UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

Larry E. Craig, Chairman
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<u>Because an Airplane Crashed Into NYC's Tallest Building . . .</u>

The Federal Government Pays Damages, But Not Punitive Damages

The Senate is considering a terrorism reinsurance bill (S. 2600), and the House passed its bill last year (H.R. 3210). Because a reinsurance bill makes the American taxpayer the ultimate guarantor for insurance losses caused by acts of terrorism, many of the proposals have sought to limit the taxpayers' liability by, for example, prohibiting punitive damages.

There is a good precedent for prohibiting punitive damages. The Federal Tort Claims Act (FTCA), which is now more than 50 years old, provides that the United States shall be liable for torts[*] "in the same manner and to the same extent as a private individual under like circumstances" but shall *not* be liable for punitive damages.[**] 28 U.S.C. §2674.

Until passage of the FTCA in 1946, the Federal Government could *not* be sued for torts that were committed by its agents. Before the FTCA, complaints were *sent to Congress*, and relief was available only if a private relief bill passed both Houses of Congress and was signed by the President. The process for obtaining private relief was often unworkable or unfair.

The event that finally helped prompt Congress to pass FTCA will sound eerily familiar. In the summer of 1945, an airplane flew into the tallest building in New York City. The impact and subsequent fireball killed and injured several dozen persons.

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[*] A "tort" is a civil wrong (except breach of contract). A lawsuit alleging the negligence of an automobile driver is a tort action. An assault is a tort and so is a trespass. A tort is a private or civil wrong or injury caused by an individual who violates a legal duty owed to another person. Torts may be intentional (e.g., assault and battery) or unintentional (as in negligence).

[**] "Punitive damages" are damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit. Such damages are intended to punish and thereby deter blameworthy conduct.

On July 28, 1945, an airplane crashed into the 79th floor of the Empire State Building, more than 900 feet above the ground. The United States was still at war, and there were initial fears that the city had been attacked by an enemy, but it turned out that the plane was one of our own B-25 bombers.

Luckily, the accident occurred on a Saturday, and only about 1,500 persons were in the building, about one-tenth the number that would have been in the building on a weekday. In all, 14 persons died in the accident, 11 in the building and 3 in the airplane. Eight of the victims worked for the Catholic War Relief Office, which was hit directly. Twenty-six persons were injured, and two women *survived* a thousand-foot plunge in an elevator.

The integrity of the building was not affected, although it sustained serious damage at the point of impact. One of the airplane's engines went through the building and landed on a 12-story building across 33rd Street. Damage to the building amounted to about $1 million.

The pilot, a decorated veteran with some 100 combat missions, had been headed for LaGuardia Airport but asked permission to divert to Newark. The air-traffic controller gave permission, but cautioned the pilot because it was so foggy he "couldn't see the top of the Empire State Building." Those were the last words from the ground that the pilot heard.

The crash into the Empire State Building may have been the final impetus for passage of the FTCA, after years of debate but inaction. The bill was enacted on August 2, 1946 (60 Stat. 843), but it was made retroactive so as to cover harms committed on and after January 1, 1945. Those injured at the Empire State Building were some of the first to benefit from the FTCA.

Today, the challenge is to act as wisely as did the 79th Congress. A good start would be to prohibit punitive damages in the reinsurance bill. Four leading members of the Administration have told the Senate that they will recommend a veto of any reinsurance bill that does not prohibit punitive damages. They said:

> "[T]he victims of terrorism should not have to pay punitive damages. Punitive damages are designed to punish criminal or near-criminal wrongdoing. Of course such sanctions are appropriate for terrorists. But American companies that are attacked by terrorists should not be subject to predatory lawsuits. The availability of punitive damages in terrorism cases would result in inequitable relief for injured parties, threaten bankruptcies for American companies, and a loss of jobs for American workers."

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Sources:
Definitions in footnotes from R. Chandler, R. Enslen, P. Renstrom, *The Constitutional Law Dictionary* 459 (1985); K. Redden & G. Beyer, *Modern Dictionary for the Legal Profession* (1993); and *Black's Law Dictionary* 396 (7th ed.).

The story of the crash is told in J. Goldman, *The Empire State Building Book* (1980), and elsewhere.
Quoted is the letter of June 10, 2002, to Hon. Trent Lott from Paul H. O'Neill, Secretary of the Treasury; Lawrence Lindsey, Director, National Economic Council; Mitchell E. Daniels, Director, OMB; R. Glenn Hubbard, Director, Council of Economic Advisors.