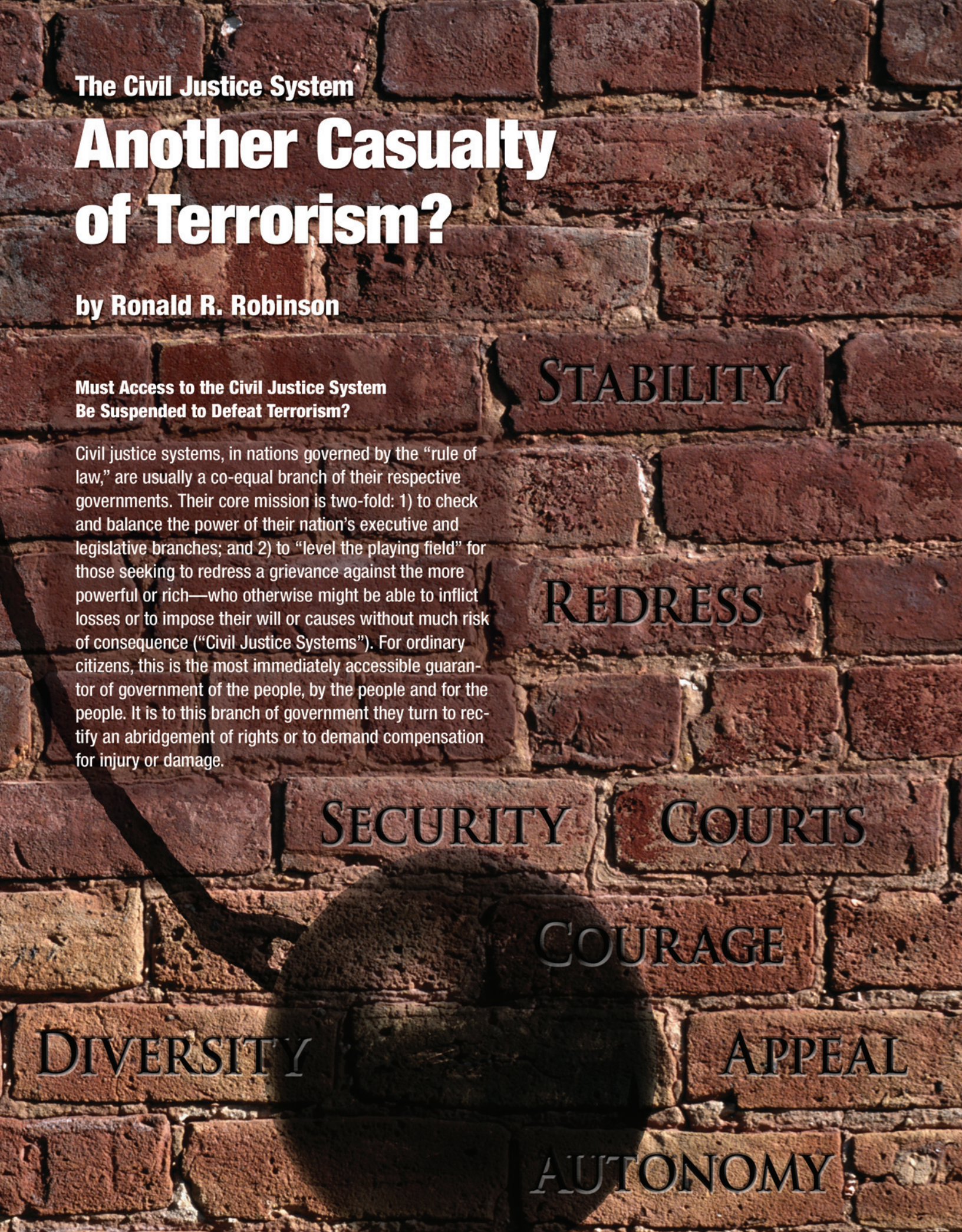
The Civil Justice System

Another Casualty of Terrorism?

by Ronald R. Robinson



Must Access to the Civil Justice System Be Suspended to Defeat Terrorism?

Civil justice systems, in nations governed by the "rule of law," are usually a co-equal branch of their respective governments. Their core mission is two-fold: 1) to check and balance the power of their nation's executive and legislative branches; and 2) to "level the playing field" for those seeking to redress a grievance against the more powerful or rich—who otherwise might be able to inflict losses or to impose their will or causes without much risk of consequence ("Civil Justice Systems"). For ordinary citizens, this is the most immediately accessible guarantor of government of the people, by the people and for the people. It is to this branch of government they turn to rectify an abridgement of rights or to demand compensation for injury or damage.

In order to try to destabilize such governments, terrorists inflict random but calculated acts of violence that damage or destroy life and property. Civil Justice Systems strive to stabilize these governments by providing redress for these losses, whatever the source. Terrorists rely on fear, insecurity and violence to try to impose their will and causes on others. Civil Justice Systems rely on the "rule of law" to instill courage, certainty and calm in a free people; and to safeguard the diversity of thought that is the hallmark of democracy. Any compromise in the authority or autonomy of the Civil Justice System, even in the name of defending against terrorism, serves to deliver what terrorists most covet—the growth of insecurity and instability, and the imposition of limits on a free society.

Notwithstanding this obvious precept of democracy, the federal government significantly compromised the historic role of the United States' Civil Justice System when it passed emergency "relief" legislation to "aid" those killed or injured and their families (herein "casualties") in the September 11, 2001, terrorist attack against the World Trade Center ("WTC") and the Pentagon (herein "9/11"). This sea change was accomplished through The Federal Air Transportation Safety and Systems Stabilization Act of 2001; amended to add the Aviation and Transportation Security Act of 2001 (herein collectively the "Act") and to add the September 11th Victim Compensation Fund of 2001 ("Fund").

The Act altered the traditional role of the Civil Justice System by protecting a select class of potential defendants on whose behalf the Act (i) imposed federally mandated liability "caps" on proven losses, (ii) sheltered assets and (iii) provided loan subsidies. The class included persons and entities—other than the terrorists themselves—that might be alleged to be responsible for 9/11 losses. The class originally included airlines, aircraft manufacturers, building owners, the police, emergency care providers, and local, state and federal government entities directly involved in the 9/11 attack. In subsequent court decisions, any other person or entity named as a defendant in a 9/11 suit was similarly protected (herein collectively the "protected parties").

The Fund offered 9/11 casualties non-litigation based "relief" in the form of "risk free" awards of "aid" paid with tax dollars instead of the protected parties. Claimants had to waive their right to seek redress of their grievances against the protected parties in court to receive their "risk free" award. For casualties who chose to pursue litigation, compensation was severely limited by the protections afforded to defendants under the Act. Thus, the Act and the Fund were intended to wrest from our courts the expected demands of the casualties for determinations of responsibility and compensation. The federal "relief" agency that in effect "suspended" the Civil Justice System addressed neither of those casualty demands, but offered only "aid" instead.

The Fund's "aid" took the form of a matrix of monetary "relief" awards, the final amounts thereof determined administratively claimant by claimant *after* the required election to opt out of the Civil Justice System was made. Determinations of award amounts were based on an administrator's assessment of individual "need," not the gravity of and causes for the loss. The "needs" paradigm served to reduce the various stated award amounts that comprised the matrix—case by case—by means of an application of certain "set-offs" based on the value of a given claimant's property, investments or assets. Too often, this "needs" paradigm resulted in a greatly diminished award or no award at all and the Act provide no mechanism for review, let alone appeal that administrative determination. Therefore, Fund "relief" was not intended to mirror the scope of "compensation" available to a plaintiff in the Civil Justice System

Award election meant that the causalities would not only forego the traditional judicial-based compensation paradigm, but also meant there would be no attempt to secure a moral accounting by the alleged perpetrators, no assignment of responsibly for the losses and no sanctions imposed that might result in changes in infrastructures, or statutes to avoid future losses.

Fully aware that: (i) after nearly a decade, other casualties, those from the 1993 WTC foreign terrorist attack and the 1994 Oklahoma City Federal Building domestic attack suits were barely through early pretrial preparation; (ii) they faced a likely wait of over a decade or more for their trial and years more on appeal; and (iii) only the Fund offered them immediate financial help, ten thousand 9/11 casualties opted out of the Civil Justice System. Only about 70 9/11 casualties sued United and American airlines, the WTC, Boeing, public and private security and safety entities and other allegedly relevant third parties. The grounds of their suits included inadequate intelligence gathering, security planning, fire prevention measures, safety plans, government emergency response, and communication and coordination of rescue efforts in the face of the alleged obvious threat. The federal court responsible for these suits has, to date, concluded that the means and scope of the 9/11 attack present traditional questions of foreseeability, negligence, failure to warn, and duty to protect. *See In Re September 11th Litigation*, 280 F.Supp.2d 279 (S.D.N.Y. 2003).

That only 70 9/11 casualties will bear the dual burdens of a moral accounting

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for the losses suffered that day and the risk that their suits may come to naught demonstrates that access to the Civil Justice System was, in a very real sense, suspended by the Act and the Fund. Thus, in the name of defeating terrorism, Congress effectively replaced the Civil Justice System paradigm of redress of grievance with a "needs"-based "aid" system devoid of any moral accounting.

The Fund and the Act (herein collectively the "Casualty Acts") present a cautionary tale of a massive government controlled protection and relief program that operated outside of the Civil Justice System. This story is relevant today because this same "taxpayer insurance" program is often touted as a solution for the losses suffered in Hurricane Katrina or as an alternative to a successor for the Terrorism Risk Insurance Act of 2002, set to expire in January 2006. A white paper from the DRI compendium—*The Future of Terrorism Risk Insurance*—by Gillian K. Hadfield entitled "The September 11th Victim Compensation Fund: 'An Unprecedented Experiment in American Democracy,'" relied upon in part for this article, provides a much more extensive and fully annotated analysis of the consequences of this highly successful but controversial suspension of the Civil Justice System and of the risks this paradigm presents to democracy itself.

Taxpayer "Relief" Supplanted Civil Justice "Compensation" and Assignment of Moral Responsibility for 9/11 Losses

The Casualty Acts' "Relief/ Protection" Paradigm

The Act guarantees protected parties up to $10 billion in loans, $5 billion to cover property losses, full reimbursement for any increases in 2002 insurance premiums and $1.5 billion for payment of 9/11 damages exceeding available insurance. The liability of the protected parties for any *future* terrorist attacks is limited to $100 million, in the aggregate, after which the government steps in with "excess" tax dollar protection capped at $1.5 billion *per event* (note that the latest loss estimate for 9/11 is about $42 billion). Punitive damages are prohibited under the Act. Most importantly, all of this protection is provided without set offs based on a protected party's assets.

The Fund's matrix of awards was originally projected to pay out $8.5 billion in death benefits and $1.5 billion in injury benefits using tax dollars. The final estimates of Fund awards are $6.0 billion for death claims and $1.0 billion for injury claims. The $3 billion "savings" between the projected and final award amount is due in large measure to the fact that casualty claimants, unlike the protected parties, were subjected to the Byzantine set off regulations noted above that served to reduce or eliminate the Fund's promised "relief" by a factor of 30 percent. Casualties had the Hobson's choice of seeking an award and risking these post-election set offs or seeking redress in court and risking great expense but no compensation. This paradigm was inverse to the "assets" treatment afforded the protected parties—they were not subject to any set offs and had full access to courts to redress their grievances, except for putative damages.

In the name of defeating terrorism, Congress effectively replaced the Civil Justice System paradigm of redress of grievance with a "needs"-based "aid" system devoid of any moral accounting.

The Issues Raised by the "Relief/ Protection" *vs.* Compensation/ Responsibility" Debate

Some take great exception to the assertion that the Casualty Acts in fact fairly "balanced" the touted goals of claimant relief as against defendant protection. They assert that the Casualty Acts paradigm is not a just substitute for the Judicial System paradigm of compensation and assignment of responsibility. These critics argue that the Casualty Acts not only unjustly favored the protected parties, but that they did so because that class was made up of powerful, rich and favored constituents of many of the politicians that drafted these statutes, while the casualties were just ordinary citizens.

Did the Casualty Acts serve or protect the casualties well? Was an award a viable and fair alternative to Civil Justice System redress of grievance? Suing protected parties does not give the claimant population the traditional tort guarantee of "all the damages one can prove;" *i.e.*, the damages are capped and these limitations assure *pro ration* of judgments unless the successful plaintiff population is small. Moreover, punitive damages are barred. Thus, the Casualty Acts appear on their face to favor the protected parties at the expense of the claimants.

Was the Act's award matrix fair? The Fund provided death and injury relief as well as $250,000 in non-economic losses per family; together with $100,000 each for surviving spouses and children of fatalities. Death and injury awards were computed separately, but the putative total award was then subjected to the noted set offs by the Fund's Special Master, who made subjective and non-appealable determinations of "need."

Given very broad discretion to make these decisions, Fund administrators determined that 401(k) and social security benefits, workers' compensation payments, life insurance, savings, and other collateral sources or benefits (including charitable gifts, investments and certain levels of family income or property value) should all serve to reduce awards. Although the "relief" was immediate, the awards were not subject to contest on any ground, with few, if any, checks or balances on the Fund's "needs"-based criteria. No matter how heartfelt or compassionate the Fund's administrators viewed their decisions, claimants had to accept the set offs that reduced their awards.

Many involved in creating, supporting and passing the Casualty Acts did not understand that these set off rules would necessarily follow from the legislation, let alone be imposed in the manner that they were. Moreover, the expansive discretion to "tailor" awards on whatever "needs" criteria the Special Master thought appropriate eliminated claim predictability. Many family members argue that claimants who agreed to accept Fund awards in lieu of litigation were, therefore, subjected to ambiguous, uncertain and inequitable treatment in the very forum that should have safeguarded them.

Moreover, merely applying for an award ended any opportunity to engage in discovery, have a judge or jury make compensation determinations or assign accountability in order to deter future damaging behavior. If negligent or irresponsible persons and entities can gravely damage others without consequence, it follows that the assignment of responsibility, the possibility of reform and correction of policy, infrastructure or conduct will be slow—if it occurs at all. Thus, many would argue that society's $3 billion in tax dollar "savings," realized by the "needs"-based set offs to Fund awards, was far outweighed by the loss of the moral accounting and reform that is part of the redress available in the Civil Justice System.

Ought "Relief," Based on Equality of "Need," Replace "Compensation," Based on Equality of "Loss"

The debate surrounding implementation of a dollar-by-dollar "needs"- based award criteria is rooted in a fundamental disagreement over whether equalizing "need" is the moral accounting equivalent of compensating "loss." As noted above, Fund awards were originally projected to be $8.5 billion in death benefits and $1.5 billion in injury benefits ($10 billion). Current Fund award estimates are $6 billion for death benefits and $1 billion for injury benefits ($7 billion). The Fund's death claim awards have an average $2 million payout—with a median award of $1.7 million. The range of these payments was $250,000 to $7 million. About 60 percent of the fatalities earned under $100,000 per year and their families received 43 percent, of the total awarded. About 15 percent of the fatalities earned over $200,000 per year and their families received 32 percent of the total awarded. The injury claims' payout averaged $390,000—with a median pay out of $110,000. The range of injury claim payouts was $500,000 to $8.6 million. Only three percent of claimants were able to successfully argue for an increase in the pre-set amounts of non-economic damages.

The above statistics put the results of the "needs"-based/set off paradigm into stark relief. They demonstrate that *equality of need—not loss*—was at the core of the Fund's "relief" covenant between the 9/11 casualties and their fellow citizens. The "need" proponents are, in the main, not indifferent to the "loss" at issue; they simply disagree with the paradigm of the Civil Justice System—where redress is based on *loss* rather than *need*.

The Rule of Unintended Consequences

The Casualty Acts resulted in the evolution of one the most effective and powerful grass roots lobbying forces in the last 100 years. Shortly after Fund awards were actually being calculated and the magnitude of the set offs became apparent, angered and frustrated 9/11 casualties formed active, savvy and organized groups and coalitions (herein the "9/11 Families") to pursue their grievances in the political arena. They brought a great deal of public attention to the Fund's imposition of "need"-based regulations—an approach they argued was unnecessary and demeaning—asserting that it was, in effect, "closet" tort reform. These same groups almost single handedly forced Congress to create, support and act on the recommendations of the 9/11 Commission that investigated the attack and submitted proposals on how to change the nation's approach to our defense against terrorism.

The public debate 9/11 Families demanded on the Casualty Acts at all levels of government, including within the White House, resulted in changes in the basic award matrix. However, the 9/11 Families failed in their attempts to stop award "set offs" based on personal assets or to increase the formula of $250,000/$100,000 in non-economic loss awards for all claimants. Of particular concern to these groups were the adverse eligibility distinctions made because a recipient had been prudent (*i.e.*, had savings accounts, retirement funds, life insurance or investments). The notion that the needs of each claimant were "different," they asserted, ignored the reality of 9/11. A claimant's "need" was, in their view, unrelated to the sole relevant fact underlying each claimant's "loss" on that day; *i.e.*, that the losses suffered—person to person and claimant to claimant—were equally horrific, and thus, the awards ought not be "reduced" to equalize needs—person to person or claimant to claimant. Thus, they argued, the guiding moral principle for dissemination of tax dollar "relief" should have been objectively based findings that honored equality of loss and not subjectively based determinations that reflected equality of need.

The Suits the Casualty Acts Could Not Divert

Some 9/11 Families argue that the Fund's Special Master created the impression that they were unlikely to obtain answers to questions of negligence and accountability if they sued. They also assert that a review of numerous pronouncements made in many venues by commentators, legal experts and those who helped to create and implement this governmental relief program disclose a pattern of argument designed to discourage them from directly challenging the constitutionality of the Casualty Acts.

It bears noting here that the Casualty Acts do not divert private lawsuits expected to be brought by others from the Civil Justice System and that the government retrains its right to engage in subrogation litigation respecting all casualty awards it pays, including the right to seek recovery from any third-party defendant. Thus, the protections, restrictions and limitations of the Act will soon generate

multiple suits over how the limited insurance resources of the protected parties are to be allocated; *i.e.*, by date of claim filing, by claimant economic circumstance or by *per capita* and other equitable *prorata* sharing theories. Moreover, while the supposed evil of lawsuits brought by casualties against the protected parties was to be diminished, if not ended, by the Fund's waiver rule, the parallel evil of litigation involving all other parties was preserved under the Act.

Did the supporters of the Casualty Acts make the fact and fault finding process of litigation a fearful prospect for the casualties? Did they create undue pressures that convinced the casualties to forfeit historic rights to redress? The answers to these questions are hotly debated. What is clear, however, is that the "all or nothing" choices presented by the Fund were powerful and that they accomplished the intended diversion of casualty claims away from the Civil Justice System. Only 70 of ten thousand 9/11 casualty claimants opted out of the Fund's award program. These casualties seek a moral accounting through the Judicial System that results in societal changes that can serve to prevent or diminish future terrorist losses.

Civil Justice Is Being Challenged Anew in the TRIA Re-authorization Debate

The Terrorism Risk Insurance Act of 2002 ("TRIA") is a federal government/private market statutorily mandated and controlled $100 billion insurance program. It covers losses from *future* foreign terrorist attacks on American soil, ships, aircraft and embassies/missions, wherever located. The TRIA "Program," administered by the United States' Treasury Department, expires on December 31, 2005 (unless extended). It is a partnership between Property, Casualty and Workers' Compensation insurance carriers and the government that provides, on a voluntary basis, coverage for terrorist attacks "certified" by the Secretary of the Treasury, the Attorney General and the Secretary of State to come within TRIA's scope of coverage. It is, in effect, a hybrid of federal law, administrative regulations and existing private market insurance policies that provide government "re-insurance" funded by tax dollars to cover TRIA certified losses.

The current administration, as a matter of policy, is hesitant to offer government funded or administrated "insurance" programs, or to place itself in competition with this or any other private sector enterprise. In its view, TRIA must expire as scheduled on December 31, 2005. Moreover, some in Congress are using the end of TRIA to create political leverage that may permit them to interject elements of their legislative agenda for civil justice reform into the raging TRIA extension/succession debate. Their agenda includes general litigation and tort reform measures, specific prohibitions on punitive damages, limitations on recovery of non-economic losses, the elimination of joint and several liability, limitations on pain and suffering awards and changes in standards of proof.

It is the Civil Justice System/insurance paradigm that is better equipped and empowered to fully safeguard claimants and defendants alike and to prevent personal agendas from becoming binding standards of relief.

Any tort/litigation reform agenda can easily be made a part of the TRIA extension/succession debate because of the pervasive role insurance plays in the Civil Justice System. Insurance drives the economic infrastructure that supports and pays for resolution of most civil disputes through monetary settlements or court/jury compensation judgments. It is also insurance dollars that pay plaintiff counsel's contingency fees as well as the defendant's attorney. Without insurance, most ordinary citizens and small to medium sized businesses would not have the financial ability to seek redress in the Civil Justice System.

Many believe that the administration and/or members of Congress may seek to replace TRIA with emergency programs like the Act and the Fund. Consequently, concerns over how and why the Casualty Acts replaced the Civil Justice System for casualty losses are at the forefront of the TRIA debate; *i.e.*, will there be a reauthorization of TRIA (with slight changes), a successor program or no federal insurance at all? The lessons taught by the Act and Fund, if heeded, can inform the TRIA debate, provide insight on the value of addressing terrorism's losses in the Civil Justice System and advance the development of a framework within which the Civil Justice system can respond to any future attack.

If TRIA expires, will it be because the paradigm of the Act and Fund is re-asserted as a "replacement" for the current government role in terrorism risk insurance? Will tax dollars support TRIA's successor or a new "relief" paradigm that supplants the Civil Justice System? A white paper by the author of this article outlines the components of the succession debate and presents a proposal for a successor to TRIA. *See*, Ronald R. Robinson, *The Terrorism Risk Insurance Act ("TRIA") 2002 to 2005—The Risk Transfer and Insurability Debates Surrounding TRIA's Successor*, The Future of Terrorism Risk Insurance (DRI 2005).

Conclusion

What are the risks to a democracy that a "relief/need based" alternative to our Civil Justice system creates? What should we do "the next time?" Will the response to Katrina's losses or TRIA's successor be an extension of the Fund/Act approach? These questions are very much in play in Congress this fall.

The Casualty Acts *de facto* sought to suspend the Civil Justice System and use

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tax dollars to compensate for terrorism's losses. Yet it is the Civil Justice System/insurance paradigm that is better equipped and empowered to fully safeguard claimants and defendants alike and to prevent personal agendas from becoming binding standards of relief. These facts alone argue for preservation of the traditional Civil Justice System/insurance-based redress for losses caused by terrorists.

The 9/11 casualties were, unnecessarily, traumatized further by the ambiguities and uncertainties attending the unbridled discretionary administration of the Fund awards that were the core of the Casualty Acts' relief program. The protected parties paid less (and received more) than they could achieve in a traditional court setting. This was not a "balanced" zero sum result. It was an inverse arrangement.

In a democracy, the power of law must remain available to every citizen and not become the province of the rich, the powerful, Congress or the Executive Branch. The Civil Justice System grants any citizen access to due process of law to "discover" the reasons for a loss, to determine the party at fault and to assign economic responsibility so that the consequences of loss are borne by the responsible party. Those consequences may well induce changes in infrastructures, policy, conduct or statute. The weakening of the Civil Justice System permits personal and political agendas to be advanced without challenge. Moreover, redress of grievances in courts ought not to be controlled by those, like the Act's protected parties, who allegedly caused loss.

Is "relief" to be the approach for future losses, or should compensation and reform be achieved through the Civil Justice System? Our courts provide access to every citizen to protect and preserve his or her "life, liberty and pursuit of happiness." Any fundamental change in the role of this co-equal branch of government is a serious Constitutional issue that should not fall victim to litigation/tort reform political agendas.

In the end, the Act and the Fund stood a core principle of democracy on its head and rendered a previously co-equal branch of government, our courts, a non-player in the national response to 9/11 losses.

History teaches repeatedly that compromise in the authority, autonomy or role of the Civil Justice System, even in the name of defending against an enemy, delivers what a nation's enemies most covet—the growth of fear, insecurity and instability and the imposition of limits on diversity of opinion, tolerance and choice. Will we heed the lesson? FD