In Case Terror Strikes American Again: Considering a Permanent Fund for Victims of Terrorism

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Bluebook Citation
COMMENT

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CONSIDERING A PERMANENT FUND FOR VICTIMS OF TERRORISM

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INTRODUCTION

Eleven years ago, two crashing towers shattered the American illusion of security. What began as a normal day at work ended in smoke, rubble, and thousands of families changed forever. The entire nation, once confident in its indestructibility, suddenly recognized the extent of its vulnerability. No longer did terrorism occur “over there,” but right at home.

Over time, the American people would learn that 2,977 victims lost their lives due to the September 11, 2001, attacks (“9/11”), and thousands more were injured. But these numbers represent only a fraction of those who were affected. Children were orphaned, spouses were widowed, and shock and grief reverberated throughout society. In the face of such a profound national tragedy, the American public expressed unprecedented sympathy for the victims and their families by showing solidarity through numerous prayer vigils, memorial altars, ribbons of remembrance, financial donations, and the ubiquitous display of the American flag. Yet, the American people also expected leadership from their government in discerning how to respond and move forward.

The government replied, and swiftly. One aspect of its multifaceted response was the creation of the 9/11 Victim Compensation Fund

* Robyn Brown is a 2012 graduate of the University of St. Thomas School of Law. She thanks her tremendously supportive family, friends, and professors (especially Hank Shea) for their consistent encouragement and guidance. She notes with appreciation the hardworking Law Journal staff, whose editorial suggestions enhanced this Comment.


Among the multiple purposes of the Fund were protecting the airline industry from collapse, providing financial assistance to victims and their families, and building public trust in the government. The Fund was widely hailed as a compassionate response, although it took some criticism. The nation stands eleven years later, seemingly stronger—but also aware of its fragility. Terrorist attacks continue throughout the world, and the September 11, 2012, attack on the Benghazi consulate was a stark reminder of the United States’ continued vulnerability. In light of this reality and lessons learned from the administration of the Fund, the federal government should create a permanent fund for victims of terror that will stand ready to expeditiously address victim needs in the event of a future attack.

This Comment will explore the historical development, administration, and rationales underlying the Fund. Next, it will examine what can be learned from other compensation programs. It will then set forth some considerations for policymakers and suggest features of a future permanent American fund for victims of terror. Part I will describe the federal government’s compensation for victims of terrorist acts prior to 9/11. Part II will walk through the creation of the Fund, examine its administration, assess its effectiveness, and describe updates to the Fund since its creation. Part III will give an overview of other (non-9/11) compensation programs, including federal and state funds in America, international compensation programs established by the United Nations, and Israel’s permanent fund for victims of hostile acts. Part IV will examine several justifications for compensating victims, and Part V will suggest practical considerations for policymakers. Finally, Part VI will make specific recommendations regarding the creation and administration of a permanent fund.


I. Pre-9/11 Responses to Terrorism

Prior to 9/11, the federal government had some experience compensating victims of hostile acts. After the War of 1812, Congress passed a statute providing relief to victims who had property lost, taken, or destroyed due to the war. A single commissioner was appointed to establish rules and processes for distributing the funds, though the statute did not provide for any judicial review of his broad discretion. The public was upset by the commissioner’s “excessive generosity,” and in response, Congress amended the statute to add bureaucratic oversight. As a result of this change, many victims received either disproportionate awards or no awards.

In more recent years, the World Trade Center attack in 1993 and Oklahoma City bombing in 1995 led to enactment of the Antiterrorism and Effective Death Penalty Act of 1996. This law amended the Victims of Crime Act by adding 42 U.S.C. § 19693(b), giving the Office for Victims of Crime (OVC) access to the emergency reserve fund in domestic and international terrorist incidents by authorizing the OVC director to supplement state crime victim compensation programs. Since then, OVC has provided supplemental grants to assist victims of the bombing of Pan Am Flight 103 (1988), the Oklahoma City bombing, the Khobar Towers military barracks bombing (1996), the bombing of the American embassies in

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9. Id. at 17–18.
10. Id. at 18.
12. See generally U.S. Dep’t of Justice, Responding to Terrorism Victims: Oklahoma City and Beyond, NCJ 183949, 1 (Oct. 2000), available at http://www.ojp.usdoj.gov/ovc/pdfxt/NCJ183949.pdf (explaining the Oklahoma City bombing was an attack on the Alfred P. Murrah Federal Building that killed 167 people and injured hundreds more) [hereinafter “DOJ”].
15. U.S. Dep’t of Justice, Office for Victims of Crime, About OVC, http://www.ojp.usdoj.gov/ovc/about/index.html (last visited Nov. 13, 2011) (“Established in 1988 through an amendment to the Victims of Crime Act (VOCA) of 1984, the OVC is charged by Congress with administering the Crime Victims Fund (the Fund). Through OVC, the Fund supports a broad array of programs and services that focus on helping victims in the immediate aftermath of crime and continuing to support them as they rebuild their lives.”).
Kenya and Tanzania (1998), and the Columbine High School massacre (1999).17

After these incidents, in 2000, the U.S. Department of Justice issued a publication entitled *Responding to Terrorism Victims: Oklahoma City and Beyond*, exploring lessons learned and offering recommendations for future victim services in the case of future acts of terrorism or mass violence.18 No one, however, could have predicted the enormity of 9/11, or how it would set in motion an unprecedented generous approach to victim compensation.

II. THE 9/11 FUND

The magnitude of 9/11, and what seemed to be a forthcoming disastrous collapse of the airline industry, propelled Congress to act quickly. The airlines’ liability insurance would not be able to handle the onslaught of expected litigation,19 so Congress stepped in to pass emergency legislation. The Air Transportation Safety and System Stabilization Act (ATSSSA)20 was signed into law with minimal congressional debate, on September 22, 2001, just eleven days after it was introduced in the House of Representatives.21

The ATSSSA gave the airline industry federal loan guarantees of up to ten billion dollars, compensation of up to five million dollars for direct losses incurred due to a federal ground stop order, compensation for “incremental losses,” reimbursements for increased insurance costs, and deferral of depositing excise taxes.22 Further, in response to calls from the airlines and the American Trial Lawyers Association (ATLA) for a compensation program that would shield airlines from liability, Congress created an alternative compensation program for victims.23 Title IV of the ATSSSA instituted the Fund,24 which was added to the bill in just one day as a “congressional afterthought.”25 The ATSSSA also discouraged lawsuits by giving the federal court in the Southern District of New York exclusive

18. See DOJ, supra note 12, at ch. VIII.
19. See Berkowitz, supra note 8, at 24–25 (explaining the airlines had approximately six billion dollars of insurance coverage, but the financial damage from 9/11 was estimated to be at least $35 billion).
21. Ackerman, Effective Response, supra note 2, at 146; accord Feinberg, supra note 6, at XV; accord Berkowitz, supra note 8, at 5.
22. Berkowitz, supra note 8, at 5.
25. Feinberg, supra note 6, at 16.
jurisdiction over claims arising out of 9/11, and by capping airline liability at the maximum of its liability insurance.26

A. Administration of the Fund

Title IV of the ATSSSA provided for a Special Master to be appointed by the Attorney General to administer the Fund.27 The term “special master” came from common law, referring to someone who assists the court in a specific way.28 However, in the case of the Fund, the position was not a judicial officer or agency administrator, but rather an unprecedented position not subject to judicial review.29 Attorney General John Ashcroft appointed Kenneth Feinberg to the position.30

Feinberg had an extensive legal background that uniquely prepared him for the position, including serving as a special master to mediate a settlement in Agent Orange litigation and as a mediator and settlement administrator for Fortune 500 companies.31 He wanted to become Special Master of the Fund so he could use his broad experience in dispute resolution skills to serve the 9/11 victims and their families.32 He offered to do all of his work for the Fund pro bono.33

The job requirements were daunting. Title IV gave the Special Master broad discretion over administering the new Fund but failed to provide any judicial oversight or much guidance.34 Looking back on his time as Special Master, Feinberg remarked that determining awards from the Fund “called for the wisdom of Solomon, the technical skill of H&R Block, and the insight of a mystic with a crystal ball.”35 He described serving as the only rule-maker, judge, and jury for the Fund: “Thus began the most harrowing experience of my professional life. In the end, it was also the most rewarding.”36

Though Feinberg was the ultimate administrator of the Fund, he hired a large legal and accounting staff to help with verifying eligibility of claimants, answering questions, and making initial award calculations for re-
The overwhelming amount of paperwork kept Feinberg and the staff working many long hours. The first important task involved establishing regulations for administering the Fund. First, potential claimants needed to know if they were eligible for an award. Section 405 of the ATSSSA defined “claimant” as:

(A) an individual who—(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and (ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175 [with exclusions for those deemed to be participants in the attacks]; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

However, these vague provisions left many unanswered questions for the Special Master. While victims of terrorist attacks prior to 9/11 were clearly not covered, the statute did not specify what “the immediate aftermath” of the 9/11 incidents entailed, nor did it specify how wide of an area could be included at each site. Feinberg thus determined the “ambit of risk” by talking with police and firefighters. He also narrowed the class of eligible claimants to those who sought medical treatment within seventy-two hours. The Fund would not grant awards for latent injuries caused by exposure to toxins in the aftermath of the attacks, though this was later changed. Property loss and psychological harm would also not be compensated due to the statute’s limitation of awards for “physical harm or death.” The interim regulations specified that eligible claimants must have sustained “physical injury inflicted by the terrorists in the immediate vicinity of the World Trade Center or Pentagon and subsequent contemporary medical treatment.”

Feinberg faced other difficult decisions concerning the class of eligible claimants. He determined that foreign applicants, including undocumented

37. Id. at 31–34 (PricewaterhouseCoopers won a bid to administer the Fund).
38. Id. at 38–39.
40. FEINBERG, supra note 6, at 21, 67.
41. Id. at 43.
42. Id.
43. Id. at 42; see Rabin, supra note 23, at 1843–44.
44. See infra Part II.C.
46. FEINBERG, supra note 6, at 43.
immigrants in America, were eligible for awards. Moreover, he guaranteed claimants the information on their applications would not be shared with other government agencies for immigration enforcement purposes.

For questions about who had priority in a claim and the eligibility of fiancées, same-sex domestic partners, and estranged parents, the statute provided no guidance. Religious books and clergy could not offer Feinberg clear direction on these questions. He thus looked primarily to the state or foreign laws of the decedent’s domicile and worked to mediate between potential claimants when necessary.

The Special Master also exercised discretion in determining the monetary amount of awards. The skeletal provisions of Title IV provided a three-part formula for these calculations: (1) economic loss (the financial circumstances of each victim), (2) noneconomic loss (pain and suffering), and (3) offsetting the awards by funds recoverable from collateral sources such as life insurance and death benefits. Feinberg was also guided by three public policy considerations: (1) consistency for victims of similar career positions, (2) transparency through public outreach and accessible information, and (3) narrowing the gap between high and low awards.

The ATSSSA did not specify a maximum award claimants could receive, so regardless of how much Feinberg awarded one person, it would not diminish another person’s award. However, he charged himself with the responsibility of “social engineering” to ensure the disparity between economic loss awards was not too great. For noneconomic loss, Feinberg found that he was unable to quantify and compare the pain and suffering of each claimant or deceased victim, so he awarded each the same amount. Feinberg looked to the death benefits given to public safety officers killed in the line of duty as a starting point and determined an award of $250,000 for the noneconomic loss of each deceased 9/11 victim. Despite many compelling stories of victims’ heroism, he decided the award would not change; rather, “[h]eroism by all was presumed.” On the issue of col-

47. Feinberg et al., supra note 6, at 29–30.
48. Id.
49. Feinberg, supra note 6, at XI, 68–69.
50. Id. at XVI–XVII, 90–91.
51. Id. at 39–40 (state laws); id. at 69–70 (foreign laws); see also Sally F. Goldfarb, Disasters, Families, and the Law, 28 Women’s Rts. L. Rep., Winter 2007, at 35, 41 (noting that Feinberg’s efforts to resolve conflicts were not always successful).
53. Feinberg, supra note 6, at 46–47.
54. Id. at 157.
55. Id. at 156.
57. Feinberg, supra note 6, at 39, 76; see also Ackerman, Effective Response, supra note 2, at 154 (discussing that presumed non-economic losses for those killed in the attacks of 9/11 would be in the amount of $250,000).
58. Feinberg, supra note 6, at 125.
lateral sources, Feinberg decided not to deduct charitable awards the claimants received in order to encourage the public to continue contributing. 59

Not only did eligibility criteria and the amount of awards have to be determined, but also an application and award process needed to be put in place. What was intended to be a simple process ended up including an application containing thirty-one pages.60 Claimants were given an option between two different tracks. Track A would give the claimant an award determination within forty-five days of the application’s submission, then the claimant could accept the award or request an individualized hearing. Claimants choosing Track B would proceed directly to a hearing after their eligibility was established.61

The opportunities for claimants to be heard were part of Feinberg’s design for due process.62 He oversaw 931 of the hearings.63 At the hearings, claimants could be represented by counsel, submit evidence, and call witnesses. There were no written records of the hearings, but the Fund was required to notify the claimant of the award in writing within 120 days.64 ATLA offered free legal assistance.65 Claimants were given until December 22, 2003, to file their claims.66

For quick turnaround of claims, Feinberg developed a streamlined procedure using a presumptive award formula based on key variables of annual salary, the age of the victim, and number of the victim’s dependents.67 The charts helped families communicate with the Fund and decide whether to apply. Feinberg also gave family members the opportunity to meet with him before filing an award to get a “guesstimate” range if they were uncertain about applying.68 This guesstimate was important because claimants were required to waive their right to sue once they filed applications with the Fund.69 The process was designed to give claimants more certainty about their awards and eliminate the uncertainty and lengthy tort litigation process.70 In addition, claimants could request emergency funds for an advance on benefits that would later be deducted from their awards.71

59. See id. at 71.
60. Id. at 44–45 (explaining this was necessary to collect information needed for accurate awards and to minimize fraud).
61. Ackerman, Effective Response, supra note 2, at 155–56.
62. FEINBERG, supra note 6, at 44.
63. Id. at 98.
64. See Ackerman, Effective Response, supra note 2, at 155–56.
65. Id. at 156. ATLA established a non-profit organization called Trial Lawyers Care to provide legal assistance to victims of 9/11.
66. FEINBERG, supra note 6, at 21.
67. See id. at 45–46; see also FEINBERG ET AL., supra note 6, at 7.
68. FEINBERG, supra note 6, at 78–79.
69. See FEINBERG ET AL., supra note 6, at 11.
70. Goldscheid, supra note 24, at 198.
71. FEINBERG, supra note 6, at 45 (only 236 claimants took advantage of the emergency award option).
Once the interim final rules were proposed on December 21, 2001, the public was given an opportunity to comment on them.\(^72\) Feinberg lived out of a suitcase for a year, conducting over one hundred town hall meetings regarding the interim regulations and draft application.\(^73\) During the comment period, 2,687 comments were received.\(^74\) Several groups—including personal injury lawyers, victims’ groups, organized representatives of rescue workers, and politicians—voiced concerns over aspects of the Fund.\(^75\)

One common concern was that the presumptive award tables stopped at an income level of $231,000, but many of the victims had higher salaries.\(^76\) Other criticisms included the failure to articulate a coherent theory of justice,\(^77\) failure to understand victims’ real needs,\(^78\) and the failure to provide a review mechanism to the Special Master’s discretion.\(^79\) Some found the cap on airline liability for tort suits to be arbitrary or irrational.\(^80\) In addition, many found the Fund too narrow because it only awarded victims of the 9/11 attacks rather than victims of all terrorist incidents or other crimes or accidents.\(^81\)

B. Assessment of the Fund

The public had high expectations for the Fund. While it was not expected to replace lost lives, it was expected to recognize the loss and the income the deceased and injured would have otherwise provided to their dependents.\(^82\) Yet, Feinberg faced a difficult struggle in helping families understand he was not placing a price tag on the moral worth of those who perished or were injured as a result of the attacks.\(^83\)

Indeed, some claimants criticized the Fund for treating people as statistics rather than humans, and some saw the formulas as unfairly valuing one life more than another, when all had suffered a common disaster.\(^84\) Some wanted a simpler award of the same amount for each victim, and many lamented the complex application process. Moreover, the Fund could not

\(^72\). See Ackerman, Effective Response, supra note 2, at 148–49; Feinberg et al., supra note 6, at 5.
\(^73\). Feinberg, supra note 6, at 49–50.
\(^74\). See Feinberg et al., supra note 6, at 5.
\(^75\). Rabin, supra note 23, at 1868.
\(^76\). See Ackerman, Effective Response, supra note 2, at 152. Feinberg’s reasoning for this decision was that 98% of earners in America earned less than that amount, and income above that mark tended to be highly variable each year. Feinberg, supra note 6, at 73.
\(^77\). See Goldscheid, supra note 24, at 174; see also Ackerman, Effective Response, supra note 2, at 138–39.
\(^78\). See Goldscheid, supra note 24, at 174.
\(^79\). See Ackerman, Effective Response, supra note 2, at 138–39.
\(^80\). See Berkowitz, supra note 8, at 34.
\(^81\). See Grey, supra note 4, at 679.
\(^82\). See Ackerman, Effective Response, supra note 2, at 224–27.
\(^83\). See Feinberg, supra note 6, at 154.
\(^84\). See Grey, supra note 4, at 678–81.
provide the kind of healing many victims and families sought, and the claim process even exacerbated some family conflicts.85

Despite these shortcomings, the Fund was hailed as a success in the end. It met its goal of preventing airlines from collapsing under litigation, as 97% of claimants filed with the Fund and waived their right to sue.86 The administrative costs were very low considering the number of employees involved in administering the Fund.87 Perhaps most importantly, it provided victims and their families with a tangible sense of closure and the ability to begin moving on with their lives.88 Pointing to these successes, Feinberg claimed, “I believe [the Fund] can fairly be considered the valedictorian of all compensation programs, public or private.”89

There are several reasons for this success. In his book, Feinberg points to the extraordinary efforts enabling this success: giving families detailed information about their likely recoveries, taking proactive steps to ensure claimants would receive their maximum award, giving each claimant the opportunity for a hearing, and providing claimants with a way to avoid the uncertainties of litigation.90 The generous pro bono efforts of many attorneys who assisted claimants also contributed extensively.91 Feinberg also acknowledged the full support of Attorney General Ashcroft, along with pressure he placed on himself, as influential factors.92 Finally, the unprecedented generosity of the American people in granting “over $7 billion in tax-free compensation” to claimants was vital.93

While even some critics acknowledge the success of the Fund,94 this type of generosity is not a sustainable precedent for the future.95 Moreover, it is difficult to determine which type of attacks or disasters should receive

85. See Feinberg, supra note 6, at 141–43.
86. See Ackerman, Effective Response, supra note 2, at 180–88; Feinberg, supra note 6, at 164.
87. Feinberg, supra note 6, at 164–65 (noting that despite hiring approximately 450 employees, administrative costs were only 1.2% of the total awards disbursed).
88. See Ackerman, Effective Response, supra note 2, at 227–28; Feinberg, supra note 6, at 175.
89. Feinberg, supra note 6, at 164.
90. See Feinberg, supra note 6, at 165–67.
91. Feinberg et al., supra note 6, at 71.
92. Feinberg, supra note 6, at 169.
94. See Editorial, 9/11 Fund Closes Its Doors, N.Y. Times, June 18, 2004, http://www.nytimes.com/2004/06/18/opinion/9-11-fund-closes-its-doors.html (asserting the Fund met its dual purposes of protecting the airlines and providing a compassionate response to the attacks); see Grey, supra note 4, at 680–81 (discussing criticisms but acknowledging the Fund “successfully fulfilled its purpose”); see Ackerman, Effective Response, supra note 2, at 227 (calling the Fund “[f]or the most part . . . a success”). See also Feinberg, supra note 6, at 163 (highlighting the supportive response from the American public and the media).
95. Even Feinberg himself stated, “I would not use the fund as a model in the event of future attacks.” Feinberg, supra note 6, at 178.
compensation and which should not. Feinberg noted that the massive impact on the airline industry was an exceptional situation that required a creative and bold response, but the civil justice system has adequate alternatives that promote responsibility and safety in many other situations.

C. Expansion of the Fund

Legislation enacted since the creation of the Fund has expanded its benefits. The Victims of Terrorism Tax Relief Act of 2001 provided tax benefits to victims of 9/11. And Congress passed the James Zadroga 9/11 Health and Compensation Act of 2010 (“Zadroga Act”) to expand eligibility to persons harmed by exposure to toxins in the aftermath of 9/11. Though these victims were excluded under the original rules if they did not discover their injuries or receive treatment by the filing deadline, the Zadroga Act opened the Fund to them. The final rule was issued August 31, 2011, amending and reactivating the Fund to include those who were injured or killed as a result of “the debris removal efforts that took place in the immediate aftermath of [9/11] crashes.”100 The final rule further expanded the geographic zone recognized as the “9/11 crash site” and added other acceptable forms of proof for establishing eligibility.

III. Other Compensation Programs

While the scope and process of the ad hoc Fund were unique in American history, the nation has enacted several other compensation programs in the past to shield industries from liability. Additionally, individual states have established and continue to administer workers’ compensation programs and crime victim compensation programs. Beyond the United States, other nations and the broader international community have created and implemented compensation programs for victims of crime. These programs

96. See Feinberg et al., supra note 6, at 79–80.
97. See Feinberg, supra note 6, at 178–80.
are worth examining because they offer valuable insight into the purpose, rationale, and administration of compensation funds. If America establishes a permanent fund for victims of terrorism, it need not start from scratch. It can examine best practices from the Fund and other programs, then consider them in the unique context of terrorist threats to America.

A. American Federal Compensation Programs

Besides the Fund, prior federal compensation legislation includes the Price-Anderson Act of 1957, the National Swine Flu Act of 1976, and the National Childhood Vaccine Injury Act of 1986. Each of these programs were enacted to limit the liability of certain private industries in which the government had an interest, to provide a more certain outcome, and to distribute compensation quickly to claimants. These programs are worth noting because a permanent fund for victims of terrorism would have similar goals.

The Price-Anderson Act was enacted to ease the entry of private industries into the nuclear energy field by guaranteeing federal compensation in the event of a nuclear accident. In exchange for purchasing private liability insurance and donating $10 million per year to the compensation fund, the Act imposed a cap on nuclear power industry liability and established exclusive federal jurisdiction so the industry would not be subject to state tort claims. Though the compensation program was rarely used, it encouraged growth of nuclear power plants. However, it was criticized by some for promoting “unbalanced and uncontrolled growth of the nuclear power industry, allowing the industry to deteriorate.”

Two decades later, the National Swine Flu Act established a compensation program for victims who died or were injured from government-mandated swine flu vaccines. The federal government took on vicarious liability for all participating manufacturers, shielding the manufacturers from liability. In another effort to limit the liability of vaccine makers, ensure enough vaccines, and stabilize vaccine costs, the National Childhood Vaccine Injury Act was enacted to compensate the pain and suffering of a child’s injury or death from a required vaccine. This act created the Vac-

104. Berkowitz, supra note 8, at 32. The compensation program was challenged in court because it retroactively revoked litigation rights from claimants, but the Supreme Court affirmed its constitutionality because it offered a “reasonably just substitute for the common-law or state tort law it replace[d].” Duke Power Co. v. Carolina Envt’l. Study Grp., 438 U.S. 59, 88 (1978).
105. Grey, supra note 4, at 697.
106. Berkowitz, supra note 8, at 31.
107. Id.
108. Pub. L. No. 99-660, 100 Stat. 3755, 3758 (1986); Grey, supra note 4, at 699. See also Berkowitz, supra note 8, at 30 (explaining the purpose and operation of the National Childhood Vaccine Injury Act).
cine Injury Compensation Fund from a tax on certain vaccine sales, and it is administered by the Department of Health and Human Services.\footnote{Berkowitz, supra note 8, at 30.} Claimants can accept the Special Master’s decision and waive their right to sue, or they can reject and file suit.\footnote{Grey, supra note 4, at 700.} The Special Master’s decisions are subject to judicial review by the Court of Claims and, if needed, the Federal Circuit.\footnote{Berkowitz, supra note 8, at 30.}

**B. State Compensation Programs**

Besides these specialized federal compensation programs, states established workers’ compensation programs in the early twentieth century.\footnote{Grey, supra note 4, at 704.} While the programs vary from state to state, they generally are the only remedy for injured workers, they exclude damages for pain and suffering, and they preclude tort claims.\footnote{Id. at 706–07.} Some claimants criticize these programs, saying the awards are insufficient to cover their needs.\footnote{Id. at 708.} Fraudulent claims and complicated interactions with other federal laws also plague these programs.\footnote{Id.}

In the mid-1960s, states also began to develop compensation programs to provide short-term emergency help to victims of violent crimes.\footnote{Goldscheid, supra note 24, at 182–83.} Today, all fifty states have crime victim compensation programs.\footnote{Id.} Each state has different rules, but most programs are primarily funded by fines and fees collected from convicted criminals.\footnote{Id. at 172.} By instituting the use of these fines instead of public funds, states were able to avoid clarifying the justification for the programs.\footnote{Id. at 175.} These programs are important to consider because they cumulatively present a picture of the rationale, structure, and range of compensation Americans deem as reasonable for victims of crime. These compensation programs generally have underlying rationales of deterrence and corrective justice (because offenders pay), and distributive justice (by addressing the relationship between offenders and the community).\footnote{Id. at 176, 218–19.}

Observations from the federal and state compensation schemes reveal common themes including (1) trading individualized corrective justice so more people receive compensation, (2) limiting judicial review of discretion in exchange for distributing benefits more quickly, (3) protecting certain
industries through general tariffs on the industries, and (4) establishing incentives for claimants to stay within the system.  

C. International Compensation Programs

The international community has established three compensation funds for victims of crime and oppressive acts, two of which are administered by the United Nations (UN). The UN Voluntary Fund for Victims of Torture distributes funds to non-governmental organizations that provide humanitarian aid to victims of torture and their family members. The UN Voluntary Trust Fund on Contemporary Forms of Slavery extends humanitarian, legal, and financial assistance through established channels to individuals who have suffered violations of human rights due to slavery.

The Rome Statute provided for the creation of the third fund, the Trust Fund for Victims (TFV), which operates quasi-independently from the International Criminal Court. The TFV was the first compensation program in international criminal justice. In addition to paving the way for victim compensation in international criminal justice, the Rome Statute also provided for the principle of victim participation at every stage where their interests are implicated.

According to some scholars, the foundation underlying international compensation funds is solidarity and the idea that “international crime is a consequence of international coexistence.” This reasoning provides justification for all sectors of society—including governments, NGOs, intergovernmental organizations, private businesses, and individuals—to

121. Grey, supra note 4, at 709–10.
125. Megret, supra note 122, at 139.
126. Rome Statute, supra note 124, at art. 68, para. 3. See also Megret, supra note 122, at 139 (noting how the Rome Statute provided for victim participation of this kind for the first time in history).
128. Megret, supra note 122, at 198. Various “causes” of international crime include colonialism, economic disparity, global indifference, and supporting criminal regimes. Id.
contribute to the funds.129 While such compensation may be criticized as “governmental paternalism,” victims in the international realm are often very limited in what individual steps they can take to protect themselves.130

D. Israel’s Permanent Compensation Fund for Victims of Hostile Acts

Because Israel has had a permanent fund for victims of terrorism for over forty years that has grown and been refined along the way, looking at its system in-depth provides useful insights for policymakers and advocates about how the United States should address victims of terrorism. Israel has had a comprehensive permanent fund for victims of hostile acts since 1970 due to its turbulent history of terrorism and hostile acts.131 After the Six-Day War in 1967, violent acts against Israelis expanded throughout Israel and abroad, so the government enacted the Victims of Hostile Action (Pensions) Law (VHAPL).132 The VHAPL expanded the legislative scheme initially covering those harmed by war to include victims of terrorism, and it has continued expanding since that time to include more benefits for more victims.133

Israel takes a broad view of eligibility for the VHAPL. Its definition of “enemy-inflicted injury” includes attacks with a nationalistic motive, whether or not the perpetrator was involved with a recognized terrorist group.134 The VHAPL provides a rebuttable presumption that an injury is enemy-inflicted if it is “under circumstances affording reasonable grounds for believing” it is enemy-inflicted.135 The VHAPL covers not only Israelis in Israel, but Palestinian-Israelis, foreigners injured while legally in Israel, certain foreign nationals affiliated with Israel, and employees of certain Israeli entities abroad.136 While the law does not cover foreign workers lacking legal status in Israel, a loophole provides them with medical treatment and humanitarian aid. Recently, the government has given these workers full financial benefits.137

129. Id.
130. Id. at 199.
131. Israel experienced a war for independence, five wars in forty-four years, and waves of terrorism, and throughout this time it provided compensation to victims on a case-by-case basis. Hillel Sommer, Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience, 36 IND. L. REV. 335, 336–37 (2003).
133. Sommer, supra note 131, at 336–37.
134. VHAPL, supra note 132; Grey, supra note 4, at 712–13. Even a single individual acting against a Jew, if acting with nationalistic motive, can satisfy the “hostile act” requirement. Sommer, supra note 131, at 339–42 (discussing V.A. (T.A.) 4076/98, Coca v. Approving Auth., 32(10) Dinim-Dis. Ct. 485 (Isr.)).
135. Sommer, supra note 131, at 340.
136. Grey, supra note 4, at 713; see also Sommer, supra note 131, at 342–43 (describing the extension of compensation schemes to foreign nationals).
137. Sommer, supra note 131, at 342 n.38.
The program compensates eligible victims for medical care, giving living stipends for those unable to work for an unlimited amount of time, rehabilitation (vocational training, higher education, or funds for starting their own businesses), and other specialized types of financial compensation.138 For families of deceased victims, the VHAPL provides the benefits to the victims’ families including monthly benefits for the surviving spouse, bereaved children, and bereaved parents.139 The compensation is based on a percentage of the salary of a low-level government employee, plus possible alimony.140 In addition, the VHAPL will compensate families for burial and mourning expenses, plus yearly memorial services (including transportation).141 Families may also be eligible for additional benefits such as tax breaks, help buying a car, school grants, business loans, health expenses, and Bar/Bat Mitzvah expenses.142

In addition to the VHAPL, Israel enacted the Property Tax and Compensation Fund Law to compensate victims for personal property damaged from hostile acts.143 A common goal between the VHAPL and the Property Tax and Compensation Fund is returning claimants’ lives to normal as soon as possible after an attack.144 The assurance of compensation provides a sense of psychological support so victims and families know they are not suffering alone. Law professor Betsy J. Grey suggests that as a result, Israelis tend to respond to terrorism by resuming their normal lives.145

The rationale behind these programs is the idea of spreading loss among society.146 Essentially, because “every restaurant and bus has become a potential frontline in terror’s war,” Israel has adopted a risk-sharing policy that ensures the entire society bears the cost rather than individuals or families.147 This policy is consistent with its extensive social welfare policy for other segments of the population.148

The National Insurance Institute (NII)—the equivalent of the Social Security Administration in the United States—administers the VHAPL.149 The Medical Committee of NII makes initial award decisions,150 which are

138. Id. at 343–47.
139. Id. at 348–51.
140. Id. at 348–49.
141. Id. at 349–50.
142. Id. at 350–51.
143. See generally Sommer, supra note 131, at 335–36, 355–57 (summarizing provisions of the Property Tax and Compensation Fund Law and how it differs from the VHAPL).
144. Id. at 356.
145. Grey, supra note 4, at 725.
146. Id. at 712; see also Sommer, supra note 131, at 338 (noting Israeli Finance Committee Chairperson, M.K. David Pinkas, and British Prime Minister, Winston Churchill, as advocating that these costs should not be borne only by those attacked but by all of society).
147. Sommer, supra note 131, at 339.
148. Id. at 359–60.
149. Id. at 343.
150. Grey, supra note 4, at 714.
appealable to NII and may be appealed further to the Labor Tribunal.\textsuperscript{151} Notably divergent from the 9/11 Fund, the Israeli system does not require claimants to choose between filing with the State or pursuing a lawsuit. Claimants may only recover once, but they may pursue both a suit for damages and a compensation claim.\textsuperscript{152} The victim can then choose to revoke the lesser of the two remedies.\textsuperscript{153}

Features of Israel’s program bring up several important aspects of establishing a program that the United States should carefully consider: how broad eligibility should be, whether property loss should be covered, whether grants for education and job training should be provided to victims who are recovering, the size of the financial award to the victim or his family, which federal department should administer the program, and whether claimants should have the option of pursuing litigation.

IV. POSSIBLE RATIONALES FOR A PERMANENT FUND

While the United States has not endured another terrorist attack even close to the massive scale of 9/11, smaller attempts since 9/11 and the volatile global political situation remind Americans that the threat must always be taken seriously. Feinberg predicts there will be calls for a new compensation program if there is another attack.\textsuperscript{154} But is it the federal government’s responsibility to ensure compensation to victims? And if so, should it create an ad hoc fund to address one specific incident or a permanent fund designed to address multiple situations? These questions have prompted scholarly discussion and speculation, but a decade after 9/11, Congress has, de facto, chosen to compensate victims of future terrorist attacks through the ad hoc route.

This portion of the Comment will explore possible justifications for creating a permanent fund and compare those rationales with American values\textsuperscript{155} to find points of convergence that could meet American needs and expectations. The main justice theories generally implicated when discussing compensation are corrective justice, distributive justice, and deterrence.\textsuperscript{156} Within these broader categories are social contract theory, shared risk rationale, social welfare theory, protection of certain industries from litigation costs, providing an alternative to an inadequate tort system, compassionate generosity, efficiency of handling claims, and the combination of political motivations and public expectations.

\textsuperscript{151} Id.
\textsuperscript{152} Sommer, supra note 131, at 351–52; see also Grey, supra note 4, at 713–14 (describing how remedies under the VHAPL are not exclusive and claimants may also pursue a lawsuit).
\textsuperscript{153} Sommer, supra note 131, at 351–52.
\textsuperscript{154} Feinberg, supra note 6, at 177.
\textsuperscript{155} The author concedes not all Americans share these values, but they are widely perceived as common values of the nation as a whole.
\textsuperscript{156} See, e.g., Goldscheid, supra note 24, at 176.
Social contract theory is a rights-based reasoning that looks to the State as the guarantor of preventing harm, and seeks to hold the State responsible when it fails. Under this theory, citizens pay taxes for the fulfillment of this contract. However, American courts have rejected this notion as a response to terrorist attacks. The government responded to the American public’s demand for answers by launching the 9/11 Commission to investigate the attacks. The United States has not admitted its liability. Therefore, the choice to compensate victims was political, not a legal obligation. Furthermore, when examining social obligations from a criminal justice perspective, “[t]here is nothing in the logic of criminal justice—in its simplest expression, that the guilty should answer for their crimes—that suggests a larger societal responsibility to victims.”

Another possible justification for compensation, shared risk rationale, is a mix of corrective and distributive justice theory that seeks to spread the loss among society. The idea is that “[c]rime is . . . a cruel sort of lottery that is particularly bereft of any moral meaning, except that by not seeking to correct it the state, in a sense, ratifies the injustice.” This theory looks to all to “share the risk engendered by society’s ineptitude.” The shared risk rationale also aligns with John Rawls’ theory of behavior behind a “veil of ignorance”—that is, if we each did not know what social circumstances we would be situated in or what would happen to us in the future, we would all want to live in a society that had a compensation fund. Such a compensation fund would advance corrective justice if the State could collect payments from perpetrators. It would also advance distributive justice by addressing the relationship between the offenders, victims, and the commu-

158. Megret, supra note 122, at 178.
162. See Goldscheid, supra note 24, at 219 (stating that funding of victim compensation based on tort damages is “unprecedented” for a government that has not admitted fault).
163. Megret, supra note 122, at 194.
164. Id. at 171.
165. Id. at 151.
166. Id. at 189.
168. Megret, supra note 122, at 189–90.
nity,\textsuperscript{169} and meeting the communitarian goal of being our brother’s keeper.\textsuperscript{170}

Another potential foundation for the creation of a permanent fund is social welfare theory. This theory focuses on meeting immediate needs and recognizing the social origin of crime, that is, the idea that society as a whole is responsible for the evil that springs from it.\textsuperscript{171} The obligation is social, rather than legal or moral.\textsuperscript{172} Compensation in this context would seek to bring rehabilitation, restoration, and equity to victims.\textsuperscript{173} While social welfare theory is “‘the most widely advocated basis for victim compensation,’”\textsuperscript{174} and state crime victim compensation funds have many similarities with welfare,\textsuperscript{175} states seem to have rejected this rationale because they do not use public funds for victim compensation.\textsuperscript{176} Perhaps by funding the programs through fines and fees, the states were trying to avoid common welfare criticisms about “governmental paternalism” or allowing people to abandon individual responsibility.\textsuperscript{177} The Fund did not appear to have social welfare theory as its underlying foundation, as the Special Master made individualized determinations that diverge from the social welfare theory of meeting basic needs.\textsuperscript{178}

Protecting certain industries from financial ruin is another possible motivation for creating a permanent fund for victims of terrorism.\textsuperscript{179} If, as in the case of 9/11, victims are unable to recover restitution or punitive damages because the terrorists are unavailable, they will seek other solutions from the legal system.\textsuperscript{180} After 9/11, the airlines, airplane manufacturers, airports, persons with property interests in the World Trade Center, and

\begin{footnotesize}
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\item Goldscheid, supra note 24, at 218–19.
\item Robert M. Ackerman, \textit{ADR in the Aftermath Post-Disaster Strategy: Mitigating Disaster: A Communitarian Response}, 9 CARDOZO J. CONFLICT RESOL. 283, 284, 292 (2007) [hereinafter “Ackerman, ADR”].
\item Goldscheid, supra note 24, at 214–15; see also Megret, supra note 122, at 192–94 (stating that “crime is not only meted against society but that it is in a sense also produced by social life itself”).
\item “[T]hese responsibilities and duties derive from the conditions of modern society and the grace of the state, not from a legally recognized liability in the relationship between the state and its citizenry.” Burt Galaway & Leonard Rutman, \textit{Victim Compensation: An Analysis of Substantive Issues}, 48 SOC. SERV. REV. 60, 63 (1974); Megret, supra note 122, at 192–93.
\item \textit{See} Rabin, supra note 23, at 1854–56 (criticizing the individualized justice model as “inconsistent with the premises of compensating the victims of September 11”).
\item State crime victim compensation programs often include assistance such as rehabilitation or training, take into account current and future needs, are offset by collateral sources, and are administered bureaucratically in a consistent way. Megret, supra note 122, at 195–97.
\item Goldscheid, supra note 24, at 215–16.
\item See \textit{id.} at 195–96 (reporting that 9/11 Victim Compensation Fund set up in part to protect airline industry from major financial losses).
\item Megret, supra note 122, at 149–52.
\end{enumerate}
\end{footnotesize}
even the City of New York may have been potential defendants in lawsuits. Congress quickly determined that keeping the airline industry operational was in the nation’s interest, and this became the primary purpose for enacting the ATSSSA.

Practical reasons may provide additional justification for a permanent fund. Part of the intention of the Fund was the creation of an alternative to an inadequate tort system. The traditional theory of the tort system, corrective justice, was viewed as insufficient not only because the terrorists were unavailable for prosecution, but because the lengthy litigation would have caused even greater stress to the victims already facing huge burdens. Moreover, other parties that were available to be sued simply did not have the resources and insurance to compensate such a large class of victims and their families.

While the other rationales look at a broader societal picture, another underlying principle, “compassionate generosity,” encompasses a more victim-centric view. While the Fund was primarily designed as part of the government’s plan to keep airlines in business, it also was partially motivated by the desire of Congress to extend sympathy and help to victims and families who were suffering. Indeed, this response was seen in the American public as a whole as they rushed to donate blood and inundated charities with over one billion dollars in donations. This impulse to respond charitably is based on generosity as an act of virtue. Feinberg specifically mentioned this aspect of the Fund in the introductory statement of the Interim Final Rule when he called it “an unprecedented expression of compassion . . . designed to bring some measure of financial relief . . . to those most in need.” Whether or not such a humanitarian response is a “moral obligation” may be argued, but the undeniable evidence of a nation moved by compassion is proof that many people search for a way to connect when they see suffering.

181. See Sommer, supra note 131, at 351 n.102.
183. Megret, supra note 122, at 163.
185. Ackerman, ADR, supra note 170, at 289.
187. For example, the airlines’ insurance coverage was insufficient to cover anticipated damages. See supra text accompanying note 19.
188. See Megret, supra note 122, at 183.
191. Megret, supra note 122, at 184.
The potential for efficient processing of claims is another important reason for creating a permanent fund.\textsuperscript{194} The Fund allowed victims and families to receive their awards very quickly in comparison to the long and uncertain litigation route.\textsuperscript{195} While the Special Master was appointed quickly and regulations for the ad hoc Fund were promulgated within ninety days of the signing of the ATSSSA,\textsuperscript{196} having a permanent fund and administrative body in place would allow for even quicker processing and distribution of claims in the event of a future attack. This would also relieve Congress of the difficult task of creating reactive legislation and would enable victims and their families to address financial burdens and move on with their lives more quickly.

The intersection of political motivations and public expectations is an additional reason for creating a permanent fund.\textsuperscript{197} When society is rocked by an event so tragic and far-reaching as 9/11, it will look to the government for a response.\textsuperscript{198} For the sake of social stability and maintaining power, the government has an interest in placating public opinion and responding to its citizens’ expectations. By promoting a perception of stability, sustaining certain industries, and appearing victim-sensitive, it can restore public trust that has been shaken by disasters like 9/11.\textsuperscript{199}

In light of these sometimes complementary and sometimes conflicting rationales, it is important to consider the specific American context that differs from an individual state, a foreign country, or the broader international community. Common American values of individualism, independence, and pride in a strong work ethic should be considered.\textsuperscript{200} Due to their pick-yourself-up-by-your-own-bootstraps mentality and the concept of limited government, Americans generally do not expect the government to reimburse them for all unfortunate events that may befall them.\textsuperscript{201} However, this American self-reliance has still allowed for compassionate responses to extraordinary disasters, as the country’s reaction to 9/11 demonstrates.

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\item[\textsuperscript{194}.] \textit{Id.} at 163–64.
\item[\textsuperscript{195}.] \textsc{Feinberg, supra note} 6, at 21.
\item[\textsuperscript{196}.] \textsc{Landsman, supra note} 190, at 399–400.
\item[\textsuperscript{197}.] \textit{See Megret, supra note} 122, at 153–55 (“Victim compensation schemes serve definite political agendas of governments who are intent on portraying themselves as ‘victim-sensitive.’”).
\item[\textsuperscript{198}.] \textit{Id.} at 154.
\item[\textsuperscript{199}.] \textit{Id.} at 153–54.
\item[\textsuperscript{200}.] \textsc{Feinberg, supra note} 6, at 178–79.
\item[\textsuperscript{201}.] \textit{See Grey, supra note} 4, at 729 (“Government does not act as an insurer of last resort to compensate those who die as a result of their own choices or life’s misfortunes.”); see also \textsc{Feinberg, supra note} 6, at 181–82 (explaining that the resolve shown by victims of the Oklahoma City bombing characterize this ideal of independence).
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To provide for a sustainable compassionate response that fits its unique needs and values, the United States must explore many aspects of creating and implementing a new permanent fund for victims of terrorism. It must first discern whether victims of terrorism should be treated differently than victims of other crimes. While “[v]ictims of acts of terrorism are not ontologically more deserving of compensation than victims of other crimes in proportion to the harm suffered,” a different response to victims of terrorism is justified when taking into consideration the unique characteristics and intentional nature of the attacks. Terrorists have specific goals such as destabilizing the nation, so responding through a permanent fund may be one strategic way to prevent terrorists from accomplishing their goals. Moreover, the practical need to provide a rapid, effective response to a potentially large number of victims also provides justification for a differentiated approach.

But should a permanent fund be established, or should the federal government create ad hoc funds as needed? For this analysis, we must compare the advantages and disadvantages of a permanent compensation fund.

A. Advantages of a Permanent Compensation Fund

The advantages of a permanent fund are many. Because America is not currently reeling from the immediate shock of a terrorist attack, it can develop a long-lasting program through a slower, more deliberate and detailed legislative process than what occurred in the aftermath of 9/11. The process of conversation, hearings, and debate would allow the American public to have a voice in value judgments rather than tasking one person with that role. If a fund were put in place through such a process, the public would adjust its expectations accordingly in the event of another attack.

Developing a permanent fund would provide a chance to clarify the criteria for when the federal government should intervene and compensate victims. Law professor Robert Ackerman suggests that policymakers determine these criteria by looking at the inherent nature of the disaster, asking how state, local, and private sources will interact with federal relief and whether political will exists to provide compensation without “a perceived crisis du jour.” Ackerman, ADR, supra note 170, at 294–95.

202. See Grey, supra note 4, at 729; Feinberg, supra note 6, at 178–79.
204. See Megret, supra note 122, at 132–33 (advocating for victim compensation schemes for victims of violent intentional crimes within a nation’s borders).
205. See UNODC, supra note 203, at 3.
206. See id. at 3, 70–74, 93–94.
207. Sommer, supra note 131, at 362.
208. Grey, supra note 4, at 729.
209. Law professor Robert Ackerman suggests that policymakers determine these criteria by looking at the inherent nature of the disaster, asking how state, local, and private sources will interact with federal relief and whether political will exists to provide compensation without “a perceived crisis du jour.” Ackerman, ADR, supra note 170, at 294–95.
efficient system of distribution for similarly situated victims, as a structured
process and trained personnel would already be in place before an attack
occurred. In addition to these administrative benefits, a permanent fund
would provide a psychological “safety net” for the public—the assurance
that the government has a proactive response ready in the event terrorists
again succeed in targeting the nation. Providing a place for victims to
turn, social support, material resources, and a sense of psychological clo-
sure would also help society return to the status quo more quickly. All of
these advantages would enable the nation to better manage the long-term
effects of terrorism. Moreover, careful establishment of a permanent
fund would avoid potential constitutional challenges that could plague ad
hoc compensation programs.

B. Disadvantages of a Permanent Compensation Fund

These positive aspects must be considered alongside the disadvantages
of a permanent fund. Economic implications must be analyzed. Along with
the cost of bureaucracy in setting up and administering a permanent fund,
there could be demands from the public to increase awards, as gradually
happened with Israel’s permanent fund. However, these economic factors
are difficult to accurately predict because amount and extent of loss from
terrorist attacks can vary widely. Without being able to predict the future,
it is unlikely society can accurately assess whether a permanent fund will be
fiscally advantageous compared to an ad hoc fund. However, this uncer-
tainty should not excuse policymakers from putting forth their best efforts
to design a permanent fund that is realistic in the extent it can compensate
victims. A permanent fund can be adjusted later if future events show weak-
nesses in its structure or administration.

Another potential advantage of an ad hoc fund over a permanent fund
is that a retrospective ad hoc fund can assess priorities and respond to the
unique situation of each event more flexibly. However, a permanent fund

210. See Ackerman, ADR, supra note 170, at 295–96 (arguing that a victim compensation
system similar to single payer health insurance can alleviate the “problem of unequal treatment.”).
211. Id. at 294–95.
212. Grey, supra note 4, at 721, 724–26; see also Ackerman, ADR, supra note 170, at 292–93
(“[T]he goal of a system financed primarily by taxpayers should be to give victims of disaster . . .
the wherewithal to get on with their lives. . . . Sustenance that allows . . . families to get past the
immediate crisis can provide for a more stable future [and] allow these families to become produc-
tive once again . . . .”).
213. Grey, supra note 4, at 750.
214. A permanent fund would be more likely to survive constitutional attack if it is considered
a reasonable substitution for tort action and addresses future claims, rather than responding retro-
actively. Id. at 730–36.
215. Sommer, supra note 131, at 364.
216. Grey, supra note 4, at 723.
217. Sommer, supra note 131, at 364.
218. Grey, supra note 4, at 723.
provides more long-term stability, as the legislative process will involve more time for detailed study, economic projections, and informed debate about what the nation can afford to consistently sustain in the event of multiple terrorist attacks. Moreover, a permanent fund could intentionally be built with a basic structure that provides room for flexibility in the event of small- or large-scale attacks.

Another potential disadvantage of a permanent fund is that Americans may end up institutionalizing a two-tiered system that compensates victims of terrorism more than victims of other crimes. This already happened when the nation decided to offer compensation for victims of 9/11 through the ad hoc Fund, using broader criteria for eligibility and offering more generous compensation than the state victim compensation programs. Because crime victim compensation programs vary from state to state, it will be impossible for a permanent fund to match the eligibility criteria, benefits, or administrative process of any state exactly. However, an ad hoc fund would face this same disadvantage, and the process of creating a permanent fund would provide a greater opportunity for close consideration of this very issue. Open and thorough discussions with the public are the best way to acknowledge and strategically confront this perceived unfairness, rather than trying to hide it by designing a one-time solution that further ignores the dissonance.

C. Implementation Considerations for a Permanent Fund

If a permanent fund is selected, America will need to determine the foundation and goals that will underlie its establishment. It must also make many decisions about the eligibility, benefits, and administration.

1. Eligibility Criteria: Who Will Qualify as a Claimant?

In terms of pragmatics, policymakers must first determine eligibility for the program. They must decide what type of attacks will be covered, and this task will likely involve creating a definition of “terrorism.” Establishing a definition of terrorism has been an elusive endeavor, but the common thread for events considered terrorist acts against the United States seem to include the following characteristics: risks beyond those normally assumed in society, the result of an ideological campaign to instill fear and violence.

219. Id. at 736.
220. See Goldscheid, supra note 24, at 225 (noting that the generosity shown to victims of 9/11, when compared to that shown to victims of domestic and sexual abuse, may be indicative of the differential attitude developed toward victims of domestic and sexual abuse).
221. See id. at 224–25 (“The 9/11 Fund illuminates the frequently unmet financial and practical needs victims of violence constantly face.”).
and action directed against all Americans.\footnote{223} These factors differentiate terrorism from other crimes.\footnote{224} Many legal and scholarly experts use the U.S. Department of State’s definition: “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”\footnote{225}

The new fund will need to specify the scope of acts it will cover—for example, whether the acts must occur within America, or if attacks abroad will be covered also. The OVC established the International Terrorism Victim Expense Reimbursement Program (ITVERP) in 2006 to compensate certain victims of international terrorism abroad for “expenses associated with that victimization.”\footnote{226} Policymakers will need to determine if the new permanent fund will be combined with ITVERP, supersede ITVERP, or act as a separate compensation program altogether. Currently, ITVERP compensates nationals of the United States or officers or employees of the U.S. government who are directly injured—either physically or emotionally—in an act of “international terrorism” as designated by the Attorney General.\footnote{227}

Once the scope of incidents covered is established, policymakers must determine who will be eligible claimants. The United States will need to have some frank and politically-charged discussions about domestic partnerships, unauthorized immigrants, and priority of relationships before coming to conclusions about who may receive compensation.

2. Benefits: What Will Claimants Receive?

Another important aspect of the new fund would be determining how much compensation is appropriate. This depends upon the goals of the fund—if preventing litigation is a main goal, then compensation must be substantial enough to give claimants incentive to choose the new fund.\footnote{228} And while the Fund was \textit{sui generis}, the American people will still likely have expectations of generous compensation for a future terrorist attack.\footnote{229} Feinberg advised that the prior work of the Fund should not be precedential, because awarding millions to victims and their families is not sound public policy in the American context of limited government.\footnote{230} He also advised against individualized determinations, advocating for standardized awards

\footnotesize{\begin{itemize}
\item \footnote{223} Goldscheid, \textit{supra} note 24, at 209.
\item \footnote{224} \textit{Id.}
\item \footnote{225} 22 U.S.C. § 2656f(d) (2006).
\item \footnote{226} International Terrorism Victim Expense Reimbursement Program, 28 C.F.R. § 94.11(a) (2012) [hereinafter “ITVERP”].
\item \footnote{228} FEINBERG, \textit{supra} note 6, at 187.
\item \footnote{229} Ackerman, \textit{ADR, supra} note 170, at 293.
\item \footnote{230} FEINBERG, \textit{supra} note 6, at 179.
\end{itemize}}
in the future. Uniform awards for similar injuries would streamline processing and avoid causing division between victims.

Funding a permanent compensation scheme must also be addressed. America must decide how much money such a fund would require and how to acquire those funds. In the current economy, Americans may not be willing to support another entitlement program, and policymakers may lack the political will to push any new legislation forward that carries a large price tag. Another financial aspect that must be considered is whether awards should be offset by collateral sources. Doing so would lighten the financial load on the government, but many victims would find it unfair. For example, victims could interpret such a rule as penalizing them for planning ahead and purchasing substantial life insurance policies. Charities would also find it harder to collect donations if donors perceived their donations would be “subsidizing” a government program. In the spirit of uniformity, Feinberg suggests not deducting collateral sources at all.

3. Administration: Who Will Oversee the Fund?

Beyond eligibility and funding for the new permanent fund for victims of terrorism, an administrator of the fund must be established. The government could appoint a special master again, but the same criticisms and dangers would exist. The Fund’s Special Master was “a rare, and tenuous, judicial creature,” as he was not appointed by a court as other special masters are, so his discretion was not answerable to a judge or supervised by the adversarial process. Alternatives that would enhance accountability include a stronger appointment process, the appointment of several special masters, or the appointment of federal magistrates or judges instead of a special master. In addition, incorporating the fund’s administrators into an existing federal agency would provide more structure and oversight. Administrative agencies generally hire organizationally independent administrative law judges to conduct hearings, and their decisions are usually reviewable or have sufficient due process safeguards where their decisions are precluded from review.

Several departments are potential candidates for the task of housing the new fund: the Department of Homeland Security, the Social Security

231. Id. at 182–83.
232. Id. at 184–85.
233. Id. at 185.
234. Berkowitz, supra note 8, at 20.
235. Id. at 38–40.
236. Id. at 39.
237. Id. at 20–22.
Administration, the Department of Veterans Affairs, and the Department of Justice’s Office for Victims of Crime. Each of these agencies has experience administering and adjudicating applications for benefits and/or allocating funding for benefits.

D. Non-Monetary Compensation Considerations

Other considerations beyond financial compensation require the attention of policymakers. Non-monetary and symbolic forms of compensation should not be neglected.239 Victims and their families have intangible needs for healing and restoration—to what extent should a new fund address these needs? And from a broader perspective, how should it provide for society’s intangible needs?

1. Commemoration of Victims

One important need is commemoration. Passing on “shared context, shared mourning, and shared memory” through creating a narrative of events has been important to all societies, religions, and cultures.240 This narrative may take many forms such as raising awareness, sharing information, educating younger generations, erecting statues of heroes, building museums, naming streets, hosting memorial services, collecting and distributing scholarship funds, creating works of art, and publishing books.241 Such efforts to remember victims and their families help them know they are not alone and reaffirms that the world is a compassionate place.242 In a survey of surviving families of 9/11 victims, 95% of respondents mentioned the importance of public and private rituals on anniversaries of the attacks.243

In 2011, the National September 11 Memorial opened in Manhattan,244 providing a public space of remembrance. The Memorial is comprised of twin reflecting pools with names of victims inscribed on bronze panels
along the pools. In addition, a museum is under construction to “bear
solemn witness” to the terrorist attacks of 9/11 and the 1993 World Trade
Center. Its mission is one of remembrance and resilience.

The Memorial and Museum are funded by public funds totaling over
$330 million and private donations of over $350 million. Policymakers
should determine what type of remembrance events, monuments, or muse-
ums would be appropriate for future acts of terrorism, and whether these
should be financed through the new permanent fund, charitable donations,
other public funds, or a combination of these sources.

2. Restoration of Victims, Families, and Society

The United Nations Human Rights Committee has outlined several
other non-monetary forms of justice that may also be appropriate in in-
stances where human rights have been violated. Many of these principles
provide relevant guidance in responding to terrorist attacks. Some of these
measures include acts of restoring the victim to his or her original situation
through family reunification, citizenship, employment, and property. The
provision of rehabilitative care, including medical, psychological, legal, and
social services are another form of justice. Other non-material govern-
ment responses that may be appropriate in response to terrorist acts include
truth-seeking (such as the 9/11 Commission), searching for victims, and
recovering and burying remains. In addition, government can strengthen
“guarantees of non-repetition” through institutional reform, emergency re-

17, 2013).

246. Nat’l Sept. 11 Mem’l & Museum at the World Trade Center Found., The
Nat’l Sept. 11 Mem’l & Museum at the World Trade Center Found., Frequently
2013).

247. “Demonstrating the consequences of terrorism on individual lives and its impact on
communities at the local, national, and international levels, the Museum attests to the triumph
of human dignity over human depravity and affirms an unwavering commitment to the fundamental
value of human life.” Nat’l Sept. 11 Mem’l & Museum at the World Trade Center
17, 2013).

248. Nat’l Sept. 11 Mem’l & Museum at the World Trade Center Found., Pub-
(last visited Mar. 17, 2013). Public funding includes the Lower Manhattan Development Corpora-
tion, the State of New York, and the Port Authority of New York & New Jersey. Id.

249. Van Boven, supra note 239, at 38–39; Basic Principles and Guidelines on the Right to a
Remedy and Reparation for Victims of Gross Violations of International Human Rights Law
and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶¶ 15–23, U.N. Doc. A/
RES/60/147 (Mar. 21, 2006) [hereinafter “Basic Principles”].

250. Id. at 8.

251. Id.

252. Id.
spoon training, law enforcement, media coverage, and industrial safeguards.  

3. Participation of Victims and Families in the Award Process

Allowing victims to participate in the compensation process is another important component of healing that the Fund sought to implement. Victims and families were given an opportunity to have individual hearings, where many shared memories and emotions. Feinberg witnessed that memory seems to hold value as a “pain reliever.” Though allowing for individual hearings took considerable time and resources, many victims found it to be an important part of finding closure and moving on.

4. The Roles of Communities and Faith in Healing

While the federal government can choose to implement many or all of these steps toward holistic restoration, Professor Robert Ackerman of Wayne State University Law School, and former director of the Center for Dispute Resolution at Pennsylvania State University’s Dickenson School of Law, points out that government is not enough for complete healing. He stressed that law is not the sole answer, but time, patience, and community are also important. While acknowledging the importance of a large-scale government response for some tragedies, he also advocates for a strong web of local support systems in civil society, starting with small units that are closest to the problems. Ackerman attributes the tendency of society to respond to the Jewish concept of holistic restoration: “[W]hen disaster strikes . . . we have a natural human inclination to reach out and to engage in Tikkun Olam (healing the world).”

Many victims, families, and members of society have also drawn upon their own beliefs to find meaning, healing, and hope. Through his interactions with many families and survivors, Feinberg noted they expressed a wide variety of reactions to God, including newfound faith, renewed faith, and lost faith. Spiritual and religious beliefs and practices are often used as coping strategies and to help victims “reconstruct a meaningful narrative following traumatic experiences.” Moreover, local support systems already know the communities they are serving, what resources are available, and have experience strategizing about how to effectively serve specific

253. Id. at 8–9.
254. Feinberg, supra note 6, at 114.
255. Id. at 149.
256. Id. at 113.
257. Ackerman, ADR, supra note 170, at 285.
258. Id. at 299–300.
259. Id. at 284–85, 289.
260. Id. at 284 (emphasis removed).
261. Feinberg, supra note 6, at 131.
groups. Thus, rather than trying to provide for every need, a new permanent fund should leave space for—and encourage—the participation of faith and community organizations in the healing and rebuilding process.

VI. SPECIFIC RECOMMENDATIONS FOR CREATING A PERMANENT FUND

Taking all of this into consideration, policymakers should design a permanent fund that best suits the nation. The fund should acknowledge the unique harms of terrorism, the needs of victims, the government’s financial limitations, and the role of non-governmental actors in restoration and recovery.

A. Recommendations for the Rationale Underlying the Permanent Fund

The government’s experience with 9/11 and the Fund should inform its future policies. While the government has legitimate interests in keeping certain industries afloat, it should not allow the fear of their collapse to motivate awarding millions of dollars to each victim of terrorism. It is not realistic to establish a program that the American people cannot afford. A smaller, standardized award for each claimant, combined with some forms of non-monetary compensation, would still be a meaningful gesture to show solidarity and help meet victim needs.

While consideration of each theory described in Part IV will probably help shape the future policy in some way, a blend of shared risk rationale, social welfare theory, and efficiency of processing claims hold the most promise for becoming the foundation of a coherent and sustainable federal program. Such a blended foundation would recognize that each of us could one day be the victim in need of restoration. It would emphasize the role of community while viewing our fellow man with active compassion. Such underlying motivation would seek to treat victims equally—not with unsustainable awards of millions of dollars, but with enough to meet basic needs. It would also recognize the limitations of government while seeking to maximize resources to distribute funds quickly to those in need. This blended justification would require some sacrifice from the public in order to provide compensation for those most affected by terrorism, but it would also leave space for communities to respond with compassionate generosity.

B. Recommendations for Award Eligibility

Victims should be defined broadly to prevent qualified individuals from facing administrative difficulties. A broad definition will facilitate the disbursement of awards quickly to those in need, because the administrator will not need to waste valuable time determining which individuals and groups Congress intended to compensate. Unlike the Fund, which was later expanded by the Zadroga Act to incorporate more qualifying individuals, a
broadened definition should be a part of the new fund’s regulations from the outset. The new fund’s compensation plan should include all individuals injured or killed in the attack, rescue, or recovery within a reasonable period following the incident. Additionally, the new fund’s regulations should have a provision that would allow victims to receive awards if they apply for funding within a certain time period of discovering their latent injuries.

Eligibility should not be based on U.S. citizenship or permanent residency, so that the maximum number of victims may be helped. The victims will have all endured the same tragedy, and their nationality or immigration status should not prevent a compassionate response. Expanding the definition of victim to include even unauthorized immigrants would be a reasonable response in light of the reality of the large unauthorized population in America, the prior awards given to unauthorized immigrants under the Fund, and the nation’s interest in preserving strong relationships with the world community. To ensure equal treatment of victims of overseas or domestic terrorist attacks, the new permanent fund should supersede ITVERP.

Whether or not domestic partners of victims should be included is a complicated area, which will likely lead to future litigation regardless of what regulations are put in place, as state views on same-sex marriage continue to change and cohabitating partners press for more rights. For the time being, a simple way to address this would be to adopt the approach of the majority of states, which limits or excludes domestic partners as claimants. Moreover, this approach complies with the federal definition of marriage while the Defense of Marriage Act is still in place. Another complexity in the realm of eligibility is determining which family member will be the primary claimant in the event there is no surviving spouse. A simple way to address this would be by comparing various states’ laws and policies and implementing the most common approach, though more input from the public should be considered if the public finds this approach unsatisfactory.

263. See generally Mostaghel, supra note 157, at 104–20 (explaining why a broad definition of “victim” is beneficial and comports with historical trends).

264. However, to the extent other nations or intergovernmental organizations compensate the American victims who have suffered due to terrorist attacks abroad, the new permanent fund should decrease its award to the victims accordingly.

265. See Goldfarb, supra note 51, at 41.

C. Recommendations for Benefits Available to Claimants

Like Israel’s program, all deceased victims should be treated equally, and death benefits should be standardized based on a government salary. The appropriate level of government salary should be decided by Congress through consultation with financial experts and the American public, but a reasonable starting point of consideration would be the amount awarded to soldiers killed in duty or in active training for duty. The military award currently includes a non-taxable $100,000 death gratuity, funeral and burial expenses up to $8,800, travel expenses for immediate family to attend a funeral and/or memorial service, a monthly Dependency and Indemnity Compensation (DIC) based on the number of dependents, financial counseling, bereavement counseling, legal assistance, educational benefits, and access to home loans which may offer better mortgage rates.

Awards should also be given for treatment and counseling for victims and surviving families’ psychological harm. When asked about her thoughts on a permanent fund for victims of terrorism, Dr. Yael Danieli, an expert on psychological trauma and treatment of victims and survivor populations, strongly emphasized that such a fund must include provisions for mental health treatment. State crime victim compensation programs and ITVERP cover mental health treatment to varying extents, so the permanent fund should not exclude remedy for this type of harm. Also, the need for psychological treatment in the context of terrorism is justifiable in light of terrorists’ goal of inflicting psychological distress on the nation. Besides funding treatment, the government should provide funding for specialized training of disaster mental health responders and the establishment of targeted support agencies to ensure a quality and timely response.

268. Id. at 10–18.
271. See Brian W. Flynn, Mental Health Response to Terrorism in the United States: An Adolescent Field in an Adolescent Nation, in The Trauma of Terrorism 755, 762 (Yael Danieli et al. eds., 2005); UNODC, supra note 203, at 94.
272. Lloyd I. Sederer, Challenges of Urban Mental Health Disaster Planning, in The Trauma of Terrorism 695, 703 (Yael Danieli et al. eds., 2005).
273. UNODC, supra note 203, at 93–94.
D. Recommendations for Administration of the Permanent Fund

While Veterans Affairs (VA) has experience with administering the type of fund most closely associated with this proposed permanent fund for victims of terrorism, the VA does not seem to be the department best suited for administering the new fund. The VA’s explicit mission is to serve and honor America’s veterans; victims of terrorist attacks are outside that scope. While the Department of Homeland Security has experience administering benefits and dealing with terrorism, the most fitting body seems to be the Office for Victims of Crime (OVC). The mission fit is strong: “OVC is committed to enhancing the Nation’s capacity to assist crime victims and to providing leadership in changing attitudes, policies, and practices to promote justice and healing for all victims of crime.”

In addition, OVC already administers ITVERP and distributes the Crime Victims Fund to state crime victim compensation programs. OVC’s experience interacting with victims and understanding victim needs would also be beneficial to fostering a victim-friendly approach.

In terms of making decisions about awards, OVC should appoint administrative law judges or special masters. These decisions should be reviewable by a court to avoid problems related to having discretion rest with a single individual.

E. Non-Monetary Compensation Recommendations

As noted in Part V, Section D, non-monetary compensation is a significant part of the healing process of the nation, the victims, and their loved ones in the aftermath of a terrorist act. Creators of a permanent fund should carefully consider what financial commitment should be made toward this important aspect of recovery. In particular, policymakers should focus on public commemoration and preserving the rights of claimants.

1. Commemoration of Victims

While providing a smaller compensation award to each victim would be a more sound and sustainable policy than awards that reach into the millions, the new permanent compensation fund should also provide for commemoration of attacks in forms of memorials, museums, and remembrance events. These types of expenses seem particularly well suited to the role of the federal government, as these forms of commemoration would be for the public good. They would also be an act of solidarity—the entire nation standing behind the victims, showing the terrorists that they did not succeed in their goal of breaking the nation. If the new permanent fund

275. See U.S. Dep’t of Justice, Office for Victims of Crime, supra note 15.
276. See id.
covered these memorial initiatives fully rather than asking for private donations, it would free businesses and individuals to give more to charities which address individual needs.

2. Claimant Participation in the Award Process

Ensuring victim participation in decisions affecting them is another important form of non-monetary compensation. The Fund gave claimants the option to have a hearing, which many found to be an important part of the healing process. The administration of a permanent fund should provide an opportunity for claimants to be heard, though it need not follow the same format as the Fund. If the new fund treats claimants more equally, there will not be the same opportunity or need for individualized hearings. Nevertheless, claimants should be given the chance to appeal a decision or seek civil damages if they so choose.

Surviving victims and family members should also be given a voice in other decisions that affect them. Carie Lemack’s mother was killed on 9/11 when her plane was involved in the attacks. Shortly thereafter, Lemack co-founded Families of September 11 to help families. The organization has also advocated for improvements to aviation safety, an investigation into 9/11, and a memorial. Lemack told the families, “If we don’t start speaking out, they’re going to make more decisions affecting us without our say.”

She advocated for life insurance and pensions to not be deducted from Fund awards. Along with the Family Steering Committee, Lemack was also instrumental in pushing the government to create the 9/11 Commission and advocating for a later bill to strengthen intelligence-gathering agencies.

Like Lemack, relatives of victims have a need for clarity, answers, and accountability. Therefore, the government’s response to terrorism should involve a forthright investigation, which is then made available to at least the surviving family members, if not the entire public. The establishment and work of an investigatory commission for future terrorist attacks should be funded by the permanent fund in the interest of transparency. Such a commission could also focus efforts on lessons learned for the prevention and mitigation of future attacks. The preparation and dissemination of these reports would be similar to the investigative reports to which surviving dependents of military members killed in duty are entitled.

Victims should also be given the option of being present in the courtroom when alleged terrorists are put on trial. While the large number of victims and survivors across the country may make this difficult, accommodations such as closed circuit television should be implemented when nec-

278. Id.
279. See U.S. DEP’T OF DEFENSE, supra note 267, at 12.
essential. In the 9/11 criminal proceedings against Zacarias Moussaoui, the Senate passed a bill ordering closed circuit televising of the proceedings to several “convenient locations” for victims deemed to have a “compelling interest” in viewing them.280 This accommodation, at minimum, should be replicated in future large-scale terrorist attacks. For foreign victims and surviving families outside America, efforts should be made to use technology to allow them to view the proceedings.281

3. Preserving Claimants’ Right to Litigate

Respect for the victims’ and family members’ legal rights should be another important component of the new permanent fund. When I spoke with Lemack about how I was writing this Comment recommending a permanent fund for victims of terrorism, she said, “Just make sure they don’t take away our right to sue.”282 She explained that after the trauma of her mother’s death, she felt disempowered by the ATSSSA’s limits on lawsuits and her lack of opportunity to seek meaningful justice in that way.

A permanent fund should keep intact claimants’ rights to pursue a litigation option against responsible parties if they choose. The United Nations Office on Drugs and Crime (UNODC) recommends that victims should have “right to bring civil proceedings in order to secure at least symbolic reparation or to protect their civil rights.”283 Like Israel’s program, the American program could allow claimants to pursue lawsuits and then choose between the greater of the awards. Such an option would give greater incentive to the private sector and the government to take all necessary measures to prevent terrorist attacks, and it would provide victims with an opportunity to have wrongdoing acknowledged in a meaningful way.

The arguments against a litigation option—potential bankruptcy of certain industries, astronomical insurance premiums, and the inundation of court resources—are indeed legitimate, but access to the justice system should not be abrogated just because these are possible outcomes. If an industry is going to collapse, the government can still decide to step in to supplement the industry’s insurance and provide funding to salvage it. In essence, that is what the Fund did—it just looked different because federal compensation funds went into the coffers of the Fund instead of directly to the airline industry.


281. UNODC, supra note 203, at 95.


283. UNODC, supra note 203, at 36.
F. Engaging Society in a Conversation About the Permanent Fund

A permanent compensation fund should be created after there has been a deliberate, conversational process with the American public through events such as town hall meetings, draft policies and opportunities for feedback, and the testimony of victims and survivors of prior terrorist attacks. Congress should incorporate these insights into the legislative process, then create the new permanent fund and entrust it to an administrative agency. The administering agency should take the public conversation into earnest consideration when formulating regulations for administering the fund. When the regulations are established, the public will have accurate expectations of who is eligible for compensation, how much modest financial compensation will be available, and what type of non-monetary compensation will be provided. This will not only help victims know where to turn for certain forms of help, but it will hopefully spur society to give generously to supplement the federal response.

The compassion of the American people will rise again if there is another attack, and charities will likely be flooded with donations once again. These charities, including faith-based organizations, can provide services and needed funds to victims and their families at the local community level through offering housing, meals, medical services, counseling, companionship, and more. This sort of giving and personal responsibility for our fellow man should be encouraged by the government because it strengthens communities, has a deeper interpersonal component than the more distant federal response, and lifts the burden from the government’s shoulders.

CONCLUSION

The government should not be expected to solve all social ills, but it should be prepared to address certain national tragedies to provide for its people and show the world its compassion and resilience.

A permanent compensation fund will never replace legs that will never again walk or a loved one who will never again come home, but it can begin to acknowledge the suffering, encourage the broken, and provide practical help. If a new terrorist attack strikes America, the public will look to the support structures it has depended on in the past: family, community, faith, and government. An approach to a permanent compensation fund for victims of terrorism should recognize the contribution of each of these realms and enable each component to do that at which it is best.

If another attack occurs before Congress decides how to resolve compensation of victims, it will once again have to scramble for an ad hoc solution, and we will have missed an important opportunity to engage society in a discussion of values and the role of communities in the healing process. We have an opportunity to kindle a flame that may be needed to light the way of tomorrow. A permanent compensation fund for victims of
terrorism based on shared risk rationale, social welfare theory, and efficiency, combined with a strengthened role for the community, can be a spark of hope and healing. A broader definition of eligibility, coverage of psychological treatment, and provisions for remembrance, participation, and preserving the right to litigate will result in more meaningful justice for victims and their families. Putting such a program in place now and establishing standardized award amounts will prepare America to respond immediately and effectively if terror does strike again.