clamor for trial priority by impecunious widows and orphans would be unlike any litigation in recent memory. The Courthouse in Foley Square is massive building with more than 40 district court judges, but nothing in the draft "Terrorist Attack Liability Act" would reduce the massive caseload presently handled by that court. Presumably, Magistrate Judges could be pressed into service and Special Masters appointed, but litigants are entitled to insist on their rights to trial by jury before a federal judge, and the disruption and delays would be unprecedented.

The litigants would also incur enormous costs. Many hundreds of plaintiffs' counsel, with the associated expert witnesses, depositions, pleadings, and motions would flood into lower Manhattan just as the island struggles to rebuild. The airlines, fighting for their economic survival, would deploy their teams of attorneys, investigators, and experts. Since, under provisions of the draft "Terrorist Attack Liability Act," the United States would only be responsible for the excess of air carrier liability above insurance, federal attorneys would join the airline defense attorneys in a massive effort.

It is likely that the Civil Division would have to hire hundreds of additional attorneys to handle the multi-track pleadings, motions, depositions, document requests, pretrial proceedings, settlements, and trials, all taking place on a "fast track" in an effort to get compensation to innocent victims of the disaster.

The cost of this avalanche of legal activity would, of course, be equally massive. Some costs would be incurred by the plaintiffs; others by the airlines; others by the Government. The cost of defense, coupled with the payment of significant deductibles, might bankrupt the involved airlines despite the intended goal of federal payment of excess judgments. Even plaintiffs with counsel on contingent fee arrangements are responsible for out-of-pocket expenses. And all of these "system costs" consume resources otherwise available for victim compensation.

Rather than expediting payment to victims, this giant infusion of thousands of civil cases would congest, clog, and arguably disable the federal judiciary in the Southern District of New York for many years to come. The end result would be to place a fat layer of transaction costs and loss of judicial resources on the top of these staggering losses and profoundly delay the payment of funds to the victims, not to speak of delaying the cases of the many other citizens who turn to the federal courts for justice.

d. Disparate Treatment of Claimants.

Turning beyond logistics, the conventional tort system is an ill-suited vehicle for mass compensation of thousands of similarly-situated victims and their families. The reasons for this relate to the antiquated and haphazard nature and operation of tort law. Even in federal court, torts are normally litigated by application of state law, which in turn incorporates a variety of disparate provisions.

Choice of law determinations must be made, often involving choices of substantive and procedural law, sometimes with different states' laws applying to different issues (e.g. negligence issues versus damages issues). Therefore, suits against American Airlines for the occupants of one tower might turn on issues of Texas law, while suits against United Airlines for the occupants of the other tower might turn on issues of Illinois law. A building occupant residing in Manhattan might face an entirely different compensation package than one residing in New Jersey, or one visiting from California.

e. Other Vagaries of Applying Tort Law.

1. Who can sue? In death cases, states vary widely in which relatives are eligible to sue for wrongful death. In some states, a surviving spouse and children are the only eligible plaintiffs; in others, additional relatives such as parents and siblings may sue for damages. In injury cases, state law

determines such considerations as "zone of danger" criteria for eligibility – and in the case of the collapsing twin towers, that zone is very broad indeed. Can occupants of neighboring buildings throughout lower Manhattan sue for their own injuries, fright and terror? What of witnesses covered with smoke, debris, and even body parts? What of family members who literally witnessed the death of their loved ones, as the entire nation watched live television coverage of the second plane crash, and then the sequential collapse of both towers? The magnitude of this disaster might yield incredible new extensions of who is considered a "direct victim" of this televised event.

2. What damages may be awarded? State laws vary widely. Some jurisdictions restrict wrongful death damages to economic loss alone, whereas others allow such "soft" damages as pre-death pain and suffering, fright, terror, loss of companionship, consortium, and even "hedonic" damages (loss of the enjoyment of life).
3. How are those damages to be computed? Even in the normally-straightforward calculation of wage-based economic damages, states impose a variety of legislative and judicial adjustments, such as mandating a specific (and usually generous) discount rate for computing present value of future losses, or allowing or prohibiting the deduction of income taxes or personal consumption from damage awards.
4. What portion of the funds expended is eventually paid to the victims? Some studies suggest that the tort system delivers as little as 20% of the total system cost to the victims, with the remainder consumed by transactional expenses, such as legal fees, Judges' salaries, court reporters, bailiffs, expert witnesses, hotel bills, etc.
5. How swift is payment? Although some cases may be settled quickly, experience with mass disaster litigation suggests that most cases must proceed through at least some pretrial discovery and motion practice before settlement. In a normal air crash case, not involving an overwhelmed court system and bar, three to five years of litigation is commonplace. In the Pan Am 103 (Lockerbie) bombing cases, some litigants are still seeking compensation more than a decade later. Given the scope of the World Trade Center disaster, together with the Pentagon and Pennsylvania crashes, decades of litigation are a virtual certainty.

6. What is the uniformity of result? As noted above, the vagaries of which airline's plane was involved, and the state of residence the decedent or injury victim, may have a massive impact upon who may sue, what laws apply, and what damages are awarded. Moreover, often the neediest victims get the least, being forced by economic necessity to take an early settlement, whereas the more affluent victims can afford to wait and bankroll a lavish litigation in search of the highest award.

III. Infirmities of the Department of State Proposal to Amend the FTCA

The Department of State has proposed to OMB enactment of the following amendment to the Federal Tort Claims Act:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty, including but not limited to gathering, analyzing and/or disseminating intelligence information pertaining to international terrorism, or providing security against acts of international terrorism, on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

This suggestion suffers from several infirmities. First, it attaches to the discretionary function exception, an already developed area of the statute, extraneous language. Second, it includes some, but not all examples of activities that would be protected from suit; it would be better to simply state what is barred. Third, it is not readily apparent that the Federal Tort Claims Act should be amended.

The problem goes beyond a need to protect the government. No entity can insure that terrorist will not thwart security measures. To leave every entity subject to suit in tort will lead to measures endemic to life in a free society. Accordingly, serious consideration should be given to creating a blanket immunity from suit for injuries arising from terrorist activities.

IV. Deficiencies in the Draft "Terrorist Attack Liability Act of 2001"

The second proposal is a draft "Terrorist Attack Liability Act of 2001." It takes the general approach of having the United States take financial responsibility for any uninsured liability of the airlines whose planes were used in the September 11 attacks.

The draft "Terrorist Attack Liability Act of 2001" would generally use adversary tort litigation to determine who would receive compensation and what level of compensation that would be. The draft would tweak that system in significant ways. It would, *inter alia*, have the United States taxpayers assume all uninsured liability of the airlines whose planes were hi-jacked, direct all litigation to the Southern District of New York, eliminate punitive damages and limit attorney fees. Attached at Tab 1 is a copy of the draft "Terrorist Attack Liability Act."

The thrust of this legislation is misguided. The potential liabilities arising from these tragedies are certainly greater than the combined insurance and assets of the airlines. No claimant would receive full compensation under our traditional tort system. Each would receive, at most, a small percentage of a traditional tort judgment because the available assets would be divided among the tens of thousands of claimants.

There are doubtless sound, policy based reasons for the federal government to take steps which will see that injured persons receive needed financial assistance and preserve the nation's airlines. To do that, however, it is not necessary for the United States to assume the uninsured portion of any liability that might be assessed against the airlines. Rather, both injured people and the airlines would benefit if an administrative, non-adversarial compensation was created to see that reasonable funds were provided to injured parties. This is akin to the way worker's compensation statutes work in every state of the union.

V. Alternative Proposal for a Two-Pronged Liability-Compensation Scheme

There are numerous advantages to an administrative compensation scheme. First, it would provide a ready mechanism to get money to people quickly. Second, it would treat everyone equitably; similarly injured people would receive the same level of compensation. Third, it would be non-adversarial. If the resolution of claims is left to our tort system, litigation will continue for years with all the excesses of our adversary system. Some claimants may go uncompensated, most will be put through the discovery process, expenses and costs (including attorneys fees) will be high. Most importantly, there will be no peace.

If the federal government is going to assume the huge financial burden of seeing that these injured people receive compensation, it should do so in a fashion that best serves the overall interests of the nation. An overarching interest is to avoid steps which will keep this tragic injury from healing. The

draft "Terrorist Attack Liability Act of 2001" would almost insure that such healing would not take place. Instead, a general immunity statute should be enacted together with an administrative compensation scheme.

a. Draft Immunity Statute.

This immunity statute is intended to apply to federal, state and local agency administrative proceedings seeking monetary damages, and similar proceedings that are in essence monetary in substance, as well as to all such judicial proceedings. The immunity is provided in the alternative to make it clear that it is immunity from being sued as well as from liability. The statute applies both in the state and federal courts and in non-judicial tribunals. The legislation does not affect any claim or suit or administrative proceeding seek only non-monetary relief (such as enhanced security procedures) and would not affect a person's right to claim that any continued detention is illegal, although the legislation would preclude wrongful imprisonment suits for damages predicated upon detentions.

The Proposed Statute

Section 1. Findings: In recognition of the fact that the tragedy that occurred in New York City, at the Pentagon and in Pennsylvania on September 11, 2001, was caused by terrorist activities and that the consequences of the terrorist activities have affected commerce throughout the United States and that civil actions and proceedings seeking monetary recoveries from persons other than the terrorists would impair our country's ability to overcome the effects of the terrorists activities, the Congress finds that civil money claim immunity on the part of persons who were neither terrorists nor in league with terrorists is necessary to further our nation's ability to overcome the effects of the tragedy.

Section 2. Immunity From Certain Actions And Proceedings. Except for willful acts intended to cause personal injury, death or property damage, no person or governmental component may be sued or held liable in any action or proceeding in any forum or tribunal within the United States of America for monetary damages or monetary relief for any personal injury, death or property loss or damage of any kind for any claim arising out of terrorist activities on September 11, 2001, unless the claim is predicated upon an express contract or agreement.

Section 3. Definitions. For the purpose of this section, terms have the following meanings:

- (a) "Persons" means any individual, corporation, partnership, association or other entity that can be sued;
- (b) "Governmental unit" means any component, agency, subdivision, or juridical subdivision of any state or federal government component or the United States of America or its territories and commonwealths, and shall include the District of Columbia;

(c) [add other definitions including "terrorist activities"]

Section 4. Effective Date. This action will be effective upon enactment and shall apply to any civil action or proceeding commenced on or after September 11, 2001.

* * *

b. Administrative Compensation System.

The direct victims of the attack should not bear a grossly disproportionate share of the harm inflicted.

There is a consensus that all Americans were the intended and actual victims of this attack. While all Americans suffer as a result, individuals who were injured or killed, who lost loved ones, who lost their means of support, and whose property was damaged and destroyed, suffered far more deeply than others. The compensation scheme seeks to shift some measure of the direct victims' loss to the rest of the nation to mitigate the devastation suffered by any one individual.

The purpose of the compensation system is not to make the direct victims "whole" in the sense that tort litigation seeks to make the plaintiff whole

The tort theory of recovery shifts the impact of the harm suffered from the blameless victim to the perpetrator. Unfortunately, the perpetrators are not likely to be answerable in tort suits. Moreover, in the absence of this compensation system, most victims would not be adequately compensated for the simple reason that the resources of potential tortfeasors and their insurers are wholly inadequate. A compensation scheme that conferred benefits on a par with traditional tort damages may damage the economy and divert resources from other compelling governmental interests. The sensible goal of the compensation system is to provide reasonable, effective relief to the individuals most directly adversely affected by this attack.

The compensation system should not create an avenue for anyone to reap a "windfall" or to profit from this national tragedy

Where resources are scarce and precious, they should be directed where they can do the most good at the least cost. The compensation system should be recognized as but one component of the United States' response to this terrorist attack. Hence, a goal in the crafting of the compensation system should be to keep administrative costs as low as possible. An important aspect of this is to assure that a significant portion of the funds appropriated for the purpose of victim compensation do not find their way into lawyer's pockets. Similarly, the compensation system should not be so cumbersome to administer that it drains resources of the federal workforce from other critical work. The system should be put into place rapidly, and some visible results should be seen soon. An essential purpose of an administrative compensation

system is to avoid lengthy, expensive, painful, finger-pointing litigation that would distract the Nation from the important work before it. To that end, the administrative compensation system should be straightforward, efficient, equitable and certain in the results it produces.

This point needs no explanation: Expending funds on victim compensation necessarily diverts funds from other purposes, and Congress must choose the combination that best allocates among competing needs.

Hallmarks of an Effective Administrative Compensation System

To satisfy the principles outlined above, the administrative compensation system should include the following hallmarks:

Exclusivity.

The compensation system would be the exclusive remedy available to any victim of the September 11 terrorist attack. Exclusivity is a fair trade-off in exchange for the certainty of compensation that would not be available in the absence of a government-sponsored compensation system.

Finality.

As with the Federal Employees Compensation Act, 5 U.S.C. § 8101 *et. seq.*, ("FECA"), (which provides a workers compensation remedy to federal employees injured on the job) the decision of the Secretary (or his designee) would be final and not subject to judicial appeal. This provision is essential to ensuring an efficient, cost effective and equitable compensation system. For example, as with FECA beneficiaries, a claimant would submit a claim to the designated agency. The decision of the agency could be appealed to a board created within the agency to hear "appeals". The decision of the appeals board would be final.

Administrative Efficiency - Streamlined Claims Process.

To assure quick recovery for claimants and to minimize administrative costs, the claims process should be simple, and straightforward. As with FECA, claims would have to be submitted on approved forms and provide specific documentation set forth by the relevant agency in regulations. The goal should be to create a system that the average layperson could easily navigate.

Objective Valuation of Damages.

To provide uniformity of treatment to victims, the administrative system should include a schedule of compensable damages and objective formulas for compensation.

For example, as with FECA, compensation where income is lost through injury or death could be computed based upon prior earnings (demonstrated by income tax returns or wage statements) and could take into account the number of dependants. In the case of persons without an earnings history, a minimum alternative sum could be awarded in lieu of lost earning capacity. Physical disability could be valued by reference to FECA tables assigning monetary value for various injuries.

Equitable Treatment of All Direct Victims.

This can be achieved by applying objective criteria for valuation of damages, as discussed above. No distinction should be drawn between airplane passengers and people in the Pentagon or World Trade Center. The same rules of recovery would apply to everyone regardless of where they were injured, where they lived, or for whom they worked.

Limit Attorneys Fees.

To prevent diversion of resources from victim compensation, Attorneys Fees should be limited: Consideration should be given to imposing a flat fee limit on each claim submitted. Legislation creating the compensation system could direct the administering agency to publicize the claims process and provide assistance to victims filing claims, with an emphasis on a "user-friendly" claims process that does not require the assistance of an attorney.

Provision for Enforcement of Insurance Contracts (e.g., through subrogation.)

The legislation creating the compensation system should expressly provide for the means by which insurers will be made to contribute to the compensation fund. One possibility would be for the United States to be subrogated to the rights of the airlines and real and personal property owners. Another possibility is to reduce recoveries by available insurance. (Property losses that are not insured should not be paid in full.)

Limitation of Compensable damages to personal physical injury, death, physical damage and destruction to real and personal property.

There is no question that the economic impact of the September 11 terrorist attack has and will continue to reverberate through layer upon layer of the United States', and even the World, economy. Virtually all Americans will likely suffer some level of economic impact from this tragedy; whether it be from the increased cost of goods and services necessitated by increased security measures, a decrease in government services sacrifice in favor of expending resources on battling terrorism, or a diminution in the value of investments. Accordingly, the goal of a compensation system cannot reasonably be to address all economic harm caused by the terrorist

attack. Rather, it must be targeted to the most egregious harm, which is identified as personal injury and death and physical damage to real and personal property. Any attempt to provide compensation beyond these damages would be impracticable. It should be recognized that this compensation is not the exclusive means of financial support for the victims of this attack. Other sources already in place include, workers compensation, social security, life insurance and charitable donations. The effect of the proposed compensation system on workers compensation and other benefits programs would have to be considered.

No recovery for "pain and suffering" or "emotional distress".

No one can doubt that the direct victims of the September 11 terrorist attack and their families suffered excruciating physical and emotional pain and suffering. The tort system, which would normally allow for such recovery, would not provide it here because of the limited resources (both insurance and assets) of the non-terrorist potential tortfeasors. Because compensation is not coming from the perpetrators of this hideous attack, it would not be appropriate or just to tax the United States with attempting to compensate for these intangibles. Moreover, it must be recognized that all Americans suffer from this attack. This compensation system should acknowledge and recognize that although the United States cannot make the direct victims and their families "whole" through monetary compensation, through this effort and other actions of the government, the United States can again be made whole.

VI. Alternative Forms of a Non-Fault-Based Compensation Model

A non-fault based model could take any one of several forms. It could be a straightforward lump-sum approach, either across the board or variable depending on factors which could include age, number of dependents, wage-earner/family breadwinner or not, etc.

A more sophisticated compensation plan could provide a replacement of all or some determined portion of economic and non-economic losses, by using a drastically streamlined process to calculate economic losses which is modeled on the tort system's methodology but removes the adversarial determination of its economic variables. This would provide the factors such as the rate of wage/salary growth, expected overall productivity increases, the discount rate for reduction to present value, and deductions for personal consumption and income taxes. Each of these figures, normally determined by the fact-finder as a part of the adversarial process, would be specified and applied uniformly to all cases. With these factors specified, a special master could determine from a determined earnings "window" (say, an average of the past three years) what income figure to input to the formula, and an economic loss figure would be immediately generated. A front-end policy decision would determine whether all or some designated fraction of that figure would be paid.

Since the law of many states (not including New York) provide for non-pecuniary damages – sometimes called "soft" damages, pain and suffering,

bereavement, loss of consortium, loss of care, counsel and advice etc. — a sliding scale of nominal non-pecuniaries could be provided, if desired, based on the survival of a spouse, minor dependents, disabled adult dependents, etc. These awards can reach many millions of dollars in some tort cases, and the amounts if provided would be quite nominal by comparison. However, it provides some recovery for those cases where the decedent has little or no earnings history (children, the elderly, etc.) but compassion requires some recovery.

Such a no-fault recovery system could be financed by contributions paid by appropriate air carrier, airport security, and property/casualty insurers, with the balance funded by the US (if this is deemed desirable). The amount of their contributions would have to be negotiated; we believe they would be receptive to participation in such a plan in light of the savings in litigation expenses, and the likely reduction of liability exposure for them and their insureds. Payments could either be disbursed by the Treasury or, for more expeditious handling, from a fund created by and administered pursuant to the system created.

The compensation plan would be administered by a large number of special masters drawn from the government, insurance, legal and alternative dispute resolution communities and other related fields who would administer the claims system. There would be limited, if any, right of administrative appeal and limited or no judicial review provided. Attorneys fees would be limited to a designated percentage, and the plan would provide information and assistance so many claims could be filed without the assistance of counsel.

VII. Summary

In contrast with a carefully-crafted compensation mechanism, consenting to the application of existing tort law would impose a second disaster on the legal system of the country. The limited number of judges and courtrooms would result in massive delays. The vagaries of state law would yield wildly disparate results. The costs and burdens of the process would be incalculable. It would serve none of the goals of equitable, swift, and fair compensation to the many victims, while burdening litigants, airlines, and the government with costs and expenses for years to come.

If the federal government is going to assume the huge financial burden of seeing that these injured people receive compensation, it should do so in a fashion that best serves the overall interests of the nation. An overarching interest is to avoid steps which will keep this tragic injury from healing. The draft "Terrorist Attack Liability Act of 2001" would almost insure that such healing would not take place.

Instead, a general immunity statute should be enacted together with an administrative compensation scheme.

* * *