

Mary Schiavo's speech before the National Air Disaster Alliance and Foundation
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November 19, 2001

Airline Litigation and Victims' Rights and Remedies in the Wake of September 11, 2001

Our nation, and the world rushed to respond

On September 11, 2001, America suffered a terrible tragedy. Nations around the world have felt the impact. The United States and our allies have deployed their military forces to root out terrorists, topple terrorist regimes, and ameliorate the threat that such an attack could be replicated. Police and firefighters toiled and died. Relief agencies launched impassioned campaigns for blood and money. The President asked each American child to give a dollar to aid the Afghan children in surviving the hunger and hurt of war. My daughter's elementary school launched a campaign for the school children of New York schools in the area of the World Trade Center. Seven year olds dressed in red, white and blue and spelled out "We Love NYC" for pictures which accompanied the money they collected for the innocent victims. Music and movie stars pitched in with telethons. It would be unthinkable and inhuman not to do all we can to help the families of the victims. Who on earth would ever consider taking any action to further harm people who had suffered such a terrible tragedy? We were about to find out. . . .

***While people around the world were concerned about helping the victims and their families,
airlines, aviation industry groups,
airports and their government sponsors and even the
World Trade Center rushed to Capitol Hill***

According to the *New York Times*, by September 12 the airlines and other aviation interests such as airports and manufacturers and the security companies (who failed so miserably), had constructed a plan--not to help the victims and improve aviation security and safety--but to seek federal payments to the airlines and aviation interests, immunity from legal proceedings, and a way to avoid responsibility for the role their poor management, lax oversight and abject security failures played in this horrible tragedy. They took action to very dramatically limit the legal rights available to the families of victims, to limit the right to discover what really happened, and to limit financial accountability of those responsible.

This is what they did

The day after the attack, the *New York Times* estimated nearly 100 lawyers and lobbyists fanned out on Capitol Hill and throughout Washington to protect airlines and aviation interests *from the victims and their families*. Before the care teams were in place to search for the dead and care for the living, the political machinery was put in motion to ***retroactively change the law***, to cut off the ability to engage in full discovery, and to limit victims' legal rights to punish the reckless companies that made us vulnerable to the terrorists. In short, the airlines and other negligent entities, *largely in secret*, maneuvered behind the scenes of Washington, D.C. to get their

protections into legislation before Congress. Their protective provisions were disguised with misleading captions and cryptic language in bills that were supposed to improve security and protect citizens. This language now gives airlines, airports and others immunity from responsibility for the attack.

How the law is supposed to work--and how it has worked in the aftermath of dozens of terrorist attacks on aviation in the past, for thousands of victims, for several decades

Aviation attacks are not rare

In the past, in the aftermath of a terrorist attack on aviation, victims on the plane and on the ground were able to seek discovery to determine how it was the terrorists were able to get access to the airlines, airports or other aviation facilities. Terrorism against aviation is not an unknown, unforeseeable risk. Quite the contrary. The risk of airlines being subject to terrorist attack--whether by a disgruntled employee or a murderous foreign faction set on launching a jihad or making a political statement--is a risk that is well known and real. Such attacks have happened dozens of times in the past, which risk airlines cover with insurance. It is because aviation has been repeatedly attacked this way, that we have laws, regulations and requirements for aviation security.

Passengers had a contract for security

The courts have held that when passengers purchase their tickets they rely on the representations made by airlines that they are U.S. certified and meet the Federal Aviation Administration standards, including security requirements. There is actually a contract associated with a ticket. Passengers don't usually see it, but that contract is on file with the federal government. It is a binding contract called the "Contract of Carriage." The carrier makes that contract with passengers when they buy their tickets.

The contract that each passenger had with his or her carrier was forged and binding when every passenger on every plane on September 11 purchased their ticket. That contract was made before the terrorist attack occurred. The contract of carriage is a very important event. The contract presumes compliance with all U.S. laws including aviation security and safety regulations. Adequate liability coverage to pay compensation to passengers that are injured or killed is also required by law. Should a horrible tragedy happen, well-established U.S. laws and courts provided a forum for victims and family members to pursue their legal rights for two very important reasons: 1) to engage in lawful discovery of facts to show the full scope of the responsibility and liability of all potential parties; and 2) to hold those accountable for their negligence by requiring them to pay damages for the injuries and deaths they helped cause. And if their negligence was particularly egregious, such as is the case here--if they were grossly negligent in their security--to require them to pay additional damages, out of their own pockets as opposed to payments by their insurers. These punitive or exemplary damages encourage those parties to change their ways and encourage others to avoid such conduct.

Choice of law

Historically, passengers and others injured in an airline tragedy had several choices regarding where and how to pursue their search for the truth and make their pleas for compensation from

the wrongdoers for their role in bringing about death or injury. Traditionally there were several possible forums, or locations to bring the actions: location of the crash; where the ticket was purchased; where the injured or killed lived; where the defendants maintain their main office, wherever the defendants are located; or a combination of these factors. Historically the "choice of law" centered on the damages law chosen by the choice of law rules in effect in the court in which the action was filed.

In commercial airline accidents, cases are usually filed in many different jurisdictions since the individual passengers, their circumstances and their survivors, are generally quite dispersed. When multiple lawsuits are filed in different federal districts, as opposed to state courts, they are subject to the Multi District Litigation (MDL) Rules and are all consolidated into one district court for a liability trial. This process prevents conflicting rulings, streamlines discovery, prevents multiple liability trials, and conserves judicial resources. Damages issues are usually left to the courts where the cases were originally filed. Even though the Federal Rules state that the law of the transferring court should govern, MDL courts often decide defense choice of law motions from the perspective of the MDL court. Usually this procedure worked to the disadvantage of the plaintiffs, but a recent ruling by the judge in the case against Alaska Airlines for the crash of Flight 261 may have the opposite effect.

In the wake of September 11, Congress retroactively changed the law to protect air carriers, aircraft manufacturers, airport sponsors, or persons with a property interest in the World Trade Center, from any liability other than the limits of their liability coverage

On September 22, 2001 and November 19, 2001, Congress attempted to retroactively reduce the rights and abilities of victims to seek redress against many, but not all, entities whose negligence contributed to, or made possible, the horrible crimes of September 11, 2001. In the wake of the incidents of September 11, 2001, the new "Air Transportation Safety and System Stabilization Act," formerly Senate Bill, S.1450, and House Bill, H.R.2926, signed by the President on September 22, and the Aviation Transportation Security Act formerly Senate Bill 1447, and Conference Report 107-296, signed by the President on November 19, changed the law. There are problems with these laws, including Constitutional impairments, which leave in doubt the long term viability of these hurriedly, secretly negotiated, and blindly passed laws.

The original plan of Congress was to limit the liability of airlines for "third-parties" [persons "other than passengers," 14 CFR 205.5(b)(1)] if the Attorney General so certifies "during the 180-days period following the date of enactment of this Act" [201(b)(2)]. In the event of such certification, which was clearly intended to materialize, the liability for such third parties shall not "exceed \$100,000,000, in the aggregate," with the Government being "responsible for any liability above such amount" and allowing "no punitive damages against the air carrier (or the Government . . .)" [201(b)(2)].

But on November 19, 2001, the law changed yet again. In the latest version, Congress extended the protections beyond air carriers to aircraft manufacturers, airport sponsors, or persons with a property interest in the World Trade Center (WTC)--as long as they don't back out on obligations to rebuild the World Trade Center! Simply put, the victims' recovery is further limited if certain entities commit to rebuild the WTC. *But, nobody asked the families of victims if they wanted*

their damages to be given to the Port Authority of New York/New Jersey and the multi-millionaires pushing to rebuild.

Additionally the liability of the City of New York cannot exceed the insurance coverage or \$350,000,000. The law fails to specify whether this limit is the greater or the lesser of the two amounts. At \$350 million, and approximately 3,500 dead, that is coverage of only \$100,000 per person. And don't forget the cost of their own lawyers, clearly actively at work here, which cost also eats into the insurance money. New York City has already claimed its insurance would be eaten up by lawyers--its OWN lawyers, not the victims.

The new laws' scheme requires those seeking compensation for passenger decedents to choose between one, but not both, of the following options [405(c)(3)]:

(1) Allow a person appointed by the Department of Justice to decide an amount to compensate the victims and families for their losses. The Department of Justice will make the rules, present arguments against the families' claims, subtract all the dead or injured's own personal life insurance, pension and death benefits (even if paid for with his or her own money) from what the award would be, and allow no discovery into the negligence of the airlines or other aviation defendants. To date there has been absolutely no indication of the value of the compensation the Justice Department has in mind, but once a claimant embarks on this route, they cannot change their mind and bring a legal action. There is no appeal if you do not like the award.

With this option, a claimant can submit "no more than one claim" [405(c)(3)(A)] for each injured individual or decedent to a "Special Master" within two years after the §407 Regulations are promulgated [405(a)(3)]. Regulations under §407 must, in turn, be promulgated "not later than 90 days after the date of enactment of this Act [407]. The Special Master will award compensation for all "economic" and "non-economic" damages [405(b)(1)(B)(i)]. The term "non-economic" damages are defined very broadly to mean "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature." This amount, which is "not subject to judicial review" [405(b)(3)], is to be reduced "by the amount of the collateral source compensation the claimant has received or is entitled to receive." [405(b)(6)]. Collateral source, in turn, is defined as "all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." [402(7)]. Payment is to be made within 20 days of the award [406(a)]. No punitive damages may be awarded [405(b)(5)] nor may "negligence or any other theory of liability" be considered [405(b)(2)].

(2) Proceed in the same method in which airline disaster cases have been brought for decades, by bringing a legal claim seeking all relief allowed by law and engaging in discovery to reveal the full extent of the negligence and wrongdoing of those involved and seek all appropriate damages.

Under this option, claimants will bring a legal action as had been done in the past, except that all actions must be filed in the Federal Court for the Southern District of New York [408(b)(3)]

utilizing the substantive law" derived from the law, including the choice of law principals, of the state in which the crash occurred unless such law is inconsistent with or preempted by Federal law" [408(b)(2)]. This Federal action is the "exclusive remedy for damages" [408(b)(1)].

Punitive or exemplary damages--to deter, for example, airlines and others from lax safety in the future--and very important to the families of PanAm 103 (Lockerbie), American 965 (Cali, Colombia), ValuJet 592 (Everglades) and Alaska Airlines Flight 261 (Point Mugu, California) to discover the extent of the gross negligence of those carriers--remain a possibility in bringing a civil action

The new laws do limit the amount of the damages, including punitive or exemplary damages--to the amount of the insurance coverage. Nonetheless this is a very, very important tool for families to use in seeking answers and discovering the full extent of all parties' negligence or criminal culpability.

It is almost impossible to overstate the importance of this possibility to families. As many families of victims know from personal experience, even where there are criminal investigations and airline personnel, contractors and others are charged with criminal offenses, it can be difficult to obtain information from the Federal Bureau of Investigation as long as the criminal case is ongoing. Yet, the statute of limitation in most aviation cases (the date by which an action for damages must be brought) occurs much sooner (one to two years), while the FBI and the federal prosecutors have usually at least five years to bring criminal charges. Therefore, discovery is of paramount importance.

I worked with the FBI for well over a dozen years, first as a federal prosecutor, and then as Inspector General of the U.S. Department of Transportation, investigating hundreds of aviation crimes with my own Special Agents and those of the FBI. While we tried to share information from our investigations as the law allowed, in many cases we were prohibited from doing so while the criminal investigation was ongoing. That fact is very well known to the families of PanAm 103. The crime and the crash occurred in 1988. Most of the families had to bring actions by 1989 or 1990. The criminal defendants were tried and convicted in 2001.

The possibility of seeking punitive or exemplary damages preserves the families' opportunity to explore the details of the careless, often reckless and criminal, behavior--whether by terrorists, domestic criminals, airline personnel or security companies, and sometimes even by the U.S. government. Only by this discovery can we get answers and accountability.

Bringing action against Osama Bin Laden, Al Qaeda, the Taliban, their bankers, and Afghanistan

The U.S. Government is also seeking the funds

These new laws do not "limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act." [408(c)]. But there is the problem of collecting from terrorists because the U.S. government is after the same funds. The laws further provide, "The United States shall have the right of subrogation with respect to any claim paid by the United States." In simple language, the U.S. and its Justice Department, can go after Osama Bin Laden and any associated organizations--and more particularly their seized bank

accounts--to cover what it pays out in the damage claims to the families. There is also the problem in suing Afghanistan, in that astonishingly, Afghanistan was not listed by the U.S. Department of State on its list of nations which harbor and support terrorists--and which permits U.S. citizens to sue such a country. The hard-core fighters are believed to be Saudi, Chechen, Egyptian, Pakistani, and other nationals who used Afghanistan in opposition to the legitimate government. Such countries are not on the State Department's list of countries harboring and supporting terrorists.

Overall limits of carrier liability

"Liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier" [408(a)]. The amount of insurance is usually some \$500,000,000 per aircraft, which leaves a sufficient \$2 Billion for the passengers or a completely insufficient \$2 Billion for all claimants if the Secretary of the Treasury fails to certify the airlines as "victim of an act of terrorism," [201(b)(2)], an unlikely event.

Is this an unconstitutional ex post facto law?

More troubling, however, is this dramatic departure from the established laws, procedure, and rights of the dead or injured *after the fact*.

Most people remember reading the Constitution at some point, usually high school civics class, and one of the phrases people remember is that the Constitution of the United States protects us from "ex post facto" laws, or in other words, from a wayward Congress attempting to change the law after the fact. King George did that, and the colonists were outraged that the "crown" could change the law retroactively to suit his circumstances with the benefits of 20/20 hindsight. We were to have none of that in the United States of America. Until now.

Here are the blatant ex post facto provisions in these laws:

1. Individuals' personal life insurance, travel insurance policies, pension, death benefits, benefits from any government-federal, state, city, county, port authority, fire department, police department, county welfare agency, Federal Emergency Management Agency, Social Security, even the automatic life insurance if the victim bought the ticket on a credit card, will go to reduce the liability of the airlines and others, reducing the amount the Justice Department might choose to award under Option #1. This was NOT the law prior to September 22 and November 19, 2001, when these bills were signed into law. This was NOT the law on September 11, 2001, when passengers boarded their planes. And, this was NOT the law when the passengers bought their tickets 30 minutes, 7 days or 30 days in advance of the flight.
2. Individuals' right to seek full recovery for their damages is limited to the carrier's insurance coverage. This was never the case. You couldn't even mention insurance at trial. There have even been cases in the past where aircraft have been seized to pay damages. And why not? If your negligence leads to someone being hurt and if you do not have enough insurance, your car, house, salary and bank accounts can be seized. Why are the airlines any different--because so many have been harmed? A family's harm and suffering are not less because thousands were

killed as opposed to a few dozen. **Why should the law choose to retroactively save the tortfeasor by impoverishing the victims?**

3. The November 19, 2001 law seeks to retroactively ban all claims for punitive damages, in a double sleight of hand. It amends the paragraph in the September 22 bill to ban all punitive claims.

4. The November 19, 2001 law retroactively gives protections to airports, all entities running airports, the World Trade Center, all government entities, and most entities associated with the September 11 flights, except the security companies like Argenbright, and, of course, the terrorists.

Yes, you can sue Argenbright, Globe, and any other responsible security subcontractors, for their roles. They must have had lousy lawyers or lobbyists. In the wake of these tragedies, their lawyers even tried to hire *me*. I am not for sale, and neither should be the victims of these tragedies.

Such an outrage is most certainly not the American law I know and respect. The government has already appropriated \$20 billion to save the airlines and billions more for insurance companies covering the airlines! Why is it necessary to hurt the victims? The airlines keep threatening us that if we do not limit victims' rights to recovery, they will bankrupt the airlines.

That is only false hyperbole. Only two airlines are at risk of being sued; American and United. Maybe American's and United's security were so outrageously poor that they were purposely selected by the terrorists. After all, American Airlines security was so bad it was fined \$3,411,225.00 by the federal government, just in the years 1998-2000! Can United be much better--fined \$3,026,825 for lax security (from 1998-2000) and in the wake of September 11, a man armed with knives, stun gun and mace got through United's security checkpoint? PanAm is gone, in part because it had several planes hijacked and bombed because of its poor security. Hundreds of people died because it failed to have adequate security. It deserved to be gone, and the law did not, and should not, save a bad carrier because it threatens us that we'll be walking. We won't. PanAm's routes were quickly assumed, and today college students have never heard of PanAm, and they aren't walking.

As an American these provisions shock my conscience. As a lawyer, I know many of them are unconstitutional and will not be upheld if challenged.

Congress knew that too; they told us so. These new laws state that if parts are held to be unconstitutional, the rest is supposed to be saved, and not stricken by the courts. The Act, anticipating a constitutional challenge for various reasons, especially the taking of property (victim insurance) and personal rights (the right to seek redress in a court of law and attendant discovery), culminates with what is known as a "separability" clause. This clause states, "If any provision of this Act (including any amendment made by this Act) or the application thereof to any person or circumstance is held invalid, the remainder of this Act (including any amendment made by this Act) and the application thereof to other persons or circumstances shall not be affected thereby."

I, for one, am more than willing to challenge this outrage, all the way through the Supreme Court, and I imagine others with a conscience and backbone would be happy to join me. Victims should not be afraid to seek justice from being bulldozed into taking a cheap payout from the government. For, as the National Air Disaster Alliance and Foundation knows, better than anybody, victims' voices start weak, and alone, but over the months and years to come, they will become loud, they will become heard, they will become a force which can bring truth and justice to the injured and the dead. And in doing so, they will forever memorialize those lost with change, improvement, security and a better future.

And frankly that is the only way to do it. Otherwise the full details of what happened will be kept hidden and forever locked away in secret government reports and there will be no change, no improvement, and no security.

Why did the airlines and others rush to change the law?

Airlines and others rushed to change the law retroactively because legally they were responsible for leaving the "door" wide open to aviation criminals.

Aviation crimes and terrorism were well known and foreseeable risks, including using planes as part of a jihad and crashing into other structures:

Many aviation industries are using the spin that this horrible terrorism was unimaginable and unforeseeable. Yet from 1993 to 1997 (more recent data are not available at this time) worldwide there were 87 hijackings, 7 commandeerings, 5 bombings or shootings, 50 attacks at airports, and 16 shootings at aircraft in just 5 years. The notion that these hijackings and terrorism were an unforeseen and unforeseeable risk is an airline public relations management myth. A look at the facts dispels that corporate spin. Terrorist attacks against U.S. aircraft on U.S. soil date as early as November 1955 when United Airlines Flight 629 left Denver with the mother of Jack Graham on board. Graham was an American, a domestic terrorist threat. He had placed a bomb in his mother's suitcase to collect her insurance policy. He could not . . . she had never signed the policy. Today, 46 years later, we still have less than a 10% chance of the airline screening her luggage. Senator Hollings says its 2-3%.

Thirty-three years after the first such attack on U.S. aviation, terrorists used the same old tried and true method . . . a bomb in a suitcase . . . to bring down PanAm 103. Not only was such a risk foreseeable, but a danger the airlines had a legal obligation to protect against. That airline's security was deemed by the courts to be wantonly negligent, and the airline was subjected to exemplary damages to punish its lax and careless security and to deter it and others from such behavior in the future.

But then, Osama Bin Laden has previously resorted to this method as well. He planned to bring down 12 U.S. airliners within 48 hours over the Pacific in 1995. He did a test run on a Philippine jetliner in 1994, and killed a passenger and injured several others, but the plane managed to land. He would have to try something different the next time around. He did, but he followed the example of several previous terrorist attacks. Documents seized in that investigation revealed they intended to crash a plane into the CIA building near Washington, D.C.

Hijackings to Cuba in the 1960s and 70s brought us the metal detectors and x-ray equipment. Again, the corporate spin says that ended the U.S. hijacking problem. Far from the truth, worldwide, FBI data reveals the terrorist threat of hijackings and crimes on planes has dramatically increased and the crimes are frequently deadly, both on U.S. domestic and international flights.

In the events of September 11, while astonishing in the numbers of casualties and the enormity of the devastation, neither the modus operandi of the terrorists, nor crashing planes into buildings, were new. In fact, these types of hijackings and the crashing of planes into buildings, had been planned but thwarted on several previous occasions.

On May 7, 1964, a former member of a Philippine Olympic yachting team boarded a Pacific Airlines flight, shot the pilot and copilot and crashed the plane.

Consider PanAm Flight 93 from Brussels to New York City on September 6, 1970. Two passengers produced handguns and grenades and ordered the plane to Lebanon and then on to Cairo, Egypt. At a stop in Beirut, the plane was laced with explosives. The fuses were lighted just before landing . . . giving the passengers and crew scant minutes to disembark before the plane exploded. The hijackers were traveling on Senegalese passports but were supporters of the PLO. Forty-five minutes into the flight the hijacking started. En route the hijackers calmly used the PA system to explain their opposition to the U.S. government's support of Israel. Within just a few days, 5 planes were hijacked, 4 on the same day! Besides PanAm 93, three others were hijacked including TWA 741, to Dawson's Field in Jordan on September 6, and a BOAC flight was hijacked on September 9. On September 12, 1970, the three additional planes were blown up, bringing the total to four. But there were supposed to be five. On the fifth plane, El Al 219, the air marshals thwarted the hijackers.

But where had the hijackers come from? Israel airline El Al had become suspicious and barred the hijackers from their flight. Their tickets were endorsed over to PanAm. PanAm was subsequently alerted and removed the two men from the plane and searched them and the area around their seats. The men very calmly complied and did not seem nervous nor did they behave oddly. Their weapons were hidden in their crotches. No one searched there.

In June 1985, TWA 847 from Athens to Rome was hijacked a half hour into the flight by two men with guns and hand grenades. Two terrorists identified as part of an Islamic jihad commandeered the U.S. plane to Beirut. When Beirut refused permission to land, the hijackers responded, "We are suicide terrorists! If you don't let us land, we will crash the plane into your control tower or fly it to Baabda and crash into the Presidential Palace!" After refueling and additional stops, passengers with Jewish names were taken off the plane, held hostage by the jihad, and later rescued by American Delta Forces. An American passenger was murdered and eventually the plane was blown up.

PanAm Flight 73 on September 5, 1986, from Bombay to New York was attacked. PanAm held forth that it had good security, but, in fact, their security was fake. They fooled the passengers but not the terrorist hijackers. They drove a vehicle through a gate onto the tarmac, boarded the aircraft and opened fire on passengers. The court found the airline was negligent.

On December 7, 1987, on Pacific Southwest Airlines, a fired USAir (now US Airways) employee used his old badge to skirt security and take a gun on the plane. He killed the boss that fired him in the cabin of the plane, then forced his way into the cockpit and killed the pilots and crashed the plane. The court held the airline responsible for their negligence in failing to implement proper security.

On April 7, 1994, a disgruntled FedEx pilot who thought he was about to be fired, took advantage of an aviation industry perk available to fellow pilots--the jump seat. With an employee badge, he had no problem stashing hammers, a spear gun and a knife on board. He fractured the pilots' skulls and intended to crash the FedEx plane into the FedEx Memphis hub, thereby bringing down the company he felt had treated him unfairly. He had counted on the crew quickly losing consciousness. They did not, and the engineer and copilot restrained the hijacker while the pilot miraculously landed the plane.

On October 31, 1999, an EgyptAir pilot, muttering an Islamic prayer . . . or curse . . . plunged a plane, departing New York's JFK airport, into the ocean. On board were dozens of Americans as well as three dozen Egyptian military officers fresh from training in the U.S. (who have remained a carefully shielded mystery of that tragedy).

Almost 31 years later to the day, after four planes were hijacked and blown up in an Islamic jihad staged in Jordan, four U.S. planes were hijacked in what Osama Bin Laden would call, in congratulatory messages, a jihad. U.S. law enforcement authorities said that on the same day there was yet another plane with box cutters pre-positioned, and that two men with shaved bodies (indicating preparation to die) were one the plane. They were arrested and held as material witnesses. Was it to have again been five planes, on almost exactly the same day, in 2001 as in 1970?

The courts have consistently held the airlines responsible for their lapses in security, and insurance companies' efforts to avoid liability on the argument that such criminal acts are war, riots, or insurrections have failed. Terrorism, hijacking and blowing up planes are exactly the crimes that security measures are supposed to protect against. It is a known danger, and a foreseeable risk. The airlines, airports, and insurance companies know what the law does about their gross negligence, so they sought to skirt the law through lobbying.

This realization is perhaps why American and United Airlines and their gaggle of lobbyists and lawyers were so intent on changing the law, after the fact, to strip passengers and those on the ground of their rights to seek discovery, proper compensation without offset of collateral sources already paid for by the victims, and exemplary damages. The airlines and the government implored us to get back to normal. Yet, very secretively, the law was changed to try to stop the normal legal process.

I firmly believe our nation is above such despicable behavior, and I believe when the light of judicial inquiry is shed on what happened in America in the wake of such a Black September, these ex post facto laws will not stand. I believe that victims are being severely harmed by any further delay in exercising their rights, and that instead of giving the families time to heal, the guilty are using the extra time to change the laws as fast as possible to cut off any legitimate inquiry into their behavior.

The FBI statistics shouted a warning to anyone who would bother to read them. And the FBI made those warnings--that hijackings, bomb threats and other terrorist threats against aviation were on the rise, and in record numbers in some parts of the world--available to the FAA. These statistics were even published in the FAA Administrator's Fact book, available on the FAA website, until it was taken down after September 11, 2001.

Yes, the airlines rushed to shield themselves from liability--they had good reason. The risks were known, rising, and getting more deadly, and the laws would hold them responsible for the security of their passengers.

Were there specific warnings and recommended courses of action for the airlines and the government to follow?

It's one thing to be caught in a rising crime wave, but it's another to know what to do about it. What did the airlines know, and when did they know it?

Actually they knew a lot. The airlines knew they had lax security, leaving passengers and others at risk. Such warnings were frequently repeated and are documented in writing. It is now an undeniable fact that the airlines knew their security was inadequate.

One of the sad, bad things about working in aviation and security as long as I have, is that you see the airlines are recidivists. They will continue to cut corners and take risks relying on redundancies and the law of averages. Their risky reliance on the odds is best illustrated by words, repeated even on the FAA website, that you would have to fly a few thousand years before you would be involved in a plane crash. Anyone who's had a freshman course in statistics knows it doesn't work that way--the risk is as great for the first time flier, and now, for the first time in history, the risk is greater of dying in a plane crash while sitting at your desk in a New York office building. No one who died on September 11 was old enough to die in a plane crash according to the statistics of the airlines and the FAA.

Why do airlines take unreasonable risks?

In showing the American public sleight-of-hand statistics, the FAA and the airlines have obscured their own safety rules. In studying what went wrong in the terrible Challenger tragedy, it was discovered that the day of the tragedy was not the first time the shuttle was launched against safety warnings and in dangerously low temperatures. Instead of saying "whew, we were lucky that time, we will never do that stupid move again," those responsible *discounted* the risk of blasting off in sub-optimal conditions. In other words, because they tempted the statistics before and skated by, they diminished the risk warnings and launched in even colder temperatures.

The same thing happened to U.S. aviation security. The realization that air carriers and other aviation interests must have and follow some security standards and recommended practices led to the Chicago Convention which established the International Civil Aviation Organization *in 1944*. That Convention required each country to take action to prevent persons from getting weapons and explosives on board planes. Every ICAO Convention thereafter addressed security concerns. Following the hijacking of TWA 847 in 1985, and the bombing of PanAm 103 in 1988, a Presidential Commission was appointed to make recommendations on improving

security to prevent such attacks. In 1989, the Secretary of Transportation addressed ICAO stating: "People around the world are calling for leadership and decisive action to eliminate the gruesome, common threat of terrorism in the skies." Years ago, the first President Bush's Commission on Aviation Security and Terrorism concluded: "The U.S. civil aviation security system is seriously flawed and has failed to provide the proper level of protection for the traveling public." But those recommendations and warnings following TWA 847 and PanAm 103 were largely ignored. By 1997, we had another Presidential Commission to study what to do about security. That commission stated as follows:

The Federal Bureau of Investigation, the Central Intelligence Agency and other intelligence agencies have been warning that the threat of terrorism is changing in two important ways. First it is no longer just an overseas threat from foreign terrorists. People and places in the United States have joined the list of targets.

Murderous hijackers crashed the planes on September 11, but the negligence of airlines, security companies and others may have presented them the opportunity and means to carry out their crimes

Make no mistake, I blame the murderous criminals killing people on airliners, hijacking planes and crashing them into buildings to kill as many people as possible, and the people, organizations and governments who sponsor terrorism. But a business inviting the public to come and purchase goods and services like airplane tickets, carries with it the legal obligation to provide safety and security, and at a minimum to follow the federal regulations and laws so passengers and others are not slaughtered.

What do we know?

1. Federal aviation security regulations were violated. Forget the idiotic statements that the box cutters were legal. The law says "no weapons." It does not say weapons under four inches are okay. As the FBI has already stated, at least some of the weapons were pre-positioned on the planes. The FBI is also holding others who were thought to be on a potential targeted fifth plane. And the hijackers had ramp passes, security badges, pilot credentials and even managed to occupy the jump seats on one or more of the doomed jetliners--clearly the regulations pertaining to credentials and SIDA (Security Identification Display Areas) were violated.

2. Airliner doors were flimsy and could be opened with the same key. Is this reasonable, when in the months preceding September 11, 2001, there were 16 cases of people breaking into the cockpit, most in the U.S., and U.S. aviation had suffered at least ten terrorist attacks on jets by breaking into the cockpit and killing or injuring the pilots?

3. Airlines relied on a "profiling system" based on what passengers told them to decide who was a threat and who was not. Obviously this did not work. What's worse, there was no scientific evidence before September 11 to show that it did work. The airlines and the FAA adopted this system to avoid the tougher security called for by the 1997 Presidential Commission.

4. Flight schools allowed criminals to obtain training to fly wide-bodied jets . . . without learning to land or take off. At least one alleged potential terrorist was thwarted when a flight

school was suspicious about such a highly improper training regimen. The school reported it, and the "flight student" was arrested. Authorities theorize he was to have been the 20th hijacker. Was complying with such a training request unreasonably negligent?

5. Airport screening contractors were abominably incompetent. Even Congress admitted this and provided them with no protection from legal action and the award of punitive damages without limits.

6. Airports and airport contractors had lax security. The hijackers obtained ramp passes and security badges, in obvious violation of security procedures.

7. Jump seat privileges have been exploited and misused for years. Jump seat privileges have even been abused by the FAA. I ordered a government investigation of this in the early 1990s which showed widespread known abuse.

8. Aviation was well known to be the target of terrorists. It has happened to dozens of planes in the past, including several U.S. passenger jetliners, and on U.S. soil. These attacks were known, foreseeable risks for which airlines have been held responsible by U.S. and international courts.

9. Passenger jetliners are known to be vulnerable to onboard attacks and yet they have left those on the ground, like air traffic control, law enforcement and the airlines' home base, unable to know what was occurring on the aircraft. In the year 2000, the National Transportation Safety Board found that airliners were more vulnerable to criminal attacks because there was no onboard video. The NTSB implored the FAA to require onboard video cameras. The airlines balked, and the FAA did nothing.

10. It was well known long before September 11, 2000, that the entire aviation security system could be skirted or breached at will. Yet astoundingly, the airlines and other aviation providers refused to implement better security. As Inspector General of the U.S. Department of Transportation, I completed two major nationwide investigations of airline and airport security. We could breach security at will and were able to get guns, knives, mock bombs and explosives into the secure areas at every airport we tested. My employees were able to circumvent the security, get security codes within seconds of being unleashed at airports, and get on planes, into cargo holds, into the cockpits, and into every area of every airport tested--even after airlines and airports were alerted by the FAA that we were coming! I published official government reports in 1993 and 1996. I testified at Congressional hearings. I wrote a book, *Flying Blind, Flying Safe*, which discussed such shocking security lapses. It became a New York Times best seller. But that is not all, my successor at the Office of Inspector General repeated the investigations, publishing yet another scathing report in 2000. The General Accounting Office, which audits and investigates for Congress, found the same thing. Even the FAA's own internal "Red Teams" found and reported on horrible security. The airlines were repeatedly warned.

Conclusion

On September 11, 2001, airlines and others had actual knowledge of how bad their security was. And that, says the law, makes them responsible. What they don't want anyone to find out is the extent of their negligence.

And that is why they raced to Congress to get immunity.

You, the families of victims, are now the only defense against such lawlessness. I bid you Godspeed, a strong will, great faith, and support from our mighty Constitution. You will need stamina, belief in your cause, supportive friends and fellow fighters, selflessly and steadfastly volunteered by the National Air Disaster Alliance and Foundation, good lawyers, and the belief that you can change the deplorable state of affairs, in part, in loving memory of your family members lost, and so that they will not have died in vain. And, as always, I pledge my support in whatever way I may be helpful.

By Mary Schiavo

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